

*Freedoms* and the amending formula, which required legislative approval of constitutional amendments at both levels of government. For different views on the relative importance of the Charter and broader societal changes see Ian Brodie and Neil Nevitte, "Evaluating the Citizens' Constitution Theory," *Canadian Journal of Political Science*, 26 (June 1993): 235-59; Alan C. Cairns, "A Defence of the Citizens' Constitution Theory," *Canadian Journal of Political Science*, 26 (June 1993): 261-67.

11. See, for example, Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972), pp. 144, 280-83.
12. See Alan C. Cairns, "Constitutional Minoritarianism in Canada," in R.L. Watts and D.M. Brown (eds.), *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990), pp. 71-96; R. Knopff and F.L. Morton, *Charter Politics* (Scarborough: Nelson, 1992).
13. Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little, Brown, 1971).
14. See J.S. Dupré, "The Workability of Executive Federalism in Canada," in H. Bakvis and W.M. Chandler (eds.), *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987), pp. 236-58.
15. Robert Russo, "Public must have a say, Wells declares," *Montreal Gazette*, 6 June 1991, p. A8.
16. For a discussion of this period see Bakvis, *Regional Ministers*, pp. 270-72.
17. On these developments see Kathy L. Brock, "The Politics of Process," in D. Brown (ed.), *Canada: The State of the Federation 1991* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991), pp. 57-87. For a most useful discussion of the significance of the two Quebec reports see Mollie Dunsmuir, *The Bélanger-Campeau and Allaire Reports* (Ottawa: Minister of Supply and Services, 1991).
18. Interview, November 1990.
19. These are those that could be amended using the general amending formula in i.e., section 38, *Constitution Act, 1982*, which specifies that a resolution is to be passed by the Parliament of Canada plus two-thirds (7) of the (10) provincial legislatures which combined represent 50 percent of the Canadian population.
20. See Robert Young and Douglas Brown, "Overview," in D. Brown and R. Young (eds.) *Canada: The State of the Federation 1992* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992), p. 6.
21. On the role and standing of these personalities in relation to restarting the constitutional process see Donna Greschner, "Closings, Cynics and Cheerfulness," in D. Brown, R. Young and D. Herperger (eds.), *Constitutional Commentaries: An Assessment of the 1991 Federal Proposals* (Kingston: Institute of Intergovernmental Relations, 1992), pp. 109-110.
22. On personnel changes and shifts in power see Anthony Wilson-Smith (with E. Kaye Fulton), "All the PM's Men," *Maclean's*, 25 March 1991, p. A16; Graham Fraser, "The Constitutional Backroom Gang," *The Globe and Mail*, 5 October 1991, p. D2.

23. The membership of the CCCU included all "political" or regional ministers, that is the senior Cabinet ministers from each province. Elmer MacKay was responsible for two provinces — P.E.I. as well as Nova Scotia — insofar as the former had no minister of its own after failing to elect any government MPs in 1988. As Mulroney announced in 1986, "These men and women will have primary responsibility of improving the Government's direct consultations with the people, with the party, with ordinary voters, to bring to our attention in a political way those concerns that can best be addressed most effectively at the federal level." Quoted in Bakvis, *Regional Ministers*, p. 246.
24. See Geoffrey Stevens, "Why Joe Clark had to throw a temper tantrum," *Toronto Star*, 12 May 1991, p. B3.
25. In each city at least one meal time was set aside for a reception with community leaders. Each table would have three or four local residents, one minister and one official. Ministers and officials were told "to listen, not too preach," an instruction apparently based on lessons from the Spicer Commission. See Robert Lee Mason, "Politicians seem to learn more with mouths closed, ears open," *Ottawa Citizen*, 4 August 1991, p. B1.
26. Anthony Wilson-Smith, "The Hard Road to Unity," *Maclean's*, 15 July 1991, p. A19.
27. Simpson, "Package filled with last-minute compromises," *The Globe and Mail*, 28 September 1991, p. A5.
28. Huguette Young, "Mulroney impose le silence au lac Meech," *Le Devoir*, 9 July 1991, A1.
29. This walkout was widely reported in the press, but there is some question about what triggered this action and secondly whether it was in fact a walkout at all. One report (Graham Fraser, "PM in charge of constitutional proposal," *The Globe and Mail*, 14 September 1991, p. A2) claims that the four Quebec ministers were unhappy with the proposal for the Council of the Federation, seeing it as simply one more central institution in which Quebec would be outvoted. Another report (Helen Branswell, "Les Canadiens sont plus sensibles aux demandes du Québec, estime Clark," *Le Devoir*, 17 août 1991, p. A4), however, claims that the walkout was precipitated by discussion over opting out and compensation provisions in future federal-provincial programs. On the other hand two officials described the event more as a "trickle out" as the four ministers left separately at different times, and, further, that there was nothing in the discussion or temper of the meeting at the time that would precipitate a sudden walkout. Media representatives saw the four Quebec ministers gathered together outside and reached the conclusion that the ministers had walked out simultaneously in response to some issue.
30. Quoted in Carol Goar, "On unity, PM should swing open cabinet doors," *Toronto Star*, 11 July 1991, p. A21.
31. Quoted in Anthony Wilson-Smith, "The Hard Road to Unity," *Maclean's*, 15 July 1991, p. A19.
32. Quoted in Wilson-Smith, "The Hard Road to Unity," p. A19.
33. This double-game in constitutional politics is not new. Simeon notes "the phenomenon of Quebec participants being more vehement and forceful outside the

conference room than inside it" during federal-provincial negotiations over the constitution in the 1960s. *Federal-Provincial Diplomacy*, p. 235.

34. See Graham Fraser, "Contentious opting-out clause was late addition, strategist says," *The Globe and Mail*, 1 October 1991, p. A4.
35. The federal government spent more than \$1.4 million on polls on the constitutional issue over a period of less than two years during 1991-92, including \$576,223 in 1991 while preparing the constitutional proposals. See Geoffrey York, "Pollsters profit from unity issue," *The Globe and Mail*, 3 October 1992, pp. A1, A2. Most of the details of the polling conducted for the government were released in response to a suit brought by the Access to Information Commissioner in the federal court after the federal government had originally denied requests for access by *The Globe and Mail*, Southam News and others. See Hugh Winsor and Graham Fraser, "Tories ignored own polls: Public warned in 1991 that constitutional issue unpopular," *The Globe and Mail*, 19 November 1992, pp. A1, A4.
36. Elizabeth Gidengil and Neil Nevitte, "'Know More': Information, Interest, and the Constitutional Proposals," paper presented to the Annual Meeting of the Canadian Political Science Association, Ottawa, June 1993.
37. Winsor and Fraser, "Tories ignored their own polls," p. A4.
38. Jeffrey Simpson, "Package filled with last-minute compromises," *The Globe and Mail*, 28 September 1991, A5.
39. *Shaping Canada's Future Together*, pp. 28-32, 43-44, 55-56.
40. Canada, *Canadian Federalism and Economic Union: Partnership for Prosperity* (Ottawa: Minister of Supply and Services, 1991)
41. The only other report that drew praise was the one submitted by External Affairs, which apparently presented quite a compelling argument on the need to preserve a single Canadian identity in Canada's representation abroad. This topic, however, did not figure prominently in CCCU discussions.
42. Anthony Wilson-Smith, "Fighting for Favor: high hopes and shrunken budgets mark the Tory plan for a new session of Parliament," *Maclean's*, 27 May 1991, p. A16.
43. Some of the division of opinions among the officials can be inferred from comments subsequently made by one of the academic advisers to the CCCU, Douglas Purvis, who clearly favoured using section 95 and stated, "Even if one accepts the principles behind and the substance of the s.91A proposal, it is clear that the optics are unacceptable." D. Purvis, "The Federal Proposals and the Economic Union," in R. Boadway and D. Purvis, *Economic Aspects of the Federal Government's Constitutional Proposals* (Kingston: John Deutsch Institute for the Study of Economic Policy, Queen's University, 1991), p. 9.
44. *Shaping Canada's Future Together*, p. 56.
45. These reports varied considerably in quality and some in fact were never completed, or at least were not in a condition to be considered by the CCCU. According to Jeffrey Simpson, in explaining the limited number of powers to be yielded to the provinces: "In part, that reflected the work last spring of committees of deputy ministers who reviewed federal proposals and concluded, as committed defenders

- of federal turf, that Ottawa should not give away very much." "Package filled with last minute compromises," *The Globe and Mail*, 28 September 1991, p. A5.
46. Ibid., p. A5.
  47. Robert Russo, "Cabinet deal didn't come easily," *Montreal Gazette*, 25 September 1991, p. A9.
  48. Ibid., p. A9; Chantal Hébert, "La proposition constitutionnelle d'Ottawa aura été le fruit de profonds déchirements," *Le Devoir*, 24 September 1991, p. A1.
  49. Quoted in Russo, "Cabinet deal didn't come easy," p. A9.
  50. Ibid., p. A9.
  51. Graham Fraser, "PM in charge of constitutional proposal," *Globe and Mail*, 14 September 1991, p. A1.
  52. Ibid., p. A9; Fraser, "Contentious opting-out clause was late addition, strategist says," p. A4; Chantal Hébert, "Le cabinet reste divisé sur la proposition constitutionnelle," *Le Devoir*, 12 September 1991; Chantal Hébert, "Mulroney devra seul trouver un compromis: Pas de consensus au cabinet sur le projet constitutionnel," *Le Devoir*, 13 September 1991, pp. 1, 4.
  53. Based on *Shaping Canada's Future Together* and "Proposal Highlights," *The Globe and Mail*, 25 September 1991, p. A1.
  54. In the order of "compelling reasons" the need to entrench aboriginal rights to self-government is listed first followed by "Quebec's desire for recognition of its distinct nature." *Shaping Canada's Future Together*, p. vi.
  55. Quoted in "Wilson calls economic plan ineffectual," *The Globe and Mail*, 15 July 1992, p. A4.
  56. See Paul Gessell, "We're sitting on a constitutional time bomb," *Ottawa Citizen*, 9 November 1991, p. B1. Clark did, however, manage to meet with a number of groups.
  57. Thomas J. Courchene, "The Economic Union and Other Aspects of the Federal Proposals," in D. Brown, R. Young and D. Herperger (eds.) *Constitutional Commentaries: An Assessment of the 1991 Federal Proposals* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992), p. 39.
  58. Simpson, "Package filled with last-minute compromises," p. A5.
  59. Ibid.
  60. Ibid.
  61. Susan Delacourt, "The buying: It doesn't totally fulfil the giant Canadian wish list — but it's a start," *The Globe and Mail*, 28 September 1991, pp. A1, A5.
  62. Rhéal Séguin and Patricia Poirer, "Bourassa rejects economic plan," *The Globe and Mail*, 26 September 1991, pp. A1, A2.
  63. Quoted in Carol Goar, "On unity, PM should swing open cabinet doors," *Toronto Star*, 11 July 1991, p. A21.
  64. On the five public conferences see the excellent analysis of David Milne, "Innovative Constitutional Processes," in *Canada: The State of the Federation 1992*, pp. 27-51.



# III

## Immediate Issues

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## Aboriginal Policy and Politics: The Charlottetown Accord and Beyond

*J. Anthony Long and Katherine Beaty Chiste*

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*En 1992, l'ordre du jour du dossier autochtone fut dominé par l'entente de Charlottetown. La participation des peuples indien, inuit et métis au processus de la réforme constitutionnelle aura atteint un degré sans précédent. Par ailleurs, si les leaders de toutes les organisations autochtones à l'échelle nationale endossèrent les dispositions de l'accord les concernant, on assista en revanche, au sein même des communautés indiennes, à un vaste mouvement de rejet à l'égard de l'entente.*

*L'échec de l'accord, le 26 octobre 1992, aura eu pour conséquence de perpétuer jusqu'à ce jour la situation ambiguë des peuples autochtones au Canada. Néanmoins, le processus de négociations tripartite conjugué aux dispositions substantielles de l'accord, détermineront à la fois les demandes autochtones et la réponse des gouvernements. On peut d'ores et déjà prévoir une intensification des initiatives à caractère non-constitutionnel telles que les négociations autour des revendications territoriales et l'autonomie gouvernementale. Mais il est possible aussi qu'à défaut d'un cadre précis de référence, semblable à celui fourni par l'entente de Charlottetown, l'union sacrée des groupes autochtones du Canada ne fasse pas long feu. De fait, en l'absence d'une solution prochaine sur le plan constitutionnel, les communautés autochtones pourraient être amenées à exercer leur action en fonction d'abord de leurs aspirations, cultures et capacités spécifiques.*

*Dans ce contexte, la Commission royale sur les peuples autochtones s'avérera peut-être un facteur de cohésion pour l'ensemble des groupes autochtones. Plus que jamais, cette Commission — dont le mandat vise à une amélioration radicale des conditions de vie des Canadiens d'origine autochtone — apparaît-elle comme l'instrument de la dernière chance, compte tenu de l'échec patent, jusqu'à présent, de toutes les autres tentatives faites au regard de cette question.*

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During 1992, the aboriginal public policy agenda was dominated by the Charlottetown Accord. Aboriginal Peoples became involved in the process of constitutional reform on an unprecedented scale when they were given

extensive opportunities to articulate their demands in both the public and constitutional forums.<sup>1</sup> Throughout the pre-Accord stage Aboriginal Peoples, as well as the political organizations representing them, formed an integral part of the public consultation process during the Renewal of Canada Conferences and the hearings of federal and provincial committees established to formulate recommendations on constitutional reform. Four national aboriginal organizations were funded to carry out a parallel consultation process with their respective memberships, so that the grass-roots opinions of Aboriginal Peoples would be reflected in the constitutional positions of organizations representing them. The Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Métis National Council (MNC) and the Inuit Tapirisat of Canada (ITC) were allowed full participant status over the entire range of constitutional issues with the federal and provincial government delegations during the tripartite negotiations leading up to the Accord. In the end, the aboriginal political organizations involved in the negotiations became an active part of the "Yes" side during the referendum campaign.

On the governmental side, as the negotiations over the substance of the Accord developed, changes from previous positions on crucial aboriginal constitutional demands found expression in the final draft of the Accord. The shift in governmental positions was strongly endorsed by the Métis and the Inuit, and both groups looked forward to the type of constitutional recognition of their peoples and cultures that they had been seeking for over a decade. Within the status Indian community, however, major splits developed over the Accord. While negotiated and strongly endorsed by the leadership of the AFN, the agreement was vehemently denounced by a number of native women's associations and by many chiefs and band councils whose reserve communities have treaty relationships with the Canadian government. In the end, nearly two-thirds of the residents voting on these reserves rejected the Accord.

The defeat of the Accord on 26 October 1992 in effect reconfirmed the existing, albeit ambiguous, constitutional status of Aboriginal Peoples, leaving their basic position within the federal system unchanged. However, not only the outcome of the referendum but also the tripartite negotiating process and the substantive provisions of the Accord itself will leave their marks on future aboriginal demands as well as on federal and provincial approaches towards aboriginal policy. Moreover, the events of 1992 promise to influence significantly the future of politics both between and within the respective aboriginal communities.

## THE CHARLOTTETOWN ACCORD: PROCESS AND SUBSTANCE

The failure of the Accord to achieve constitutional status has tended to overshadow the achievements made by Aboriginal Peoples in the process of constitutional reform and the implications those gains hold for the future of Aboriginal Peoples within the dynamics of Canadian federalism. From 12 March 1992 until the final agreement was concluded in August four national aboriginal organizations were afforded formal participant status over the entire gamut of constitutional issues. Even though their primary involvement in the negotiations occurred within the aboriginal working subgroup they were not precluded from participating in the dealings over the entire constitutional package. Although the aboriginal associations chose to participate only minimally on a number of the other constitutional issues under negotiation, the principle of full participation remained and aboriginal political organizations became integrated into executive federalism. Arguably, the elevation of the aboriginal organizations to the level of equal status within the tripartite negotiations finally afforded these groups the recognition they had previously fought so hard to achieve.

The incorporation of aboriginal political organizations into the model of executive federalism has been a gradual evolution from previous attempts to define a constitutional status for Aboriginal Peoples. This process has been influenced by the personalities and politics of sitting premiers, prime ministers and aboriginal leaders. The AFN, the NCC, the MNC and the ITC were originally invited to be representatives of their respective constituencies by Prime Minister Trudeau during the constitutional conferences from 1983 to 1987. Four years later, aboriginal leaders were invited to the Premiers' Conference at Whistler, B.C. in August 1991. The press, perhaps presaging future events, even declared Ovide Mercredi as Canada's "eleventh premier" following his election as National Chief of the AFN. Governments were sensitive to aboriginal demands for expanded participation in the constitutional revision process, particularly after the abortive Meech Lake episode. The ability of Aboriginal Peoples to influence constitutional change, as demonstrated by the Member of the Manitoba Legislative Assembly, Elijah Harper, and his supporters, was not lost on either federal or provincial politicians.

It is difficult to judge the full effect that the Charlottetown Accord process has had on the position of Aboriginal Peoples within federalism. The most obvious effect is that it elevated the benchmark for the role of aboriginal political organizations within the constitutional forum, at least if the constitutional revision process continues to be characterized by executive federalism. Whether aboriginal political associations will be invited to attend future premiers' or first ministers' meetings that focus on general public policy concerns



depends upon the residual strength of the Charlottetown Accord process. It is possible that the participation achieved by Aboriginal People in 1992 will turn out to have been, for some time to come, a *sui generis* event. Such aboriginal participation in the first ministers' process, however, as Menno Boldt has argued, might serve to undermine the position of more sovereigntist First Nations, who see such participation as incorporating them within the constitutional framework of the Canadian state and thereby diminishing their claim of nationhood.<sup>2</sup>

Like Meech Lake, the Charlottetown Accord is now part of the constitutional history of Canada. While its relative place within that history will be decided by scholars in the future, it is important to consider what might have been for two significant reasons. First, the elements of the Accord intended for constitutional entrenchment as well as their associated political accords established a new baseline for future demands by aboriginal leaders at both the constitutional and legislative policy levels, whether aboriginal leaders act singly or in concert. It is likely, moreover, that the Accord will drive some of the future recommendations of the Royal Commission on Aboriginal Peoples, which endorsed the general thrust of the Accord's aboriginal provisions during the negotiation process.<sup>3</sup> And second, the Accord stands as an indicator of how far both the federal and provincial governments are capable of moving in their thinking about the place of aboriginal governments within the federal system. While it remains an open question whether the final federal and provincial positions represented a basic shift in principle or were rather a pragmatic, politically motivated response to the demands of aboriginal leaders or a combination of both, these positions were nevertheless crystallized in the Accord. An overview of some of the major features of the Accord will illustrate the extent of this movement.

The elements of the Charlottetown Accord that held the greatest potential impact for the place of aboriginal governments within the Canadian federal scheme were the recognition of the "inherent right of self-government within Canada" for Aboriginal Peoples, the description of aboriginal governments as a third order of government, the future relationship of those governments to the *Charter of Rights and Freedoms* and the inclusion of the Métis under section 91(24) of the *Constitution Act, 1867*.

Aboriginal leaders had fought vigorously since the constitutional conferences of the 1980s for constitutional recognition of their inherent right of self-government — a battle that has until recently been resisted with equal vigor by most provincial premiers. Paragraph 41 of the August 1992 *Consensus Report on the Constitution* provided that the inherent right of self-government within Canada should be placed in section 35.1 of the *Constitution Act, 1982*. Furthermore, the inherent right of self-government should be interpreted within the context of aboriginal self-government as a third order of government within

Canada. While the concept of inherency attempted to acknowledge the historical self-governing status of Aboriginal Peoples, the qualifying phrase "within Canada" effectively precluded recognition of that status outside the Canadian constitutional framework, thus delegitimizing any claim to sovereignty in the international sense by aboriginal governments. That is, any independent legal status for aboriginal societies and their governments outside the jurisdiction of Canada was rejected. Still, the provision would have had the effect of establishing a "stand-alone" constitutional footing for aboriginal government thus elevating it from its current legislative base, as exemplified by the band government provisions of the *Indian Act*.

The authority of aboriginal governments as a third order of government was to be described in the constitution, but not defined. Essentially, paragraph 45 provided that definitions of self-government with respect to jurisdiction, lands and resources, and economic and fiscal arrangements would emerge through negotiations among the federal government, provincial governments and aboriginal leaders. The process and parameters of these negotiations would have been spelled out in a political accord to be developed subsequently. Should the respective parties have failed to reach self-government agreements, the Accord provided that judicial definition of the right of self-government could occur after a five-year period. Delaying the justiciability of the right for five years, however, would not have made the right of self-government "contingent" on the results of the negotiations. A "contingent" right had been vigorously opposed by aboriginal leaders not only during the Charlottetown negotiations but also during the 1980s FMCs when several provinces insisted that they would have to see the details of aboriginal self-government fleshed out before they would agree to give it constitutional status. Once negotiations over the specifics of aboriginal governments had been completed, paragraph 45 provided that they would acquire constitutional status as "treaties" protected by section 35 of the *Constitution Act, 1982*.

While ultimately the exact nature of aboriginal governments as a third order of government within Canadian federalism would not have been known until the various self-government agreements had been finalized or judicial definition of the right to self-government had occurred, the Accord provided some general parameters. Paragraph 41 stipulated that a contextual statement be inserted in the constitution, specifying that the right of self-government includes the authority of aboriginal governments: "(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and (b) to develop, maintain and strengthen their relationship with their lands, waters and environment so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies." Paragraph 47 provided that a constitutional provision would ensure that federal and provincial laws applied until they were displaced by the

laws of aboriginal governments. Also, as Sanders suggests, paragraph 41 indicated that aboriginal legislative powers would overlap with federal and provincial ones and that in case of conflict the laws of aboriginal governments would have paramountcy over the laws of both other orders of governments.<sup>4</sup> As to the role of aboriginal governments in future constitutional reform, paragraph 60 provided that there should be aboriginal consent to future constitutional changes that directly affect Aboriginal Peoples. This represented a substantial change from the earlier constitutional conferences on aboriginal rights which, organized under section 37 of the *Constitution Act, 1982* were essentially first ministers' conferences to which the representatives of Aboriginal Peoples were invited to discuss constitutional matters that affected them. Moreover, the reference in paragraph 60 is to aboriginal consent only, not to aboriginal governments, leaving open the question of what mechanism would be used to express that consent. The right of aboriginal governments to participate in constitutional negotiations on a level with the federal and provincial governments in the future was thus left problematic in the Accord.

On the restrictive side, paragraph 47 would have required that laws passed by aboriginal governments could not be inconsistent with those laws that are essential to "the preservation of peace, order and good government in Canada." This provision, along with paragraph 44's statement that the constitutional provision on inherency and the commitment to negotiate land claims should not create new aboriginal rights to land, was put in to placate provincial concerns, in particular that of Quebec, over the protection of provincial territorial integrity.

Another limitation on the authority of aboriginal governments rested on the application to them of the *Charter of Rights and Freedoms*. The issue of Charter exclusion was one of the most heated and divisive issues within the native community during the Accord negotiations. Indian leaders have argued consistently since the late 1970s that First Nation governments should not be subject to the unqualified application of the Charter. Although often cast in legal terms, this argument rests on cultural grounds. Indian leaders argue that the belief systems and many of the governance processes of Indian societies are fundamentally antithetical to the Western liberal ideas that Indian leaders believe underlie the Charter; therefore, Indian societies and cultures cannot survive and traditional forms of governance, such as matriarchal or patriarchal kinship forms, cannot be revitalized under such an ideological regime.<sup>5</sup> On the opposite side of the issue, the Native Women's Association of Canada (NWAC), claiming to represent a large constituency of aboriginal women, argued that First Nation governments must be subject to the Charter.<sup>6</sup> In particular, NWAC leadership argued that the equality guarantee in section 15 is a universal human right which should not be violated by aboriginal governments. Failing this, native women will continue to face gender discrimination from male-dominated band councils

by being denied an equal voice in community affairs and will have little protection against oppression and family violence in their communities.

The division between the NWAC and the AFN has its roots in what the NWAC leaders conceive to be the AFN's opposition to their efforts to end sexual discrimination as evidenced by the AFN's opposition to Bill C-31 as an unwarranted intrusion on band government authority. Bill C-31, mandated by the equality provision of the Charter, was enacted into law in 1985. The Bill contained several major provisions.<sup>7</sup> First, it removed sex discrimination clauses from the *Indian Act*. Second, it abolished the concept of enfranchisement. Third, it provided for the restoration of Indian status and band membership to persons who had lost them because of provisions in the *Indian Act*. And finally, it enabled Indian bands to establish their own membership codes, presumably constituting a major step in their evolution towards self-government. The AFN leadership's opposition at the time to Bill C-31 left a legacy of mistrust on the part of many aboriginal women. During the course of the Charlottetown Accord process, the NWAC, claiming that the AFN does not speak for the interests of Indian women, launched separate legal actions in the Federal Court of Canada, initially to achieve participant status in the constitutional negotiations over aboriginal self-government and later to get the referendum declared invalid. Given the Accord's defeat, it remains to be seen if the NWAC argument for participant status alongside the other national aboriginal political associations will be resurrected in any future round of constitutional negotiations.

In the final analysis, the Accord went a considerable distance in meeting the demands of the AFN. Section 25 of the *Constitution Act, 1982* would have been buttressed by a paragraph to "ensure that nothing in the Charter abrogates or derogates from the Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise of their languages, cultures or traditions." This section, in combination with section 24 of the Draft Legal Text, which would have limited the democratic rights provisions of the Charter to federal and provincial legislative assemblies rather than to legislative assemblies in general, arguably could have permitted traditional forms of aboriginal government that do not conform with the democratic or other rights guaranteed in the Charter. And last, paragraph 43 would have allowed aboriginal governments access to the opt-out provisions in section 33 of the Charter, previously available only to federal and provincial governments. The net effect of these provisions is that as a third order of government aboriginal governments would have enjoyed a unique status in relationship to the Charter. That is, aboriginal governments would have had the opportunity to depart from the Canadian constitutional tradition of democratic rights and representative government, creating the potential for a significant anomaly within the structure of Canadian federalism.

Finally, paragraph 54 of the Accord suggested that a new provision be added to the *Constitution Act, 1867* to ensure that section 91(24) which gives the federal government authority over "Indians and Lands reserved for the Indians" would apply to all three aboriginal groups, in effect bringing the generally landless Métis under federal jurisdiction along with the Indians and Inuit. This provision would have gone a long way towards satisfying Métis demands to be put on a legal par with Indians and Inuit, and eliminating their ambivalent historic legal and political status. Moreover, it would have opened the door for Métis claims to federal financial resources as well as federal participation in dealing with Métis land claims. This was certainly an important consideration for the Métis in light of paragraph 50 which, through a separate political accord, would have committed the federal and provincial governments to the principle of providing the governments of Aboriginal Peoples with fiscal and other resources, such as land. Moreover, paragraph 49 provided that all Aboriginal Peoples should have access to those aboriginal and treaty rights recognized and affirmed in section 35 of the *Constitution Act, 1982* that apply to them, respectively. However, while endorsing the general idea of incorporating the Métis under section 91(24), the Accord recognized the unique status of the Métis settlements in Alberta; paragraph 55 called for a constitutional amendment to safeguard the legislative authority of the Alberta government for Métis and Métis Settlement Lands.

