

Federal Leadership In Economic and Social Policy

Peter M. Leslie

Institute of
Intergovernmental
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CONTENTS

PREFACE	v
SOMMAIRE	vii
ABSTRACT	ix
I — Introduction	1
II — The Need for National Leadership in Economic and Social Policy ...	2
Economic Policy	2
Social Policy	5
III — Social Policy, the Meech Lake Accord, and the Issue of National Standards	6
Existing Cost-sharing Arrangements	9
Cost-sharing: Scenarios for the Future	13
IV — Economic Policy	15
Policy Control	15
Policy Leadership	19
V — Meech Lake and the Intergovernmental Process: Toward a New Working Relationship Between the Federal Government and the Provinces	21
Supreme Court Appointments	21
The Senate: Appointments and Reform	22
The Future Constitutional Agenda: Division of Powers Items	23
Intergovernmental Liaison and the First Ministers' Conferences	24
VI — Conclusion	25
APPENDIX: STRATEGIC CHOICES FOR PROVINCIAL GOVERNMENTS	27

PREFACE

An initial version of "Federal Leadership in Economic and Social Policy" was prepared in late 1987 for circulation to a few friends; the intent was that it should serve as a basis for discussion of the policy-making environment in Canada as it might be affected by the passage of the Meech Lake Accord. While it was not certain that the Accord would, in fact, be endorsed by all provincial legislatures (and nor is it now), there seemed to be some utility in assuming its coming into force, and reflecting on how the new situation would or might affect the policy role of the federal government. This approach was adopted in part because some of the intended readership were concerned about the erosion of federal power under the Accord.

The paper, slightly expanded and revised, is published now in order to reach a wider audience, some of whom will undoubtedly also be worried that the Accord may concede too much power to provincial governments. My personal concern, however, would be more how to "pick up the pieces" if the Accord should fail to get unanimous legislative endorsement; and I believe the analysis contained here is equally pertinent to that situation. Its relevance derives, paradoxically, from the fact that the policy capacity of the federal government is already severely limited under the "pre-Meech" constitution. Extensive federal-provincial concertation is required across almost the whole policy spectrum if Canada is to make, at least in some degree, its own path in a world where each country's independence (especially small ones like Canada) is severely constrained by the international environment. Where policy *control* is lacking under the constitution, more effective policy *leadership* is required. The question at issue, therefore, is whether leadership is more effectively exercised under the "pre-Meech" or a "post-Meech" constitution.

A complementary perspective on intergovernmental policy coordination is presented in the appendix entitled "Strategic Choices for Provincial Governments." This piece was prepared as a set of notes for the provincial premiers at their 1987 conference, held that year in Saint John, New Brunswick, in late August. It served as "backgrounder" for a supplementary session involving premiers and a few guests, after the main conference business had been completed. These notes are published here without revision.

SOMMAIRE

L'inquiétude à l'effet que la constitution canadienne impose des restrictions au gouvernement fédéral dans l'élaboration de ses politiques économiques et sociales est fondée. Dans certains cas, les pouvoirs des provinces chevauchent ceux du fédéral, alors que dans d'autres cas, des outils essentiels au développement des politiques publiques appartiennent en exclusivité à chaque ordre de gouvernement, rendant la coopération entre les deux paliers essentielle à toute action efficace. Ainsi, dans plusieurs domaines importants, où la mise en place de nouvelles politiques est requise, le gouvernement fédéral ne dispose pas d'un contrôle efficace sur les politiques publiques appropriées. Plusieurs critiques de l'accord du lac Meech sont d'avis qu'en pareille circonstance l'accord constitue un recul—qu'il dilue les pouvoirs du fédéral et entraîne encore plus loin le Canada sur le chemin de la décentralisation.

Ce travail défend une position autre. Il soutient que le contrôle sur les politiques publiques, ou la capacité du gouvernement fédéral d'atteindre ses objectifs en dépit des résistances éventuelles des provinces, n'est pas le seul facteur pertinent dans l'élaboration de nouvelles politiques nécessaires à l'échelle nationale. Le leadership vis-à-vis les politiques publiques est, lui aussi, important. Le leadership suppose une action commune entre le fédéral et les provinces dans les principaux domaines d'intervention, et un processus conjoint d'élaboration des politiques. Cela a été, et demeurera très certainement, une caractéristique importante du fonctionnement du système politique canadien, lequel est inévitablement fédéral et par conséquent complexe.

Dans ce contexte, les questions qui s'imposent sont de savoir si le gouvernement fédéral a la capacité d'entraîner les provinces dans des initiatives conjointes, et si l'accord du lac Meech affecte cette capacité. Ce travail analyse les programmes à frais partagés (pouvoir fédéral de dépenser) en ce qui a trait aux soins de santé, à l'éducation post-secondaire et à l'assistance sociale; il traite également de l'élaboration des politiques économiques de stabilisation (le contrôle de la demande via les politiques fiscales et monétaires), de réglementation, et de l'offre de services tels que l'assistance pour la restructuration industrielle, la promotion des exportations et le développement régional. La conclusion à laquelle il arrive est que l'accord du lac Meech, si ratifié, ne nuira pas au leadership fédéral dans le domaine économique ou social; à l'inverse, il peut constituer un facteur essentiel renforçant son leadership dans le développement des politiques publiques. A ce sujet, une attention spéciale est portée au processus de nomination à la Cour suprême et au Sénat, aux prochains changements dans la division des pouvoirs tels qu'inscrits à l'ordre du jour de la réforme constitutionnelle, et aux relations intergouvernementales via les conférences des premiers ministres et autres mécanismes.

ABSTRACT

Concerns that Canadian constitution limits the federal government's capacity to implement needed policies, both economic and social, do indeed have substance. In some cases, provincial powers overlap federal ones; in others, essential policy instruments are divided between the two orders of government, with the consequence that each level needs the other to act effectively. Thus, in many essential areas where extensive policy innovation is required, the federal government lacks policy control. Many of the critics of the Meech Lake Accord are concerned that in this situation the Accord represents a backward step—that it will sap federal power and push Canada dangerously down the decentralist road.

This paper argues a different position. It asserts that policy control, or the federal government's ability to achieve its purposes in the face of possible resistance by provincial governments, is not the only factor relevant to needed policy innovation on a national scale. *Policy leadership* is also important. Leadership implies joint action by federal and provincial government in major policy fields, and an interactive process of policy formation. These have been and will inevitably remain prominent features of the Canadian governmental system, which is inescapably federal and correspondingly complex.

In this context, the relevant questions are whether the federal government has the ability to recruit the provincial governments in joint policy endeavours, and whether the Meech Lake Accord affects its capacity to do so. To explore these questions, the paper discusses cost-sharing (or the use of the federal spending power) in relation to health care, post-secondary education, and social assistance; it also discusses economic policy formation under the headings of economic stabilization (demand management through fiscal and monetary policies), regulatory activities, and the provision of services such as assistance for industrial restructuring, export promotion, and regional development. The conclusion is that the Meech Lake Accord, if it goes into effect, will not weaken federal leadership in either the economic or the social domain; on the contrary it may be an essential element in strengthening federal policy leadership. In this connection, special note is made of the process of appointment to the Supreme Court and Senate, future division of powers items on the constitutional reform agenda, and intergovernmental liaison through First Ministers' conferences and other devices.

FEDERAL LEADERSHIP IN ECONOMIC AND SOCIAL POLICY

I — INTRODUCTION

Fundamental changes in Canadian economic and social policy are likely to be required over the next few years. Several factors are responsible for this: developments in the international economy, increasing budgetary pressures both federally and provincially, current and prospective demographic trends, rapid technological innovation, and shifting political attitudes at home and abroad. With such sweeping changes in the domestic and international environment, it is essential that both the federal and the provincial governments should be able to act vigorously and creatively, designing and implementing new policies appropriate to a new situation.

Vigorous leadership will have to be exercised at the federal level. However, many citizens are evidently concerned that Ottawa's capacity to implement needed policies—already slight because, so it is said, the provinces have too much power—will be further sapped if the Meech Lake Accord comes into force. A different view will be argued here. I acknowledge that severe obstacles do indeed face any federal government that aims to exercise control, or even to take the prime initiative, in many policy areas. Difficulties arise because in many fields of government activity (indeed in almost all of them) some of the key policy levers are held jointly by the two orders of government—provincial powers duplicate federal ones—while other policy levers are divided between federal and provincial authorities. In neither case does either order of government have all the appropriate or needed policy instruments within its exclusive grasp. As a consequence, governments may work against each other, neutralize each other, frustrate each other. Thus, clearly, the constitution places obstacles in the way of decisive or coherent policy-making. However, in my opinion the Meech Lake Accord does not, on balance, add to the number or the seriousness of such obstacles. On the contrary, the Accord is likely to give rise to inter-governmental bargaining that may result in greater federal-provincial concertation in policy-making, and enhance the federal government's capacity to fulfil its policy responsibilities and objectives. While there can be no guarantee that this will be the outcome, there is an opportunity to work toward this objective. Should the effort fail, at least the country is no worse off than before, because existing federal powers remain intact under the Accord (except to some extent in the immigration field). This will permit Ottawa, if need be, to tough it out with the provinces in future policy disputes. This is not the desired course, but

it remains an option if the effort to reach a new and better working relationship with the provinces does not succeed.