#### THE FAILURE OF THE ACCORD: THE ABORIGINAL REACTION

The leaders of the national aboriginal associations that had participated in the negotiation process leading up to the Accord reacted with disappointment and frustration to its rejection, even though post-referendum polls revealed that over 60 percent of Canadians agreed with the constitutional changes proposed for Aboriginal Peoples.<sup>8</sup> Ron George, head of the NCC, angrily denounced non-aboriginal Canadians for betraying Aboriginal Peoples by refusing to recognize their demands for a just place within Canadian society. He rejected the status quo as acceptable, and added, "I'd like to see those people who are celebrating the No victory come and see what it's like to live on the streets."<sup>9</sup> Ovide Mercredi, Grand Chief of the AFN, reacted to the Accord's defeat by promising a "quiet revolution" among Indian peoples and a "campaign of creative disobedience" to challenge federal and provincial laws.<sup>10</sup> The quiet revolution would see Indian peoples taking control of their affairs by passing their own laws in areas such as child welfare, education, gambling and economic development. This action would flow from the inherent right of Indians of self-government which, according to Mercredi, was given *de facto* recognition by the federal and provincial governments during the negotiations over the Charlottetown

Accord.<sup>11</sup> Rosemarie Kuptana, President of the Inuit Tapirisat, whose constituency overwhelmingly supported the Accord, expressed the hope that self-government provisions would not die with the Accord.<sup>12</sup> Likewise, Yvon Dumont, the leader of the MNC, while admitting that the Accord's failure signified a major setback for the Métis, called on the federal and provincial governments to maintain their political will and implement the Métis Nation Accord, negotiated as part of the Charlottetown package.<sup>13</sup> This political accord committed governments to negotiate self-rule agreements for the Métis, the transfer and ownership of lands and resources and cost-sharing agreements. Failing this, Dumont indicated that the Métis would accelerate a huge land claim in the Manitoba courts, thus using the judicial route to force governments to talk to them.

While the disappointment over the failure of the Accord expressed by the Métis and Inuit leadership appeared to mirror the views of their constituents, the same could not necessarily be said for Mercredi's reaction. Referendum results indicated that status Indians voting at more than 750 polling stations on reserves across Canada rejected the Accord by nearly a two-thirds margin.<sup>14</sup> The AFN, unlike the other national aboriginal associations, had requested that its constituents be polled separately. The extent to which "off-reserve" Indian voters may have mirrored the "on-reserve" position cannot be ascertained, because the referendum results were not broken down to reveal the off-reserve vote. However, the self-proclaimed representative of urban Indians, the NCC, certainly did endorse the Accord.

The rejection of the Charlottetown Accord by a significant segment of the status Indian community was not a complete surprise. A number of events that occurred during the previous months provided clear warning signals that the agreement was in trouble. In May, the Indian Association of Alberta withdrew its support from the AFN, objecting to provincial involvement in constitutional discussions, particularly over treaty rights. Many of the chiefs in Alberta wanted to develop their own constitutional positions and establish a bilateral process with the federal government. In August, Mohawk leader Billy Two Rivers publicly disagreed with Mercredi, making it clear that the AFN did not represent Mohawk interests. In a full page advertisement in *The Globe and Mail* on 24 September, chiefs from reserves in the Treaty 6 and Treaty 7 areas disassociated themselves from the position of the AFN and stated that they would not support the unity package nor would they participate in the ratifying process.<sup>15</sup> Perhaps the greatest indicator of status Indian feelings towards the Accord occurred in mid-October, when nearly 400 Indian leaders from across Canada failed to endorse the constitutional package at an AFN general meeting on the Squamish reserve in North Vancouver. Finally, the chiefs and councils on several reserves, including the Mohawks in the east and the Bloods of southern Alberta refused to allow enumerators to cross their reserve boundaries or set up polling stations.

Reserve residents who wanted to participate in the referendum had to go to neighbouring non-Indian communities to be enumerated and vote. As Chief Peter Yellowquill of Manitoba commented, "If they wish to vote, they can vote in Canada."<sup>16</sup>

The split that occurred within the status Indian community over the Charlottetown Accord reflected both long-standing divisions and tensions as well as circumstances unique to the process itself. In the first place, the difference between the AFN and the NWAC over application of the Charter to aboriginal governments undoubtedly resulted in some Indian women voting against the Accord. It is difficult to tell just how many voted negatively, because some aboriginal women's groups supported the Accord as it stood, including the Inuit Women's Association of Canada, the Métis National Council of Women and the Ontario Native Women's Association. In the second place, the rift between some of the leaders of treaty-based Indian reserves and the leadership of the AFN took a significant amount of Indian support away from the Accord. The opposition of treaty-based Indian leadership to the Accord consisted of several interrelated arguments. In its basic form, this position held that constitutional recognition of the inherent right of self-government proposed in the Accord incorrectly implied that the right was created by the Canadian state. Instead, many treaty Indians hold that the inherent right to self-government is already possessed by First Nations and was recognized in the treaties which they argue were negotiated on a "nation to nation" basis and thus have the legal status of international agreements. Following this, some treaty-based Indian leaders claimed that since treaties are in essence international agreements, any negotiations concerning the content of and rights under treaties must be conducted exclusively on a bilateral nation-to-nation basis. Consequently, they refused to be part of a tripartite process of treaty negotiation that involved the provinces. At another level, they objected to the inclusion of the Métis under section 91(24). This objection was based on the belief that inclusion of the Métis would intrude upon the traditional trust obligation of the Crown to status Indians grounded in this section. In a more pragmatic vein, these Indian leaders envisaged a siphoning off of federal financial resources to other aboriginal groups and a consequent dwindling piece of the financial pie for status Indians.

Finally, not only the vagueness of a number of the aboriginal provisions of the unity package, but also the presence of political accords leading to unspecified future negotiations on such critical matters as the financing of aboriginal governments left many Indian voters unsure as to what they were voting upon. The legacy of distrust that has characterized Indian-government relationships in Canada for decades inhibited many Indians from giving the federal and provincial governments the benefit of the doubt. Moreover, it became apparent after the referendum that the leadership of the AFN had not done an effective

job of either explaining or selling the Accord to the grass-roots Indian community.

The divisions within the Indian community that occurred over the Accord are symptomatic of a larger problem that confronts both First Nations and governments in their relationship with each other. Despite the AFN being accepted by the federal and provincial governments as representative of status Indians on constitutional matters, that association, like its predecessor the National Indian Brotherhood, has never enjoyed hegemony over First Nations. First Nations in Canada exhibit a great deal of cultural diversity, significant differences in levels of economic development, varying ideological stances and differing legal relationships with the Canadian state. Furthermore, the leadership of the AFN is hardly immune to the mistrust and hostility facing many elected politicians at all levels of Canadian government. The experience of the status Indian community with the Charlottetown Accord process may force both governments and Indian peoples to rethink how they want to approach the question of Indian participation in future constitutional discussions. The divisions within the status Indian community underscore a larger problem that governments have in developing aboriginal policy at the constitutional level, namely the difficulty of constructing provisions that encompass the entire aboriginal community in general while at the same time accommodating the historical differences between, and present aspirations unique to Indians, Métis and Inuit.

In retrospect, the Accord offered a mixture of substance and promises to Aboriginal Peoples. It is unfortunate that the agenda for aboriginal constitutional reform was linked so closely to the Quebec agenda. When the Assembly of First Nations released its report on the Accord package — after six months of hearings — one of the major concerns was the “artificial deadlines” imposed by Quebec. Ovide Mercredi observed that the fast-paced process was not designed to take care and caution with constitutional reform.<sup>17</sup> In fact, the speed and pressure of the negotiations into which Aboriginal Peoples were drawn were antithetical to the consensual and thoughtful nature of many aboriginal political traditions. Given more time, Aboriginal Peoples might have been able to sort out the differences both between and within their respective communities and emerge with accommodating and meaningful constitutional reform.

## LOOKING TO THE FUTURE

Both aboriginal governments and the federal and provincial governments face challenges as they adjust to the reality of finding non-constitutional solutions to the pressing social and economic needs of Aboriginal Peoples. While constitutional negotiations on aboriginal issues are likely to be reinitiated at some future date, governments are gun-shy about restarting any constitutional reform



process in the immediate future, given the message sent by the Canadian electorate in its decisive rejection of the Accord that it was fed up with constitutional haggling and that governments should redirect their attention to economic and other concerns.

Within the aboriginal community, this adjustment will vary with the level of political organization. The rejection of the Accord will probably necessitate the greatest adjustment on the part of aboriginal political associations. These groups are confronted with problems not only of maintaining organizational momentum but also of retaining their constituencies as members of those constituencies seek to find individual remedies for their specific needs. In March 1993, the AFN released a draft version of a strategic plan for 1993-94.<sup>18</sup> This strategic plan was a response to a Chiefs-in-Assembly Resolution adopted by the AFN in November 1992 that directed the AFN to review its structure, role, mandates and priorities. This draft plan is to be reviewed by the AFN membership at a future date. In essence the plan seeks to retain the original mandate of the AFN, while suggesting, among other things, reforms in the area of internal procedures; the development of a more formalized and focused bilateral process between the AFN and the government of Canada; the development and operation of national institutions such as a First Nations Land Registry, a National Citizenship Registry and a network of First Nation financial institutions; as well as the extension of AFN activities in the international forum through a strengthened international unit.

It remains uncertain if the AFN's strategy proposal can surmount the centrifugal forces within its membership. The sovereigntist-oriented First Nations, exemplified by the Mohawks, have made it clear that only their own leadership represents them. Moreover, the legacy of perceived "backroom" negotiations by Mercredi and his advisors over the Charlottetown Accord will continue to affect the representational legitimacy of the AFN with a number of chiefs. Also, in April 1993 a group of treaty chiefs meeting on the Tsuu T'ina reserve near Calgary announced the formation of the United Treaty First Nations Council (UTFNC), declaring that they were dissatisfied with the manner in which they were represented by the AFN.<sup>19</sup> The focus of the UTFNC will be on treaty rights, with a mandate to speak for treaty Indians in any bilateral treaty discussions with the Crown.

In late March 1993, the Métis National Council formalized and staffed a new internal governing structure in order for the leadership to serve their constituents more effectively as well as to better represent them to departments of other governments.<sup>20</sup> The overall result is the creation of an umbrella type of Métis First Nation government that transcends provincial boundaries. At the apex of the new governing body is the Métis Nation Cabinet, consisting of seven portfolios ranging from Justice and Social Development to Environment and Northern Development. The Cabinet is headed by the president, Gerald Morin,

who is also Minister of National Affairs responsible, among other things, for developing and implementing a national political strategy relating to intergovernmental affairs. A Métis National Council Secretariat and a Métis Nations Secretariat will complete the government organization. The effectiveness of this new structural approach in articulating and representing Métis interests remains to be seen; in particular how this governmental level might relate to the Alberta Métis Settlements, which recently concluded agreements with the Alberta government involving their land base, a form of self-government and economic development matters.

In contrast to the AFN and MNC, the Native Council of Canada does not appear to be eager to begin any major organizational reforms but rather will focus on defining the relationships it has with other organizations such as the AFN and the NWAC, as well as its recent alliances with several non-Aboriginal organizations and lobby groups. Moreover, the NCC is a leading participant in governmental negotiations aimed at maintaining the momentum gained during the Charlottetown process. One principal outcome of these efforts was a meeting of federal, provincial and territorial ministers and senior officials, with representatives of the national aboriginal organizations, which took place in Inuvik in July 1993. A working group from that meeting is scheduled to report to the annual premiers' conference to be held in August 1993 in Nova Scotia, where aboriginal issues have been placed on the agenda.

Formal organizational change is also less urgent for the Inuit. Representing the least numerous of Canada's Aboriginal Peoples, their leadership is a small and flexible group which moves between various organizations as circumstances warrant. With Canadian constitutional reform on hold the ITC is likely to refocus on its international role as a stakeholder in the Arctic on such issues as the moratorium on whaling. Moreover, the preparations for governance of the new Territory of Nunavut will take on increasing urgency as the millenium approaches.

Regardless of organizational change and mandate redefinition, the bottom line for aboriginal political associations is financial support, and the prospect of continued financial support related to their role in the constitutional process is not promising. The budget cutting strategies of both the federal and provincial governments will undoubtedly affect all First Nations' governments and other aboriginal organizations, leaving levels of financial support emanating from these sources unpredictable. Even the ITC, which probably faces the most secure future of any aboriginal political association, must worry whether the federal government can come up with the estimated one billion to cover the cost of establishing Nunavut.

At the individual community and tribal group level, most First Nations will likely resume their previous efforts to achieve a greater degree of self-government, resolve land claims and move forward with economic

development, efforts that were either put on hold or pushed to the background during the Charlottetown Accord process. First, treaty First Nations will continue to push for revitalization of treaties, not only from the viewpoint of enforcing current Crown obligations, but also as a base for the evolution of future Indian-Crown relationships. Second, the absence of a constitutional option for self-government is likely to accelerate the entry of still more Indian bands, both non-treaty and treaty-based, into the federal Department of Indian Affairs "Alternative Funding Arrangement" initiative and the negotiated community-based self-government process, designed to allow Indian communities a legislative base for self-government outside the *Indian Act*. Both of these initiatives are major instruments for achieving the federal policy goal of devolution. This development will follow a trend that has been occurring for a number of years. While in 1988-89 only 3.7 percent of Indian bands were participating in the Alternative Funding Arrangement program, by 1991-92 this figure had increased to over 37 percent.<sup>21</sup> Similarly, the interest expressed in the community-based negotiations has increased. Currently, 15 Indian communities including the Gitksan Nation, the Siksika Nation and the Kahnawake Mohawk Nation have signed framework agreements within which substantive negotiations over jurisdiction and Indian government political structures will take place.<sup>22</sup>

Third, Indian bands, both individually and collectively, will undoubtedly increase pressure in both the political and judicial forums for the resolution of specific and comprehensive land claims. Indians may find a more receptive audience for their claims in the political forum since the federal government has moved to an accelerated claims process and provinces appear more willing to compromise. The government of British Columbia, for example, has reversed the province's historical opposition to the concept of aboriginal title by withdrawing from the position that a blanket extinguishment of aboriginal rights occurred throughout British Columbia. Moreover the province became involved in the British Columbia Claims Task Force and has now appointed its representative to the British Columbia Treaty Commission, an arms-length agency established from a recommendation of the Task Force. A recent (June 1993) British Columbia Court of Appeal decision in the Gitksan/Wet'suwet'en land claim appeared to encourage this kind of development, criticizing the Gitksan and Wet'suwet'en for taking an "all or nothing" approach and calling instead for negotiation and "co-existence."<sup>23</sup>

Fourth, a number of the more entrepreneurially oriented bands will push Indian Affairs to develop new legislation in the areas of band taxation, financial control and land and resource development to escape the strictures of the *Indian Act*. A prominent example of this type of legislation is the *First Nations Chartered Lands Act* now being developed by chiefs from several of these kinds of bands sitting on a board funded by Indian Affairs. All of these initiatives

promise to be highly controversial and divisive, since many Indian leaders view them as threats to First Nations' treaty rights, bilateral relationships with the federal government and communal land bases.<sup>24</sup> Finally, some of the more adventuresome band governments will attempt to enter the financially lucrative gambling industry by establishing casinos and installing other gambling devices on their reserves. Bands in Quebec, New Brunswick, Manitoba and Saskatchewan have already put forward proposals to the respective provincial governments for the establishment of Indian gaming commissions. The provinces, however, have remained cool to such intrusion on their perceived jurisdiction, and Manitoba and Saskatchewan have authorized police action to stop the bands that have established gambling casinos on their reserves without provincial authorization.

The demise of the Charlottetown Accord will have the greatest effect at the community level on the Métis. Métis leaders were hopeful that their peoples would be incorporated under section 91(24) *Constitution Act, 1867* and that their communities would be subsumed under federal financial responsibility. They also looked forward to the finalization of the Métis Nation Accord, which would have committed the federal government and the governments of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and the Northwest Territories to negotiate agreements in the areas of self-government, lands and resources and cost-sharing arrangements for the Métis, among other things. However, both the federal government and the provinces appear to take the position that both the principle of equal footing for all aboriginal peoples and the Métis Nation Accord died with the Charlottetown Accord.

The microcircumstances of various Métis communities differ, and some face a more favourable geopolitical environment than do others. The eight Alberta Métis settlements, for example, are currently undergoing a devolution of authority from the province overseen by the Métis Settlements Transition Commission. Having reached agreement with the province in 1991 for \$310 million for land settlement, their opportunities for self-determination at the community level are favourable. In the Northwest Territories, where land claims are being negotiated region by region, the Métis have traditionally allied themselves with Indians in the negotiations process and can expect a mutual increase in community autonomy and control of resources. In Manitoba, a lawsuit is before the courts in which Manitoba Métis are seeking constitutional recognition of their rights, including those to land lost a century ago; however, this case has been dragging on since the early 1980s. A number of non-status Indians, formerly grouped with the Métis for policy purposes, have also regained status as registered Indians under the provisions of Bill C-31, although reacquired status does not translate automatically into socio-economic advantage nor to participation in an established Indian community. In the end, Métis

aspirations to self-government as a "Nation" are linked to their acquisition of a community land base, and in many cases this seems a remote possibility.

The Inuit, meanwhile, are least affected at the community level since the new Territory of Nunavut fits within the current federal system and constitutional amendment is not necessary to achieve Inuit aspirations. Two votes were held in 1992 on the Inuit land claim settlement which would establish Nunavut. In May, the proposal was narrowly passed by voters in the Northwest Territories, although opposition to the deal was strong among some western Arctic communities. In the west there was concern both about the location of the territorial boundary and about the demographic changes to government in the west which territorial division would bring. In November, an Inuit vote on ratification of the agreement passed overwhelmingly, and the territory of Nunavut is scheduled to be formally established in 1999. It has been estimated that 1,000 new jobs will be created to administer the government of Nunavut, and in preparation a non-profit Inuit agency is conducting an experimental management training course by satellite to reach students in the remote communities.<sup>25</sup>

The defeat of the Accord has eliminated, at least for the near future, the constitutionally based third order of aboriginal government upon which the federal and provincial governments were predicating their future relationships. On the federal level, it is unrealistic to expect anything beyond incremental tinkering with existing policies and programs until after the next federal election. Moreover, it is unlikely that the Department of Indian Affairs and Northern Development (DIAND) will attempt any major reformulation of its relationship to Aboriginal Peoples until the recommendations of the Royal Commission on Aboriginal Peoples, now expected in 1995, can be reviewed and incorporated into policy. Until then, federal policy will continue to reflect the basic principles of Prime Minister Mulroney's Native Agenda, announced in September 1990.<sup>26</sup> Under this statement, the federal government committed itself to addressing issues arising from social and economic conditions on reserves, the relationship between Indians and government, land claims and the place of Aboriginal Peoples within Canada. Apart from seeking a constitutional basis for aboriginal government, the federal government has pursued this agenda through the instruments of devolution, the settlement of specific and comprehensive land claims<sup>27</sup> and the shifting of an increasing level of responsibility for aboriginal programs and services to other federal departments such as Justice, Employment and Immigration, National Health and Welfare and the Solicitor General.<sup>28</sup>

The commitment of the federal government to the native agenda resulted in a number of organizational changes made to DIAND in 1992.<sup>29</sup> The major reorganization occurred at the regional level, where the traditional regional delivery function has been replaced by a funding service approach and by the addition of an explicit intergovernmental affairs role. The shift from service

delivery to funding service at the regional level follows DIAND's emphasis on devolution, with the result that the lion's share of program delivery formerly done by DIAND now will be carried out at the band level. The creation of intergovernmental affairs offices at the regional level reflected both an incremental approach by the federal government to developing a more government-to-government oriented relationship with First Nations as well as the anticipation that the Charlottetown Accord would pass and that DIAND would be intricately involved with not only band governments, but also with the provinces in developing aboriginal governments as a third order of government. With the rejection of the Accord, the intergovernmental affairs role is likely to evolve on an incremental, pragmatically oriented basis.

The devolution policy also underpins a continuing emphasis on the downsizing of DIAND. In a November 1992 interview, Indian Affairs Minister Tom Siddon reiterated the federal government's commitment to reducing the department and eliminating its historic policy of paternalism.<sup>30</sup> Moreover, it is likely that the trend of shifting aspects of its responsibilities to other federal departments and the provinces picking up still other functions will continue as aboriginal governments develop more capacity to interact directly with other levels of government. The failure of the Accord is likely to intensify the pressure on provinces to become more involved in aboriginal policy and programs, continuing a trend that has been in existence for some time. This is somewhat ironic, because provincial involvement in the negotiations over the Accord as well as in its implementation, had it passed, constituted a significant source of opposition to the Accord by treaty-based Indians.

Although circumstances vary among provinces with respect to their relationships with Aboriginal Peoples, the pressure for greater provincial activity in aboriginal policy and programs is likely to occur on several closely related fronts. First, the devolution policy of the federal government aimed at providing more control over finances and service delivery at the community level is forcing bands to develop arrangements with the provinces for the delivery of social and educational services, among others. Second, provinces will have to respond to the demands of band governments for more authority in areas of provincial jurisdiction such as policing, corrections and child welfare, either under community-based self-government negotiations or through separate agreements with the provinces. In the case of the Métis, provinces will face pressure to develop structures that allow for community level self-control. The Saskatchewan government, for example, has recently signed an agreement with the Métis Society of Saskatchewan to work together on social and economic issues.<sup>31</sup> Third, provinces will have to come up with creative ways to deal with the growing number of urban Aboriginal People, who draw heavily on provincial welfare resources and municipal government infrastructures and have little voice in either municipal or their native community governments. And finally,

provinces will be expected to move ahead on both specific and comprehensive land claim negotiations, including the establishment of new mechanisms for negotiations, where necessary.

Faced with the necessity of stringent budget cuts over the next several years, provinces will be forced to take a cautious approach towards enlarging their policymaking role in aboriginal matters and devoting increased financial and other resources to this area. Their most likely course of action will be to assess agreements already in place or committed to before entering into new ones that require additional financial resources. Provincial monies allocated to programs dealing with native alcohol and drug abuse, native friendship centres and education, among others, may suffer cutbacks. Moreover, outside participation in community-based self-government negotiations or self-government arrangements tied to land claims, provinces are likely to restrict negotiations over the transfer of authority with First Nations to existing political accords such as the Ontario "Statement of Political Relationship" signed in August 1991, and the recently agreed upon memorandum of understanding between the Grand Council of Treaty No. 8 and the Alberta government, a process-type agreement for the discussion of issues of mutual concern. Unfortunately, whatever political goodwill developed between the provinces and Aboriginal Peoples during the Charlottetown Accord process may be lost on the grounds of financial expediency.

Without question, the spotlight within the aboriginal policymaking arena over the next year will be focused on the Royal Commission on Aboriginal Peoples. Established in August 1991, the Commission was originally scheduled to make its report in 1994, although the report is now likely to be delayed until sometime in 1995. The Commission was given a mandate to examine a broad range of issues concerning Aboriginal Peoples and furnished with a generous budget. In fact, the Commission may turn out to be one of the most costly of any royal commission; early estimates suggest \$50 million will be required to cover its costs.<sup>32</sup> The first two rounds of public hearings were held in 1992, described by the Commission respectively as the "listening phase" and the "discussion phase" of its consultations. Testimony during the first phase crystallized around anger and frustration about the basic relationship between Aboriginal and non-Aboriginal People in Canada.<sup>33</sup> Fundamental concerns expressed included increasing the autonomy and self-sufficiency of Aboriginal Peoples, maintaining a strong sense of aboriginal identity and improving the living conditions of individuals in aboriginal communities.<sup>34</sup> As the Commission went into the second phase of hearings in October, it sought to focus the dialogue around four "touchstones for change," issues that had been raised repeatedly by its witnesses: a new relationship between Aboriginal and non-Aboriginal People, self-determination for Aboriginal Peoples within Canada through self-government, economic self-sufficiency for Aboriginal peoples and

personal and collective healing for Aboriginal People and communities.<sup>35</sup> The third and fourth phases of hearings, scheduled for 1993, were intended to identify solutions leading to "lasting change" in the four touchstone areas.<sup>36</sup>

In 1992, the Commission made an impressive effort to canvass aboriginal opinions, holding hearings in 72 communities across the country and commissioning \$8 million worth of research; yet its work has already come under harsh criticism. In February the commissioners inserted themselves into the debate over the Charlottetown Accord by issuing a position paper listing the criteria they felt a constitutional amendment on self-government should meet. While Indian representatives declined to comment on the paper, Inuit and Métis leaders responded with anger, accusing the Commission of arrogantly meddling and overstepping its mandate.<sup>37</sup> The co-chairs, René Dussault and Georges Erasmus, defended their action as an attempt to "smooth the path" of constitutional reform,<sup>38</sup> but the potential for political entanglements was already apparent. The Commission has also been attacked for ignoring the voices of aboriginal women, for failing to identify concrete solutions to well-known problems and for tiptoeing around the question of government accountability.

With the failure of the Charlottetown Accord the day before the second round of hearings commenced, the Commission's work has come under even greater scrutiny and pressure to produce results. The problems the Commission faces in meeting those expectations were brought to the forefront in April 1993 when Commissioner Allan Blakeney suddenly resigned, quoted as saying that the Commission was still settling for statements of generalities rather than moving to come up with concrete solutions to aboriginal problems.<sup>39</sup> How a task force of seven — despite its extensive resources — is to come up with answers that will not only satisfy the diverse aboriginal constituency but will be capable of being acted upon by governments remains an open question. It may be that the contextual focus provided by the aboriginal sections of the Charlottetown Accord will make some of the obstacles faced by the Commission surmountable. On the other hand, the Commission may have to distance itself from those elements of the Accord that proved to be unacceptable to segments of the aboriginal community.

In retrospect, the year 1992 had the potential of being a major watershed in the history of Aboriginal Peoples in Canada. A combination of forces and events occurred that resulted in a constitutional proposal that went a long way to meeting the demands that many aboriginal leaders had been making since the early 1970s. While the Charlottetown Accord was rejected by a segment of the status Indian community, its failure during the 26 October 1992 referendum was due to factors within the Canadian electorate largely beyond the control of aboriginal leaders. The challenge now facing the Canadian federation is accommodating the demands of Aboriginal Peoples through legislative and



administrative solutions until Canadians are willing to accept a resurrection of the constitutional reform process.

## NOTES

1. Section 35.2 of the *Constitution Act, 1982* identifies Aboriginal Peoples in Canada as the Indian, Métis and Inuit. Indians have been traditionally divided into three groups, status, non-status and treaty Indians. A status Indian is a person registered or entitled to be registered as an Indian for purposes of the *Indian Act*. Non-status Indians are those persons of Indian ancestry and cultural affiliation who have lost their right to be registered under the *Indian Act*. Non-status Indians do not have a distinct constitutional standing, but are grouped with the Métis for jurisdictional and public policy purposes. Since 1985, however, over 90,000 non-status Indians have been reinstated as status Indians under the provisions of Bill C-31. Treaty Indians are those who are registered members of, or who can prove descent from, a band that signed a treaty. Most status Indians are treaty Indians, except those living in areas not covered by treaties, such as most of British Columbia. The Métis are people of mixed Indian and non-Indian ancestry. The term Métis originally referred to people of mixed blood living on the prairies, but Statistics Canada now includes in the category of Métis all people living in any part of Canada who claim mixed Indian and non-Indian ancestry. Finally, the Inuit are those Aboriginal People who inhabit the Northwest Territories and northern parts of Quebec and Labrador. In 1939, they were brought under the jurisdiction and responsibility of the federal government in a Supreme Court decision.

The term "First Nations" is now commonly used by Indian leaders to identify their societies and to emphasize their distinctiveness from the English and French founding nations. The term, however, is conceptually vague because it is used in both a legal and cultural sense by treaty and non-treaty Indians. The Métis also refer to themselves as a "nation" on a more general cultural level. In this chapter, however, "First Nations" will only refer to Indian societies.

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4. Douglas Sanders, "Aboriginal Self-Government: Elements of the Accord," *Network on the Constitution*, Analysis no. 4, 2.
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16. "Can't Take the Leap of Faith, Fontaine Says," *The Vancouver Sun*, 26 October 1992.
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## Current Issues in Federal-Provincial Fiscal Relations

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*En continuant d'affirmer sa prépondérance dans le champ d'impôt sur le revenu des particuliers, le gouvernement fédéral est parvenu à réaliser une importante harmonisation au sein du système fiscal canadien. En tout premier lieu, Ottawa a fourni une base pour le financement du programme de péréquation fiscale. De plus, par l'entremise du Financement des programmes établis, le gouvernement fédéral a été en mesure de remettre aux provinces, en respectant scrupuleusement les règles de la péréquation, l'espace fiscal réservé à l'impôt sur le revenu des particuliers; l'objectif étant ici d'améliorer le fonctionnement du programme de péréquation fiscale. Enfin, Ottawa a pu poursuivre l'octroi de transferts aux provinces, au titre des dépenses en matière d'aide sociale, en vertu du Régime d'assistance publique du Canada. Pour l'heure, le souci du gouvernement fédéral de s'attaquer à la réduction du déficit compromet, dans sa forme actuelle, le système de paiements de transfert; on s'interroge présentement sur la nécessité, pour le gouvernement fédéral, de maintenir son engagement en faveur du partage des revenus entre les provinces. Ottawa réfléchit également à la possibilité de renouveler les accords actuels de perception fiscale.*

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### INTRODUCTION

Federal-provincial fiscal relations have resurfaced as a major policy issue in the Canadian federation. While much of the political rhetoric has focused on budget deficits and how the federal government has downloaded its deficit problem to the provinces through unilateral actions, the issues involved are, in fact, quite fundamental to the future of Canada as an economic and social union. In part, these issues found some expression in the debate and negotiations leading up to the Charlottetown Accord.<sup>1</sup> In addition, a major review of federal-provincial fiscal arrangements is underway at the intergovernmental level, scheduled for completion by April 1994.

The existing system of federal-provincial fiscal arrangements is a reflection of the postwar devolution of income tax room to the provinces. This process has been characterized by a continued federal dominance in the income tax field through which a substantial degree of fiscal harmonization has been achieved within what is widely recognized as being an otherwise highly decentralized federation. Fiscal harmonization is manifested to the extent that provinces with widely different own-source fiscal capacities<sup>2</sup> are, in the presence of intergovernmental transfers, able to provide "reasonably comparable levels of public services at reasonably comparable levels of taxation"<sup>3</sup> — a principle that was enshrined in the *Constitution Act, 1982*. In addition, it is manifested through a highly coordinated personal income tax system as a consequence of the tax collection agreements.

For 1992-93, the federal Department of Finance estimates that some 27.2 percent of provincial gross revenues may be attributed to the three major transfer programs<sup>4</sup> — fiscal equalization, Established Programs Financing (EPF) and the Canada Assistance Plan (CAP). This represents a total of \$35.5 billion. Of this figure, \$24.2 billion is in the form of cash transfers, representing almost 22 percent of federal program expenditures. The significance of these transfers varies by province — between 27 percent of provincial revenues in Saskatchewan and 44 percent of provincial revenues in Newfoundland among the have-not provinces,<sup>5</sup> and 20-21 percent of provincial revenues among the have provinces.

Under the fiscal equalization program the federal government makes unconditional revenue transfers to the have-not provinces, designed to raise provincial per capita revenues, based on the Representative Tax System<sup>6</sup> (RTS), to the corresponding average yield for Quebec, Ontario, Manitoba, Saskatchewan and British Columbia.<sup>7</sup> This program is subject to review at five-year intervals. Traditionally, this review has also provided an opportunity to assess the two other major federal-provincial transfer programs — EPF, under which the federal government provides equal per capita transfers to the provinces in respect of health care and post-secondary education expenditures, and CAP, under which the federal government shares equally with the provinces in the cost of eligible provincial expenditures in respect of social assistance and social services.

The major federal-provincial transfer programs result in a significant redistribution of federal tax revenues across provinces.<sup>8</sup> Each program has a distinct role to play in this process. Fiscal equalization raises per capita revenues in the have-not provinces to the standard, thereby clearly redistributing in favour of those provinces with fiscal capacities that are below the standard for equalization. Layered on top of this, EPF is a "fully equalized" revenue transfer. While the total per capita amount is independent of provincial fiscal capacities, the tax effort required to generate equivalent revenues in the have-not provinces

would exceed that in the have provinces, even in the presence of fiscal equalization. This program therefore redistributes in favour of those provinces with below average fiscal capacities, particularly the have-not provinces. Finally, eligible per capita provincial welfare expenditures made from (equalized) own-source revenues receive a 50 percent subsidy under CAP. By the same token, then, the tax effort required to replace per capita revenues received under CAP would be greater in those provinces with below average fiscal capacities than in those with above average fiscal capacities, again resulting in a net redistribution in favour of the have-not provinces.

A similar pattern of net redistribution would occur if all revenue and expenditure functions were fully centralized. For example, equal per capita expenditures across the country financed through uniform taxes, assuming different fiscal capacities in different parts of the country, would result in redistribution in favour of those parts of the country with below average fiscal capacities. While the extent of net redistribution relative to the *status quo* may be somewhat greater or somewhat less, in practice it is unlikely that it would differ significantly. The relevance of decentralized expenditure and tax authority is that it allows decisionmaking to better reflect differences in preferences or needs across provinces while maintaining some element of accountability. The "costs" associated with the loss in accountability resulting from transfers must then be weighed against the "benefits" resulting from decentralized decision-making.

There is, therefore, some level of net redistribution that is, in principle, consistent with attaining the same standard of fiscal equity<sup>9</sup> in a decentralized federation as would exist under a fully centralized system. Moreover, fiscal equity will ensure the efficient allocation of individuals across provinces; that is, there will be no incentive to migrate for fiscal reasons alone. The system of federal-provincial transfers is therefore integral to the functioning of the economic and social union.

Either directly or indirectly, each of these programs have been affected by the strained fiscal environment of the 1990s. Per capita entitlements under EPF have been subject to a five-year freeze since 1990-91. Also for a five-year period beginning in 1990-91, annual growth in entitlements under CAP in each of the three have provinces have been subjected to a 5 percent ceiling. Growth in entitlements under fiscal equalization has also been restrained under a growth ceiling provision put in place in 1982. This provision, which limits the cumulative rate of growth in entitlements to the cumulative rate of growth of GDP over a designated base year, first became effective in 1988-89 and has impacted in each year since then (other than the 1992-93 fiscal year as a result of a change in the designated base year to 1992).

The province of Ontario has estimated that, since 1982-83, the cumulative loss in revenues to all provinces resulting from federal expenditure controls

affecting the major transfer programs amounts to \$40.8 billion. In 1992-93 alone they estimate that transfers will be 21 percent less than they would have been in the absence of federal expenditure controls, amounting to a \$9.4 billion revenue shortfall.<sup>10</sup>

The end result of all this is a situation in which all provinces — the haves and the have-nots — are financing an increasing share of their expenditures out of own-source revenues. This has seriously compromised the application of the principle of fiscal equity in the Canadian federation. It has also had consequences for provincial expenditure decisions: in all provinces the marginal cost of expenditures has risen, but, perhaps more importantly, these increases have been uneven across provinces. Uniformity in essential public services across the provinces is in serious jeopardy.

The provinces, of course, have not been unaware of the fiscal consequences of federal expenditure control programs. In part, this was manifested in the various elements of the Charlottetown Accord which pertained to federal-provincial fiscal relations. Included among these were the possibility of constitutionally enshrining intergovernmental agreements to prevent the sort of unilateral actions on the part of the federal government that have characterized fiscal relations in recent years. Also, there was an attempt to strengthen the federal commitment to making equalization payments as currently contained in section 36, the *Constitution Act, 1982*. More generally, concerns over the maintenance of Canada as a social union as well as an economic union gave rise to the proposed clause enshrining the social union, committing governments to

providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities; [and] providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education<sup>11</sup>

as well as enshrining the five principles of medicare — comprehensiveness, universality, portability, public administration and accessibility.

The issues remain unresolved. The scheduled review of the fiscal arrangements in 1992 resulted in only relatively minor modifications to the fiscal equalization program, with the intent that, over the next two years, a major review of the fiscal arrangements would be undertaken. Necessarily, this must involve a redefinition of the role and level of transfers under EPF as well as a new approach to the federal-provincial dimension of income security programs.

The remainder of this chapter will review in greater detail the issues associated with the federal-provincial fiscal arrangements. First, there is a brief review of the evolution of federal-provincial fiscal arrangements in Canada, as reflected in the evolution of the division of income tax room between the federal government and the provinces. This is followed by a more detailed review of

the issues associated with EPF and CAP and some proposals for reform of these programs. Next, proposals for modifying the income tax collection agreements are reviewed. Finally, the consequences of the growth ceiling on equalization entitlements are examined. The final section of the chapter provides some concluding remarks.

## ISSUES AND ALTERNATIVES

### THE POSTWAR DEVOLUTION OF INCOME TAX ROOM

The division of income tax room between the federal and provincial governments has been central to the evolution of federal-provincial fiscal relations in the period since World War II. Both levels of government were assigned the power to levy income taxes under the *Constitution Act, 1867*. However, the federal government became the sole occupant of the income tax field during the war years, in return for agreed upon levels of compensation to each of the provinces (the, so-called, tax rentals) and has maintained a dominant position in the income tax field since that time while gradually devolving income tax room to the provinces.

Federal dominance in the income tax field has resulted in a highly coordinated income tax system. It has also permitted the federal government to make redistributive transfers to provincial governments. These redistributive transfers have taken different forms over time. Prior to 1957, the federal government transferred revenues to the provinces in the form of tax abatements<sup>12</sup> supplemented by equal per capita transfers. In addition, minimum total and per capita revenue yields were guaranteed. This system involved a significant degree of implicit redistribution through the equal per capita component and the minimum yield provisions. Specifically, those provinces in which federal per capita revenue collections were below (above) the amount of per capita transfer were equalized up (down). Additional "equalization" was paid under the minimum yield provisions. It is also significant that the value of the tax abatement was tied to a particular base year rather than to current year revenues. Thus, in effect, total rental payments made to any province were unrelated to current federal revenue collections by province.

In 1957, the tax rentals were restructured such that each province was provided with an abatement tied directly to current year federal tax collections within its borders. In addition, an explicit equalization formula was introduced under which per capita revenues from the tax abatements were to be equalized up to the average per capita yield in Ontario and British Columbia. Thus, per capita yields under the tax abatements were "fully equalized" — up to the "top-two-province" standard.



Since 1947, Quebec had chosen to opt out of these arrangements (initially, Ontario had opted out also) and had instead received standard abatements tied to federal revenue collections within the province. In 1954, Quebec introduced its own personal income tax (throughout, it had levied its own corporate income tax) and, in lieu of the federal tax abatement, was granted equivalent personal income tax room.<sup>13</sup> Significantly, Quebec's personal income tax revenues were eligible for equalization payments under the 1957 arrangements.

The 1962 *Federal-Provincial Fiscal Arrangements Act* replaced the system of tax rentals with the tax collection agreements that continue under the present system. Under the 1962 arrangements, the federal government transferred personal income tax room to all provinces, allowing them to levy their own income taxes to fill the gap as they wished. Per capita revenues were still to be equalized to a "top-two-province" standard. The federal government undertook to collect personal income taxes on behalf of those provinces that wished it. Participating provinces were bound to accept the federal definition of the tax base as well as the federal rate structure. Provincial income taxes, under the tax collection agreements, were to be levied as a single rate of tax applied to basic federal tax (the tax-on-tax method). Each province had discretion over setting its own tax rate. Quebec was (and continues to be) the only province that chose not to participate.

Since that time, the practice of transferring income tax room to the provinces has been an integral part of the evolution of federal-provincial fiscal relations. In 1967, additional tax points were transferred as part of a combined cash-tax point transfer in lieu of previous cash transfers for post-secondary education. The process culminated in 1977 with regard to the, so-called, established programs financing, or EPF (discussed in more detail below). Under EPF, provincial accountability was to be increased through the transfer of additional tax room to the provinces in lieu of health-care grants. The intent was that, for 1977, 50 percent of the federal transfer for post-secondary education, health care and hospital insurance (the established programs) would be derived from the value of the associated 13.5 EPF tax points<sup>14</sup> (plus the value of 1 corporate tax point transferred as part of the 1967 post-secondary education arrangements). EPF tax points were eligible for equalization. The balance was to be made up through cash transfers.

Also in 1967, the equalization standard was changed from a "top-two-province" standard to a national average standard (along with other important changes to the program). Those provinces with below average per capita yields under the representative tax system would be equalized up to the standard; those with above average yields, however, would not be equalized downwards. A significant implication of this was that provincial per capita income tax yields would no longer be "fully equalized" (to the average per capita value in the two wealthiest provinces); rather, while they would be equalized up to the national

average in those provinces with per capita yields below the national average, they would be of greater value (per capita) in those provinces with above average yields.

Prior to 1967, the transfer of tax room to the provinces in lieu of federal cash transfers, when equalized to the "top-two-province" standard, produced equal per capita yields across provinces. The adoption of a national average standard for fiscal equalization in 1967, however, rendered the matter of transferring income tax room to the provinces more complex. In order to preserve the principle of equal per capita yields, a variable cash component was required in addition to the transfer of tax room. In a sense, the cash component would provide a form of supplementary equalization, raising the per capita yield associated with the transferred tax points from a national average standard to a top-province standard.

#### ESTABLISHED PROGRAMS FINANCING

EPF transfers are made on an equal per capita basis. The transfer is largely unconditional, although the provinces must adhere to the five principles of medicare. The total transfer consists of a cash component and the value of the EPF tax points. Since 1982, each province's per capita cash transfer under EPF has been calculated as a residual — the difference between total per capita entitlement and the per capita value of the EPF tax transfer (computed as the per capita value of the EPF tax points, inclusive of associated fiscal equalization).<sup>15</sup>

Total per capita EPF entitlements were to be escalated annually according to a three-year compound moving average of GNP growth per capita. The escalator has, however, been modified under successive federal austerity programs. For 1983-84 and 1984-85 growth was limited to 6 and 5 percent, respectively, for the post-secondary education component as part of the federal government's "6&5" program. For 1986-87 through 1989-90 it was reduced to growth of per capita GNP less 2 percentage points. This was scheduled to be scaled down further to growth of GNP per capita less 3 percentage points for 1990-91, but this was preempted by the two-year freeze on total per capita entitlements announced in the 1990 budget. The 1991 budget extended the freeze through to the end of 1994-95 at which point the growth in per capita GNP less 3 percentage points escalator is scheduled to kick back in. Thus, a growth rate on per capita entitlements of 14 percent in 1977-78 fell to 5.8 percent in 1986-87, to just under 5 percent in 1989-90 and has been held at 0 percent since then.

The province of Ontario estimates that the total revenue loss to all provinces resulting from these modifications to the EPF escalator amounts to \$33.6 billion. They estimate that all provinces combined will lose \$7.3 billion in 1992-93 alone as a result of these modifications. In Ontario alone, they estimate

that the cumulative loss since 1982-83 amounts to \$12.3 billion, projected to be just under \$2.7 billion in 1992-93.<sup>16</sup> The province of Quebec estimates that its loss in revenues for 1992-93 will be just under \$2 billion.<sup>17</sup>

The inclusion of a cash component as part of the EPF transfer as well as the interplay with the fiscal equalization program made it possible to provide an effective transfer of tax room that was equal per capita across provinces. The effective transfer of tax room to the provinces in any year is the implicit number of tax points associated with the total EPF transfer for that year. The cash component of EPF serves the role of ensuring that the revenue yield associated with this effective transfer of tax room accrues to provinces on an equal per capita basis; that is, the effective transfer of tax room is "fully equalized."

It might be argued that the federal government has, in various ways, been unilaterally pre-empting tax room earmarked for provincial finance of the established programs since the inception of EPF in 1977. Modifications to the EPF escalator have simply hastened this process. The basis for this argument is that the rate of growth of per capita revenues from the implicit number of tax points transferred in 1977 has exceeded the rate of growth of per capita GNP in view of the progressivity of income taxation. Put another way, the implicit number of EPF tax points has been declining since 1977 because of what amounts to a per capita GNP ceiling (as variously modified) on growth in total entitlements. This is entirely inconsistent with previous transfers of tax room. Moreover, it has produced a confusion between federal and provincial budget deficits and policies aimed at deficit reduction; and finally, it has been to the detriment of promoting accountability at the provincial level.

Thus, there is an important sense in which the devolution of income tax room to the provinces with respect to the established programs remains as incomplete business on the federal-provincial fiscal relations agenda. In order to finally effect a complete disentanglement, tax room should be devolved to the provinces once and for all with respect to the established programs. This would be consistent with the call for disentanglement in program delivery and funding that appears to be receiving such popular support at present. It would also be consistent with earlier transfers of tax room.

One way of achieving this within the existing EPF framework, as outlined in research which the author has conducted with France St-Hilaire,<sup>18</sup> would be for the federal government to cede the value of the cash component of EPF to the provinces as an income tax abatement rather than as a direct transfer of tax room. That is, a fixed percentage of federal income tax revenues would be earmarked for the established programs. The revenue yield from this abatement would then form a pool from which cash transfers could be made to provinces on a similar basis to the existing cash component of EPF. In this way, the federal role in funding social programs would simply be that of coordinating inter-provincial revenue pooling through centralized collection and redistribution.

A significant aspect of this proposal is the notion of a federal role in coordinating interprovincial revenue pooling. The proposed tax abatement would earmark for the provinces a fixed percentage of federal income tax revenues. These revenues would not, however, be distributed in proportion to collections by province; rather they would be pooled for purposes of "topping up" the per capita value of the existing EPF tax transfer by province. This would seem to lend some definition to the notion of a transfer of "fully equalized tax room" in lieu of EPF cash transfers contained in a recent proposal by the western finance ministers.<sup>19</sup> Here, full equalization is achieved through revenue pooling. Revenue pooling is, however, achieved indirectly through formula-driven disbursements of a federal tax abatement to the provinces.

#### OTHER EPF SCENARIOS

Other scenarios are, of course possible. Recent analyses by Peter Leslie<sup>20</sup> and Ken Norrie<sup>21</sup> both consider the possibility of simply allowing EPF cash payments to continue to wind down. This could be effected more or less rapidly through modifications to the GDP escalator on per capita total entitlements (currently set at zero). The end result of this would, *de facto*, be a federal withdrawal from the health care and post-secondary education fields. The provinces would not acknowledge the value of the EPF tax points as a "transfer" from the federal government. Also, the per capita value of the EPF tax points would differ between the have and have-not provinces, and, indeed, among the have provinces, purely on the basis of fiscal capacities. The degree of fiscal disparity across provinces would be increased.

Norrie also considers the possibility of federal withdrawal accompanied by a transfer of tax room. This would occur in two stages. First, the other nine provinces would receive additional EPF tax points such as to place them on an equal footing with Quebec.<sup>22</sup> Next, additional tax points would be transferred to all provinces, sufficient to yield the desired total transfer of tax room. Since the value of any tax transfer would vary by province based on fiscal capacity, transitional cash payments may be required to raise all provinces, for example, to a "top-two-province" standard. His concern is that the additional pressures placed on the fiscal equalization program would jeopardize its future — place the sharing community in jeopardy.

Both Norrie and Leslie propose that preservation of the sharing community will require a commitment to direct interprovincial revenue sharing. There is, however, a legitimate concern that such a scheme would not be sustainable; that, in hard times, the richer provinces may simply withdraw from such revenue sharing arrangements. The advantage of the Hobson and St-Hilaire proposal is that it provides a mechanism whereby there can be further disentanglement without placing the sharing community in jeopardy.

Proposals by Robin Boadway and this author go further than this.<sup>23</sup> They argue that one way of attaining fully equalized fiscal capacities would be to compute EPF entitlement as a net entitlement; that is, actual entitlement plus equalization entitlement. For those provinces with negative equalization entitlement (the have provinces), then, their net EPF entitlement would be less than for the have-not provinces. Under such a scheme, the net effect would be to fully equalize the per capita revenues of the provinces. While this would be consistent with the equity and efficiency arguments first presented over ten years ago by the Economic Council of Canada,<sup>24</sup> it would involve a significantly expanded federal presence in cash transfers.

#### THE CANADA ASSISTANCE PLAN

Under the original terms of CAP, the federal government agreed to pay 50 percent of eligible provincial and municipal government expenditures on social assistance and welfare services. The imposition of the cap on CAP in 1990 has resulted in a reduction in the federal share in eligible program expenditures to 28 percent in Ontario, 47 percent in Alberta and 37 percent in British Columbia.<sup>25</sup> Moreover, the effect of the growth ceiling has been to convert what was a matching grant to a lump sum grant, no longer tied to actual program expenditures. The result is that additional expenditures on social assistance in the three have provinces are not cost-shared at all; costs must be met entirely from own-source revenues.

Estimates made by the province of Ontario suggest that the cumulative loss to the three have provinces since 1990 will exceed \$4.0 billion of which \$3.4 billion can be attributed to Ontario. For 1992-93, the loss to Ontario is estimated at \$1.8 billion.<sup>26</sup> Moreover, it is evident that a return to open-ended cost sharing would result in a significant increase in the share of total transfers going to Ontario.

The cap on CAP has not only had serious budgetary consequences, especially in Ontario, it has also strained the commitment in the have provinces to the principles of Canadian federalism. In particular, the discriminatory nature of the cap — applied only to the have provinces — has created the perception of a departure from the tradition of the equal treatment of provinces. Moreover, some have argued that a return to 50 percent cost sharing at the end of the five-year period is now impossible; the implied magnitude of the increase in transfers to Ontario is simply too great. From the perspective of the federal government a return to open-ended cost sharing runs counter to any deficit control objectives, also suggesting that CAP will not return to its previous form. Finally, a renewed interest in reviewing income security programs in Canada carries with it the implication that federal-provincial cost-sharing arrangements too will be reviewed.

The discriminatory aspect of the cap on CAP needs to be viewed in the context of overall program restraints. The growth ceiling on equalization entitlements has impacted severely on the have-not provinces. Replacing revenues lost because of the freeze on per capita EPF entitlements has had to be done through own-sources, requiring significantly greater tax effort relative to national averages. Their ability to fund rising welfare payments has been equally constrained. In particular, their ability to keep up with welfare reforms elsewhere, especially Ontario, has been more constrained than ever. To the extent that the cap on CAP has slowed the pace of welfare reform, some uniformity has been preserved across provinces.

Traditionally, the provinces, especially Quebec, have complained that cost-sharing arrangements distort provincial priorities and inhibit innovation in the delivery of services. In addition, the provinces, especially the Atlantic provinces, have argued that provinces with relatively greater fiscal capacities have greater ability to spend in these areas. The argument that it is the role of fiscal equalization to account for differences in fiscal capacities seems somewhat hollow in this respect, since its goal is to raise fiscal capacities in the recipient provinces to a standard that is somewhat below the national average.

During the 1970s, there was a proposal to replace the portion of the CAP tied to welfare services with a block grant similar in structure to EPF.<sup>27</sup> Social assistance (income maintenance) programs would, however, have continued to be cost-shared. The block grant would have been structured as an equal per capita payment to be escalated annually in accordance with the rate of growth of per capita GNP.

More recently, Ken Norrie<sup>28</sup> has considered the possibility of complete federal withdrawal from cost sharing under CAP, accompanied by a transfer of tax room to the provinces. One difficulty with such a proposal is establishing the amount of tax room to be transferred since federal liabilities under CAP tend to be cyclical. In addition, since the associated tax points would be eligible for equalization, this would further strain the fiscal equalization program.<sup>29</sup>

As argued by Boadway and Hobson,<sup>30</sup> social assistance liabilities ought to be viewed as negative tax liabilities and treated symmetrically with personal income taxes under fiscal equalization. This is not done, however, and it can be argued that cost sharing of social assistance provides some offset to this defect in the design of the fiscal equalization program.

If negative tax liabilities were incorporated directly into fiscal equalization, those provinces with per capita social assistance liabilities above the standard for equalization would receive additional positive entitlements.<sup>31</sup> Hence, those provinces with positive net entitlements under the existing program would have their entitlements increased accordingly. Those provinces with negative net entitlements under the existing program, however, would only receive

equalization if these were outweighed by positive entitlements with respect to social assistance liabilities.

An alternative proposal of Hobson and St-Hilaire<sup>32</sup> would maintain a federal presence in social assistance through a system of differential cost sharing. Those provinces with above average social assistance liabilities would be eligible for a differentially higher level of cost sharing and *vice versa*. The scheme would involve implicit equalization of social assistance liabilities across provinces but maintain the spirit of existing CAP arrangements.

The federal government has made the argument that it has no control over additional liabilities resulting from the enrichment of provincial programs. That is, a given province can shift 50 percent of the cost of program enrichment to the federal government. Moreover, it is the richer provinces that are best able to contemplate such enrichment schemes. At the least, then, it seems likely that CAP will be redesigned along block grant lines rather than reverting to open-ended cost sharing. What seems even more likely is that a review of income security programs will result in substantially more social assistance being delivered through the personal income tax, resulting in less reliance on cash transfers to the needy. This could substantially reduce the levels of transfers under CAP even if it reverted to its original cost-sharing design.

#### REFORM OF THE TAX COLLECTION AGREEMENTS

The federal and provincial governments have been exploring alternative models for the tax collection agreements, designed to give the provinces greater flexibility in tax policy, to promote transparency while at the same time maintaining the desirable features of a harmonized system.<sup>33</sup> A common aspect of these alternative models is that provincial tax would be levied against taxable income. This would obviate the need for the myriad of tax credits and the like which the provinces have introduced over time in order to affect their own redistributive and/or economic development goals within the constraints of the tax-on-tax system.