II — THE NEED FOR NATIONAL LEADERSHIP IN ECONOMIC AND SOCIAL POLICY

ECONOMIC POLICY

An industrial policy is needed, as the Macdonald Commission affirmed,¹ to bolster economic performance. The commission proposed a package of reforms to improve the competitiveness of the Canadian economy:

- upgrading of work skills
- assistance to workers for changing jobs or moving to low-unemployment regions
- improved physical infrastructure
- subsidies for research and development as well as closer links between universities and industry, and
- redesign of social security programs to eliminate disincentives to make the transition from welfare to work.

The federal government, said the commission, must take the lead in all these policy areas, either acting directly on its own account, or inducing the provinces to cooperate in designing and implementing desired reforms.

One may go further in this direction than the commission urged; indeed I think one must. The commission asserted that all forms of federal government interference with market allocation of labour and capital are unwarranted and counterproductive, except in demonstrated cases of market failure; thus federal industrial policy must be consistently neutral in relation to specific industries, regions, and firms. An industrial policy, said the commission, is necessary; but it must be non-targeted. A rejoinder is called for on political, economic, and purely pragmatic grounds.

1. *The political case.* No government can afford to appear indifferent to the plight of those whose livelihoods are being destroyed by changing market and technological conditions. The pace of such changes seems to increase all the time. If the provincial governments visibly respond to them, devising structural policies with the aim of creating or even merely preserving jobs, while the federal government stands aside, the

1 Royal Commission on the Economic Union and Development Prospects for Canada. *Report*, three volumes (Ottawa: Minister of Supply and Services, 1985).

consequences would be disastrous. Federal inaction would be both electorally suicidal and, in a broader political sense, intolerable. By this I mean: a policy stance that appears do-nothing, care-nothing, would inevitably sap the legitimacy of the federal government. In fact, a government that was nominally committed to non-intervention (except for "framework policies") would probably so often violate the principle of neutrality vis-a-vis market forces, that the results would be just as interventionist as with a targeted industrial policy, but would have far more wasteful results. It is not just that errors of judgment would occur with predictable regularity: the pretense of neutrality would merely veil, though only thinly, the economic chaos and political cynicism that inevitably flow from doing routinely what is supposedly not done at all.

2. *The economic case.* A totally non-targeted industrial policy is also economically dubious, for reasons argued by Rick Harris in his study for the Macdonald Commission.² Harris affirms (p. 12) that "the strict paradigm of neoclassical trade theory is not useful or accurate in its description for a substantial part of world trade and investment patterns." Elaborating this, he points out that Canada has a small open economy in a world where leading industrial nations are engaging in technological competition. The structure of national economies, and therefore international trading patterns as well, are heavily influenced by various forms of government subsidy. It would be foolish for Canada to ignore this. Further, it is absurd to ignore the role of oligopolistic multinational firms in determining world trade patterns, especially non-market (intra-firm) trade. Canadian policy must take account of these facts, in other words it must be informed by recognition of the fact that neoclassical models falsely represent present conditions. Harris concludes that "an active [targeted] industrial policy is the optimal policy for a small country in response to the imposition of similar policies by other industrial nations," especially in the context of declining employment opportunities in the primary sector and in traditional manufacturing industries. However, he says, a protectionist and defensive policy is the worst sort of policy: "Clearly defined distinctions must be drawn between industrial adjustment policies and protection." (p. 151)
3. *The pragmatic case.* Finally, even if one favours in principle a totally non-targeted federal industrial policy, its implementation is impossible unless at least two preconditions (other than those already mentioned)

2 Harris, Richard G.: *Trade, Industrial Policy and International Competition* (Toronto: University of Toronto Press, 1985) [Macdonald Commission Study # 13].

have been met. I do not think these preconditions have received the attention they deserve. One is that provincial government interventionism, the effects of which are potentially divisive in a regional sense, as well as contrary to common market principles, must be held in check. The other is that Canadian producers must have unimpeded, harassment-free access to a large market. The Macdonald Commission expected both of these conditions to be achieved through a Canada-US trade agreement. "Free trade," the *Report* states, "is the main instrument in this Commission's approach to industrial policy." (v. 1, p. 60) However, the agreement signed 2 January 1988 falls far short of what the Commission proposed, and also fails to meet the government's initial objective, which was to guarantee Canadian producers open access to the US market by replacing domestic trade remedy laws in both countries with a new, common set of rules to be commonly and authoritatively applied. The new code would have proscribed many NTBs, but would also have had the effect of identifying permissible (non-countervailable) instruments of industrial policy. In so doing, the code would also have effectively limited the provinces' capacity to raise NTBs against each other. But this objective was abandoned during the course of the negotiations. Instead, an effort is to be made to negotiate a common NTBs code for both Canada and the United States over the next five to seven years. Can the attempt succeed? All one can say on this is that there is no indication yet that Congress will agree to work out new trade rules which will reduce its own capacity to define the principles of "fair trade." In the absence of a common NTBs code, applicable to provinces and states as well as to the two national governments, essential preconditions for a market-driven or non-targeted industrial policy in Canada are missing.

The worst outcome would be a set of ten provincial industrial policies, targeted on specific industries, while the federal government limits itself to framework policies.³ Not only would this situation be irrational in economic terms, politically it would be a disaster. The federal government would be accepting a role demonstrably subordinate to that of the provinces, destroying its legitimacy and leaving the United States to play the role of a surrogate national government for Canada.

3 Or as I put it on an earlier occasion: There would be no logic in proposing that the federal government act as if the world were a neoclassical one, while the provinces are responsible for coping with problems cast up by the fact that it is not. See my *Federal State, National Economy* (Toronto: University of Toronto Press, 1987), 185.

There is tangible public malaise that Canada is stumbling down the decentralist road. Many people are worried that the provinces have been too insistent in the defence of their particular interests, to the detriment of the whole and ultimately of themselves individually. Concern has been expressed especially about the international ramifications of provincial assertiveness in economic policy, and about possible damage to Canada's bargaining power internationally. What is at issue here is a principle that was written into the terms of reference of the Macdonald Commission, namely that: "*The Government of Canada has the primary responsibility for managing the national economy, for encouraging reasonably balanced economic growth among the various regions of the country and for ensuring that fiscal disparities among provinces are reduced, while at the same time the provincial governments also have important responsibilities in the development and carrying out of economic and social policy.*"⁴

SOCIAL POLICY

Another source of worry is that policy drift, or lack of self-confidence among the Canadian public, will erode Canadians' commitment to social programs. Canada may become a less caring society, a less compassionate one. There are two broad reasons for fearing that social programs are under seige. One source of concern is that social spending may be cut back because of foreign pressure: programs like medicare and unemployment insurance have reportedly come under attack in the US as a form of subsidy to Canadian industry, potentially providing the basis for a countervail suit. The other source of concern is the belief that domestic neo-conservatism is winning out. According to this thesis, Canadian businessmen, trying to preserve their share of the domestic market and/or to penetrate foreign ones, complain that the taxes used to fund such programs impose too great a burden on the economy, hobbling our industry and destroying its competitiveness.

These two arguments appear to work against each other, but it is possible they are complementary. On the face of it, they are incompatible because one says social programs subsidize industry, while the other says they burden the economy unduly. On the other hand, it would make sense to suppose that both arguments apply, though to different industries. In any case, both arguments appear to carry weight in political debate. Both support the contention that if the federal government does not establish and protect national standards in public services, the provinces will not be able to withstand the forces that threaten to

4 *Report*, v. 3, p. 563. Italics added.

wipe out many of the achievements of the past. For the same reasons, there is a tendency to look to Ottawa to take new initiatives such as the launching of a child care program. Moreover, this tendency is greatly reinforced by the 1982 Charter of Rights, which has made Canadians think much more in terms of entitlements claimable by every individual in every province, as a right of citizenship: "Every individual," the Charter affirms, "... has the right to the equal protection *and equal benefit* of the law..." (Section 15).

III — SOCIAL POLICY, THE MEECH LAKE ACCORD, AND THE ISSUE OF NATIONAL STANDARDS

It is increasingly difficult to make a sharp distinction between economic policy and social policy, because each impinges on the other. Nonetheless, their general character is reasonably clear, and the two do differ. Social policy is about the delivery of public services to individuals, especially but not exclusively the disadvantaged. Economic policy either deals in aggregates like the supply of money, or regulates the market behaviour of individuals and firms, or alters producers' costs through a mix of taxes, subsidies, and public services such as the improvement of transportation networks. Thus the content of social policy differs from the content of economic policy;⁵ policy instruments differ correspondingly. This is crucial to our argument. Since federalism allocates control over policy instruments between orders of government (some on an exclusive basis and some on a shared basis), the federal structure of the country—read here: "the Meech Lake Accord"—tends to have distinctive effects in the two categories of program.⁶

Canada does not have, and could not attain even under the present, "pre-Meech" constitution, national standards in social services.