Rather, there would be a common set of non-refundable credits and associated eligibility criteria, but provinces would be able to set values for these and establish their own income thresholds and reduction rates. These would be broken down into two major categories — personal credits and expense credits. Personal credits would include basic, married or equivalent, child, disability and age credits. Expense credits would include credits for Canada/Quebec pension plan contributions, unemployment insurance premiums, tuition fees, education expenses, and medical expenses. In addition there would be credits for charitable donations and pension income.

One important issue for consideration in reforming the income tax collection agreements is providing the provinces with sufficient flexibility to better

integrate the delivery of social assistance with the personal income tax system. Quebec, because it does not participate in the tax collection agreements, has already been able to move significantly in that direction.<sup>34</sup>

#### FISCAL EQUALIZATION

It has been estimated that, between 1988-89 and 1991-92, the growth ceiling on equalization has resulted in a shortfall in transfers to the have-not provinces of \$3.3 billion.<sup>35</sup> While this is a significant amount, what is even more important is that the presence of the growth ceiling has increased the extent of fiscal disparity among the provinces.

In the absence of fiscal equalization, fiscal capacities vary significantly across provinces. For example, Newfoundland's fiscal capacity in 1990-91 was just over 62 percent of the national average compared with 133 percent in Alberta. What this means is that, based on the RTS, the tax effort required to generate \$1 in revenues in Newfoundland is approximately twice that required in Alberta. Such differentials are significantly reduced through the operation of the fiscal equalization program; in the absence of the ceiling, fiscal capacities in the have-not provinces would have been raised to almost 93 percent of the national average in 1990-91.

With regard to EPF, the equalization ceiling has two effects. First, it lowers the effective equalized value of the EPF tax points. At present this is compensated by an offsetting adjustment in the cash transfer. Such an adjustment would not be possible if the federal government were to withdraw from EPF.

Second, to the extent that the provinces respond to reductions in EPF cash entitlements through offsetting tax increases, the additional tax effort required in the have-not provinces will be significantly greater than in the have provinces. The province of Quebec estimates that the tax effort required to replace \$1 per capita in reduced EPF cash transfers is 39 percent greater in the have-not provinces than in the have provinces. These figures vary significantly by province. Relative to the average for the three have provinces, the index (relative to the have provinces) is 170 in Newfoundland, 168 in Prince Edward Island, 148 in Nova Scotia, 156 in New Brunswick, 134 in Quebec, 102 in Ontario, 142 in Manitoba, 133 in Saskatchewan, 85 in Alberta and 108 in British Columbia. If there were no growth ceiling on equalization entitlements, the index of tax effort required to compensate for each \$1 shortfall in EPF cash transfers would be only 17 points higher than for the have provinces.<sup>36</sup>

As an example, Quebec has estimated that its loss in revenues resulting from the various modifications to the EPF escalator was \$1.7 billion in 1991-92. In order to maintain service levels (i.e., compensate for the loss in transfers through a provincial tax increase), they estimate the resulting increase in the provincial tax burden to be \$285 million more than it would have been had the



province exhibited the average fiscal capacity among the have provinces. This figure would have been substantially lower in the absence of the growth ceiling on equalization entitlements.

In order to partially alleviate this latter effect, the base year against which the growth ceiling is applied has been altered to 1992-93. While this had the effect of restoring equalization flows for that fiscal year, the growth ceiling is again expected to bite in 1993-94.<sup>37</sup>

It seems clear that of the three major transfer programs, the fiscal equalization program has an overarching role in compensating for differences in fiscal capacities among provinces. Inevitably, federal withdrawal from funding social programs places pressure on the fiscal equalization program which further increases the likelihood of the growth ceiling continuing to have effect. If the sharing community is to survive, it seems imperative that the growth ceiling be removed.

## CONCLUSIONS

There is a crisis in federal-provincial fiscal arrangements in Canada: the system is unravelling. By maintaining a dominant position in the personal income tax field, the federal government has been able to achieve a substantial degree of fiscal harmonization in the Canadian system through federal-provincial transfers. First and foremost among these has been the fiscal equalization program. In addition, through Established Programs Financing, the federal government has been able to effectively devolve personal income tax room to the provinces on a fully equalized basis, supplementing and enhancing the functioning of the fiscal equalization program. Finally, the federal government has been able to provide transfers in respect of provincial social assistance expenditures through cost-sharing arrangements under the Canada Assistance Plan. Now, the federal government's preoccupation with deficit reduction has compromised the effectiveness of the transfer system as an instrument of fiscal equity in the federation.

The growth ceiling on equalization entitlements has had the effect of widening disparities in fiscal capacities across provinces. Differing fiscal capacities across provinces render them unequal in their ability to meet the rising costs of delivering social programs. In addition, the federal government has been eroding the total number of income tax points implicitly transferred to the provinces in respect of programs in health care and post-secondary education with the introduction of EPF in 1977. This erosion has resulted both from the use of per capita GNP growth as the basis for escalating per capita entitlements and from a series of modifications to the growth formula itself (including the current freeze on total per capita entitlements). Inevitably, this has resulted in a serious fiscal imbalance at the provincial level. Moreover, EPF has itself been significant in reducing disparities in fiscal capacities across provinces, thereby

supplementing and enhancing the functioning of the fiscal equalization program. In the presence of the growth ceiling on equalization entitlements, the tax effort required to compensate for each dollar per capita in scaled-back EPF cash entitlements is significantly greater among the have-not provinces than among the have provinces. In other words, the have-not provinces are further disadvantaged by the shortfall in EPF transfers, because the deficiencies must be made up entirely by (unequalized) own-source revenues.

Had the EPF cash transfer originally been structured as a tax abatement to the provinces, it would have been possible to implement a system of direct revenue sharing among the provinces, coordinated by the federal government, thereby rendering the total EPF transfer (cash plus tax) equivalent to a fully equalized transfer of tax room. Not only would this have forced further accountability on the provinces, it would have transferred the cost of equalization pertaining to the tax-room transfer directly to the provinces as a whole and further restrained federal spending in the designated program areas. There is yet sufficient cash associated with EPF to undertake a scheme of this type. There would, however, be the additional issue of determining the appropriate division of income tax room between the federal government and the provinces in light of the existing fiscal imbalance at the provincial level.

The issues surrounding cost-sharing arrangements under CAP are somewhat different. First, in the have provinces there is no longer cost sharing beyond the 5 percent annual growth ceiling on transfers. In the have-not provinces, widening disparities in fiscal capacities make it increasingly difficult to participate in cost-sharing arrangements. Second, existing restrictions on the eligibility of programs for cost sharing, especially programs that deliver income security through the income tax code, limit the incentive for provinces to experiment with alternative delivery mechanisms. Moreover, the tax collection agreements limit participating provinces in their ability to integrate income security programs with the tax code. Third, any review of CAP must be undertaken in conjunction with a review of the entire income security network.

One area that ought to receive more attention, however, is the impact of provincial income security liabilities (negative taxes) on fiscal capacities. A deficiency of the fiscal equalization program is precisely that it does not take such differences into account. One way of doing this, parallel to the fiscal equalization program, would be to implement a system of differential cost sharing based on differences in per capita liabilities. One significant aspect of such a scheme, appropriately designed, would be that the implicit equalization associated with it would be borne by provinces rather than by the federal government.

It seems clear that the current state of federal-provincial fiscal arrangements has seriously compromised the important redistributive function of the federal government to the detriment of both fiscal equity and economic efficiency in

the federation. Yet it may be that there has been too much reliance on the federal government as the vehicle for interprovincial redistribution. Rather, there appears to be some scope for developing a greater degree of interprovincial revenue sharing within the framework of the existing federal-provincial fiscal arrangements.

## NOTES

This paper draws heavily on work I have done with each of Robin Boadway and France St-Hilaire. I wish to acknowledge their contributions to my thinking on the themes I have chosen to pick up on in the paper, without in any way implicating either of them in my interpretations. The paper has also benefited from the comments of two anonymous referees, as well as those of Doug Brown and Ron Watts.

1. See Canada, *Consensus Report on the Constitution* (the Charlottetown Accord) agreed to at Charlottetown, 28 August 1992.
2. Own-source fiscal capacity is defined to be a province's ability to generate revenues when national average tax rates are applied to a standardized set of provincial revenue bases.
3. Part III of the *Constitution Act, 1982*, section 36(2).
4. In part as a result of the impact of federal expenditure controls, this figure is down somewhat from 30.8 percent in 1982-83.
5. The designated "have-not" provinces are those that are eligible for transfers under the fiscal equalization program — Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Manitoba and Saskatchewan. The non-recipient provinces — Ontario, Alberta and British Columbia — are designated as "have" provinces.
6. The Representative Tax System (RTS) provides a standardized measure of provincial fiscal capacities. The RTS estimates for each of 32 revenue sources the potential yield, by province, if a common rate were applied to a commonly defined base. The common rate is simply a national average tax rate.
7. Prior to 1982, the equalization standard was the national average revenue yield. In practice, the five-province standard is only slightly less than the national average.
8. See Robin W. Boadway and Paul A. R. Hobson, *Intergovernmental Fiscal Relations in Canada* (Toronto: Canadian Tax Foundation, 1993), p.128, for a discussion of the extent of redistribution involved.
9. Fiscal equity requires that otherwise identical individuals be treated in a similar manner in the presence of provincial fiscal programs regardless of province of residence.
10. See Ontario, *1992 Budget Paper D*, "Federal-Provincial Programs: The Need for Change."
11. See *Consensus Report on the Constitution*.

12. A tax abatement involves the payment to a provincial government of a fixed proportion of taxes collected within the province by the federal government.
13. A transfer of tax room involves the federal government reducing its tax rates (and revenues), creating tax room which can be filled through provinces raising their rates with no net change in total (federal + provincial) yield.
14. A tax point is simply 1 percent of basic federal tax.
15. In 1977, the cash component of EPF was set up as an equal per capita amount to be escalated annually in accordance with growth in per capita GNP. Growth in the per capita value of the tax transfer varied with provincial fiscal capacities, however, necessitating supplementary cash transfers to ensure that total per capita entitlements remained equal. The 1982 modifications to EPF obviated the need for such supplementary payments.
16. See Ontario, *1992 Budget*.
17. See Quebec, *Budget 1991-92, Annex E*, "Federal Transfers to the Provinces: Quebec's Point of View."
18. See Paul A.R. Hobson and France St-Hilaire, *Rearranging Federal-Provincial Fiscal Arrangements: Toward Sustainable Federalism*, Institute for Research on Public Policy (forthcoming).
19. Western Finance Ministers, *Report of the Western Finance Ministers: Economic and Fiscal Developments and Federal-Provincial Fiscal Relations in Canada*, submitted to Western Premiers' Conference, Lloydminster, Saskatchewan, 26-27 July 1990 (unpublished).
20. Peter M. Leslie, "The Fiscal Crisis of Canadian Federalism," in Peter M. Leslie, Kenneth Norrie and Irene K. Ip, *A Partnership in Trouble: Renegotiating Fiscal Federalism* (Toronto: C.D. Howe Institute, 1993).
21. Kenneth Norrie, "Intergovernmental Transfers in Canada: An Historical Perspective on Some Current Policy Choices," in *ibid.*
22. In addition to the standard 13.5 EPF tax points, Quebec receives an additional 8.5 point abatement in respect of earlier opting-out arrangements.
23. See Boadway and Hobson, *Intergovernmental Fiscal Arrangements*.
24. Economic Council of Canada, *Financing Confederation: Today and Tomorrow* (Ottawa: Minister of Supply and Services, 1982).
25. See Ontario, *1992 Budget*.
26. *Ibid.*
27. See Canada, *Fiscal Federalism in Canada: Report of the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements* (The Breau Report) (Ottawa: Minister of Supply and Services, 1981).
28. See Norrie, "Intergovernmental Transfers."
29. Norrie also argues that, if responsibility for funding social assistance were devolved wholly to the provinces, it would be logical to also devolve responsibility for unemployment insurance. As discussed in Boadway and Hobson, *Intergovernmental Fiscal Arrangements*, if unemployment insurance were devolved to the provinces, it would be necessary to provide for associated equalization payments. The arguments here are symmetric with those for equalization of social assistance.

30. Ibid.
31. For a proposal as to how to incorporate negative tax liabilities into the representative tax system (RTS), see Hobson and St-Hilaire, *Rearranging Federal-Provincial Arrangements*.
32. Ibid.
33. See Canada, *Personal Income Tax Coordination: The Federal-Provincial Tax Collection Agreements* (Ottawa: Department of Finance, 1991).
34. See Hobson and St-Hilaire, *Rearranging Federal-Provincial Arrangements*, for a fuller discussion of the importance of undertaking reform of the tax collection agreements in conjunction with reform of delivery of social assistance and the federal role therein.
35. See Ontario, *1992 Budget*.
36. See Quebec, *Budget 1991-92*.
37. See Ontario, *1992 Budget*.

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## The NAFTA, the Side-Deals, and Canadian Federalism: Constitutional Reform by Other Means?

Ian Robinson

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*Cet article identifie les principaux domaines où l'ALÉNA empiète sur la juridiction provinciale, ainsi que les moyens dont dispose le gouvernement fédéral pour instituer ces chevauchements. L'article analyse dans quelle mesure ces ententes viendront accroître les contraintes commerciales par rapport aux initiatives politiques provinciales. Robinson se demande aussi si le rejet ou l'abrogation des ententes en question se traduira par la survie du volet social que comporte le fédéralisme canadien. L'auteur soutient que la mise en oeuvre de l'entente de libre-échange entre le Canada et les États-Unis a marqué le début d'une nouvelle ère dans l'histoire du fédéralisme canadien, une réalité que sont venus conforter d'ailleurs l'ALÉNA et l'«ébauche Dunkel».*

*La mobilité accrue du capital international, qu'encouragent ces ententes, a pour effet d'augmenter aussi les pressions commerciales à l'endroit de tous les paliers de gouvernement, en particulier, sur les gouvernements provinciaux. Du coup ces derniers seront moins en mesure de répondre efficacement aux attentes de leurs commettants, y compris dans les secteurs où leur juridiction n'est pas remise en cause par suite des obligations nouvelles contractées par ces ententes internationales.*

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### INTRODUCTION

The North American Free Trade Agreement (NAFTA) and its labour and environmental "side-deals" are part of a growing number of international agreements that seek to regulate the global economy. Like the FTA and the Dunkel draft of the Uruguay round of the General Agreement on Trade and Tariffs (hereafter, Dunkel GATT), the NAFTA is dubbed a "free trade" agreement. However, it applies to much more than the border measures (e.g., tariffs and quotas) that impede trade (i.e., the international flow of goods and services).

Indeed, the most important element of these agreements are the new international property rights that they grant to investors, and the new restrictions that they impose on government regulatory powers. In this light, this genre of international economic agreement may be more accurately labelled a "free capital" agreement. At the same time, as the NAFTA's side-deals and the rapid expansion of the "social dimension" of the European Community in the 1980s suggest, pressures are also mounting to develop international agreements on environmental protection and labour rights and standards backed by economic sanctions.

In the past, important changes in the structure of the international economy and the role of the state have precipitated major changes in the powers possessed by the federal and provincial governments of Canada, in the ends to which those powers are used, and in the relationships between federal and provincial governments. This chapter asks what kinds of changes in the character of Canadian federalism are likely to result from the NAFTA and the labour and environmental side-deals that accompany it. Each of these agreements represents a particular case of a more general phenomenon: ever more comprehensive free capital agreements, and increasing pressures for an enforceable international social dimension. The chapter also asks what these more general trends imply for Canadian federalism, whether or not the NAFTA and its side-deals are implemented in their current form.

In seeking answers to these questions, it is important not to become obsessed with the formal constitution. Changes in the character of Canadian federalism have occasionally been facilitated by constitutional amendments (e.g., the transfer of exclusive jurisdiction over unemployment insurance to the federal government in 1940). But most such changes — notably, the dramatic expansion of the federal government's activities after World War II, under the rubric of the "spending power" — were not the result of a formal constitutional amendment or a landmark court decision.<sup>1</sup> It is therefore important to distinguish between impacts on government roles and policy instruments and impacts (if any) on the constitutional division of powers. Either can profoundly affect the character of federalism. The former is more common and often more important.

This chapter argues that the NAFTA, especially if reinforced by the Dunkel GATT, is likely to produce a change in the character of Canadian federalism on the same order of magnitude as the changes that launched the postwar era of "modern" or "social" federalism. So, too, would a substantial international social dimension, whether taken alone or in conjunction with such free capital agreements. Whether such changes someday receive the official imprimatur of a formal constitutional amendment or a ringing Supreme Court declaration is a secondary issue.

The chapter considers mainly how the NAFTA and its side-deals are likely to affect the policy options and the policy instruments available to the federal and provincial governments of Canada. The analysis in this chapter is part of broader work examining the impact of and response to economic globalization on Canadian federalism.<sup>2</sup>

How will the NAFTA and its "side-deals" affect the balance of political power between federal and provincial governments, and between governments in general and private investors? Two causal routes from the NAFTA to these power balances can be traced. The first runs from the NAFTA's impact on capital mobility to the market constraints faced by governments. Such impacts would be felt even if Canada did not sign the NAFTA, provided that Mexico and the United States did. The second route runs from the NAFTA's new international obligations, through the federal government's duty to enforce (some of) these obligations against provincial governments, to the loss of provincial policy instruments.

The discussion below has three sections. The first considers how the NAFTA increases capital mobility, and to what effect. The second asks whether the side-deals offset or otherwise affect the NAFTA's impact on distribution of economic power. The last section considers the legal restrictions that both sets of agreements impose on provincial governments.

### CAPITAL MOBILITY AND GOVERNMENT POLICY CAPACITY

International capital mobility is affected by many things that governments can influence: transportation costs, communications technologies, the extent of tariff and "non-tariff barriers" (NTBs) to the movement of goods, services and capital, and the scope and strength of private property rights. By reducing tariff and non-tariff barriers, governments make it easier for private investors to produce goods in countries other than those that constitute their primary markets. This facilitates the shifting of investment in production to facilities "overseas." By increasing and standardizing protections for investors' property in other countries, governments can reduce the risk that foreign investors will lose some or all of their investments due to unforeseen changes in government policies. This makes overseas investment more attractive, other things equal, with the largest effect in the countries where such "political risks" were previously greatest. How does the NAFTA increase international capital mobility, and how does this affect the market constraints faced by federal and provincial government policymakers? I consider each question in turn.



## NAFTA AND CAPITAL MOBILITY

The NAFTA contributes to capital mobility in two ways. It eliminates all remaining tariffs among three countries over a period of 15 years, and most long before that. It also eliminates the need for import licences and a variety of other NTBs that restricted the movement of capital as well as consumer goods into Mexico. The NAFTA's contribution to these sources of capital mobility is modest because tariffs and NTBs between Canada and the United States had already been greatly reduced by successive rounds of the GATT and the FTA.<sup>3</sup> Similarly, Mexico's tariffs and NTBs against all countries have been even more rapidly reduced — though, from a much greater height, so that they remain more stringent — as part of the “liberalization” program that began in earnest under President Salinas in 1986. Mexico has since acceded to the GATT, so that the Salinas reductions are now embedded in a binding international agreement.<sup>4</sup>

The second and larger contribution that the NAFTA makes to increased capital mobility is through reducing the risk to private investors of investing in Mexico. The NAFTA does this by creating what amount to new continental private property rights that will protect foreign investors operating in all three countries. These new property rights are explicit in the Investment chapter, the chapter on monopolies and state enterprises, the Intellectual Property (IP) chapter, and the Financial Services chapter. However, the restrictions on government regulation found in the Standards-Related Measures chapter, and in the section of the Agriculture chapter dealing with Sanitary and Phytosanitary (SPS) standards, can also be understood as property rights. These latter chapters make it more expensive and difficult to regulate the behaviour of domestic and foreign corporations in ways that might reduce the value of their property.<sup>5</sup>

The most important of the new private property rights that the NAFTA creates are found in its Investment chapter.<sup>6</sup> Under the FTA, American investors were granted protection against four types of “performance requirements.”<sup>7</sup> They were also protected against expropriation without “just compensation,” as determined by an FTA panel.<sup>8</sup> Finally, American investors were protected against any “nullification and impairment” of benefits which they expected to derive from the agreement, even though such disappointment might not result from the violation of any specific provision of the FTA.<sup>9</sup> The NAFTA incorporates these rights and extends them in a number of ways. It prohibits three new types of “performance requirements,” the most important of which are “technology transfer” and “product mandating” requirements. These rights are granted to all foreign investors, whether or not they originate in NAFTA countries.<sup>10</sup>

The NAFTA also creates a new investor-state dispute process, permitting NAFTA investors who believe that one of their rights has been violated to go to an international tribunal with binding arbitration powers, or to the domestic courts, whichever the aggrieved investor prefers. Under the FTA and the GATT,

by contrast, private investors must persuade their national governments to undertake such a challenge. The NAFTA Investment chapter expands the number of corporations that will have access to these new property rights and legal procedures through its expanded definition of NAFTA "investors."<sup>11</sup>

The NAFTA Monopolies and State Enterprises chapter incorporates the FTA's restrictions on monopolies.<sup>12</sup> In addition, it requires that monopolies accord "non-discriminatory" treatment to NAFTA investors. The NAFTA also requires state enterprises to comply with the obligations set out in the Investment and Financial Institutions chapters when exercising any "regulatory, administrative, or other government authority."<sup>13</sup>

The NAFTA's Intellectual Property chapter has no predecessor in the Tokyo GATT or the FTA.<sup>14</sup> It applies to virtually every important form of intellectual property rights, in many cases granting more stringent forms of protection than were available under the domestic intellectual property laws of Canada and Mexico. The IP chapter also contains novel and important enforcement procedures.<sup>15</sup>

The main impact of the FTA's Financial Services chapter on capital mobility was the waiving (for American investors) of restrictions on foreign ownership of Canadian financial institutions chartered by the federal government.<sup>16</sup> The NAFTA's Financial Services chapter is much more comprehensive, incorporating the National Treatment principle, and the Investment chapter's provisions on the right to transfer profits, dividends, and the like freely across national borders.<sup>17</sup> It also incorporates the Investment chapter's investor-state dispute mechanism to protect these rights, subject to certain qualifications.<sup>18</sup> Finally, the financial institutions have the right to transfer financial data out of NAFTA countries for processing.<sup>19</sup>

The NAFTA also strengthens FTA restrictions on government regulations by increasing the burden that governments must meet in order to defend technical and SPS standards deemed trade restrictive. Like the Tokyo GATT and the FTA, the NAFTA recognizes a special class of "legitimate" regulatory objectives — the "safety or the protection of human, animal or plant life or health, the environment, or consumers" — which may be valid even if they restrict trade.<sup>20</sup> If a measure is found to be trade restrictive, a government seeking to defend it must first demonstrate that the intent of the measure was to realize one of these "legitimate objectives." In the FTA and the Tokyo GATT, if a trade-restrictive measure passed this first hurdle, the government had to show that this measure was also "necessary" to achieve that legitimate objective. If this second test was also met, then the measure survives the challenge. The NAFTA increases the difficulty of meeting this second test by requiring that governments prove that the measure chosen was the "least trade restrictive necessary" to achieve a legitimate objective.

Given the difficulty of successfully defending a regulation deemed "trade restrictive," the burden that a challenger must meet in order to show that a measure is indeed trade restrictive becomes very important. In many cases, the most promising way to meet this burden is to show that the measure violates the National Treatment principle. Under this principle, a measure is trade restrictive if it discriminates in favour of national producers or investors as against non-national exporters or investors. Over the years, GATT panels have developed a broad interpretation of what counts as "discrimination" — the "equal competitive opportunity" (ECO) interpretation.<sup>21</sup> On this reading, a government measure can apply the same rule to nationals and non-nationals and still be discriminatory if it has the *effect* of placing foreign exporters or investors at a competitive disadvantage.<sup>22</sup> Language reflecting this interpretation is explicitly included in the NAFTA's Financial Services chapter,<sup>23</sup> and it may be "read into" other chapters by future NAFTA panels, investor-state arbitration tribunals, or the courts.

In all of these ways, the NAFTA will make it faster and less expensive for an expanded list of eligible NAFTA investors to protect their new property rights against the deprivations of NAFTA governments. The NAFTA will also increase the likelihood of successful challenges to a broad range of government regulations by the Mexican and American governments. This will result in more challenges to more government measures, other things equal, and hence, higher regulatory costs, even if governments successfully fend off all such challenges. Where governments lose, they will have to change their behaviour or pay compensation. Efforts to reduce the number and success of such challenges by ensuring that the "least trade restrictive necessary" test has been met, will cost money and reduce the range of policy instruments available to governments. All this is likely to have a chilling effect on efforts to raise national regulatory standards in existing fields or to introduce regulations in new areas, a prospect that private investors greet with approbation.

These changes will have the greatest impact on capital mobility where the risks of investment, in the absence of NAFTA property rights, were greatest. These risks were perceived to be much higher in Mexico, owing to the more interventionist character of its economic policies, memories of the oil company nationalizations, perceived nationalist hostilities to foreign investors, the lesser legal protections offered by their courts, and a range of other factors. Risks of investment in Canada were doubtless rated higher than in the United States, but they have already been reduced somewhat by the new investor property rights created in the FTA. Thus, the NAFTA's impact on the foreign private investor security is much greater in Mexico than the other two NAFTA countries. By making Mexico a substantially less risky place to invest than it was before, the NAFTA thus increases the pressure on Canadian and American governments

seeking to retain or attract domestic and foreign private investment in industries (e.g., auto) that could be located in any of the three countries.

#### GOVERNMENT BARGAINING POWER WITH PRIVATE INVESTORS

By substantially increasing capital mobility, the NAFTA will significantly increase the bargaining power of private investors (in most cases, the transnational corporations (TNCs) that are best equipped to take advantage of these new opportunities) vis-à-vis governments. In a mixed economy, democratic governments must try to persuade private owners to invest a sufficient share of the economic resources that they control to make possible productivity growth, low unemployment, and the other economic desiderata. Private sector investors cannot guarantee good economic performance, but by refusing to invest, they can guarantee bad performance.