- The closest we come to national standards is in the field of income supplementation or support, where federal cash grants are paid directly to individuals. Such payments establish minimum support levels that

5 On the other hand their ultimate goals do not differ. These are: a) to raise real incomes—I mean here to include everything that people value, including collective goods such as TV programming, clean air, and the maintenance of public order—b) to stabilize incomes over time, and c) to achieve a desired or at least a tolerable distribution of the goods that life-in-society has to offer.

6 Of course, our categories do tend to overlap at the fringe. Thus programs such as manpower training or mobility grants have an "in-between" character. They are primarily economic in terms of objective, but are similar to social programs in manner of delivery. Given our concern with policy instruments it will be useful to think of them as social programs.

the provinces have the authority to "top up" if they want (and of course, if they have the fiscal resources). Most or all "demogrants"—transfers to all individuals within certain groups defined according to demographic variables such as age—are in this category.

- A similar situation exists with respect to specific-purpose federal transfers to individuals. An example is youth allowances, which are payable only when a dependent of a certain age is in full-time attendance at an educational institution. Another example: income tax credits for health care expenditures.
- The federal government apparently has the power to make grants or to offer subsidies to institutions or organizations, even those under the exclusive jurisdiction of the provinces, such as municipalities and educational institutions. On the other hand, the provinces may prohibit such bodies from accepting federal monies, as Quebec (subject to certain exemptions or exceptions) has done. Such actions, both federal and provincial, have implications for the quality of services available to the public; clearly, in such cases, if national standards obtain, they do so only by happenstance.
- There remains the important field of those publicly-provided or publicly-subsidized services that lie within exclusive provincial jurisdiction, but where the federal government makes a financial contribution to provincial program costs. Health care and post-secondary education are prime examples. It is also conventionally accepted that social assistance is exclusively provincial; direct federal payments to individuals on the basis of need, if not actually unconstitutional, would probably be regarded as an infringement of time-honoured principle.⁷ In all these areas (health care, post-secondary education, and social assistance), standards and program design vary quite widely among provinces. Cost-sharing is manifestly ineffective in achieving interprovincial comparability of

7 The provinces have exclusive jurisdiction over "hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals," and also over "property and civil rights in the province." (Section 92 of the *Constitution Act, 1867*.) These two clauses, whether taken separately or together, have limited the federal government role in social policy. Federal constitutional authority appears not to extend to income support programs other than a) programs funded out of general revenues or implemented through the personal income tax, and b) contributory schemes specifically mandated by constitutional amendment, for example unemployment insurance and contributory pensions.

standards; indeed, only in the case of health care is federal funding linked to comparable availability of services.

It will be useful to review cost-sharing arrangements in health care, post-secondary education, and social assistance; but before doing so, it is important to note that the Meech Lake Accord is pertinent to the national standards issue only in the last of the four cases mentioned, where cost-sharing *within a field of exclusive provincial jurisdiction* occurs. The Accord has nothing to say about federal cash payments to individuals, whether as demogrants or as specific-purpose transfers; nor does it touch upon federal subsidies to institutions or organizations regulated exclusively by the provinces. What the Accord does do is to guarantee financial compensation to a province that chooses not to join a new national shared-cost program; it inserts into the *Constitution Act, 1867* the following new section:

106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

The concern that has been voiced about this clause—other than by Quebec nationalists who dislike the explicit recognition of the federal spending power—is that it may discourage the use of cost-sharing in the future. Thus, according to the critics, provincial entitlement to compensation may have the effect of halting further innovations in the social policy field, and might even result in reversing past achievements.⁸ These are concerns that cannot responsibly be brushed aside. They deserve scrutiny.

8 On the face of it, there should be no concern about backsliding in areas where shared-cost programs already exist, because provincial entitlement to compensation applies only to new programs. However, if in Ottawa's view provinces were to renege on the principles of established programs, and if in response new provisions were added to tighten the conditions under which a fiscal transfer were authorized, a province might litigate to claim the transfer under the old (looser) conditions. One could imagine this response, for example, to any future analogue to the Canada Health Act, 1984.

EXISTING COST-SHARING ARRANGEMENTS

The question that must concern us now is whether Ottawa's already weak capacity to achieve the definition and observance of national standards in the field of social policy would be further weakened by the coming into effect of the Meech Lake Accord or, if the Accord fails, by the implementation of the principles it enunciates. (This could be done by the federal government without special constitutional mandate.) In thinking about this matter, it is necessary to comment separately on the fields of social assistance, health care, and education. (Note that in the field of education the main federal involvement is at the post-secondary level.)

Social Assistance

Most and perhaps all provincial social assistance programs are cost-shared with Ottawa on a fifty-fifty basis under the Canada Assistance Plan. The "Plan" is really an umbrella under which ten bilateral agreements have been negotiated between the federal government and the provinces individually. Levels of support for recipients vary considerably; Ottawa has never made any attempt to secure uniformity or to establish national standards. It could perhaps have gone a certain distance in this direction without violating the letter of the constitution, but it was presumably constrained from doing so by a combination of fiscal and political reasons, the latter being closely related to conventional understandings about the allocation of responsibilities [sic] under the constitution.⁹

I do not necessarily recommend a federal initiative now to define and implement a set of national standards in the social assistance field, especially if the program design is such as to burden provincial finances in a significant way; but most or all of the authority Ottawa has had under the "pre-Meech" constitution to mandate or impose national standards would/will, under the Meech Lake Accord, remain intact. The difference from the pre-Meech situation is that Ottawa would probably have to formulate the objectives of a hypothetical shared-cost program in a way that was independent of provincial expenditures under it—thus the coverage of provincial programs, as well as standards of support (perhaps varying according to the level or character of recipients' disabilities), might have to be set out. Such objectives would have to be specific enough to

9 Common usage and even the discourse of lawyers frequently refer to "constitutional responsibilities" rather loosely, as if the constitution imposed an obligation to use the powers conferred by it, to fulfil what are really *political* aims. The constitution may legitimize their pursuit, but their inspiration is electoral and/or moral.

establish a benchmark against which a provincial claim for financial compensation could be evaluated. Paradoxically, if a new shared-cost program were launched, under Meech Lake rules it might be necessary to go much further toward defining and establishing national standards than Ottawa ever attempted to do in the Canada Assistance Plan. A province that stayed out of the program would still have to meet those standards, albeit in its own way, in order to qualify for compensation.

Health Care

In the field of health care a performance benchmark was at least nominally established in 1977, with the Established Programs Financing scheme, and an enforcement mechanism was devised in the Canada Health Act, 1984. I do not know whether the term "shared-cost programs" as used in the Meech Lake Accord would cover future arrangements analogous to the present schemes for hospital insurance and medicare. They are not, in the traditional sense, cost-shared; Ottawa does not comb through the provinces' books to see which expenditures are eligible for subsidy and which are not. Rather, the provinces are entitled to a fiscal transfer—a combination of "tax points"¹⁰ and cash—provided they have certain programs in place that have certain features stipulated in federal legislation. These are, in the case of medicare, the four conditions originally written into the Medical Care Act, 1966, plus "comprehensiveness," a fifth condition introduced in 1977, meaning that all medically necessary services must be covered by the program.

It seems entirely plausible that a suit will eventually be brought, either against a province or against the federal government or against both, for violation of this principle. For example, recent news reports indicate that in British Columbia alone something like 14 or 18 patients have died in the past year while they were on the waiting list for open-heart surgery. Is such surgery not, in the circumstances, a medically necessary service? And does not the Charter of Rights and Freedoms (in Section 15, already cited) provide that every individual has the right to equal benefit of the law?

Meanwhile, Parliament has declared, through the Canada Health Act, that extra billing and hospital user fees contravene the principles of universality and

10 "Tax points" are the revenues generated by a specified percentage of the yield of the federal income tax (on the tax form, "basic federal tax"). Thus, if Ottawa transfers one tax point to the provinces, it lowers its rates by a percentage calculated to reduce the aggregate "basic federal tax" by one per cent; as a result, the provinces have the opportunity to increase their levies by a like amount, without imposing an additional burden on the taxpayer.

accessibility to medical services, as stipulated in the Medical Care Act and confirmed in the EPF Act. The relevant clauses of these acts are under challenge, as being *ultra vires*, amounting to a federal regulatory scheme in an area of exclusive provincial jurisdiction (prohibited, if the precedent holds, by the 1937 reference case on the federal Social Insurance Act). As a result of this challenge, one can expect judicial determination of the extent to which Parliament can set objectives or—this can sometimes amount to the same thing—can specify conditions or standards for provincial programs; similarly, there may develop a very interesting jurisprudence on what constitutes, in the context of public services funded in part by Ottawa, equal benefit of the law. The Supreme Court may eventually rule that certain features of the medicare program, as modified by the Canada Health Act, are unconstitutional.

Such a ruling would establish a boundary to the conditions the federal government can constitutionally attach to conditional grants. Wherever that boundary is located, there it will sit for future national shared-cost programs set up under the terms of the Meech Lake Accord, if the Accord comes into effect. A province *not* participating in a new national shared-cost program would be in about the same position as all the provinces are at present regarding hospital insurance and medicare: they would have to meet objectives (e.g. universality, accessibility, and comprehensiveness) set by Parliament, though some such objectives may yet be set aside by the courts as being over-specific or not credibly "national",¹¹ if they are to receive the full fiscal transfer to which they may be entitled. Non-participation in the program would ensure that Ottawa would not be auditing the books, but the law could probably be written in such a way as to establish rights to certain public services that every individual might claim through the courts. Since the relevant law would be federal, and the fiscal transfer authorized under it would be paid by Ottawa, provinces might not even be able to invoke the *non obstante* clause, section 33 of the Charter.

Post-Secondary Education

The principle of cost-sharing in post-secondary education was introduced in 1967, supplanting direct federal grants to universities, but at no time has Parliament sought to define or impose national standards in this field. The present

11 Another possibility, which actually I think more likely, is that the objective may be sustained as credibly national, but the rules supposedly justified by such objectives (ban on extra billing and hospital user fees) may be held not to be necessary to achieve the objectives.

arrangements, part of the EPF scheme, impose no detectable policy constraints or budgetary priorities on the provinces. The pertinent question, then, is what would happen if the federal government were to attempt to exercise some policy control in post-secondary education (PSE), and whether the Meech Lake Accord or Meech Lake principles would affect its capacity to do so.

Consider, for example, the recommendations made in a report by A.W. Johnson to the Secretary of State in 1985,¹² in which it was proposed, in effect, that the post-secondary education component of EPF be re-converted into a straightforward shared-cost program of the "fifty-cent dollars" variety. Under the Johnson scheme Ottawa would pay, up to a specified ceiling, half the cost of provincial grants to post-secondary institutions. In no other respect would the federal government attempt to influence provincial policy. Clearly, the aim was to influence provincial spending patterns. However, this is one thing that probably could not be done under the Meech Lake Accord. If EPF, or part of it, were to be reconverted into a shared-cost program, one would expect several and perhaps all provinces to claim the maximum cash transfer to which they would be entitled under federal law, regardless of their expenditure patterns. Specifically, the Johnson proposal, given the absence of stated national objectives—other than to improve both quantity and quality of PSE services, on the assumption that quality and quantity correlate reasonably well with dollars spent—would be extremely vulnerable to a provincial claim for "reasonable compensation." For the phrase "compatible with the national objectives" to have any practical application, those objectives would, I believe, have to be framed in a way that was independent of levels of expenditure. They would have to focus on policy goals rather than (as in the Johnson Report) on levels of expenditure. Contrast, again, the two health-care programs financed in part under EPF, where (as noted above) five objectives were specified in the Act. The essence of EPF is that the provinces were invited to find the most efficient possible way of meeting these objectives; that is why the federal transfer was made completely independent of levels of provincial expenditure on the three programs. However, a gigantic flaw in this scheme has always been that no objectives were identified for the PSE component.

I am far from being persuaded that Ottawa could legitimately seek to achieve broad national objectives for post-secondary education through a cost-sharing arrangement. I have tried to think of how such objectives could be formulated, other than in terms of the magnitude of provincial expenditure, identifying criteria that could be invoked in intergovernmental negotiation and/or (ul-

12 *Giving Greater Point and Purpose to the Federal Financing of Post-Secondary Education and Research in Canada* (Canada, Secretary of State, 1985).

timately) litigation. Aims such as "to improve accessibility" or "to raise standards of research," while perfectly valid, lack the precision of a phrase such as "covering all medically necessary services." This problem is one factor steering me away from the cost-sharing idea for post-secondary education. The Meech Lake Accord would make cost-sharing in this area more difficult, and perhaps impossible (except unconditionally, as under EPF). On the other hand, there is absolutely nothing in the Meech Lake Accord or anywhere else to prevent the federal government from mounting specifically federal programs complementary to provincial ones (but not cost-shared with them), to increase accessibility or raise standards in research, and, if desired, to target certain areas for special effort. In other words, federal objectives could probably be achieved in a "post-Meech" Canada, but the devices employed to do so might have to be adapted to the terms of the Accord.

COST-SHARING: SCENARIOS FOR THE FUTURE

The Meech Lake Accord confirms the federal government's authority to launch new shared-cost programs. On this point, everyone agrees that, if the Accord comes into effect, the constitution will be a lot clearer. However, doubts have been raised about: 1) what political incentive the federal government will have to embark on new initiatives involving cost-sharing, 2) what conditions may be attached to federal grants, and 3) the likelihood of provincial opt-outs. The latter two points lead supporters of the spending power to ask whether Ottawa would be able to bring about much similarity among provincial programs, as regards both design and standards.

All these issues are matters for speculation, and nothing categorical can be said about them. However, it seems unlikely that the proposed Section 106A would discourage a federal government from introducing new programs if public support for them were high, and if broadly national objectives could be achieved through cost-sharing. My personal view is that the promised "reasonable compensation" would affect program design but would not (as was argued in the comments, above, on health care programs and the Canada Health Act) prevent the federal government from playing a significant leadership role. Specifically, it would probably not be possible to introduce new programs with only vaguely defined purposes or standards, on the assumption that the provinces would be induced to spend more money in that particular area (presumably raising standards of service) if they were spending "fifty-cent dollars." From such programs provincial governments would be likely to opt out. (That's fine with me, because I think this is bad program design anyway.) In these circumstances, the federal government would probably have to be very careful about enunciating program objectives that the provinces would have to follow.

in order to receive the federal money. In the circumstances it probably would not much matter whether or not any given province had, or had not, in a formal sense, opted into the hypothetical new program.

In fact, I think the spending power provisions of the Meech Lake Accord are somewhat of a red herring, throwing commentators off the scent of the really significant issues about federal and provincial roles (respectively, and together) in social policy. It is quite possible that, under pressure of public opinion—as in the child care case—Ottawa will be induced to launch new programs on a shared-cost basis. It will have to resort to cost-sharing because of a mixture of fiscal reasons ("let's have a new program, but we can't afford the full cost") and constitutional-limitations reasons. The result will be to impose additional program responsibilities on provincial governments; but will the provinces, especially those with a slender tax base, be able to raise enough cash to meet those responsibilities?¹³ Provinces have always taken the position that if they are to shoulder new responsibilities they must receive additional fiscal transfers; Ottawa, by contrast, tends to insist that the provinces must pay their fair share from their own tax revenues, and also that in times of retrenchment, the provinces cannot be immune from federal expenditure cuts affecting mature or established programs. This could be called the "fiscal fallout" problem. It is likely to be at least as severe as the "national standards" problem or issue.

Future changes in social policy will have not only to define and achieve national standards in programs where this is both desired and feasible, but to grapple with the possibly contradictory goal of keeping overall costs within manageable levels. To do the latter, it will be necessary to rationalize the design of social programs. So far, however, cost control at the federal level has mainly taken the form of "offloading" onto provincial governments.¹⁴ This is becoming an increasingly tense area in intergovernmental relations. Another potential source of trouble is prospective cost-cutting in certain wholly federal

13 Unconditional fiscal transfers such as equalization payments fall far short of removing fiscal disparities among the provinces. As a result, if Ottawa launches a new shared-cost program, it places an extra burden on those provinces that have a relatively narrow tax base, if they are to enter the program. This forces them to raise more tax dollars, increasing the discrepancy among provinces as regards tax rates. On the other hand, cost-sharing, while not mandating national standards, does contribute significantly to the availability and quality of provincial public services. If there were no cost-sharing, the poorer provinces could not possibly sustain present levels of service, even if taxing to the limit.

14 "Offloading" means leaving the provinces with full financial responsibility for certain programs while holding increases in federal fiscal transfers to a level below the escalation of costs.

programs where savings to the federal government would increase the burden on provincial programs, effectively transferring costs to provincial governments (for example, cutbacks in unemployment insurance inevitably place an added burden on provincial or municipal welfare rolls). The more political resistance there is to cuts in federal social spending (as occurred when, in 1985, the partial de-indexing of old age pensions was announced—but then abandoned), the more Ottawa will be tempted to cut selectively and in ways intended to focus public opprobrium on the provincial governments. This will cause all the more resentment if, simultaneously, Ottawa seeks to do any or all of the following:

- to launch new programs on a shared-cost basis, as with aspects of the child care program proposed in late 1987
- to establish benchmarks for program delivery, or tightened-up citizen entitlement criteria, as in the case of health care, where the "comprehensiveness" criterion was introduced in 1977
- to restrict the provinces' access to additional sources of revenue, as in the ban on hospital user fees in the Canada Health Act, and
- to amend the equalization formula to the detriment of the receiving provinces, for example by "capping" equalization (as was done in 1982 and 1987), a move potentially widening the gap in the provinces' after-transfers fiscal capacity.