The only other private interest possessing anything approaching this kind of economic power is organized labour. But workers must organize and act collectively in order to exercise such power, which makes them highly visible and vulnerable to government restrictions on the right to strike. By contrast, private investors need not organize in order to withhold, withdraw, or transfer their investments. Independent action on the part of numerous investors who believe that the government is insufficiently pro-business is sufficient to put great pressure on governments to mend their ways.<sup>24</sup> Thus, even if private investors were constrained to make their choices about where (and whether) to invest within a single national economy, they would possess unparalleled power to influence government economic policy.<sup>25</sup>

The power of private investors is further increased if they are able to move their investments freely from one country to another. As long as private wealth holders are constrained to invest (or consume) within their country of origin, high consumption taxes can create strong incentives to re-invest profits in domestic businesses, even if government economic and social policies are not regarded as particularly congenial to business interests.<sup>26</sup> However, this tax instrument becomes less effective as capital mobility increases. Merely pointing to the existence of an increasingly attractive exit option substantially increases the leverage of private investors vis-à-vis governments seeking to maintain and increase investment. It becomes riskier to introduce new regulations or taxes that might have a negative impact on corporate bottom lines. Consequently, such taxes are not raised as much as would otherwise have been the case, and either taxes on other sectors of society are raised more or cuts in government spending are made.<sup>27</sup>

An increase in capital mobility can substantially affect the economic and political power of the labour movement. Where a strong labour movement exists, governments are constrained not to bend too far in the direction of private

investor interests. This is reflected in the fact that countries in which labour movement power is high tend to have larger and more activist governments,<sup>28</sup> more egalitarian distributions of the benefits of economic growth,<sup>29</sup> and lower levels of inflation and unemployment.<sup>30</sup>

In Canada, increased capital mobility will tend to reduce both the membership and the political influence of unions, because membership levels tend to be very high in the manufacturing sector that is most directly and (I would argue) negatively affected by this change. Manufacturing plants may close as the TNC moves its operations to lower labour-cost zones, and union members who worked in those plants are lost. Or plants may be kept open, but in order to remain competitive with such low-cost production sites, new capital investments that reduce the need for labour are introduced. Because it is more difficult to organize most parts of the private-service sector than the manufacturing sector, members lost in the latter sector are not easily made up in the former.<sup>31</sup> Consequently, a decline in the manufacturing sector's share of total employment, other things equal, will be associated with a decline in union density.

In summary, the NAFTA would increase capital mobility and with it, the bargaining power of large private investors vis-à-vis Canada's federal and provincial governments. An agreement only between the U.S. and Mexico would also have this effect, with or without Canada. The NAFTA goes well beyond the high water mark established by the FTA in two ways: first, it substantially extends the scope of the new private property rights that are the principal source of increased capital mobility; and second, it protects these property rights in Mexico, which (given the current global competitive climate) arguably provides a much greater incentive to "social dumping"<sup>32</sup> than was the FTA's increased incentive to locate production in the United States.

All of the impacts of increased capital mobility on national government bargaining power with private investors hold *a fortiori* for provincial and local governments. An increased threat of exit, once acquired, is just as effective in negotiations with subnational governments as with national governments. Indeed, it is more effective because it is much easier for TNCs to play ten provincial, 50 U.S. state, and 30 Mexican state governments off against one another than it is to play the three national governments off against each other. Ninety state and provincial governments amount to a competitive market in which any one government is a TNC condition-taker; three national governments are an oligopoly, retaining the power to impose some conditions on TNC investment, although this is also diminished by international competition for investment among nation-states. This would be true even if none of the provisions of the NAFTA that enhance capital mobility applied to provincial government measures (though in fact, as we shall see below, most do).

## SOCIAL DUMPING AND THE NAFTA SIDE-DEALS

The labour and environmental side-deals to the NAFTA, completed on 13 August 1993, are supposed to neutralize any encouragement that the NAFTA might give to "social dumping." Even if completely successful in this objective, capital mobility would still be substantially higher, and hence, government power significantly lower, under the NAFTA. But successful side-deals would at least reduce one of the most powerful incentives to use their mobility in economically inefficient and socially harmful ways. This would reduce, though not eliminate, some of the most important political costs of increased capital mobility. How effective are the side-deals likely to be in their stated purpose? The final legal text of the side-deals is not available at the time of writing. However, using the summary "highlights" of the final agreement released jointly by the three governments on 13 August 1993, and the legal texts from 9 August to 12 August 1993 (leaked to *Inside U.S. Trade*), it is possible to form a reasonably clear picture of how the side-agreements will work.<sup>33</sup> I first summarize and then evaluate these agreements.

### DESCRIPTION

The main strategy for dealing with social dumping embodied in the side-deals is to improve the domestic enforcement of domestic labour standards and environmental laws by creating an international oversight mechanism to monitor this process. Where this mechanism finds a "persistent pattern of failure to effectively enforce" one of the domestic laws covered by the agreement, a national government can bring the matter before an arbitral panel provided that certain conditions are met. The panel is empowered to levy a fine against the country failing to enforce, should it find in favour of the complaining party. If the national government so sanctioned fails to pay the fine, the complaining party is entitled to levy trade sanctions against the non-complying party if it is the United States or Mexico. If the non-complying party is Canada, the complaining party has the right to go to the Canadian courts which will be mandated by federal statute to order the federal government to pay the fine. I will briefly expand on each of these features.

Oversight of domestic enforcement processes is the task of two commissions (Labour and Environment), each made up of a ministerial council, and a permanent secretariat mandated to provide technical, administrative and operational assistance to the council. Each ministerial council is comprised of Cabinet-level representatives from each country; each secretariat is comprised of officials with a degree of autonomy from the three national governments. The environmental secretariat is empowered to receive complaints from private parties, and to prepare a report on the facts relevant to the validity of the complaint. The labour secretariat does not have these powers, though it will

prepare "analytical reports" on issues relevant to disputes at the request and under the terms of reference of its council. Neither secretariat has subpoena powers, and neither is entitled to make recommendations as to how the council should proceed.

The Labour Commission will be more complicated than its environmental counterpart in two ways. First, the Labour Commission will have a third component: national administrative offices (NAOs) will be located within each country, with top officials appointed by the national governments of that country. These NAOs will compile and transmit information to the secretariat and to receive complaints from other NAFTA governments.<sup>34</sup> NAOs would not be entitled to hear complaints from interested parties, and consultations among them could only be initiated by national governments. Second, the labour side-deal interjects an additional procedural step between the initiation of consultations by an NAO and the decision to initiate an arbitral panel. Should consultations fail to resolve the issue, a party can initiate the formation of an "Evaluation Committee of Experts" (ECE) provided that three criteria are met:<sup>35</sup> (i) the labour law in question is among those covered in the agreement, (ii) a systematic "pattern" of non-enforcement is alleged,<sup>36</sup> and (iii) such non-enforcement has "trade-related" consequences.<sup>37</sup> For purposes of the first criterion, labour laws are divided into three categories:

- (a) child labour, minimum wage, and worker health and safety measures;
- (b) forced labour, employment discrimination, equal pay for men and women, compensation in cases of work accidents or occupational diseases, and the protection of migrant workers; and
- (c) all other matters covered by labour laws, including basic worker rights to organize, bargain collectively, and strike.

ECEs can only investigate alleged failures to enforce laws of types (a) and (b), which are defined as "technical labour standards." Type (c) laws and regulations are not covered by the agreement. The ECE process will be "non-adversarial." The ECE would issue a public report, which would have no binding force, but would be fed into ongoing consultations.

Under the labour side-deal, if consultations following the ECE's report still fail to resolve the issue, the complaining party can initiate the formation of an arbitration panel provided that two-thirds of the other parties to the agreement concur, and the law in question is of type (a).<sup>38</sup> Under the environmental side-deal, there is no ECE stage, and the complaining party may initiate an arbitral panel provided that the same two-thirds support is secured, and the complaint pertains to one of the types of environmental law to which the side-deal applies. The environmental side-deal applies to measures aimed at preventing pollution, controlling hazardous materials, and protecting flora and fauna and their habitats. Largely at Canada's insistence, the environmental

side-deal will not apply to provisions governing the management of the "commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources."

If these conditions are met, the arbitration panel is empowered to impose a fine on the offending party. No minimum fine has been set. If and only if the offending party fails to pay any fine assessed within a specified period, the complaining party may impose trade sanctions in the form of quotas or tariffs commensurate with the scale of the harm caused by the failure to enforce. However, no such trade sanctions may be taken against Canada. Instead, the federal courts of Canada will be granted the power (by federal statute) to require the government of Canada to pay any fines levied against it by this body, with no possibility of appeal.<sup>39</sup>

The application of the side-deals in the Canadian case is characterized by a second important asymmetry. Without the cooperation of a minimum number of provinces, Canadian obligations will apply only to labour laws falling under exclusive federal jurisdiction (these cover about 10 percent of the workforce). The provincial labour laws that apply to the remaining 90 percent of the Canadian workforce will only be subject to the labour side-deal process if a sufficient number of provincial governments choose to participate to reach a minimum "threshold" level. The 9 August 1993 labour accord draft reveals continued disagreement as to the precise threshold level, but the range is between 30 and 40 percent of the total Canadian workforce, and 55 to 60 percent of the total employment in the sector to which the complaint pertains.<sup>40</sup> Conversely, the Canadian government will only be able to challenge lax enforcement in other NAFTA countries for the economic sectors over which it has exclusive jurisdiction, *and sectors under provincial jurisdiction where the required thresholds are met*. Provincial governments will indicate their participation by agreeing to list their (relevant) labour laws in Annex II of the labour agreement, and the Canadian government is obliged to encourage provincial governments to do this.<sup>41</sup>

The 10 August 1993 draft of the environmental side-deal reveals a parallel approach to provincial government adhesion. Canada may not seek panel proceedings against another party unless provincial governments representing at least 55 percent of Canada's GDP sign on to the agreement, and (if the matter is industry or sector-specific) at least 55 percent of the industry or sector in question is covered by the provinces adhering to the agreement. Conversely, no actions can be brought against Canada or any province that may adhere to the agreement until these thresholds are met.



## EVALUATION

The exclusion of resource management schemes from the ambit of the environmental side-deal is problematic if its point is to prevent price competition based on unsustainable forms of environmental exploitation. Past inadequacies in the enforcement of such schemes — e.g., the failure of B.C. logging companies to meet their commitments to replanting — have contributed to a situation in which loggers now press to cut down the last stands of ancient timber in the hope of extending their employment for a few years. The exclusion of worker rights from coverage under the labour side-deal is even more damaging to the effectiveness of what is, in any case, the weaker of the two agreements. These rights are the single most important target of employers and governments wishing to engage in (or permit) social dumping. This is because unionization levels tend to be higher where worker rights are well protected, and wages and benefits tend to be higher where a larger share of the workforce is organized, other things equal.

Labour rights are also critical to the effective monitoring and enforcement of the (United States) kinds of labour standards that are covered by the labour side-deal. As the declining enforcement of the *Occupational Health and Safety Act* (OSHA) in the 1980s demonstrates, even countries as rich as the United States find it difficult to effectively monitor all the workplaces in the country effectively. Where workers are able to organize into independent unions, so that they are less fearful of reprisals if they assert their legal rights relating to workplace health and safety, they are ideally placed to discover and report infractions, and they have a strong incentive to do so. Conversely, it often appears to employers that the simplest way to reduce costs associated not only with worker wages and benefits but also with the effective enforcement of labour standards is to deny workers their rights.

Even if the side-deals covered worker rights and natural resource management laws, the strategy for combatting social dumping implicit in the side-deals is deeply flawed. As long as the relevant national standards can be unilaterally reduced as competitive pressures mount, mechanisms to improve the monitoring and enforcement of such laws are of very limited value. Moreover, Canada will not be able to use the side-deals to challenge enforcement in either of the other NAFTA countries unless a sufficient number of provincial governments agree to be bound by the side-deals. Nor will other countries be able to challenge lax enforcement in Canada unless these conditions are met.

To conclude, the side-deals are, for many reasons, unlikely to seriously retard, much less neutralize the social dumping pressures increased by the NAFTA's boost to continental capital mobility. Indeed, they may be worse than nothing, given the symbolic message sent by Article 32. Even if they did substantially reduce social dumping opportunities, this would only provide

some respite from the intensified market constraints that the NAFTA will impose on both orders of government in Canada.

## LEGAL IMPACTS ON PROVINCIAL POLICY INSTRUMENTS

The federal government is subject to the legal restrictions on its policy instruments outlined in the previous discussion of the NAFTA and its side-deals. However, the legal restrictions on provincial governments are not identical to the federal government's. Some restrictions apply only to the federal government. Moreover, there remain questions about whether some or all of these restrictions can be enforced effectively by the federal government. I first consider what the agreements claim provincial governments must do or refrain from doing. I then consider how the federal government might seek to enforce these claims, how hard it is likely to try, and whether it is likely to succeed.

### SCOPE AND STRINGENCY OF RESTRICTIONS ON PROVINCIAL POLICIES

Prior to the Tokyo round, the GATT focused almost exclusively on the reduction of quotas and tariffs on imported goods. Such measures are matters of exclusive federal jurisdiction. With the Tokyo round, "non-tariff barriers" (NTBs) to trade became a major focus of all "trade" agreements. The best known forms of NTBs are probably subsidies and government purchasing (or "procurement") policies. But virtually any government policy that has the effect of placing foreign producers at a competitive disadvantage vis-à-vis domestic producers can be construed as an NTB. Signed in 1979 and phased in over the next eight years, the Tokyo round agreements included NTB "codes" on subsidies and countervailing duties, anti-dumping measures, government procurement, technical barriers to trade, import licensing procedures, and customs valuation.

By the inclusion of NTBs in the GATT, many provincial government and Crown corporation procurement and regulatory policies became potential objects of GATT regulation for the first time.<sup>42</sup> Accordingly, provincial governments insisted on (and got) an unprecedented level of participation in the Tokyo round.<sup>43</sup> As it turned out, however, the Tokyo codes had only a very limited direct impact on provincial policy instruments. Subnational governments were exempted from all provisions of the government procurement code. The subsidies code was too weak and preliminary to have much impact on provinces.<sup>44</sup>

Only the technical barriers code created obligations sufficiently specific and robust to provide the basis for GATT-based challenges to provincial government measures. Article 2.1 committed governments to ensure that technical standards and regulations "do not have the effect of creating unnecessary obstacles to international trade," and that products imported from other parties are accorded

“treatment no less favourable than that accorded to like products of national origin” in relation to such standards and regulations.<sup>45</sup>

### *Canada-U.S. FTA*

The restrictions on provincial policy instruments created by the FTA went well beyond those found in the Tokyo GATT. Indeed, the Ontario Ministry of the Attorney-General concluded that, while it did not “purport to change the formal division of powers prescribed in the Constitution Act, 1867,”

the Agreement will permanently alter the capacity [of provincial governments] to make economic and social policy in Canada, sometimes shifting it to the federal government, sometimes abandoning it for all governments. This dramatic change in the ability of governments to respond to the legitimate expectations of their populations amounts to a constitutional change.<sup>46</sup>

Of the many areas examined by the Ontario Attorney-General, only the most important can be highlighted here. These include the new investor property rights and the restrictions on the operations and policies of provincial government monopolies, discussed above.

The National Treatment requirement of the FTA Investment chapter might, for example, prevent provincial governments from treating American insurance companies differently from their domestic competitors, even if there were sound industrial policy reasons for wishing to do so. The new monopolies provisions could make it much more expensive to introduce public auto insurance in provinces that do not already have it.<sup>47</sup> The FTA also prohibited provincial policies restricting the export of some unprocessed natural resources. Such policies have been used to promote job creation in the short run, and over the longer haul, the development of forward and backward industrial linkages from the exploitation of raw materials.<sup>48</sup>

The FTA included a commitment to develop an FTA subsidies code over a period of five to seven years.<sup>49</sup> This code would likely have had important implications for provincial policy, but the commitment to develop such a code has thus far been quietly dropped when it became clear that American negotiators were not willing to make substantial concessions on this matter.<sup>50</sup>

Provincial food and agricultural product standards (“sanitary and phytosanitary” or SPS standards), were already covered by the Tokyo GATT technical standards codes, but the FTA subjected such measures to a more stringent test than the GATT: standards must not create an “arbitrary, unjustifiable, or disguised restriction on bilateral trade.”<sup>51</sup> Depending upon how these tests were interpreted, provincial governments might find it more difficult to maintain or increase environmental standards.

Despite its broad impact on provincial policy instruments, the FTA’s dispute resolution mechanisms (Chapters 18 and 19), made no provision for provincial

participation. Provincial governments had no role in the selection of Canadian panel members, and no right to participate in defending provincial measures against American challenges. Moreover, the federal government alone had the right to decide whether to contest a challenge, and if so, by what arguments, and whether to launch a challenge on behalf of a province or a private actor. Contrast this with the procedures employed in the German federation for negotiating and implementing EC provisions trenching on the jurisdiction of the Länder.<sup>52</sup>

The FTA's impact on current provincial government policies was mitigated in two important ways. First, many of its provisions were "grandfathered" (i.e., measures already in place prior to the implementation of the FTA on 1 January 1989 were exempt from coverage). The bulk of the FTA's burden was thus imposed on future provincial governments, which will find it impossible to develop many new classes of policy instruments, or to employ many traditional policy instruments in innovative ways, in response to new international challenges or new voter demands. The FTA's alcoholic beverages provisions were the only ones requiring an immediate change in provincial practices.<sup>53</sup> Second, Ottawa's approach to implementing legislation was calculated to present the smallest possible target to provincial government objections and a possible constitutional challenge. Three approaches were considered. The least immediately obtrusive was chosen after consultations with provincial governments indicated that the support of some was contingent on adopting this "minimalist" approach.<sup>54</sup> The federal legislation which implemented the FTA provided if necessary for federal regulations to implement the wine and spirits provisions, but put off their introduction to a later date. Beyond that, it simply reserved the right to introduce legislation to enforce other provisions of the agreement against any non-complying subnational government should this become necessary.

### *NAFTA and its Side-Deals*

Most of the new types of restrictions on government measures found in the NAFTA apply to provincial government measures. Among these are the three new kinds of "performance requirements" found in the Investment chapter, the new restrictions on state enterprises in Chapter 15, and the substantial expansion of the rights of foreign financial service providers set out in Chapter 14. The NAFTA's new investor-state dispute process for enforcing these private property rights can be used to challenge provincial as well as federal measures. As with FTA and NAFTA panels, so with the new investor-state arbitration tribunals, provincial governments have no place in any of the dispute resolution processes set out in the agreement.

Consider the new performance requirement prohibitions. Product mandating and technology transfer are important industrial policy instruments for provincial as for federal governments, particularly in countries such as Canada that rely heavily on foreign investment. TNCs may not wish to see the wide diffusion of technologies that they develop, as this may increase the competition that they face. They may also resist pressures to include a full range of managerial and R&D employment in countries other than their home base.<sup>55</sup> The need for such requirements may be increasing, owing to changing TNC strategies that reduce the autonomy of their operations outside their home country.<sup>56</sup> The NAFTA's prohibition of these policy instruments was thus important for future provincial governments, even though most do not employ such measures at present.

The NAFTA also expands FTA restrictions on provincial governments in several ways. The new and wider definition of "investors" eligible for the rights created in the Investment and State Enterprise chapters increases the number of private actors that can directly challenge provincial government measures. In contrast to the FTA, the NAFTA applies to all provincial technical standards, and toughens the tests that provincial governments must meet in order to defend technical and SPS standards. It also expands the scope of provincially regulated financial institutions covered to include all such institutions.

As in the FTA, many of the NAFTA's provisions are "grandfathered," so that their principal burden falls on future provincial governments rather than current ones. Once again, federal implementing legislation minimizes requirements to change existing provincial laws, claiming instead the right to enforce the agreement through later legislation, should a party or investor mount a successful challenge to a provincial measure. These approaches minimize the immediate impact of the NAFTA on provincial governments, but they imply a federal claim to the jurisdiction to enforce such provisions at some future date.

Yet the government of Canada maintains that the only serious inroads into provincial jurisdiction in the NAFTA package are located in the provisions of the labour and environmental side-deals. Hence the complex procedures, outlined above, that permit individual provinces to opt-in, and make Canada's rights and obligations under these agreements conditional upon reaching a certain threshold of voluntary provincial participation. There is no doubt that jurisdiction over approximately 90 percent of Canada's paid workforce, and all of the laws and regulations applying to them *qua* workers, falls to the provinces.

The division of powers relevant to the matters covered in the environmental side-deal is more complex and less clear. Unanticipated by the framers of the constitution, environmental issues could fall under federal exclusive jurisdiction insofar as they have international and interprovincial dimensions, and under exclusive provincial jurisdiction insofar as they pertain to provincial ownership of and regulatory powers over natural resources. The actual working relationship that emerged out of this constitutional uncertainty in the 1970s may

be characterized as a situation of *de facto* concurrent jurisdiction, in which the two orders of government interact as follows:

Generally, the federal government agrees to establish national baseline effluent and emission standards for specific industrial groups and specific pollutants, and the provinces agree to establish and enforce requirements at least as stringent. Both parties agree to cooperative monitoring programs in areas of joint interest and to free exchange of data.<sup>57</sup>

So both side-deals bear on matters falling partially or primarily within provincial jurisdiction. Yet the side-deals in no way require provincial governments to alter their laws or regulations in these areas. Even if we set aside the possibility of provincial opt-out, all that the side-deals do is create a long and convoluted dispute resolution process. At the end of that process, the governments of Mexico and the United States are entitled to collect fines from the Government of Canada unless and until it is able to convince a non-complying provincial government to improve the enforcement of its own laws. In what sense can this be seen as a federal intrusion into provincial jurisdiction?

Federal pressure on a province to enforce its own laws could affect its budget priorities since the provincial government in question might prefer to allocate a larger share of its budget to something other than enforcing the particular labour or environmental standards in question. But there is surely a difference between federal actions that affect provincial spending priorities (e.g., capping the CAP), and outright federal intrusions into areas of provincial jurisdiction (e.g., federal claims to enforce investor property rights against provincial governments and their enterprises). The side-deals' provisions fall in the former category of indirect influence; it is the NAFTA itself, as the above example suggests, that includes a long list of provisions falling in the latter category of more direct intrusion.

Even the claim that the side-deals could, in principle, force provincial governments to alter their spending priorities may be over-blown, because the side-deals are actually highly solicitous of democratic governments' rights to set their own priorities. For example, Article 5.3 of the labour side-deal (9 August 1993 draft) states that:

a Party has not failed to "effectively enforce its labour law" when an agency or official of that Party has not taken action authorized by law to prevent, halt or penalize violations, or ameliorate the consequences of such violations, of labour statutes and regulations, but such inaction: (a) reflects a reasonable exercise of the agency's or official's discretion with respect to investigatory, prosecutorial, regulatory, or compliance matters; or (b) results from *bona fide* decisions to allocate enforcement resources to violations determined to have higher priorities.<sup>58</sup>

The environmental side-deal has a similar provision, though it is located in an Annex containing definitions.<sup>59</sup>

Labour rights and standards are stronger and better enforced in most Canadian jurisdictions than in either the United States or Mexico. The same can confidently be said of environmental standards and their enforcement in Canada, relative to Mexico. The U.S.-Canada comparison on environmental standards is another matter; here there is evidence that American enforcement (of standards at least as stringent) is significantly better than Canadian, at least in some areas.<sup>60</sup> This implies that, with the possible exception of some environmental regulations, the Mexican and American governments are unlikely to challenge enforcement by Canadian provinces. They have no reason to fear Canadian social dumping, and little incentive to challenge enforcement practices in Canada that their domestic critics (and ours) will be quick to identify as tougher than their own. Since ordinary Canadians have no right to use the dispute resolution processes set out in the side-deals, challenges will not come from the Canadian labour or environmental movements either.<sup>61</sup>

The upshot is that in most of the areas covered by the side-deals, there is not likely to be anyone who is both willing and able to use them to pressure provincial governments to alter their enforcement or spending priorities, even if provinces lacked the right to opt-out. Yet the governments of Quebec and Alberta publicly express fears that the side-deals will trench on provincial jurisdiction in unacceptable ways.<sup>62</sup> This contrasts sharply with the FTA and the (main text of the) NAFTA, both of which purport to impose substantial legal restrictions on a wide range of provincial government policy instruments. Neither of these agreements has comparable provincial opt-in provisions, yet the same provincial governments have strongly backed both the FTA and the NAFTA, down-playing their potential impacts on provincial jurisdiction. I will return to this odd behaviour in the final section of the paper.

#### EXTENT OF FEDERAL OBLIGATION TO ENFORCE

All of the new provincial obligations that the FTA and the NAFTA purport to create may amount to little if the federal government has no serious obligation to enforce such provisions against provincial governments. How strong is this federal obligation in the NAFTA, and how does it compare with the obligations in the Tokyo GATT and the FTA?

The Tokyo round left untouched the GATT's original "federal state" clause, which states that: "Each contracting party shall take *such reasonable measures* as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."<sup>63</sup> "Reasonable measures" was not defined in the original GATT, or in any of its subsequent iterations. With respect to the Tokyo GATT, the Government of Canada has taken the position that it cannot "reasonably" be expected to launch constitutional court cases aimed at establishing federal

jurisdiction in areas long regarded by courts and politicians as falling under exclusive provincial jurisdiction.

The federal government's obligation to enforce the FTA against provincial governments was substantially strengthened under Article 103 of the agreement, which stated that: "The Parties [i.e., the two federal governments] to this agreement shall ensure that *all necessary measures* are taken in order to give effect to its provisions, except as otherwise provided in this Agreement, by state, provincial and local governments." The FTA does not specify what a party must do to meet this obligation. But it is widely agreed that this language is stronger than the GATT's "reasonableness" standard.<sup>64</sup> FTA dispute resolution panels will determine what counts as "all necessary measures" in the first instance. It appears that panels can be over-ruled on such interpretative matters by the Commission comprised of Cabinet-level officials operating on a consensus basis.<sup>65</sup>

Article 105 of the NAFTA incorporates the FTA's "all necessary measures" language, and the agreement appears to assign a parallel final appeal role to its Commission. It remains to be seen how this term will be interpreted. Consider the following scenario: a group of American insurance companies use the new investor-state dispute process to challenge the Ontario government's plan to create a public auto insurance system without compensating them for their lost business. They win their case at the arbitral tribunal. The federal government is obliged to convince Ontario to alter its policy. If it fails, it will have to pay the damages that result to the private insurance companies (or incur the loss of NAFTA benefits for failing to pay such damages).<sup>66</sup> Ottawa consults with Ontario, but the provincial government is adamant. Is the federal government obliged by Article 105 to do anything more, or can it just pay the damages and leave it at that?

It might be argued by the complainants that Ottawa has not met its Article 105 obligation to take "all necessary measures" until it employs the financial and constitutional levers at its disposal to try to stop the Ontario government from implementing this policy. After all, federal payment of damages for provincial non-compliance is not the same as provincial compliance, and Article 105 speaks of the federal government's obligation to ensure the latter. "All necessary measures," in plain English, means whatever measures are necessary to get the job done. If the parties wanted a weaker standard than that, it could be argued, they could have retained the weaker GATT standard.

If a NAFTA panel accepted such arguments, and ruled that the federal government must launch a constitutional challenge against Ontario's right to pursue such a policy in order to meet its Article 105 obligations, the NAFTA Commission would have to decide whether to back the panel's interpretation. The Commission, which must operate by consensus, could decide to override the NAFTA panel, perhaps on the not implausible grounds that such an exercise



of *force majeure* could well provoke a constitutional crisis in Canada that would result in the abrogation of the NAFTA. On the other hand, with a lot of money at stake, there would be strong pressures on the American government to press its claims. It would have to consider not only the losses in the Ontario case, but also the implications for the security of American investments in Mexico — the single most important purpose of the entire treaty for the United States. In the absence of a Commission consensus to the contrary, the panel's interpretation would presumably stand.

We cannot know exactly how far the federal government might be compelled to go in order to meet its Article 105 obligations, or what would happen if the Government of Canada balked at a NAFTA panel's interpretation on this point. All that can be said with any conviction is that the high conflict scenario sketched above does not depend on manifestly implausible provincial government policy objectives, or wild interpretations of NAFTA investor rights or of the words of Article 105.