All such measures increase the fiscal burden on provincial governments. Manifestly, this burden falls much more heavily on some provinces than on others. This is a basic problem in our federal system, which insistence on the maintenance of national standards cannot but compound. In relation to this issue, the debate on the Meech Lake Accord is wholly irrelevant.

IV — ECONOMIC POLICY

The role of the federal government in the economy is significantly limited, as is its involvement in social affairs, both constitutionally and financially. However, I do not consider that its policy capacity in the economic field is significantly—if at all—reduced by the Meech Lake Accord. One of the issues here is policy *control*; the other is policy *leadership*.

POLICY CONTROL

Policy control is unaffected by the Accord, as it does not reallocate legislative powers, except (to some extent) in the field of immigration. On the other hand, there are not many respects in which the federal government can exercise full

control over economic policy. Its role is limited because the provinces possess many of the relevant legislative and administrative powers, and at least some of the provinces can exercise a great deal of fiscal clout. To illustrate, let's review federal and provincial involvement in major aspects of economic policy: demand management, or macro-economic stabilization policies; market regulation; and the provision of services to individuals and corporations.

Demand Management

The tools available for demand management, or economic stabilization, are both fiscal and monetary. While monetary policy is largely under federal control because of Parliament's exclusive powers in relation to banking, currency, and interest and credit, even here the behaviour of provincial governments is still of great importance. Their impact on overall levels of effective demand is significant because of the sheer size of their operations, especially if one takes account of the activities of provincial crown corporations. The transactions of the provincial governments and provincial crown corporations in foreign capital markets are great enough to affect the value of the Canadian dollar, perhaps (in effect) forcing the Bank of Canada to compensate through its own dealings on foreign exchange markets and through adjustments to its interest rate (money supply) policies. I do not want to press this point too far, because Ottawa clearly does have the powers it needs to exercise ultimate control, even if the activities of the provinces are a complicating factor.

On the other hand, in fiscal policy the two orders of government are more nearly balanced. In 1987 the federal government both raised and spent (excluding intergovernmental grants) about 18 per cent of gross national product; the provinces, slightly less. If municipal revenues and expenditures are added to the provincial figures (as it makes sense to do, since the municipalities are created by the provinces and perform functions delegated to them by provincial legislation), the federal government is fiscally overshadowed. In 1987 provinces and municipalities together raised 22 per cent and spent 26 per cent of GNP (these figures disregard intergovernmental transfers).¹⁵ Given these magnitudes, it is significant that at present Ontario is following a fiscal policy that some observers regard as irresponsibly expansionary; the federal government can do nothing about this, except perhaps to impose a contractionary monetary policy to neutralize the effects of Ontario's fiscal behaviour—an un-

15 Statistics Canada: *National Income and Expenditure Accounts*, Fourth Quarter 1987 (Catalogue 13-001). According to these figures, the total public sector deficit amounts to about 4 per cent of GNP, down from about 6 per cent in 1985.

fortunate policy mix reminiscent of the early 1980s, though obviously not in so severe a form. Other observations, also suggesting that the provinces are major players in setting fiscal policy, are as follows: 1) The provinces outweigh the federal government as investors in public works, especially if one takes into account the operations of crown corporations. 2) Early postwar attempts by the federal government to control the personal and corporate income tax, after an initial but partial success through the device of "tax rentals," had failed by the mid-1950s or (judged according to another criterion) by the mid-1960s.¹⁶ It would be difficult or impossible for Ottawa to reassert control over the tax system. 3) In this context, the current federal-provincial negotiations to establish a national sales tax present an interesting test case of the ability of the two orders of government to work together to reform Canadian tax policy. Even if the attempt succeeds, however, the federal government's capacity to design and implement an overall fiscal policy with demand-management objectives will scarcely be enhanced.

Regulation

"Regulation" is a catch-all category covering, in its broadest sense, all forms of government activity that impose limits or restrictions on the behaviour of individuals or firms. Examples are legion: foreign trade (quantitative controls and fiscal levies over imports and exports), transportation services, compulsory marketing of farm products and certain resource commodities, ownership rules (foreign investment, and controls over specific sectors such as financial institutions), combines legislation, labour relations including matters such as minimum wages and security of employment, industrial safety, product standards, and price controls (both general controls over wages and prices, and controls specific to individual sectors such as electricity or oil and gas).

For all aspects of regulation, including those aspects just mentioned and many others besides, the federal-provincial division of powers is complex. Some fields are divided (both the federal government and the provinces have

16 In 1957 Ottawa conceded that its attempt to force all provinces to adopt a common tax base had failed—a casualty of Quebec's introduction, in 1954, of its own personal income tax. Five years later (1962) the federal government conceded that, even for those provinces agreeing to levy their income tax as a percentage of the federal tax (and thus accepting, in the main, the federal definition of the tax base), the *rate of tax* could vary. Thus, in 1983, Newfoundland imposed a tax at 60 per cent of "federal basic tax", Alberta's rate was 38.5 per cent, and other provinces fell somewhere in between. See Canadian Tax Foundation: *Provincial and Municipal Finances 1983* (Toronto: Canadian Tax Foundation, 1983).

exclusive control over a part of the field) and others are concurrent (the two orders of government have overlapping powers, with federal paramountcy in case of conflict). In divided fields some policy coordination is desirable and may be absolutely required for effective policy-making. In concurrent fields, while legally Ottawa has the upper hand, conventionally or traditionally the provinces may be in control; credit unions, for example, are provincially regulated because in the early years of this century the federal government refused to have anything to do with them as "banking" institutions. In practice, therefore, federal policy control may be as hard to assert in areas of concurrency as it is in fields of divided jurisdiction.

Services to Individuals and Corporations

Many government programs offer services to potential recipients, of which the recipients may avail themselves as desired. Examples are skills training, manpower mobility grants, marketing assistance, (including export development), management counselling, provision of infrastructure such as transportation networks, discretionary and tax-based subsidies (e.g. for R & D, investment, and production)—some such subsidies may be location-dependent—and various other forms of industrial assistance offered through devices such as public procurement.

In all these areas the provinces have powers that are virtually co-extensive with federal ones (though of course some provinces have only slender fiscal resources, so their actual policy capacity may be quite limited.) Provincial programs may duplicate national ones, may fill in the cracks between them, or may "top up" a basic service or level of support provided by Ottawa. Some provincial programs are actually set up or administered so as to help resident firms or individuals tap into federal programs. Where provincial programs top up federal ones, as happens for example in some price support programs for agriculture, federal money can be used as a base which a province may enrich, its supplementary dollars creating, in effect, interprovincial barriers to trade. (This is a nice case, because Ottawa could presumably control such practices by reducing its subsidies by the amount of any provincial subsidy: but so far as I am aware, it has lacked either the desire or the courage to do so.) Be that as it may, where provincial programs exist alongside federal ones—being rooted in both cases in taxing and spending powers, which are largely concurrent—the provincial governments may have the capacity to offset, neutralize, or virtually reverse various federal policy objectives. Of course, the two orders of government can also work in tandem with each other, pursuing common objectives through the coordination of their policies. This is the intent, for example, where there is joint federal-provincial action to promote regional development.

Policy Control: A Summary Comment

It appears, then, whether we are talking about demand management, regulation, or the provision of services to individuals or corporations, that the federal government's policy control is seriously limited under the constitution. Its room for manoeuvre is also limited by financial considerations. I acknowledge: Ottawa does have important powers at its disposal, and those powers have frequently been used in ways that the provinces (or some of them) have much resented. In other words, federal economic powers are strong enough to have sometimes been used against the provinces, or over their vehement objections and counter-moves. But the question we must answer is not just whether Ottawa has the means to engage in policy warfare with provincial governments, but whether or not federal powers are strong enough to achieve desired or desirable purposes. Can it implement an industrial policy that does the sorts of thing that the Macdonald Commission recommended (see above) and, as well, goes beyond the strictly sector-neutral, framework policies that the Commission was willing to contemplate? In other words, has the federal government the capacity to implement an industrial policy targeted to specific industries, creating new industrial opportunities by developing new areas of comparative advantage, and promoting both upside and downside adjustment to changing world market conditions? This question raises the issue, not so much of policy control, as of policy leadership.

POLICY LEADERSHIP

On an earlier occasion, in the context of an enquiry into the constitutional and political prerequisites of embarking upon a new National Policy, I concluded:

At present both orders of government engage in a wide range of activities lying within the scope of an industrial policy, though frequently these activities are only weakly coordinated even within individual governments. Perhaps what is most at issue is whether the federal system permits coherence if the central government should decide to take the initiative.... The main question, then, is whether the provinces can be recruited as willing partners in a joint enterprise, both federal-provincial and public-private. [Or perhaps:] Is it possible to design a national industrial policy that the provinces could be persuaded to help implement through a set of complementary policies?... The new policies must serve the interests of central Canada *no less well than did the old ones* [I should have written, *rather better than the old ones did*], but not in a way that subordinates the interests of the rest of the country to those of southern Ontario and Quebec.¹⁷

17 *Federal State, National Economy*, 187-89. Italics added.