#### FEDERAL ENFORCEMENT STRATEGIES

By what means might the federal government seek to meet its Article 105 obligations, and how effective are these means likely to be? I first consider the constitutional division of powers as it bears on the federal government's capacity to enforce through legislation. I then turn to the non-legislative means by which the federal government might attempt to induce provincial government compliance, regardless of the constitutional division of powers.

The federal government could argue for its authority to make laws to implement and enforce the NAFTA under its treaty power, its trade and commerce power, or its "Peace, Order and Good Government" (POGG) power. The federal treaty power appears to be the least promising of these possibilities, owing to the near-sacred status that the JCPC's decision in the *Labour Conventions* case (1937) has acquired over the years.<sup>67</sup> The case involved federal legislation to implement three International Labour Organization (ILO) conventions that the Bennett government had ratified in 1935. Lord Atkin, for the Judicial Committee of the Privy Council, held that the federal government could only introduce the legislation necessary to implement treaties on matters falling within its jurisdiction. In areas falling under provincial jurisdiction, the federal government would have to persuade provincial governments to introduce the required implementing legislation, if legislation were required. In Canada, the federal government could not expand the scope of its jurisdiction simply by signing a treaty trenching on provincial jurisdiction.

The more likely strategy is to expand what has traditionally been understood to be the scope of federal jurisdiction so as to encompass the provincial practices that the federal government is required to alter. The most promising

ways to realize this objective are to build on recent developments in the interpretation of the federal trade and commerce and POGG powers.

In the United States, the federal commerce power was dramatically expanded in a series of landmark cases upholding the constitutionality of much of President Roosevelt's New Deal legislation.<sup>68</sup> In Canada, however, the JCPC defined the Canadian trade and commerce power much more narrowly. In the 1960s, the Supreme Court of Canada began to broaden the interpretation somewhat.<sup>69</sup> But the most important trade and commerce power case for our purposes is a very recent one, *General Motors v. City National Leasing* (1989). In that case, the six Supreme Court of Canada judges participating in the decision unanimously upheld the federal *Combines Investigation Act* on the ground that it fell within the scope of the federal trade and commerce power. In so doing, the court affirmed the criteria developed by (then) Chief Justice Dickson in the *C.N. Transportation* case (1983): (i) the regulatory scheme must be national in scope, rather than local, and pertain to trade in general, rather than a particular business; (ii) provinces must be constitutionally incapable of implementing the type of regulation in question; and (iii) failure to include one or more provinces must jeopardize the successful operation of the regulatory scheme in other parts of the country.<sup>70</sup>

It is difficult to assess the federal government's capacity to meet these conditions. The first seems straightforward: the NAFTA is surely national in scope and pertains to trade in general. However, the NAFTA applies to much more than trade and commerce (i.e., to investment flows and investor and intellectual property rights). These latter provisions certainly affect trade and commerce, but then so do any number of other things (e.g., civil rights and language policies). It could therefore be argued that the first branch of Dickson's test screens out the federal government's power to enforce aspects of the NAFTA that fall outside some reasonably circumscribed definition of "trade and commerce."

The second test could also be difficult for the federal government to meet. Provincial governments are constitutionally capable of implementing the NAFTA provisions that bear on their practices; the problem is that they may not all want to implement such provisions. The third condition raises the question: What counts as "the regulatory scheme"? If it is the NAFTA as a whole, and one province fails to implement some or all of its provisions, this may not undermine the deal as a whole. If it does not, then it will continue to apply in the other provinces. If several provinces refuse to cooperate, however, the other NAFTA parties may threaten to pull out of the deal, which would have an impact on all provinces. On this reading, as much depends upon the behaviour of other provinces and other parties to the agreement as it does on the behaviour of a single non-complying province.

The leading case expanding the POGG power is *Crown Zellerbach* (1988). In that case, the Supreme Court of Canada upheld federal legislation prohibiting the dumping of any substance at sea, even though the definition of "sea" included provincial internal waters, and some kinds of dumping might have no direct effect on an expressly conferred federal jurisdiction such as the fisheries. The court upheld the federal law not on the ground that it was necessary to implement an international convention, but on the ground that it was necessary to realize an objective of "national concern." The court set out three conditions that federal legislation must meet in order to fall under the "national concern" dimension of the POGG power: (i) "it must have a singleness and distinctiveness of purpose that distinguishes it from provincial legislation; (ii) it must have a limited scale of impact so as not to cut a devastating path through provincial jurisdictions; and (iii) it must have been shown that the failure of a province or provinces to deal effectively with the problem would have significant extra-provincial impacts."<sup>71</sup>

It is not easy to assess the chances of a federal claim to enforce one of the agreements considered here under this new doctrine. Regarding the first condition, it could be argued that implementing the NAFTA is a single purpose, and one that falls outside provincial jurisdiction by virtue of its status as an international agreement. But "singleness of purpose" is a slippery concept. If the intent (or effect?) of the agreement is not only to permit the freer movement of goods and services across national borders, but also to alter the risks and other incentives facing investors in ways that will substantially alter international capital flows, does the NAFTA embody multiple "purposes"? As to the second condition, what counts as a "devastating" intrusion into provincial jurisdiction? Will courts look only to the impact that the NAFTA has on existing provincial policies, or will they consider what future provincial electorates might want their governments to do? The final condition should be relatively easy to meet. If a provincial government is found to have violated the provisions of one of these agreements and fails to alter its behaviour, then trade sanctions may be levied against Canada as a whole, rather than the offending province alone. Such sanctions would constitute a clear extra-provincial impact. Knowing this, other NAFTA parties keen to increase the federal government's enforcement capacity would have a strong incentive to threaten this sort of sanction.

In summary, all of the possible routes for justifying federal legislative enforcement are problematic. The federal trade and commerce and POGG powers are more promising than the federal treaty power, but it is by no means obvious that any of them are adequate to justify the scale of the shift in what we have heretofore understood to be the division of powers implied by the FTA and the NAFTA. Of course, the issue will only be decided *en masse* in this way,

rather than on a case-by-case basis, if a government sends a more general reference to the courts. This is a high risk move for either side.

The language of the new conditions posited in these areas is far too vague to permit such weighty matters to be decided by a process of deduction from doctrinal first principles, even if there were a judicial consensus on a doctrine or model of federalism in Canada. In practice, the trade-offs implicit in the answers given by the courts, while buttressed by reason, will depend upon the ideological and political commitments of those who sit on the bench. These personal biases will be tempered and conditioned by the balance of political forces in the wider society, because unelected judges concerned to maintain the legitimacy of judicial review in a democratic society can never move very far away from any broad societal consensus that emerges.

The NAFTA does not require the federal government to override or strike down non-conforming provincial measures by legislative means. It is enough if the federal government can induce provincial governments to bring their measures into conformity with the requirements of the agreement through some form of positive or negative incentive. The two most plausible tools at this level are the threat to introduce enforcement legislation, and the use of the federal spending power.

If the federal government introduced enforcement legislation that clearly overrode significant provincial legislation, the affected provincial governments would be forced to either back down and lose face, or launch a constitutional challenge. If they launched such a challenge and lost, the ramifications for their jurisdiction might be larger and more negative than compliance with the particular provisions in the federal legislation as noted above. Depending on the importance of the measure at issue (e.g., public auto insurance versus an obscure effluent standard), and how risk averse the affected governments are, they might decide that bowing to the federal legislation is the lesser evil.

Another weapon in the federal enforcement arsenal, which can be used as a carrot or a stick, is its spending power. Given the level of federal transfers to provincial governments — particularly the share of total revenues that such transfers represent for the poorer provinces — the threat to make some part of those transfers conditional on meeting NAFTA obligations cannot be dismissed lightly. Some find this scenario implausible, but the federal government was willing to use this weapon to protect the principles of the *Canada Health Act*. It does not seem so far-fetched to think that a future federal government (perhaps even the current one) will put at least as much stock in the private property rights embodied in the NAFTA as in the principles of Canada's health-care system. Certainly, the current federal government has not been reluctant, in the name of budgetary responsibility, to violate the conventions governing unilateral changes to the five-yearly federal-provincial fiscal arrangements.<sup>72</sup> Is not the defence of "free trade," a good relationship with our

major trading partner, and so on, at least as compelling as balancing the federal budget?

To conclude, the NAFTA main agreement (unlike the side-deals) purports to impose stronger legal restrictions on a broader range of actual and potential provincial policy instruments than any other trade agreement Canada has ever signed. The precise character of the federal government's obligation to enforce these restrictions against recalcitrant provincial governments is unclear, but it is likely to be more extensive than the GATT. The federal government's constitutional right to enforce these provisions legislatively is also unclear, but Ottawa has a number of potentially quite effective means to induce provincial compliance, short of outright legislation. In all of these respects, the NAFTA echoes and reinforces the FTA. Taken together, these considerations suggest that the NAFTA could become the legal basis for a significant narrowing of the provincial policy space, whether or not this is ever recognized as a formal shift in the division of powers.

## CONCLUSION

Pulling together the discussion of the last three sections, the most general conclusion is that things are not always as they appear to be. It might appear that the greatest constraints on provincial government powers are to be found in the legal restrictions embodied in these agreements. But the largest and most powerful constraints on Canada's provincial governments are likely to result from the substantially increased capital mobility that depends most upon the legal restrictions imposed on the federal government of Mexico.

It might appear that the legal restrictions on the federal Government of Canada are greater than those that apply to the provincial governments, since all restrictions in these agreements apply to the federal government, while only some apply to provincial governments. Nevertheless, Ottawa has found a way to at least claim the right to regulate provincial governments to an extent far beyond anything ever attempted with the spending power, and provincial governments have thus far granted this claim sufficient credibility by refraining to test it in the courts. Moreover, the market constraints increased by the agreement will fall most heavily on provincial and local governments.

It might appear that the most substantial legal restrictions on provincial jurisdiction must be located in the side-deals, since these are the agreements that give provincial governments the right to opt-out, and indeed, to "deactivate" the entire agreement if most choose not to participate. Yet it seems most unlikely that the side-deals will require changes in existing provincial policies in the labour and environmental fields, or foreclose any future options that provincial governments might wish to pursue. Conversely, the NAFTA — which lacks all such opt-out and threshold mechanisms — is the source of a

wide range of important legal restrictions on current and future provincial government policy instruments and options.

Finally, it might appear that the Meech Lake and Charlottetown Accords were about fundamental constitutional reform, while the FTA and NAFTA are about something quite different called trade policy. But the federal government has sought (among other things) to advance the same neo-conservative policy prescriptions in both processes. Efforts to bring expanded private property rights and increased court powers over provincial industrial policies through the front door of formal constitutional reform were blocked by provincial governments, social movements, and Canadian voters. It may be argued therefore that important steps towards the realization of these objectives were nonetheless made through the back door opened by the FTA and the NAFTA. These gains have been entrenched in the quasi-constitutional form of an international agreement that will be difficult if not impossible for subsequent national governments to amend in these areas, and more costly to abrogate with each passing year. In the constitutional shell game, the pea turns out to have been under the shell labelled "trade policy."

For a decade now, the attention of students of federalism has been rivetted on our marathon efforts to amend the constitution, in ever more baroque ways, in response to the burgeoning demands of the politics of collective identity. These reform efforts — those that succeeded and those that did not — have changed Canadians and, to some degree, the character of Canadian federalism. They have not, however, resulted in any major changes in the formal or the actual division of powers. The politics of identity may yet alter the character of Canadian federalism more profoundly, perhaps even leading to the exit of Quebec from the federation.

Meanwhile, however, the character of Canadian federalism is subject to change from another source: developments in the international and domestic political economy, and changes in the economic and social roles of the state. For the foreseeable future, the form that globalization takes will be the most important determinant of changes of this type. I would argue that two broad types of globalization are possible: one would extend the national and subnational deregulation trends of the 1980s; the other would build new supranational institutions to regulate international worker rights and labour and environmental standards. I called these the neo-conservative and the communitarian forms of globalization.

No matter which form of globalization prevails, federal intrusions into provincial jurisdictions can be expected to increase in scope, and both orders of government will be increasingly subordinate to new quasi-constitutional obligations located in international agreements backed by trade sanctions. The real issue is not whether such a reduction in "state sovereignty" — both federal and provincial — can be stopped, but what form this reduction takes, and what

ends it serves. I have argued that neo-conservative globalization will substantially reduce the capacity of both national and provincial governments to pursue the kinds of public goods that their electorates value (e.g., low unemployment and rising real wages). Communitarian globalization, on the other hand, offers the prospect of increasing governments' capacity to realize such values, even though they restrict the policy instruments available to do so.

The international economic integration agreements such as the *Single European Market Act* and the FTA, the NAFTA, and the Maastricht Treaty will be among the most important determinants of which form of globalization emerges in the coming years. If implemented, the NAFTA will substantially encourage the neo-conservative form of globalization. In part, this flows from the new legal restrictions that the agreement imposes on a wide range of federal and provincial policy instruments. But even more important are the new market constraints on government power and policy options that flow from the increased capital mobility that this agreement promotes. The market constraints will exist even if Canada refuses to implement the NAFTA, provided that the United States and Mexico go ahead with it. The market constraints will also hit provincial governments harder than national governments. Only the defeat of the NAFTA in the United States or Mexico can prevent an acceleration of already existing tendencies towards the neo-conservative model of globalization in North America.

The labour and environmental side-deals to the NAFTA, insisted upon by the Clinton administration, and strongly resisted by the governments of both Canada and Mexico, represent a gesture — but little more than that — in the direction of communitarian globalization. They do not even begin to neutralize the NAFTA's acceleration and intensification of the trend towards neo-conservative globalization, much less to set the political economies of North America firmly on the path to communitarian globalization. When assessing the likely impact of these agreements on the character of Canadian federalism, then, we must view them as promoting subordinate federalism in the context of neo-conservative globalization. So understood, there are best-case and worst-case scenarios.

In the best case, where the economy performs well, subordinate federalism is likely to resemble the "classical" federalism of the 1920s more than anything else with which we are familiar. Both orders of government will do much less, with fewer policy instruments. They will therefore interact with one another less, whether in cooperation or conflict.

In the worst case, stronger versions of the neo-conservative economic policy prescriptions of the 1980s will only exacerbate current economic problems of high and rising unemployment, falling real wages for most Canadians, and increasing income polarization. In such an economic context, the federal government will have to try to enforce a wide range of NAFTA-type restrictions

against provincial governments and electorates that are increasingly inclined to view them as counterproductive and unconstitutional. The result could be intense federal-provincial conflict and constitutional crisis.

## NOTES

This chapter is based on a paper presented to the annual meeting of the Canadian Political Science Association at Carleton University, on 7 June 1993. Thanks to Alain Noel for organizing the session, and to Richard Simeon, Ronald Watts, and Yves Vaillancourt for their comments on that paper. My understanding of the NAFTA and its relation to provincial power has also been advanced through conversations with Frank Longo, Barry Appleton, Louise Barry, Sandra Morris, and Doug Brown over the course of the last year. Thanks are also due to Doug Brown and Patti Candido for their editorial work on this manuscript. Any remaining errors are my own. Research for this paper was made possible in part by a Post-Doctoral Research Fellowship from the Social Sciences and Humanities Research Council of Canada.

1. For the details of these developments, and an explanation of the periodization in the evolution of Canadian federalism that will be used throughout this chapter, see Richard Simeon and Ian Robinson, *State, Society and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990).
2. See my forthcoming chapter "Globalization, Trade Policy and Canadian Federalism," in François Rocher and Miriam Smith (eds.), *New Trends in Canadian Federalism* (Peterborough: Broadview, forthcoming).
3. By the time the FTA was signed, the Tokyo GATT had been fully implemented. By 1987, about 70 percent of Canadian goods entered the United States duty free and vice versa. The average American tariff on the remaining 30 percent of Canadian goods was under 5 percent, though it was over 20 percent in the apparel sector. The average Canadian tariff against American goods was somewhat higher, but under 10 percent. See Michael Hart, *A North American Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1990), pp. 42-43.
4. For an overview of Mexican tariffs, border measures, and NTBs as of 1990, see Clyde Prestowitz, Jr. and Robert Cohen, with Peter Morici and Alan Tonelson, *The New North American Order: A Win-Win Strategy for U.S.-Mexico Trade* (New York: University Press of America, 1991), pp. 14-23, 113-16.
5. "Property rights" include but go beyond the exclusive ownership of a thing or an idea. A right to the value accruing from — or expected to accrue from — the use of some thing or idea is also a property right. Government regulations can reduce the value of property even though they do not expropriate it. Investor rights that restrict such government regulations — or provide for compensation for any lost value caused by such regulations — can thus be understood as a species of property rights.
6. The NAFTA's Investment chapter is the only one that American negotiators sought to protect with a clause guaranteeing that its provisions would continue to apply for a full decade after abrogation, should any party exercise its right to abrogate the agreement. This provision was cut in the final round of negotiations and does



not appear in the final text, but it indicates the unique importance attached to this chapter by American negotiators.

7. FTA Article 1603. Performance requirements are conditions that investors must meet if they are to do business in a province or nation. Most apply exclusively to foreign corporations, because the ownership structure of these corporations was thought to make them less amenable to other forms of government regulation, and more likely to behave in ways contrary to the public interest. The National Treatment principle would require governments to generalize performance requirements to all comparable investors, foreign and domestic. The four performance requirements listed are prohibited even if governments impose them equally on domestic investors.
8. FTA Article 1605. This may amount to importing American property rights jurisprudence into Canada. Under Canadian law, there is a convention of statutory interpretation to the effect that governments are bound to compensate private property holders who are expropriated unless the expropriating legislation clearly indicates that there is to be no compensation. See *Manitoba Fisheries* case [1979] 1 S.C.R. 101. Under American constitutional law, no matter what a government includes in a statute, the constitution has been interpreted to prohibit the expropriation of private property without "just compensation." See *Pennsylvania Coal v. Mahon* (1922) 260 U.S. 393.
9. See FTA Article 2011. The "nullification and impairment" clause states that a government measure need not conflict with the provisions of the FTA in order to violate this Article. Nor need the expected benefits be "directly" affected by the measure in question; it is enough if they are "indirectly" affected (whatever that means).
10. "Technology transfer" conditions require foreign investors to train Canadian workers and engineers in all stages of product development, manufacture, and sale. "Product mandating" requires the parent TNC to assign its operations in a particular country the mandate to develop, produce, and market one or more products in the continental or global market.
11. Foreign investors seeking the more limited protections of the FTA's Investment chapter had to own a majority of shares in, or otherwise control, the business claiming these protections. The NAFTA definition of "investment" merely requires *some* American or Mexican ownership or control. This appears to grant almost any publicly held business operating in Canada protection under this chapter, since most of them will have at least some American (or Mexican) ownership. Protection against the performance requirements listed in Article 1106 extends even further to include all foreign investors.
12. Article 2010 of the FTA imposed constraints on the creation of new monopolies and the operation of existing ones by governments. Governments had to try to "minimize or eliminate any nullification or impairment of benefits" to U.S. investors or exporters caused by such monopolies. Further, monopolies were required to act "solely in accordance with commercial considerations" and could not use their monopoly power to engage in "anticompetitive practices," such as "the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct."

13. NAFTA Articles 1502, 1503 and 1505.
14. There were no *intellectual property* (IP) provisions in the Tokyo GATT or the FTA. Intellectual property rights were discussed during the FTA negotiations at American insistence, but no agreement was reached. See G. Bruce Doern and Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991), pp. 67-74, 97-98, 153-57, and 281-82.
15. NAFTA Articles 1714-1718.
16. FTA Article 1703.
17. NAFTA Articles 1405 and 1401, respectively.
18. NAFTA Article 1415.
19. Article 1407.
20. NAFTA Article 904.
21. See "United States — Section 337, Report of the Panel (16.1.89)," *World Trade Materials*, 2, 1 (January 1990): 51-53.
22. For example, Northern Telecom has recently developed a non-ozone-depleting (i.e., CFC-free) way of cleaning printed circuits and microchips. Were Canada to require that all producers of such materials in that province and all exporters of such materials to that province employ a CFC-free process, this would place Northern Telecom's foreign rivals at a competitive disadvantage in Canada until they licensed its clean technology or developed their own. This would be enough to qualify such a regulation as discriminatory, hence trade restrictive, on the ECO interpretation. Thanks to Frank Longo for this example.
23. NAFTA Articles 1404.5, 1404.6, and 1404.7.
24. See Claus Offe and Helmut Weisenthal, "Two Logics of Collective Action," in Maurice Zeitlin (ed.), *Political Power and Social Theory*, vol. 1 (Greenwood, Conn.: JAI Press, 1980), pp. 67-115.
25. See C.E. Lindblom, "The Market as Prison," in Thomas Ferguson and Joel Rogers, (eds.), *The Political Economy: Readings in the Politics and Economics of American Public Policy* (Armonk, NY: M.E. Sharpe, 1984), pp. 3-11.
26. See Adam Przeworski and Michael Wallerstein, "Democratic Capitalism at the Crossroads," in Ferguson and Rogers (eds.), *ibid.*, pp. 335-48.
27. For estimates of the scale of the losses incurred by the Canadian government as a result of cuts in corporate income tax since the early 1970s, motivated in part by the intensifying international competition for investment, see David Wolfe, "The Politics of Deficits," in G. Bruce Doern (ed.), *The Politics of Economic Policy* (Toronto: University of Toronto Press, 1985), pp. 111-162.
28. See David R. Cameron, "The Growth of Government Spending: The Canadian Experience in Comparative Perspective," in Keith Banting (ed.), *State and Society: Canada in Comparative Perspective* (Toronto: University of Toronto Press, 1986), pp. 21-51; and John D. Stephens, *The Transition from Capitalism to Socialism* (Chicago: University of Illinois Press, 1986), pp. 89-176.
29. See Stephens, *ibid.*, pp. 163-76; and Francis Green, Andrew Henley and Euclid Tsakalotos, "Income Inequality in Corporatist and Liberal Economies: A

- Comparison of Trends within OECD Countries," Working Paper 92/13 (Leicester: Centre for Labour Market Studies, University of Leicester, November 1992).
30. See David R. Cameron, "Social Democracy, Corporatism, Labour Quiescence, and the Representation of Economic Interest in Advanced Capitalist Society," in John H. Goldthorpe (ed.), *Order and Conflict in Contemporary Capitalism: Studies in the Political Economy of Western European Nations* (Oxford: The Clarendon Press, 1984), pp. 143-178; and Miriam Golden, "The Dynamics of Trade Unionism and National Economic Performance," *American Political Science Review*, 87, 2 (June 1993): 439-54.
  31. See Noah Meltz, "Unionism in the Private-Service Sector: A Canada-U.S. Comparison," in Jane Jenson and Rianne Mahon (eds.), *The Challenge of Restructuring: North American Labor Movements Respond* (Philadelphia: Temple University Press, 1993), pp. 207-225.
  32. By "social dumping" I mean a competitive strategy that pushes the costs of labour and/or natural resource inputs below their real costs to society and/or the global ecosystem. Costs can be externalized in this fashion by repressing worker rights or maintaining labour standards far below the levels that productivity levels permit, and/or by exploiting the environment without any consideration for the standards necessary to maintain the sustainability of the resource. On social dumping in North America, see Jim Stanford, "Cheap Labour as an Unfair Subsidy in North American Free Trade," (Ottawa: Canadian Centre for Policy Alternatives, 1992). On social dumping in the EC, see Christopher Erickson and Sarosh Kuruvilla, "Labor Costs and the Social Dumping Debate in the European Community," photocopied ms. (October 1992).
  33. The unbracketed portions are those on which there was already agreement among the negotiators by 9 August 1993. It is therefore less likely that there will be changes to these sections. The 9 August 1993 labour side-deal text was reproduced in full in *Inside U.S. Trade* (20 August 1993), pp. 7-13.
  34. See Government of Canada, *Highlights of the Labour and Environmental Agreements* (August 1993).
  35. It is not clear who is to determine whether these criteria have been met. It could be the government launching the ECE process, or it might be the first issue to be decided by an ECE once it is convened, or it might be decided in some other fashion.
  36. Article 17.3 states that the Evaluation Committee of Experts provisions apply only to "matters occurring after the entry into force of this Agreement." A "pattern" of non-enforcement, according to the definitions in Part VII, must involve "a series of events and does not arise from a single instance or case." Does this mean that sustained failure to enforce prior to the agreement cannot be counted as part of the requisite "series of events"? The answer is probably yes. Article 29 of the environmental side-deal explicitly includes a "non-retroactivity" clause stating that "The provisions of this Agreement do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of this Agreement."

37. See Article 17.2 of the 9 August 1993 draft text. Part XI defines "trade related" to mean "a situation involving workplaces, firms, companies or sectors that produce goods or services traded between the Parties or that compete with goods produced and services provided by another Party." This could mean that labour laws otherwise covered by the agreement pertaining to the public sector, and to substantial parts of the private-service sector that are not traded, would be exempt from the agreement. This was one of the Canadian government's original proposals.
38. I see nothing in the text of the 9 August 1993 draft, or in the subsequent dispute resolution provisions texts (see previous endnotes for references) that prevents the arbitral panel from examining complaints of failure to enforce type (b) labour laws. However, the "Summary of the North American Agreement on Labour Cooperation" released on 13 August 1993 indicates that the arbitral panel can investigate alleged violations of the agreement pertaining to "labour laws with respect to health and safety, child labour and minimum wage" (p.4). This is also Scott Otteman's interpretation. See "NAFTA Accord Reveals Watered-Down Deal," *Inside U.S. Trade* (20 August 1993), pp. 1, 6 at 6.
39. See "Kantor Highlights Enforcement Provisions of NAFTA Side Accords," *Inside U.S. Trade* (16 August 1993), pp. S1-S8, at S1. It is doubtful that a statute can deny the courts the right to hear appeals that raise constitutional questions. The agreement presumably refers to appeals based on other grounds.
40. See Annex II: Subnational Governments. The draft text provides for a ministerial council review and possible modification of threshold levels two years after the agreement enters into force. The point of this provision seems to be to make it possible to lower the thresholds if necessary. See "Provinces Could Limit Challenges to Canada Under NAFTA Side-Deals," *Inside U.S. Trade* (20 August 1993), pp. 1, 17 at 17.
41. At his 13 August 1993 press conference, Canadian Trade Minister Thomas Hockin argued that provincial governments have an incentive to participate so as to enable Canada to challenge enforcement failures in the U.S. and Mexico. Participating provinces would also be permitted to take part in a number of the "cooperative exercises" specified in the agreement, if they sign on. See *ibid.*, p. 17. The cooperative exercises mentioned by the minister could be those listed in Part VI of the 9 August 1993 draft, the cooperative consultations process described in Part IV, or both.
42. For a detailed discussion of provincial NTBs, see John Quinn, "Federalism and Foreign Economic Relations," *Canada-United States Law Journal*, 10 (1985): 197-219.
43. For details of the federal-provincial process associated with the Tokyo round negotiations, see Douglas M. Brown, "The Evolving Role of the Provinces in Canada-U.S. Trade Relations," in Douglas M. Brown and Earl H. Fry (eds.), *States and Provinces in the International Economy* (Berkeley: Institute of Governmental Studies Press, University of California, Berkeley, 1993), pp. 107-111.
44. The subsidies code contained a "commitment" by the parties not to employ export subsidies (except for certain primary products). But it did not define an "export subsidy." Nor did it seek to distinguish between subsidies that should be

countervailing and those that should not, leaving this judgement to national legislation. The code's principal impact was on countervailing duties, rather than subsidies per se. National governments wishing to impose a countervailing duty were required to hold prior consultations with the alleged subsidizer, and to demonstrate that some of its producers had suffered material injury as a result of the alleged subsidy. They were also committed to ensure that the scale of any countervailing duties levied was commensurate with the scale of the subsidy that it is supposed to neutralize. Provinces provide subsidies, but they do not levy countervailing duties, so the code did not restrict their subsidy practices. If anything, it provided their subsidy practices with greater protection against massive (and disproportionate) retaliation than they had enjoyed prior to the Tokyo Subsidies Code.

45. See Article 2.1, Agreement on Technical Barriers to Trade, in *The Texts of the Tokyo Round Agreement* (Geneva: GATT, August 1986), pp. 2-3.
46. Ontario Ministry of the Attorney-General, *The Constitutional Impact of the Free Trade Agreement* (Toronto: Ministry of the Attorney-General, 1988), pp. 4-5.
47. Suppose that the provincial government of Ontario passes legislation creating a public monopoly in auto insurance. No private investor has been expropriated, but the value of private investments has been reduced. Should these investors be compensated for this loss of value? American courts have interpreted the constitutional prohibition on "takings" of property without just compensation to include reductions in the value of property. The Canadian convention that statutes will be interpreted to compensate expropriated property-owners — unless the statute explicitly states otherwise — does not conflate expropriation and value-diminishing regulation. Here, as with expropriation, the FTA moves Canadian law towards American property rights doctrines.
48. Controls on the export of logs and unprocessed fish on the east coast were exempted from this prohibition by Article 1203, but export controls on unprocessed minerals and west coast fish are prohibited. "Backward" industrial linkages related to minerals would include mining equipment; "forward" linkages would include refining plants, smelters, and the like.
49. The FTA subsidies code was to provide "rules governing government subsidies and private anti-competitive pricing practices such as dumping, which are not controlled through unilateral application of countervailing and antidumping duties." Government of Canada, *The Canada-U.S. Free Trade Agreement* (Ottawa: External Affairs Canada, 1988), p. 267, referring to Articles 1906 and 1907.
50. A decent interval was observed between the 1988 election and the quiet end of efforts to negotiate the subsidies code. With hindsight, it is remarkable that some trade experts took seriously the idea that this commitment would ever be realized. If the U.S. signed such a code with Canada (20 percent of its export market), and brought its subsidy practices into conformity with it, it would lose an important source of leverage to induce its other trading partners to make reciprocal concessions on their subsidy practices.

Recognizing this, Canadian trade officials now look to the Uruguay round of the GATT for a subsidies code sufficiently strong to discipline American legal definitions of unfair subsidies. However, the subsidies code outlined in the Dunkel

draft promises to be highly intrusive with respect to provincial jurisdiction. It divides all subsidies into "general" and "specific" subsidies. All specific subsidies — i.e., those that are targeted on a particular firm, or sector, or region — are *prima facie* trade distorting. If the nation is the unit of analysis, then all subnational government subsidies are regionally specific, since they apply within a part of the nation's territory. All subnational government subsidies are therefore *prima facie* trade distorting and as such, countervailable. Existing inconsistent subsidy programs may be grandfathered for up to three years, but no more. See Matt Schaefer and Thomas O. Singer, "U.S. Multilateral Trade Agreements and the States: An Analysis of Potential GATT Uruguay Round Agreements" (Denver, CO: Western Governors' Association, May 1992), pp. 22-25. Exceptions are made for R&D and assistance to disadvantaged regions, but it is unclear whether provincial regional policies fall under the latter exception unless approved by the federal government. The Canadian government has made altering the subsidies code its top priority in the GATT negotiations, but so far there is no indication that it is succeeding in this effort. See *Inside U.S. Trade* (4 December 1992), p. 3.

51. FTA Article 708.2b. The GATT language, as we have seen, prohibited only "unnecessary" restrictions on trade.
52. See Rudolf Hrbek, "German Federalism and the Challenge of European Integration," in Charlie Jeffrey and Peter Savigear (eds.), *German Federalism Today* (Leicester and London: Leicester University Press, 1991), pp. 84-102. For suggestions on how Canadian practices and processes might be modified to address the same problems, see Richard Simeon, "Federalism and Free Trade," in Peter M. Leslie (ed.), *Canada: The State of the Federation, 1986* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1986), pp. 189-214; and Douglas M. Brown, "The Evolving Role of the Provinces," pp. 123-134.
53. See Brown, *ibid.*, p. 116.
54. For details, see Anonymous, "Issues of Constitutional Jurisdiction," in Peter M. Leslie and Ronald L. Watts, *Canada: The State of the Federation, 1987-88* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1988), pp. 39-55, at pp. 45-46.
55. The federal government claims that it secured an exemption from both provisions in Annex I-C-5, but these exemptions apply only to conditions attached to the federal review of foreign acquisitions of Canadian companies under the *Investment Canada Act*. They do not exempt provincial regulations or conditions, they do not apply to foreign acquisitions of existing foreign investments, and they do not apply to any new foreign acquisitions of Canadian firms valued at less than \$150 million.
56. Reed Scowen, "We Are Americans," *Montreal Gazette* (10 February 1993), p. B3, argues that "the role and even the existence of the Canadian head offices of U.S. firms is being questioned everywhere. What, exactly, is the purpose of a second head office in a single market?... The expansion, contraction, and the existence of Canadian factories and research facilities is being reconsidered." Isaiah Litvak, "U.S. Multinationals: Repositioning the Canadian Subsidiary," *Business in the Contemporary World*, 3, 1 (Autumn 1990): 111-19, also finds that many U.S. TNCs are considering moving managerial functions once performed in Canada to American head offices.

57. Testimony of the deputy minister of the environment for Ontario to the Ontario Select Committee on Ontario Hydro Affairs, reported in their published *Hearings* (29 July 1980), p. 27. For a detailed case study of federal-provincial interactions on labour and environmental standards issues, see Ian Robinson, "The Costs of Uncertainty: Regulating Health and Safety in the Canadian Uranium Industry," Working Paper No. 24 (Kingston: Centre for Resource Studies, Queen's University, April 1982).
58. See the text of the 9 August 1993 draft, *Inside U.S. Trade* (20 August 1993), pp. 7-8.
59. See the Annex to the environmental side-deal draft text (10 August), Section II on "Effective Enforcement," in *Inside U.S. Trade*, Special Report (20 August 1993), p. 9.
60. I am not aware of a systematic comparison of environmental standards and enforcement in Canada and the United States. However, Kathryn Harrison's recent paper on enforcement in the pulp and paper industries of the two countries finds that compliance in Canada is significantly lower than in the United States. See Harrison, "Is Cooperation the Answer? A Comparison of Canadian and U.S. Enforcement of Environmental Regulations," paper prepared for the annual meeting of the American Political Science Association, Washington, DC, 2-5 September 1993.
61. Regarding the labour side-deal, all that Canadian citizens groups can do is go to their NAO and request that it initiate consultations with another government alleged to be failing to enforce its laws; they cannot ask that their NAO enter into consultations (or anything stronger) with a provincial government. In the environmental side-deal process, Canadian citizens can request that the Environmental Secretariat investigate complaints of non-enforcement against their own country as well as the other signatories. However, the secretariat is not even allowed to compile a "factual record" on the allegations without the support of two of the three members (i.e., governments) of the Environmental Council. This would imply that both foreign governments would have to support the efforts of Canadian citizens to challenge their own government's enforcement record. Does this sound like good diplomacy? If not, what is the likelihood that it will ever happen?
62. See, e.g., Ian Austen, "Now Hard Part Begins: Provinces Hold Real Power and Have Good Reasons Not to Join," *Ottawa Citizen* (14 August 1993), and Barrie McKenna, "Ciaccia Blasts NAFTA Side Deal," *The Globe and Mail* (4 August 1993).
63. See GATT Article XXIV (12). Emphasis added.
64. See Anonymous, "Issues of Constitutional Jurisdiction," pp. 39-55, and Brown, "The Evolving Role of the Provinces," p. 115, for additional references.
65. FTA dispute resolution panels will have to decide the meaning of "all necessary measures" in the first instance. However, Article 1802.1 clearly assigns the Canada-U.S. Trade Commission, comprised of Cabinet-level representatives of the two national governments, the power "to resolve disputes that may arise over its [the FTA's] interpretation and application," and "to oversee its further elaboration." Article 1802.5 then states that the Commission's decisions shall be taken

by consensus. Are both national governments — challenger and defender — likely to agree to differ from the panel on such a key interpretative issue? On the face of it, this seems unlikely. If they do not, then the panel's interpretation presumably stands.

66. See Article 1135 (Final Award) which indicates that under the investor-state dispute process, the arbitral tribunal will award either monetary damages (plus interest) or restitution of property. It may also award costs in accordance with applicable arbitration rules. Article 2018 and 2019 contain the relevant provisions on what happens should the Canadian government fail to restore lost property values or pay the damages assessed by the tribunal.
67. *A.-G. Canada v. A.-G. Ontario* [1937] A.C. 326. See Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell Co., 1985), pp. 251-54; and Anonymous, "Issues of Constitutional Jurisdiction," p. 42 n.7.
68. The leading cases from this period are *NLRB v. Jones and Laughlin Steel* 301 U.S. 1 (1937), *U.S. v. Darby* 312 U.S. 100 (1941), and *Wickard v. Filburn* 317 U.S. 111 (1942). The federal commerce power has been further expanded since the New Deal, as a basis for U.S. laws banning racial discrimination in public places. See Gerald Gunther, *Constitutional Law*, 11th ed. (Mineola, NY: The Foundation Press, 1985), pp. 157-76.
69. See Hogg, *Constitutional Law*, chaps. 17, 19, and 20; and John D. Whyte, "The Impact of Internationalization on the Constitutional Setting," in *Think Globally: Proceedings of the 42nd Annual Conference* (Toronto: Institute of Public Administration of Canada, 1991).
70. See *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641 and *Attorney General of Canada v. Canadian National Transportation*, [1983] 2 S.C.R. 206, discussed in Whyte, "Impact of Internationalization," pp. 13-14.
71. See *The Queen v. Crown Zellerbach*, [1988] 1 S.C.R. 401, discussed in Whyte, "Impact of Internationalization," pp. 477-78; 480-81.
72. See James J. Rice and Michael J. Prince, "Lowering the Safety Net and Weakening the Bonds of Nationhood: Social Policy in the Mulroney Years," in Susan D. Phillips (ed.), *How Ottawa Spends, 1993-1994: A More Democratic Canada...?* (Ottawa: Carleton University Press, 1993), pp. 381-416, at 396-99.





# IV

## Chronology

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## Chronology of Events July 1992 – June 1993\*

*Anne Poels*

An index of these events begins on page 255

1 July 1992  
*Taxation*

Personal income taxes rise in British Columbia by one percent to 52.5 percent of federal tax payable, in Ontario by 1.5 percent to 54.5 percent and in Newfoundland by 2.5 percent to 64.5 percent of federal tax. The tax increases are expected to generate \$900 million over the next two years.

Analysts fear that provincial as well as municipal tax increases across Canada will have a direct impact on consumer spending and further delay economic recovery.

2 July 1992  
*Fisheries –  
Northern Cod  
Moratorium*

Fisheries Minister John Crosbie announces a two-year shutdown of the northern cod fishery off Newfoundland's east coast to protect dwindling stocks and allow the resources time to recover. The moratorium leaves about 19,000 fishermen and plant workers out of work in the already depressed region. The northern cod fishery, worth \$700 million, provides 31,000 jobs in Atlantic Canada. Ottawa plans to provide emergency aid.

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\* The author would like to thank Dwight Herperger for his much appreciated assistance with entries concerning constitutional reform.

7 July 1992  
*Constitutional  
 Reform*

Constitutional Affairs Minister Joe Clark and nine provincial premiers (excluding Quebec) reach an agreement deal after a last ditch, three-day effort to save the almost four month process of multilateral talks on constitutional reform; the deal, presented as a response to Quebec's demands for offers on renewed federalism, ultimately hinged on agreement on a modified Triple-E Senate (elected, equal, effective).

The agreement gives each province eight seats (Quebec currently has 24) and the territories two seats each in the reformed Senate. Aboriginal representation is to be determined later.

To compensate for the loss of seats by some provinces in the Senate, the Commons would be expanded to better reflect population distribution. Ontario would get ten more seats, British Columbia and Quebec three and Alberta one.

Other elements of the agreement:

- Quebec would be recognized as a distinct society;
- The aboriginal inherent right of self-government would be enshrined;
- All provinces would have a veto on amendments to federal institutions, but not on the issue of new provinces;
- Provinces would have exclusive jurisdiction over manpower training, culture, forestry, mining, housing, recreation, tourism and urban affairs;
- There would be a commitment to dismantle inter-provincial barriers;
- There would be a statement of principles about social programs; and
- Quebec's right to three Supreme Court seats would be enshrined.

9 July 1992  
*Constitutional  
 Reform – Quebec*

Quebec Premier Robert Bourassa makes his first official response to the 7 July agreement, identifying positive elements in the constitutional package and leaving open the possibility of this province's return to the negotiating table; at the same time, Bourassa warns that the agreement, particularly the provisions relating to the Senate, would be "difficult to sell in Quebec" and are a "serious

setback" for the province, and that changes would be needed; other areas of concern identified by the premier were provisions relating to the division of powers and aboriginal self-government.

10 July 1992  
*Constitutional  
Reform*

At a news conference, Prime Minister Brian Mulroney hails the deal as containing "fundamental elements of an agreement" and says that Quebec could not expect much more from a constitutional settlement; indicating that the agreement would need some fine tuning, the prime minister cancels plans to recall Parliament 15 July to consider the constitutional deal.

14 July 1992  
*Constitutional  
Reform - Ontario*

Ontario Premier Bob Rae announces that he will not return to the constitutional bargaining table unless Quebec Premier Robert Bourassa is present as an active participant.

15 July 1992  
*Constitutional  
Reform*

Following a wave of criticism in Quebec towards the 7 July constitutional agreement, Prime Minister Mulroney appears to retreat from his remarks five days earlier by noting that his government would not support "any initiative whatsoever that would have the effect of isolating Quebec," particularly on the issue of Senate reform; in contrast, Constitutional Affairs Minister Joe Clark maintains that there will be no major structural changes to the proposal for an equal Senate, and or to other elements of the agreement.

17 July 1992  
*Fisheries -  
Compensation*

Fisheries Minister John Crosbie announces that fishermen left jobless as a result of the moratorium on northern cod fishing will receive up to \$406 a week depending on the average amount of their unemployment insurance benefits for the last three years. The payments are part of a plan that will offer retraining and early retirement to people wishing to leave the industry. The government hopes to reduce the number of people depending on the fishery for their livelihood by 5,000 over the next two years. Crosbie would not reveal the expected cost of the program, saying only it would be "well in excess" of \$500 million.

22 July 1992  
*Energy - Quebec*

The Cree of Quebec file a court order designed to stop Hydro-Québec from continuing construction on its La-forge 1 hydroelectric development. Hydro-Québec

maintains the project is not subject to environmental procedures specified in the 1975 James Bay agreement because it is part of the La Grande complex agreed to by the Cree. The Cree argue that Hydro-Québec made significant changes to the project since the 1975 agreement. Work on the \$1.6 billion project began in 1988 and is expected to be completed late next year.

28 July 1992  
*Industrial Policy –  
Ontario*

The Ontario NDP government presents its new industrial strategy. The strategy identifies six "competitive fundamentals" the government wants to advance through its spending and policy proposals. These include:

- increasing the technological and innovative capacities of Ontario companies;
- encouraging companies to place more of their "home-base" activities in Ontario;
- developing closer cooperation among companies in each sector while improving their international potential.

29 July 1992  
*Constitutional  
Reform – Quebec*

Quebec Premier Robert Bourassa announces that he will drop his province's two-year boycott of constitutional talks and attend a lunch meeting of all first ministers at Harrington Lake to discuss the progress of the multilateral talks.

The Quebec premier cites several conditions for his return to the bargaining table, including: clarification regarding the creation of new provinces, changes to the provisions on a distinct society clause and an improved deal on immigration.

4 August 1992  
*Constitutional  
Reform –  
Federal-Provincial*

Prime Minister Brian Mulroney and all the provincial premiers, including Quebec, meet at Harrington Lake to discuss how to proceed with the constitutional talks. Aboriginal leaders protest their exclusion from the talks.

12 August 1992  
*Free Trade – North  
America*

Officials from Canada, United States and Mexico reach a tentative agreement on a "North American Free Trade Agreement." The deal, agreed to in Washington, provides for the phase-out of investment and trade barriers on thousands of items over the next ten years. The new agreement leaves intact the Canada-U.S. auto pact and at the same time opens up Mexico's highly protected auto market to duty free imports following a ten-year

phase in period. In the textile and clothing industries Canada agrees to stricter rules which require more yarns and fabrics to be produced in North America.

Reaction to the agreement is mixed. Trade Minister Michael Wilson calls it a "good agreement for all three countries"; Bob White, president of the Canadian Labour Congress vows an all out fight against the agreement; and Ontario NDP Premier Bob Rae calls the agreement a "sell out" of Canada's economy.

17 August 1992  
*Health Policy –  
Saskatchewan*

Saskatchewan announces plans to introduce a "new era" in health-care delivery. Health Minister Louise Simard presents a "conceptual framework" that will shift the responsibility for the \$1.6 billion health budget from the province to 20 or 30 newly created regional health boards. The province also plans to merge several government departments, such as health, environment and social services, to promote better health and disease prevention as well as to cut costs.

22 August 1992  
*Constitutional  
Reform*

An agreement-in-principle is reached on a sweeping package of constitutional reforms after five days of intense, behind-closed-doors bargaining in Ottawa among all eleven first ministers and territorial and aboriginal leaders.

28 August 1992  
*Constitutional  
Reform –  
Charlottetown  
Agreement*

Prime Minister Mulroney meets with the ten provincial premiers, two territorial leaders and four aboriginal leaders in Charlottetown to put the finishing touches on the constitutional agreement reached a week earlier, and announces at a press conference that all the participants in the multilateral talks are leaning towards a national referendum.

Some of the provisions of the Charlottetown agreement are:

- An elected and equal Senate;
- 18 more Commons seats for Ontario and Quebec;
- Reduction of Senate seats to 62, six from each province and one from each territory;
- Senate veto for legislation involving natural resource taxation, and ratification authority over certain government appointments;

- A Senate double-majority (i.e., of both French and English-speaking Senators) requirement for legislation affecting French language and culture;
- The power to force a joint sitting of both houses by a majority vote against Commons bills;
- The recognition of an inherent right of aboriginal self-government, including provision for the courts to mandate progress towards implementation if negotiations are delayed;
- A set of principles outlining the social and economic union;
- Confirmation of provincial control over forestry, mining, tourism, recreation, housing, municipal and urban affairs, job training and culture. Federal control remains over national cultural institutions, and unemployment insurance;
- Provisions for constitutionally-protected agreements concerning immigration and regional development;
- Harmonization of federal and provincial rules on telecommunications.

The agreement must still be ratified by all governments; and legislation in British Columbia, Alberta and Quebec requires these provinces to hold their own referendums on the proposed constitutional amendments.

There appears to be wide support for the agreement across the country. With the exception of Parti Québécois most federal, business and union leaders pledge their support.

4 September 1992  
*Aboriginal Peoples*  
 – *Self-government*

In a step towards self-government, the Inuit of Northern Quebec assume control over the federal government's local employment and manpower training programs. It is the first time Ottawa has transferred such power to a regional government controlled by Aboriginal Peoples. The Inuit are currently negotiating with Quebec to transfer administration of provincial manpower programs as well.

8 September 1992  
*Constitutional*  
 Reform – *Quebec*

The Quebec National Assembly amends Bill 150 to allow for a referendum vote on the Charlottetown Accord, rather than on sovereignty as originally envisaged in the legislation.

9 September 1992  
*Party Leadership –  
Alberta*

Alberta Premier Don Getty stuns the country by announcing his resignation from government, with plans to step down this fall. Getty said he wanted to devote his time to selling the Charlottetown agreement in the referendum campaign without any question of his motives.

10 September 1992  
*Constitutional  
Reform –  
Referendum*

The House of Commons, in a vote of 233-12, approves legislation for a national referendum on the question: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on 28 August 1992?"

11 September 1992  
*Maritime provinces  
– Cooperation*

In an effort to reduce the size and cost of government the three Maritime Provinces sign several cooperation agreements in Halifax. The three governments agree to harmonize their business taxes, jointly promote exports and tourism, harmonize their agriculture departments, deregulate the trucking and bus industries, and study the removal of barriers to job mobility.

The premiers of Nova Scotia, New Brunswick and Prince Edward Island make it clear that a full Maritime Union is not being considered.

13 September 1992  
*Constitutional  
Reform –  
Referendum*

National Action Committee on the Status of Women President Judy Rebick announces that her organization will campaign for a "No" vote in the national referendum.

14 September 1992  
*Education – New  
Brunswick*

The New Brunswick government announces plans to spend an extra \$61.1 million to improve education in the province. The additional funds are aimed at giving students more testing in core subjects, smaller classes, improved curriculum content in subjects such as math, sciences and languages, as well as providing more support for remedial programs and libraries.

15 September 1992  
*Constitutional  
Reform –  
Referendum*

The Senate gives final approval to the wording of the question for the national referendum, clearing the way for a campaign for the national vote; federal law will govern the vote in the nine provinces and two territories, while Quebec legislation will guide the vote there; federally, there will be an unlimited number of ("Yes" and "No") committees with relatively flexible spending limits, while in Quebec, there will be two umbrella committees with fixed spending limits.



- 16 September 1992  
*Constitutional Reform – Referendum*
- A taped telephone conversation between two senior Quebec constitutional advisors (outgoing Deputy Minister of Intergovernmental Affairs Diane Wilhelmy, and Andre Tremblay, a senior advisor to the premier), is leaked to the press. The conversation contends that the Charlottetown agreement is “humiliating” to Quebec and that Premier Bourassa “caved in” during negotiations. A court injunction obtained by Wilhelmy two days earlier did little to prevent the leaks and did not apply to publication of the transcripts of the conversation outside the province.
- 16 September 1992  
*Social Assistance*
- A bill to end the family allowance, known as the “baby bonus,” passes in the Commons by a vote of 99-62. It will be replaced by a system designed to give more assistance to the working poor. Many fear that the bill marks the beginning of the end for universal social programs in Canada.
- 17 September 1992  
*Health Policy – Funding*
- Canada’s health ministers meet in St. John’s and call for a national information network to be set up. The network’s mandate would be to analyze how well health dollars are spent, how costs can be cut, and services improved.
- 21 September 1992  
*Constitutional Reform – Referendum*
- The national referendum campaign officially begins.
- 21 September 1992  
*Aboriginal Peoples – Land Claims – British Columbia*
- The British Columbia Treaty Commission is established. The committee will work to facilitate negotiations, with various aboriginal groups, involving land claims in British Columbia.
- 22 September 1992  
*Aboriginal Peoples – Land Claims – Saskatchewan*
- Prime Minister Brian Mulroney and Premier Roy Romanow sign a \$450 million land deal with Saskatchewan Indian Bands. The money provided by both Ottawa and Saskatchewan will enable bands to purchase between 170,000 and 640,000 hectares of new lands for reserve status.

- 26 September 1992  
*Constitutional Reform – Referendum*  
Angus Reid/Southam News releases a poll indicating significant loss of support for the “Yes” side across the country — particularly in British Columbia, Alberta and Quebec.
- 29 September 1992  
*Constitutional Reform – Referendum*  
In a dramatic gesture Prime Minister Brian Mulroney rips up a list of Quebec’s gains while speaking in Sherbrooke, Quebec.
- 1 October 1992  
*Constitutional Reform – Referendum*  
Former Prime Minister Pierre Trudeau gives a speech at Maison du Egg Roll in Montreal in which he urges Canadians to vote “No” in the 26 October referendum. The speech is seen as a significant boost to the “No” forces in the referendum campaign.
- 1 October 1992  
*Aboriginal Peoples – Justice*  
The government of Nova Scotia and native leaders sign an agreement which will allow some of the minor criminal cases to be tried by a native panel on the Indian Brook reserve. The agreement is seen as a step toward a native justice system, recommended by a provincial inquiry into the case of Donald Marshall Jr., a Micmac wrongly convicted of murder.
- 7 October 1992  
*Free Trade – North America*  
Trade ministers from Canada, the United States and Mexico initial the legal text of the North American Free Trade Agreement in San Antonio, Texas. Prime Minister Mulroney attends the ceremony and says that “the North American free-trade agreement provides us all with a pathway to prosperity.”
- 7 October 1992  
*Aboriginal Peoples – Royal Commission*  
The Royal Commission on Aboriginal Peoples releases a report entitled *Framing the Issues* in which it calls for a complete restructuring of relations between natives and non-natives in Canada. The report stresses that aboriginal self-government is a crucial first step towards reconciliation.
- 10 October 1992  
*Constitutional Reform – Charlottetown Agreement*  
The legal text of the Charlottetown Accord is released in Quebec, quieting allegations that vital information was being withheld from voters and fears that the original Charlottetown agreement was being watered down; the text was released early in Quebec to accommodate a televised debate between Premier Bourassa and PQ leader Jacques Parizeau.

13 October 1992  
*Constitutional  
Reform –  
Charlottetown  
Agreement*

The 51-page “best efforts” legal text of the Charlottetown Accord is released across Canada. At the same time two political accords, which were included as part of the Charlottetown Accord, are made public by Ottawa; the first dealing with aboriginal representation on the Supreme Court, and the second relating to the provision of land and resources to Métis communities. The accords are not legally binding.

18 October 1992  
*Constitutional  
Reform –  
Aboriginal Peoples*

Assembly of First Nations chiefs meet in Vancouver, inviting Constitutional Affairs Minister Joe Clark and premiers Harcourt, Romanow and Rae to speak; they fail to provide their support for the “Yes” campaign, in contradiction of the position taken by the AFN Grand Chief Ovide Mercredi.

26 October 1992  
*Constitutional  
Reform –  
Referendum*

The Canada-wide referendum vote is held, with an overall vote of 44.6 percent for the Charlottetown Accord and 54.4 percent against. A majority “No” vote is delivered in six of the ten provinces. Percentage results by province and territory are:

	<i>Yes</i>	<i>No</i>
Newfoundland	62.9	36.5
Prince Edward Island	73.6	25.9
Nova Scotia	48.5	51.1
New Brunswick	61.3	38.0
Quebec	42.4	55.4
Ontario	49.8	49.6
Manitoba	37.8	61.6
Saskatchewan	44.5	55.2
Alberta	39.7	60.1
British Columbia	31.7	68.0
Yukon	43.4	56.1
Northwest Territories	60.6	38.7

29 October 1992  
*Economic Policy*

A federal advisory committee, appointed by Prime Minister Mulroney to make recommendations concerning the economy, co-chaired by David Camus and Marie-Josée Drouin, presents its report. The study, entitled *Inventing our Future — An Action Plan for Canada's Prosperity*, says Canada should trim federal and provincial deficits through spending cuts, not tax increases.