The vital question seemed to me when I wrote these words—and it still seems vital to me now—to be as much about the feasibility of inventing a regionally non-discriminatory industrial policy, as about the adequacy of federal policy instruments, regardless of what the various regions and provinces may think about the direction of federal policy. However, the glaring omission in my analysis at that time was that I did not ask what sorts of policy Canada can successfully implement, given the character of the international trading system, and given particularly the considerable extent to which Canada is economically integrated with the United States. This question now seems of overwhelming importance, and would obviously be so even in the absence of a bilateral trade agreement.

The upsurge of American protectionism over the past few years has created a situation where the provinces may be readier to work together to face a common external rival, provided—and of course this is the joker—*provided* they can agree on a strategy. The rancour produced by the domestic debate over free trade may completely destroy any hope of this. Indeed, the political fall-out from that debate may well be the most significant single factor affecting Ottawa's capacity for leadership in economic policy, certainly in the near term and possibly for a long time to come. I am convinced that its significance, both in terms of its substance and in terms of its effects on Canadian/regional public opinion and the legitimacy of federal power, will far outweigh that of the Meech Lake Accord.

Well, that's obvious. But the point of stating this is that it underscores my main contention, that *the Accord is relevant to the subject of federal leadership in economic policy mainly because of its potential for affecting the dynamics of federal-provincial interaction in policy formation*. It does not redistribute or redefine powers over the economy, but it can be expected to affect how the existing distribution of powers will work. The context—one in which a) constitutional authority is shared, being both divided and overlapping (in exclusive and concurrent areas respectively), and b) Canada is a bit player in a world economy dominated by giants and is, to boot, increasingly vulnerable to the defensive-aggressive behaviour of the giant to the south—is important, and will affect how the Accord works out, if it is approved. But equally, the Accord can be expected to shape how the Canadian federal system will work in practice, and will cope with the demands placed upon this country by the international environment. The task will be to utilize the arrangements foreshadowed in the Accord to strengthen the working of the federal system. If the Accord fails, the task will be to minimize the consequences of failure.

V — MEECH LAKE AND THE INTERGOVERNMENTAL PROCESS: TOWARD A NEW WORKING RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE PROVINCES

What is essential in the present context is to make the intergovernmental process a source of strength for Canada, partially compensating for the "complications of federalism" in the field of economic policy, and facilitating the building of consensus domestically when the world-economic environment is increasingly hostile. Meech Lake obviously does not automatically accomplish these aims; indeed its provisions, used wrongly, could work in the opposite direction. But if used right, they could help. On this, I'd like to comment briefly on four subjects: appointments to the Supreme Court, the Senate (appointments process and reform), the future constitutional agenda (division of powers), and regular intergovernmental liaison in economic affairs (with the first ministers' conference at the apex of a larger though fluid structure).

SUPREME COURT APPOINTMENTS

Quite simply, the alleged danger is that the provinces (or some of them, especially Quebec) will regularly nominate for judgeships only those persons who are committed to augmenting provincial power, and that Ottawa will not be able indefinitely to go on refusing to accept any of the names proposed. This could be especially damaging at a time when, as one may anticipate, the scope of the federal trade and commerce power will come under repeated scrutiny in the context of international economic relations, fundamentally affecting Canada's capacity to negotiate effectively with its trading partners and to respond to the actions and initiatives of foreign governments (such as the threatened imposition, by the US, of a duty on softwood lumber in 1986).

The federal government has the latitude—and, personally, I would hope will use it—to act within the rules established by the Meech Lake Accord to prevent the Supreme Court from becoming a pro-provincialist body. (An even worse result would be one in which the non-Quebec judges were centralist and the Quebec judges decentralist in their federal philosophies.) A constitution typically establishes certain parts of an overall institutional framework, and those parts are subsequently complemented by the creation of new institutions. Over time, fairly standardized working relationships among institutions (both non-formal ones, and those established in the written constitution) tend to arise, eventually acquiring the force of convention.

An attempt could be made to work deliberately for this result in the case of Supreme Court appointments. For example, the federal government could adapt the recommendations of the Canadian Bar Association's Committee on the Appointment of Judges in Canada, which reported in 1985, establishing one or

more advisory committees on federal judicial appointments. Such advisory committees could complement the role of provincial governments in nominating future judges. The Minister of Justice could announce that he would routinely seek the advice of such a committee or committees before making any appointment, and might ask the provincial governments to indicate, when making nominations, whether they had consulted with the relevant committee. Alternatively, the provinces could be asked to indicate what process of consultation they had engaged in with a view to submitting the list of nominees. (Under Meech Lake rules, the federal government would be unable to make any appointment without provincial nomination, but it would have full power to decide whether or not to accept any of those persons nominated. What is important is that its behaviour in this regard should not be seen to be either partisan or, in an institutional sense, self-interested.) Ultimately, provinces might feel constrained to make their own soundings with the relevant committee, or to consult informally with at least some members of it, before putting forward their nominations. The result could be to increase the legitimacy of the court, which may have no choice in the future but to engage in a considerable degree of judicial activism. Since judicial activism will inevitably expose the court to charges that it is transgressing the role appropriate to the judiciary, it will need all the be-seen-to-be-neutral support it can get. To take a contrasting situation, a court appointed by the current procedures would be extremely vulnerable to criticism on the ground of partiality if it took historic decisions expanding federal power.

THE SENATE: APPOINTMENTS AND REFORM

The most telling argument against a strong Senate is that it may hamper or even paralyze the federal government in its dealings with the provinces (not to mention foreign governments, especially the US, and entrenched interest groups). Internal divisions create weakness. Thus the danger in the half-reform agreed to at Meech Lake is not (as some have alleged) that it may become an upper chamber filled with party hacks whose only distinction is to have been appointed by premiers rather than by the PM. Such a chamber which would have even less legitimacy than the present Senate. However, an upper chamber composed of persons of considerable talent, whose legitimacy would be enhanced by joint federal-provincial appointment, could be very threatening.

In the circumstances, about all the federal government can do unless and until more fundamental reform is brought about, is to accept nominations only of "reasonable" persons. Ottawa can afford to be picky about who it accepts, because it can leave positions unfilled for a considerable period of time. The

provincial governments will have every incentive to be "reasonable" about whom they nominate.

An appropriate longer-term strategy for the federal government would be to endorse, and attempt to augment public support for, more fundamental reform. Much has been made of the unanimity rule for future constitutional amendments on the structure and role of the Senate. This certainly does constitute an obstacle to reform, but even the most reluctant of provinces may be susceptible to public pressure in this area. The likely tradeoff will be an elected Senate, probably with disproportionately high representation from the smaller provinces, perhaps with special powers in matters such as language rights (the concurrent majorities idea again?), and certainly with only a suspensive veto over legislation. The federal government may be able to mobilize public opinion in favour of an elected Senate, hoping that even hesitant provinces will be induced to go along with the proposal. I suspect that to be acceptable federally, the reform proposal would have to provide for some diminution in the Senate's powers. Additionally, the deal may have to be sweetened by including some other items in the package, that the provinces cannot resist. Even so, the enterprise will require good luck as well as good management.

THE FUTURE CONSTITUTIONAL AGENDA: DIVISION OF POWERS ITEMS

Some people are worried that with annual first ministers' conferences on the constitution the provinces will gang up on Ottawa, pressing for new powers, and that sooner or later a weak federal government will give way, abandoning for all time some essential powers. There can be no guarantee this will not happen. However, there is nothing inevitable about it either. As in all other aspects of federal-provincial relations, Ottawa must play its cards right.

In the case of revisions to the constitutional division of powers, "playing the federal cards right" means negotiating a package deal in which Ottawa gains some powers while ceding others to the provinces. Powers relating to the fisheries will be on the agenda for the first of the projected annual first ministers' conferences on the constitution. Either that item should be linked with others, or under the heading of "fisheries" there should be a combination

of changes that clarify the extent of federal powers as well as of provincial ones.¹⁸ The analogy here would be the "resources clause" negotiated in 1982, which was quite specific about the limits of provincial control over natural resources, prohibiting actions such as discriminating against out-of-province customers either in price or availability of supplies—actions in which some of the producing provinces had been actively engaged. Such an action could respond positively to the fears or concerns expressed, for example by New Brunswick, which clearly is worried that any reallocation of powers in relation to the fisheries could adversely affect its interests.

A more general comment about the constitutional division of powers. One of the interesting features of the debate over the Meech Lake Accord is the extent to which opinion has rallied to the cause of protecting federal power, and the extent to which such opinion has received expression through provincial governments. Jurisdiction over the fisheries is just one case where a province could be expected to come to the defence of federal constitutional powers. Such a situation could be more typical than the imagined scenario, where all provinces clamour for more powers and only Ottawa stands as the defender of the national interest.

INTERGOVERNMENTAL LIAISON AND THE FIRST MINISTERS' CONFERENCES

The Meech Lake Accord promises annual first ministers' conferences on the economy (FMCEs), a prospect which has raised concerns similar to those about annual constitutional conferences: that the provinces will gang up on Ottawa. Again, there is no guarantee that this can be avoided; but if the premiers use the FMCEs for publicizing their views on economic policy, Ottawa can do likewise. There is no reason to suppose that in confrontational politics the federal government will lose ground, either in policy terms or in terms of public opinion (legitimacy).

More positively, it may be possible to use the FMCE as a device for building an intergovernmental consensus on economic policies and strategies. In a situation where constitutional powers are divided, as has been noted, concertation of federal and provincial policy initiatives is essential. The provinces must

18 "Seacoast and Inland Fisheries" is an exclusive federal head of power under the *Constitution Act 1867*, so it may be argued—and perhaps correctly—that any shift in jurisdiction will necessarily augment the powers of the provinces. However, the coastal provinces also have programs relating to the fisheries, validated under provincial heads of power such as "Property and Civil Rights in the Province." There may therefore be some scope for a new delineation of federal and provincial roles in relation to the fisheries, which could ultimately be given constitutional effect.

be recruited as willing allies in the implementation of national economic policy, particularly in a situation where the United States is acting in an aggressive-defensive manner to protect its interests. I realize that federal-provincial concertation is more easily talked about than accomplished, but I believe the effort must be made.

The FMCE, alone, cannot be the instrument for this. Interestingly, though, steps are already being taken to turn the FMCE into a domestic summit supported by a more complex network of federal-provincial working groups (on regional development, on the environment, etc.) which report to the First Ministers. It is far from clear to what extent such a pattern of interaction will continue, or what results it may accomplish, but a start has been made. One provincial official recently remarked to me that we are rapidly approaching the moment when a decision will have to be made about the character and intent of the annual FMCEs. Are they to stand alone, essentially as media events, or are they to be working sessions, an institution at the apex of a larger structure of joint intergovernmental bodies?

VI — CONCLUSION

Whether the Meech Lake Accord is ratified or whether it fails, it is likely that working relationships between the federal and provincial governments will evolve fairly rapidly over the next few years. Changes in the international environment alone, for example as reflected in the negotiation of the Canada-US trade agreement, will ensure this result. What is less clear is how the Meech Lake initiative will shape future changes in the Canadian federal system, altering the respective policy capacities of the two orders of government and affecting how well they can work together to achieve common aims.

An obvious source of uncertainty is that it is not yet clear whether or not the Accord will go into effect. Most of my remarks have been directed toward a situation where the Accord is indeed ratified. It foreshadows some problems for the federal government but, in my opinion, it also promises a rather more significant set of opportunities. The main question at issue is how future federal governments will utilize or work within the modified rules.

The analysis is, I think, also relevant to the situation that the country will face if the Accord fails to obtain the support of all legislatures. In that case the eleven governments will have to launch an effort to pick up the pieces. There may be considerable rancour to deal with, but some features of the Accord could be implemented as matters of intergovernmental practice: procedures for judicial and for Senate appointments are candidates for informal implementation. Likewise, so are the rules for the exercise of the federal spending power, and the holding of annual FMCEs. The problem would be to reestablish a good

working relationship between orders of government, and especially to repair the damage that would be brought about concerning Quebec's relationship with its Confederation partners. One could expect that any future constitutional negotiations would be placed indefinitely on hold, a development that would cause strains with several provinces, especially those in the West.

The task of picking up the pieces would be particularly difficult if the Canada-U.S. trade agreement should collapse as well. The most dangerous scenario in terms of its domestic repercussions would be American passage of the legislation, followed by Canadian rejection of the agreement, presumably after a federal election. In this case interregional conflict and intergovernmental suspicion and resentment would be monumental; I believe the country would, with the simultaneous collapse of the Meech Lake Accord and the Canada-US trade agreement, face possible dismemberment. Claude Morin would have been proved right: this country can achieve constitutional change only "un fusil à la tête." This time, though, there could well be two guns: one held by Quebec, and one by the western provinces.

While the Meech Lake Accord is not perfect, its drafters implicitly acknowledged that the country faces some grave difficulties, toward the resolution of which the Accord is an incremental step. Its main character was determined by the specific legacy of 1980-82, the "Quebec agenda," but it looks to further changes in the institutions and procedures of Canadian federalism. It will be necessary to consider and to work toward some such set of changes in the future. If the Meech Lake Accord falls to the ground, that will complicate the process, because of the legacy of resentments and the overloading of the reform agenda. As with trade relations, the status quo is not an option.

APPENDIX: STRATEGIC CHOICES FOR PROVINCIAL GOVERNMENTS*

Recent events foreshadow a changed dynamic of federal-provincial relations, especially in the formation of economic policy. The situation now emerging will offer new opportunities, new challenges, and some new dangers for provincial governments. At stake is their capacity to meet the needs of their residents and, together with the federal government, of Canadians generally. These notes explore the contours of this new situation, and highlight some of its implications. Specifically, we shall look at some strategic choices the provincial governments will have to make.

A CHANGED ENVIRONMENT

Let's consider first some implications of the Canada-US trade talks, and of the negotiation of an export duty on softwood lumber to avoid US countervail. These events offer glimpses, which some people have found far from reassuring, of a new role for the provincial governments in foreign economic relations. However, neither dossier is yet closed. Depending on what happens over the next year or so, the longer-term effects of these experiments in federal-provincial policy coordination may work to diminish, not expand, the role of provincial governments in the economy.

A tougher international economic climate—trade agreement or no trade agreement—may generate new demands for a single, coordinated policy in areas where each province has traditionally made its own decisions. For example, if one province adopts policies that result in countervail on Canadian exports, producers in other provinces may suffer: their exports may be subjected to countervail too. Or to take another case, Canada's negotiating stance internationally may be damaged by untimely interventions by a provincial government. In such situations, lack of discipline and direction work to everyone's disadvantage.

The more threatening the international economic climate, the more it will require the very smoothest federal-provincial and interprovincial policy coordination. Hitherto the response of the present federal government has been to associate the provinces with its major economic initiatives, aiming in this way for unified, collaborative action. In effect, the provinces have been invited to

*Notes prepared for discussion at the annual Premier's Conference, Saint John, New Brunswick, 28 August 1987.

accept a tradeoff where their individual freedom of manoeuvre will be limited, in return for their obtaining, collectively, a stronger voice in the formulation of national policy.

If the provinces, or some of them, are unwilling to make such a tradeoff, the dynamics of the situation may change drastically. Private sector interests and the federal government itself are likely to demand new powers for Ottawa to direct those aspects of domestic economic policy that affect Canada's dealings with its trading partners. Many of the relevant policies have been, up to now, within areas of provincial responsibility.

Thus the situation now emerging, as highlighted by the trade talks and the softwood lumber deal, seems to present a dilemma for provincial governments. They may choose to become more closely involved with each other and with the federal government in the formulation of national economic policies, but at the cost of reduced ability to go their own way in economic affairs. Alternatively, they may try to play their own hands individually in the economy, but to do so within a set of constraints that could well become increasingly tight over the years. Some of the constraints in question, as already indicated, originate outside Canada; but others are domestic—budgetary restrictions, changing attitudes (i.e., mounting doubts in the public mind about the effectiveness of government intervention in the marketplace), and possibly new initiatives from Ottawa to expand the scope of its trade and commerce power, and generally to gain fuller control over the levers of economic policy.

FIRST MINISTERS' CONFERENCES

In the context that has been sketched out the annual First Ministers' Conferences on the constitution ("FMCCs") and also on the economy ("FMCEs"), as prescribed in the Meech Lake Accord, have a special significance. These questions arise:

- What is expected of the FMCEs? Through these conferences, will the provincial governments come to play an increasingly important role in making national economic policy? In this context, will the larger and wealthier provinces tend to dominate; or, conversely, does a multilateral process offer advantages for the smaller provinces?
- Will annual FMCCs alter the balance of power between the federal government and the provinces?

My own guess is that these two forms of FMC will work quite differently from one another.

Conferences on the Economy. The FMCEs may be occasions where all the governments attempt to work towards a set of common policies. This is the

"maximum cooperation" model. (There is also a "minimum conflict" model, to be discussed below.)

If the provincial governments want to join with the federal government in designing and implementing national economic policies—the international situation may make this highly desirable: that is one of the questions premiers may wish to discuss—then the FMCE is the obvious vehicle for such a joint endeavour. It would appear to an outside observer that the present federal government may be willing to develop joint policy-making considerably beyond the stage it has reached so far. This is what I had primarily in mind when I said, at the beginning of these notes, that the present situation offers new opportunities for provincial governments. The corresponding challenge is to bring it about. Is this what premiers wish to work for? Is it what business leaders and representatives of other private sector interests want to happen?