- 30 October 1992  
*Party Leadership –  
Prince Edward  
Island* Joe Ghiz resigns as premier of Prince Edward Island after holding office for six years.
- 30 October 1992  
*Aboriginal Peoples  
– Land Claims* Inuit, federal and territorial leaders sign a political accord in Iqaluit for the division of the Northwest Territories and the creation of a new territory of Nunavut by the end of the century. Ottawa agrees to cover costs of setting up the new territorial government, including training programs to help the Inuit develop the skills and workforce necessary to run the government.  
The land agreement would give the Inuit title to 350,000 square kilometres, as well as \$1.15 billion over 14 years.
- 5 November 1992  
*Fiscal Policy –  
British Columbia* In an effort to reduce a mounting deficit of almost \$2.7 billion, British Columbia announces \$83 million in spending cuts. Finance Minister Glen Clark blames his province's financial woes on reduced personal and corporate income tax revenues from Ottawa — about \$500 million below projection this year.
- 7 November 1992  
*Health Policy –  
Ontario* The Ontario Medical Association and the Province of Ontario agree on a cost-cutting agreement. A number of medical services, such as examinations for life insurance, school entrance, motor-vehicle or pilots' licence, and sick notes will now be billed directly to the patient.
- 12 November 1992  
*Aboriginal Peoples  
– Land Claims* Referendum results, in which the Inuit of the eastern Arctic endorse by 69 percent the proposed land claim settlement and the creation of a new territory of Nunavut, are released in Iqaluit.
- 12 November 1992  
*Telecommunications  
– Manitoba* Manitoba becomes the ninth province to allow long-distance telephone competition. Saskatchewan remains the only province where competition for long-distance telephone service is not allowed.
- 19 November 1992  
*Transportation –  
Royal Commission* The federal Royal Commission on transportation, appointed by Prime Minister Mulroney in October 1989 following public protests over Ottawa's intention to cut Via Rail service by 50 percent, presents its report. The Commission recommends that Canadian governments should phase out their \$5 billion-a-year transportation

subsidies within ten years and make passengers responsible for the full cost of road, rail, water and air travel.

20 November 1992  
*Environment –  
Quebec*

The Federal Court of Appeal, in a 3-0 decision, rules that federal environmental review regulations cannot be applied retroactively to government decisions made before the regulations came into effect in 1984. The court's decision was made in reference to the \$1.5 billion Eastmain hydroelectric development in northern Quebec. The James Bay Cree, who are seeking the environmental review for Eastmain, say they will appeal.

25 November 1992  
*Fisheries –  
Compensation*

Federal Fisheries Minister John Crosbie announces that Ottawa will spend about \$5 million on make-work projects designed to help unemployed fishery workers in Quebec and Atlantic Canada qualify for unemployment insurance.

Crosbie also announces that another \$100 million will be made available to older workers, aged 55 to 64, who decide to leave the fishery by the end of the year.

26 November 1992  
*Fiscal Policy –  
Ontario*

Ontario Treasurer Floyd Laughren announces an expenditure restraint package designed to help bring the province's deficit under control. Ontario's schools, hospitals and municipalities will receive the promised 2 percent increase in their transfer payments for the fiscal year 1993-94 but not the following year. University and college tuition will rise by 7 percent and the implementation of job equity in the public sector will be delayed until 1998. These new measures are expected to save \$600 million in the fiscal year beginning in April 1993 and another \$1.2 billion the following year.

26 November 1992  
*Environment*

Federal and provincial environment ministers meet in Aylmer, Quebec. At the conclusion of a two-day conference they announce a new plan to control national air quality starting next year. The ministers were responding in part to a report released by Pollution Probe claiming that toxic air pollutants are contaminating soils, crops and waterways across Canada.

2 December 1992  
*Fiscal Policy*

Finance Minister Don Mazankowski presents a special economic statement in the Commons. The government is proposing to cut \$8 billion in spending. Taxes are not expected to rise. One widely criticized measure is the

plan to save \$2.5 billion from the unemployment insurance budget by denying benefits to people who quit jobs without just cause or are fired for misconduct. Other cost saving measures proposed by the government:

- a two-year freeze on salaries for federal public servants and judges; and
- a 3 percent cut in government departmental operating budgets for 1993-94.

3 December 1992  
*Trade –  
Interprovincial*

Provincial trade ministers meet in Toronto and agree to start a negotiating process aimed at dismantling inter-provincial trade barriers by 1995. The ministers plan to meet again in March.

4 December 1992  
*Budgets –  
Newfoundland*

Newfoundland's Finance Minister Winston Baker presents a mini-budget. Personal income tax will rise 4.5 percent to 69 percent of basic federal tax. Tobacco and gasoline will cost more as will obtaining a driver's licence and registering of vehicles. Newfoundland is hoping that the new measures will help to cut the 1992-93 provincial deficit in half to \$78.6 million.

14 December 1992  
*Resources*

Federal Health Minister Benoît Bouchard and Quebec Energy Minister Lise Bacon announce in Montreal that the Canada-Quebec Agreement on Mineral Development will be extended to 1998. The agreement is expected to pump \$100 million into the depressed sector. Ottawa and Quebec will split the cost.

16 December 1992  
*Education –  
New Brunswick*

The Senate approves a constitutional resolution guaranteeing English and French communities in New Brunswick the right to their own cultural and educational institutions. (The bilateral Canada-New Brunswick amendment had been part of the Charlottetown Accord set of amendments.)

16 December 1992  
*Transportation –  
Prince Edward  
Island*

Ottawa, New Brunswick and Prince Edward Island sign a federal-provincial agreement in Charlottetown for the construction of an \$800 million bridge linking Prince Edward Island to the mainland.

17 December 1992  
*Fiscal Policy*

Canada's finance ministers meet in Ottawa and agree to cut spending for two or three years to control the ever rising deficits. Federal Finance Minister Don Mazankowski fails to persuade his provincial

counterparts to put tax increases on hold. In view of Ottawa's limits on growth in transfer payments to the provinces, for health care, education and welfare, provincial finance ministers feel they have few other options.

- 17 December 1992  
*Free Trade – North America*  
Prime Minister Brian Mulroney signs the North American Free Trade Agreement. In order for the agreement to become law legislation must still be passed in all three countries.
- 17 December 1992  
*Energy – Manitoba*  
Manitoba announces it will not go ahead with its \$5.8 billion Cinawapa dam project. In 1989 Ontario Hydro agreed to buy 1,000 megawatts of electricity, for 22 years beginning in 2000, from Manitoba. Recently, however, demand has decreased and Ontario Hydro, facing financial problems and a surplus of electricity, backed out of the deal.
- 18 December 1992  
*Fisheries – Quotas*  
In an effort to preserve what is left of the groundfishery on the East Coast the federal government further slashes quotas, in some cases by as much as 70 percent, and limits fishing licences. Fisheries Minister John Crosbie says that people forced out of the industry will receive employment training aid but no special compensation.
- 21 December 1992  
*Sovereignty – Quebec*  
Speaking at a Quebec City news conference, Parti Québécois Leader Jacques Parizeau predicts that Quebec could become a sovereign country within two and a half years.
- 23 December 1992  
*Fiscal Policy – Alberta*  
Alberta Treasurer Jim Dinning announces that this year's provincial deficit will be \$300 million higher than expected. Dinning blamed the increase on welfare and education costs and a drop in income tax revenues. Alberta is expected to have a \$2.6 billion deficit this year.
- 23 December 1992  
*Telecommunications*  
The Federal Court of Appeal rules that major Canadian telephone companies must pay millions of dollars to enable their competitors to hook up to their systems.
- 8 January 1993  
*Energy – Aboriginal Peoples – Quebec*  
The Cree of Northern Quebec sign a deal in Montreal with Hydro-Québec. The agreement is designed to compensate the Cree for the social, economic and environmental disruption on their communities of the La Grande

hydroelectric project. The Cree will receive a minimum of \$125 million over 50 years.

13 January 1993  
*Aboriginal Peoples  
– Land Claims*

The Sahtu Dene of the Great Bear Lake region of the Northwest Territories reach a land-claims agreement with the federal government. The agreement, signed in Yellowknife, will give the Sahtu Dene and Métis 41,437 square kilometres of land, a tax-free payment of \$75 million over 15 years and a share of the government's resource royalties from the southern Mackenzie Valley.

15 January 1993  
*Energy – Hibernia*

Ottawa steps in to increase its share of the \$5.2 billion Hibernia oilfield project in order to keep the project going. Energy Minister Bill McKnight confirms that the federal government will spend \$360 million on an 8.5 percent share in the oilfield, located off the coast of Newfoundland.

19 January 1993  
*Energy – British  
Columbia*

Premier Mike Harcourt announces that the government of British Columbia will hold public hearings to determine ways to reduce the environmental impact of the \$1 billion Kimano hydroelectric project. Harcourt also emphasizes, however, that the British Columbia government will not stop the completion of the project.

19 January 1993  
*Health Policy –  
Quebec*

Quebec's Finance Minister Gérard-D. Levesque and Treasury Board President Daniel Johnson release a discussion paper in which they suggest imposing user fees for health services, raising university tuition and school taxes, privatizing Crown holdings, contracting-out services and holding down civil servants' wages and benefits. The measures outlined in the report are designed to attack the provincial deficit which has risen to more than \$4.2 billion this year.

20 January 1993  
*Labour Training*

Federal-provincial ministers meet in Toronto for talks on labour and training issues.

Federal Employment Minister Bernard Valcourt refuses to relinquish control over manpower and job training to the provinces, a move Ottawa agreed to in the Charlottetown Accord, in spite of pressure from Quebec.

22 January 1993  
*Social Assistance –  
Ontario*

The government of Ontario agrees to take over the costs of general welfare now paid for by municipalities. Municipalities in turn agree to maintain more roads and pay



the \$135 million cost of providing property assessment services. The province will also reduce its grants to municipalities by \$165 million to reflect their savings on welfare.

The change, to take effect next January, will bring the province's share of welfare costs to approximately 70 percent, with the other 30 percent being paid by Ottawa.

25 January 1993  
*Aboriginal Peoples*

The Ontario Court of Appeal rules that Indians in Canada do not have a historical right to bring commercial goods across the U.S. border.

25 January 1993  
*Party Leadership –  
Prince Edward  
Island*

Catherine Callbeck is sworn in as premier of Prince Edward Island, succeeding the retiring Joe Ghiz.

2 February 1993  
*Health Policy –  
British Columbia*

British Columbia's Health Minister Elizabeth Cull announces major reforms to the province's health-care system. The responsibility for planning and management of the province's \$6 billion yearly budget will now fall to local authorities. Newly created community health councils and regional boards will have the responsibility of deciding which services best meet the needs of the population and which services should be cut. The Health Ministry will continue to set standards and establish core services that all community councils must provide.

3 February 1993  
*Fiscal Policy –  
British Columbia –  
Deficits*

A study commissioned by British Columbia's NDP government shows that Ottawa is "offloading" its financial problems on the provinces contributing to soaring provincial deficits. Federal Finance Minister Don Mazankowski responds by saying that British Columbia is looking for a scapegoat to justify its own out-of-control deficit expected to reach \$2.3 billion this year.

9 February 1993  
*Aboriginal Peoples  
– Newfoundland*

Federal Minister of Indian Affairs, Tom Siddon announces that the federal government will pay for the relocation of the Innu village of Davis Inlet in northern Labrador. In 1967 the Newfoundland government moved the community to its remote location. Davis Inlet has been progressively devastated by poverty and suicide.

24 February 1993  
*Party Leadership –  
Federal*

Prime Minister Brian Mulroney announces his plans to resign in June after a successor is chosen to lead the Progressive Conservative Party.

25 February 1993  
*Fiscal Policy –  
Equalization  
Payments –  
Transfer Payments*

Six provinces, Newfoundland, Prince Edward Island, Nova Scotia, Quebec, Manitoba and Saskatchewan, are told by Ottawa that they will have to repay more than \$600 million in equalization payments. The changes in transfer payments result from new estimates of the population by Statistics Canada. However, Ottawa now owes the provinces more under the EPF program. The census recalculation also affects the equalization program as a bigger proportion of the undercount is in provinces that define the equalization standard. The amount the poorer provinces will have to pay back more than exceeds the increase they will get under the EPF. On the other hand, Ontario, British Columbia, Alberta and New Brunswick will benefit from the revision and are expected to receive an extra \$200 million next year and \$400 million in back payments.

1 March 1993  
*Fiscal Policy –  
Ontario,  
Saskatchewan,  
British Columbia*

Canada's three NDP premiers, Rae, Romanow and Harcourt, agree at a meeting in Toronto to form a common front when dealing with Ottawa on fiscal matters.

The three premiers complain that the federal government blames them for running high deficits while it continues to reduce the amount it pays towards cost-sharing programs.

The premiers also condemn the proposed North American Free Trade Agreement saying it will further contribute to Canada's unemployment.

4 March 1993  
*Education –  
Manitoba*

In a unanimous decision the Supreme Court of Canada rules that Manitoba must establish an independent French-language school board and hand over exclusive control of French-language education to the franco-phone community.

9 March 1993  
*Fiscal Policy –  
Federal*

Moody's Investors Services releases a report in which it paints a grim picture of Canada's financial health. The report also backs provincial claims that Ottawa has been off-loading its debt problems on the provinces by reducing transfer payments for social programs. Since 1990, Moody's has downgraded Ontario, Alberta and

- Saskatchewan, making it more expensive for them to borrow money.
- 12 March 1993  
*Constitutional Reform – Official Languages – New Brunswick*
- Following the passage of constitutional resolutions in the New Brunswick Legislature and the House of Commons and Senate, the Governor-General of Canada proclaims the amendment of the *Constitution Act, 1982* to add a new section 16.1 entrenching the equality of the English and French linguistic communities in the province of New Brunswick, including the right to distinct educational and cultural institutions. The amendment is the first of the provisions that had been part of the Charlottetown Accord to become constitutional law.
- 17 March 1993  
*Fiscal Policy – Stabilization Payments*
- Ontario, Saskatchewan and Prince Edward Island will receive special fiscal stabilization payments from the federal government. Stabilization payments are made to provinces facing a year-over-year decline in revenues because of economic downturn. Final amounts have not yet been determined.
- 18 March 1993  
*Budgets – Saskatchewan*
- The Saskatchewan government presents its 1993-94 budget in which it proposes to cut its deficit in half to \$296 million. Taxes will rise, hospitals, municipalities, schools and universities will have their grants reduced and farmers will receive 19 percent less in support payments. The universal prescription drug plan and a children's dental plan will apply only to the needy. The government will spend an additional \$15 million on social services and another \$51 million on research and development on ways to stimulate the economy and create jobs.
- 18 March 1993  
*Budgets – Newfoundland*
- The Newfoundland government presents its budget. There will be no new tax increases, instead money will be saved by cuts in public spending. Public sector workers will have their compensation packages cut by \$70 million and another \$29 million will come from cuts to programs and services.
- The government plans to bring its 1993-94 provincial deficit to \$51 billion.

- 19 March 1993  
*Economic Policy – Federal-Provincial – Alberta*
- Federal Finance Minister Don Mazankowski, Alberta Premier Ralph Klein and Cabinet ministers from both levels of government meet in Calgary. Ottawa and Alberta hope to coordinate economic policies and eliminate overlap in areas of shared concern. Among other things they agree to improve highways throughout Alberta and to combine environmental assessment reviews for major projects.
- 20 March 1993  
*Budgets – British Columbia*
- Glen Clark, British Columbia's finance minister, brings down the provincial budget. Taxes will rise and spending will increase by 5.7 percent. The deficit is projected to be \$1.5 billion for 1993-94 which will bring the province's accumulated debt to \$26.4 billion.
- 25 March 1993  
*Budgets – Yukon*
- The Yukon government presents its budget. Taxes will rise but the territory hopes to balance its \$483 million budget and eliminate the \$57 million deficit left over from the previous NDP administration.
- 29 March 1993  
*Elections – Prince Edward Island*
- Catherine Callbeck, leader of Prince Edward Island's Liberals, becomes Canada's first elected female premier. The Liberals win 31 of the 32 seats in the Island legislature. Pat Mella, the Conservative leader, captures the sole remaining seat to become the official opposition.
- 31 March 1993  
*Budgets – New Brunswick*
- New Brunswick presents its budget. The budget contains tax increases, spending cuts and job losses. The budget deficit for 1993-94 is forecast to reach \$350 million, raising the province's net debt to \$4.1 billion.
- 2 April 1993  
*Aboriginal Peoples – Royal Commission*
- The Royal Commission on Aboriginal Peoples releases its second report. Commission member Alan Blakeney resigns in frustration over how the Commission is proceeding. Blakeney is reported as being dissatisfied with the slowness in finding practical solutions to the problems of Aboriginal Peoples.
- Ovide Mercredi, national chief of the Assembly of First Nations, also voices his dissatisfaction saying the Commission has yet to offer "concrete and substantive solutions."
- 6 April 1993  
*Budgets – Manitoba*
- Manitoba releases its budget designed to reduce the deficit through spending cuts and tax hikes. Finance Minister Clayton Manness forecasts total spending of

- \$5.4 billion in fiscal year 1993-94, down 1.2 percent from last year, and a deficit of \$367 million compared with \$562 million in 1992-93.
- 6 April 1993  
*Transportation –  
New Brunswick*
- New Brunswick Premier Frank McKenna and the federal government come to an agreement on a deal to upgrade the Trans-Canada Highway running through the province. The agreement commits each government to spend \$150 million over the next four years.
- Ottawa and Nova Scotia also recently signed an agreement to upgrade the highways in that province, worth \$140 million.
- 22 April 1993  
*Parti Québécois –  
Manifesto*
- The Parti Québécois publishes a new manifesto entitled "Quebec in a New World." The manifesto proposes that a sovereign Quebec and Canada break all political ties but establish three bi-national institutions to manage their economic association. A Council of Ministers, made up of elected members from the two states, a Secretariat, an administrative branch of the Council of Ministers and a Tribunal that would act as a dispute-settlement mechanism on trade matters. The manifesto will serve as a discussion document as the Parti Québécois prepares a new platform in the coming months in anticipation of the 1994 provincial election.
- 23 April 1993  
*Fisheries –  
Compensation*
- Fisheries Minister John Crosbie announces a further \$190 million aid package to the East Coast groundfishery. Fishermen whose catch consists of 50 percent groundfish and workers in plants who process 25 percent groundfish will qualify for assistance.
- 26 April 1993  
*Budgets – Federal*
- Finance Minister Don Mazankowski delivers what is termed a "pre-election" budget. There will be no rise in taxes and no significant cuts in government spending. The deficit is expected to be \$32.6 billion. The accumulated federal debt is expected to be in excess of \$450 billion this year.
- 3 May 1993  
*Elections –  
Newfoundland*
- Newfoundland's Premier Clyde Wells is re-elected for a second term. The Liberals capture 34 seats in the 52 seat legislature, the Conservatives 17 and the NDP one.
- 6 May 1993  
*Budgets – Alberta*
- Alberta's Treasurer Jim Dinning presents what is expected to be a pre-election budget. There will be no tax

increases, and deficit reduction will come through spending cuts. The deficit is expected to be \$2.5 billion for 1993-94 down from \$3.2 billion last year.

6 May 1993  
*Fiscal Policy –  
New Brunswick*

The New Brunswick legislature passes a balanced budget bill that makes it illegal for the government to show a cumulative deficit on its current account (day-to-day) expenditures. There are no penalties in case the government fails to abide by the new law. Alberta also passed a similar deficit elimination bill this month.

13 May 1993  
*Fisheries – Reform*

Fisheries Minister John Crosbie introduces legislation in the Commons that would see the creation of two independent agencies, the Atlantic Fisheries Board and the Pacific Fisheries Board, representing the east and west coasts. The agencies would have the authority to decide who could catch fish and how much they could take. The proposal is met with opposition from Newfoundland's premier, Clyde Wells, who feels that the plan compromises his province's fishing interests. Wells wants Newfoundland to have more control over the fishery.

13 May 1993  
*Environment –  
Prince Edward  
Island*

Federal Public Works Minister Elmer McKay announces that his department has completed a court-ordered environmental impact assessment of the proposed bridge between Prince Edward Island and New Brunswick and found it to be insignificant. He added that the governments of Prince Edward Island, New Brunswick and Nova Scotia "concur with the process followed to date." Ottawa now has 30 days to decide whether to hold public hearings on the potential environmental effects of the \$840 million project.

17 May 1993  
*Education –  
Manitoba*

Manitoba introduces a bill aimed at the establishment of a new francophone school board. The legislation is in response to a recent Supreme Court ruling that gave Manitoba's francophone parents control over the education of their children.

19 May 1993  
*Budgets – Ontario*

Ontario's NDP government introduces a budget that includes \$1.6 billion in tax increases, the biggest increase in the province's history. Ontario's Finance Minister Floyd Laughren says that the tax increases coupled with \$4 billion spending cuts are necessary to keep the projected deficit for 1993-94 to \$9.2 billion. Laughren

- estimates that Ontario's total expenditures will be \$53.1 billion overall, about the same as last year.
- 20 May 1993  
*Budgets – Quebec*
- Quebec's Finance Minister Gérard-D. Levesque tables a budget that eliminates deductions, closes loopholes and leaves Quebecers \$1.3 billion poorer. Levesque's aim is to hold the province's 1993-94 deficit at \$4.1 billion, down from \$4.9 billion in the last fiscal year.
- 25 May 1993  
*Elections – Nova Scotia*
- The Liberals, led by John Savage, win a resounding majority in Nova Scotia's provincial election winning 40 out of 52 ridings. The Conservatives manage to hold on to nine seats while the NDP fail to add to their existing three seats.
- 27 May 1993  
*Free Trade – North America*
- The Commons passes legislation that would bring Canada into the proposed North American Free Trade Agreement by a vote of 140-124. The bill now goes to the Senate for approval. The agreement, if ratified in Canada, United States and Mexico, is scheduled to take effect 1 January 1994.
- 28 May 1993  
*Aboriginal Peoples – Land Claims*
- The federal government introduces legislation to create Canada's third territory. The Inuit of the Eastern Arctic and Prime Minister Mulroney signed the final agreement to create the territory of Nunavut on 25 May in Iqaluit, N.W.T. Ottawa agreed to create the territory by 1999. The Inuit will own one-fifth of the new territory and have the right to fish and trap in the rest. They will also get \$1.14 billion over 14 years and representation on boards and commissions concerning Nunavut.
- 29 May 1993  
*Aboriginal Peoples – Land Claims*
- The federal government and First Nations in the Yukon sign a land claims agreement in Whitehorse. The settlement, known as the Umbrella Final Agreement, gives the 14 First Nations involved \$280 million and 41,400 square kilometres of land to divide among themselves. The agreement provides for the establishment of a joint management board system between the Indians and the territorial government in such areas as wildlife and land use. It also envisions eventual Indian self-government with jurisdiction over taxation, education, justice and environmental protection.

31 May 1993  
*Fiscal Policy –  
Debt and Deficit  
Reduction*

Federal and provincial finance ministers meet in Ottawa to discuss the debt and deficit reduction. Bank of Canada governor John Crow also attends the two day meetings.

The nine ministers agree to work over the summer on issues such as duplication of services and the reduction in costs of social programs.

9 June 1993  
*Fiscal Policy –  
Federal Debt*

Moody's Investors Service, a prominent New York bond-rating agency, releases a report in which it down-plays Canada's debt crisis. Moody's vice-president William Streeter, speaking in Toronto, says "we do not subscribe to the notion that there is an impending credit crisis." Streeter expects, however, that the provinces will have to pay more for the money they borrow.

10 June 1993  
*Aboriginal Peoples –  
Land Claims*

Legislation providing for the creation of Canada's third territory, Nunavut, passes in the Senate.

13 June 1993  
*Party Leadership –  
Federal*

Kim Campbell becomes the new Conservative leader at the party's leadership convention in Ottawa. Campbell wins on the second ballot with 1,817 votes over 1,630 for Environment Minister Jean Charest. Campbell will become Canada's first female prime minister when she officially takes over from Brian Mulroney 25 June.

15 June 1993  
*Transportation –  
Prince Edward  
Island*

Legislation allowing the federal government to proceed with plans to build a bridge between Prince Edward Island and New Brunswick passes in the Commons by a vote of 146-17. Before it becomes law the bill must also be approved in the Senate.

15 June 1993  
*Elections – Alberta*

Alberta's Conservatives under Premier Ralph Klein are re-elected with a majority government. The Tories win 51 seats, the Liberals become the official opposition with 32 seats, and the NDP fail to elect a single member, losing all 15 seats they held in the previous legislature.

17 June 1993  
*Budget – Prince  
Edward Island*

Prince Edward Island Treasurer Wayne Cheverie brings down a deficit-fighting budget. There will be job cuts affecting civil servants as well as government workers in the health-care and education fields. There will be no new hospitals or schools built and road construction will be limited. The new budget cuts spending by \$25.4 million to \$792.6 million for fiscal year 1993-94.



- Cheverie expects a deficit of \$25.4 million this year down from last year's \$83.4 million.
- 18 June 1993  
*Fisheries – Reform – Compensation*
- Fisheries Minister John Crosbie holds out little hope for a significant recovery of cod stocks before the late 1990s. Crosbie would not commit to future aid for those left unemployed as the result of a two-year fishing moratorium, imposed last July, when a federal compensation program runs out next year. Crosbie says that Ottawa is willing to set aside proposals for fisheries reform, which the federal government introduced in May, if Newfoundland stops its push for joint management of the resource.
- 21 June 1993  
*Aboriginal Peoples – Land Claims – British Columbia*
- The federal government and the government of British Columbia sign a memorandum of understanding aimed at settling aboriginal land claims in the province. Ottawa agrees to provide most of the money and British Columbia most of the land. It is hoped that the agreement will facilitate negotiations between the Aboriginal Peoples and the province.
- 22 June 1993  
*Fiscal Policy – Quebec*
- Moody's Investors Service cuts Quebec's credit rating from AA minus to A plus citing continuing budgetary pressures that hinder deficit fighting. Quebec now rates lower than British Columbia, Ontario, Alberta and New Brunswick.
- 25 June 1993  
*Aboriginal Peoples – Land Claims – British Columbia*
- The British Columbia Court of Appeal rules that the Gitksan and Wet'suwet'en Indians have a valid claim to aboriginal rights for the use of territory in the northwestern part of the province. In a unanimous decision the court agrees that aboriginal rights to the land have not been relinquished during colonial times before British Columbia joined Confederation in 1871. However, the court declines to extend ownership as such of the lands involved to the Gitksan and Wet'suwet'en.

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