Joint decision-making in economic policy, and indeed in matters such as income security, has obvious attractions, but it cannot be expected to constrain the federal government alone. If collaborative action is the preferred way for Canada to go in the changed world-economic environment, it will limit also the provinces' capacity to act as they choose within their own areas of jurisdiction and traditional policy responsibility. The extent to which this happens will depend, obviously, on the scope of the collective decision-making process, at the apex of which will be the FMCE. For the FMCE to occupy this strategic position, it would have to become the focal point of an extensive process of consultation, intergovernmentally and with private sector interests. It would probably be necessary to further develop the concept of sectoral ministerial councils, which already seem informally to be acquiring an important role in working towards federal-provincial policy coordination. In short, if the FMCEs are to be set up on the "maximum cooperation" model, they will have to become simply the most visible part of a more elaborate system.

Premiers may well prefer something much less ambitious. In this case the FMCE will operate according to a "minimum conflict" model. Under this model, the participating governments would merely regard the FMCEs as opportunities to ensure that, as much as possible, they avoid working at cross-purposes. Information would be exchanged and, especially in private session, the First Ministers would have an opportunity to discuss the nature and gravity of the economic problems facing the country, as well as possible responses to them. It would be up to each government to react as it saw fit; but unnecessary conflict between them could be reduced.

An assumption of the "minimum conflict" model is that the purpose of the FMCEs is merely to gather intelligence from each other, not to settle on a joint course of action. I daresay premiers would be more comfortable with this conception of the FMCE, because it would be less constraining. On the other hand,

their claim to a voice in directing federal policy would be less strong. Perhaps more significant, their *actual* freedom of action may already be very severely limited by the international situation, and by international agreements entered into by the federal government. Premiers may wish to discuss how severe those constraints are, and whether a collaborative mode of intergovernmental decision-making would much diminish, in practice, their scope for independent action.

Naturally, the "maximum cooperation" and the "minimum conflict" models for the FMCE encapsulate two very different conceptions of what these meetings may accomplish. It will be desirable if the governments share basically the same assumptions about how much policy coordination ought to be aimed for on these occasions—and can realistically be achieved. Thus one strategic choice for provincial governments will be to decide whether or not to utilize the FMCEs for collaborative policy-making.

Constitutional Conferences. With either model of FMCE, the underlying idea is that federal and provincial governments should try to work together better, or more consistently, than in the past. The existing constitutional distribution of powers is, for this exercise, taken as given. The FMCCs, by contrast, will be occasions where the governments can seek changes in the framework for policy-making, and indeed will be invited to do so. The failures or shortcomings of the FMCEs could easily set the agenda for the FMCCs. In that case provincial governments should expect Ottawa, sooner or later, to come to the FMCC with a shopping list, resurrecting the 1979-80 agenda item on "Powers over the Economy." Indeed, a provincial shopping list would virtually force Ottawa to draw up its own list, and vice-versa. Thus these conferences could be quite intense bargaining sessions in which each government seeks to defend its own powers and if possible to expand them. All the parties would aim to minimize future constitutional constraints on their freedom of manoeuvre, and each would be concerned that concessions or compromises made today would be irreversible in the future.

This does not mean the FMCCs are doomed to regular and repeated failure, because not all of the issues on the agenda would be of the character I have described. Furthermore, those agenda items that do raise division-of-powers questions would quite predictably involve the *trading* rather than merely the *transferring* of powers. There could be some quite positive results. But the level of conflict at FMCCs will probably be high, unless the conferences themselves become perfunctory. (For example they could become, not so much conferences in themselves, as an agenda item for the FMCE.)

If these suppositions are correct, they point to another strategic choice that provincial governments will face in the short to medium term. To what extent

will it be to their advantage to place division-of-powers items on the agenda for FMCCs, and to what extent would they be better advised to work within the existing constitutional framework? If they want to gain increased policy control they may be tempted to seek new constitutional powers, but they will probably have to be ready to offer something in exchange.

BILATERAL ADJUSTMENTS IN POLICY ROLES

There may be an intermediate choice, also foreshadowed by the Meech Lake Accord. That is for each province to work, as much as possible, bilaterally with Ottawa. Regional development programs are one model for policy coordination, with federal monies being the bait, or grease, for an agreement. This works, because in regional development the two orders of government can—and do—each fund their own projects and programs, or may choose to share the cost of a single project or program; the main constraint is not the constitution, but the availability of funds. However, in other policy areas expenditures may be a less important aspect, or instrument, of government action.

In such areas the immigration agreement concluded in 1977 with Quebec (the Cullen-Couture agreement), now given quasi-constitutional status in the Meech Lake Accord, could conceivably provide a model. This agreement, of course, lies within an area of concurrent jurisdiction, so complications arising from divided jurisdiction do not occur. However, even in subjects where exclusivity is the rule, delegation of powers is possible provided delegation does not occur from one legislature to another. Parliament may delegate to a provincial board, or a provincial legislature may delegate to a federal board, as occurs (both ways) with the marketing of farm products. Thus there is plenty of room across a wide part of the policy spectrum for governments to negotiate both multilaterally and bilaterally some readjustment of their respective roles and responsibilities. If an agreement is in place and gives evidence of working well, it could eventually be incorporated into a constitutional amendment. I understand negotiations are under way for such an agreement in the field of communications, with the possibility of constitutional entrenchment at a later stage.

Such arrangements could significantly adapt the federal structure to the particular needs and concerns of individual provinces. The more Ottawa negotiates working relationships with each of the provinces on a bilateral basis, across a spectrum of policy fields, the greater the potential for interprovincial differences in *de facto* policy roles. Thus there may well come about increasing differentiation among the provinces in the responsibilities they exercise, though they will do so within a formal constitutional status about the same as every other province. Is such differentiation desirable, and if so, is it desirable for all, or only for some? The question points to a third strategic choice facing each of

the provincial governments: whether, in most matters relating to provincial policy roles and responsibilities, to deal individually with Ottawa, or collectively—to negotiate bilaterally or multilaterally, or both (first bilaterally, then multilaterally).

ANOTHER ROUTE TO CHANGE

The foregoing analysis suggests that one can expect significant adjustments in the roles played by the two orders of government, and by provinces individually, quite outside the annual round of First Ministers' conferences. There is nothing new in this, as historically the chief avenues of constitutional change have tended to be informal, involving more *de facto* than *de jure* change; these processes have been to some extent supplemented or confirmed by judicial interpretation of the Constitution Act.

I have already alluded to the possibility of an extension of federal power under the trade and commerce clause (Section 91.2 of the Constitution Act, 1867); but significant change may easily occur without the Supreme Court being involved at all. The point may be illustrated by referring, once again, to the export tax on softwood lumber. I think its negotiation was an extraordinarily illuminating occurrence as regards both Canada's relationship with the United States and the potential for change within the Canadian federal system, reflecting a rapidly evolving international situation. I do not refer to the circumstances surrounding its negotiation, which have engendered controversy, but rather to its actual terms.

The agreement provides for the eventual removal of the export tax if certain modifications, acceptable to the United States, are made in provincial policies towards the forest industries. By this means the United States has reached far into what had hitherto been regarded as the realm of domestic Canadian policy; and the federal government, by administering the tax, has accepted a supervisory role in relation management practices over provincial public lands, notwithstanding the exclusivity of this provincial power under Section 92.5 of the *Constitution Act, 1867* and also notwithstanding the new Section 92A, the "resources clause" adopted in 1982. This object lesson in *realpolitik* has made me wonder to what extent provincial concurrence in a trade agreement with the United States may be required in law, though of course, regardless of the legal situation, there may be strong political reasons for gaining the provinces' willing assent. Moreover, the United States is reported to have insisted upon it.

STRATEGIC CHOICES FOR PROVINCIAL GOVERNMENTS

These thoughts may bring into focus, from a different angle, the strategic choices predictably facing the provincial governments over the next few years. Those choices have already been alluded to, but it may be useful to recapitulate them here.

- To what extent do provinces wish to involve themselves, together with the federal government, in a process of national decision-making in economic affairs, and perhaps also in other areas? The FMCE is the obvious vehicle for this, though it would probably have to be part of a much fuller process of collaborative action, and of consultation with the private sector. If an attempt is to be made to move in the direction of fuller intergovernmental collaboration, a necessary consequence is that the provinces' independent decision-making capacities will be reduced, though not necessarily much more than changes in the international environment may already be bringing about.
- To what extent do provinces want to work for modifications in the existing distribution of constitutional powers, and to utilize the FMCCs to accomplish this? If they do wish to press for extension of their powers, in what areas are they willing to cede powers to the federal government, assuming a unidirectional transfer is not in the cards?
- To what extent should provinces aim to shift intergovernmental negotiation away from a multilateral and towards a bilateral process? This more tentative and low-key approach may offer quicker results in bringing about a reassignment of governmental roles and responsibilities, but bilateral agreements may have implications for governments that were not party to them. Further, the more bilateralism there is, the greater the potential for differences in policy roles, if not actual constitutional status, to arise among them; this may be judged good or bad.

Throughout these notes, the emphasis has been on provincial governments, the impact that a changing set of circumstances may have on them, and the strategic choices facing them. However, it is important never to lose sight of the fact that it is not the *governments* interests that are ultimately at stake, but those of the people whom they serve. What really counts is the capacity of Canadian governments, acting individually and in concert, to meet the needs of the Canadian people.

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