Federal-Provincial Fiscal Arrangements: Their Impact on Social Policy and Current Prospects for Reform

Harry Beatty
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I. FEDERAL-PROVINCIAL FISCAL ARRANGEMENTS AND CANADIAN SOCIAL POLICY

For the student of Canadian social policy, the most arcane yet essential subject is provided by the federal-provincial fiscal arrangements which impact so pervasively. These agreements play a crucial, if somewhat hidden, role in determining the shape of income maintenance programs and social services. The purpose of this paper is to provide an introduction to such agreements, especially the Canada Assistance Plan (CAP),¹ to explain, making use of examples, how agreements such as CAP determine and sometimes limit income maintenance and social service programs delivered by the provinces, and to explore current prospects for reform. The present-day events and possibilities which may change these fiscal arrangements (and not necessarily for the better as far as disadvantaged individuals and groups are concerned) are: the Federal-Provincial Review of Fiscal Arrangements Affecting Persons with Disabilities (the "Review"); administrative and Charter litigation; and constitutional reform (the "Meech Lake / Langevin Block agreement"). Each of these will be discussed in turn, once the main features of CAP have been considered, and related fiscal arrangements outlined briefly.

Fiscal arrangements in the social policy field are a product of the Canadian system of federalism. At the time of Confederation, matters such as social welfare, health and education were regarded as local responsibilities not requiring major governmental involvement or expen-

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ditures. Accordingly, the British North America Act placed these within provincial jurisdiction. The federal government was assigned what were then the more important and costly functions of government - defence and national security, the administration of justice, major public works. To pay for these responsibilities, the primary taxing powers were given to the national government.

During the 1930's, the severe hardship experienced by many Canadians led to political initiatives aimed at increasing the federal role in social programs. While many of these initiatives did not succeed at first, they created a climate of expectations which ultimately resulted in significant developments during the post-war period. Constitutional amendment and interpretation permitted direct federal delivery of important income support programs - unemployment insurance, family allowances, old age security and the Canada Pension Plan. In the wide fields of social assistance, human services, and health and education, on the other hand, the federal role was limited constitutionally to indirect participation through contributing to the cost of provincial programs. There evolved a series of fiscal arrangements whereby the federal government uses its greater monetary resources to pay in part for programs entirely within provincial jurisdiction. These arrangements, especially CAP, played an essential role in the national development of income maintenance and social service programs.

In considering federal-provincial fiscal arrangements certain general factors must be kept in mind:

(a) the contributions made by the federal and provincial governments respectively, and whether these are adequate to fund the program;

(b) the equity or inequity among provinces, having regard for the regional economic disparities which exist in Canada;

(c) the conditions or criteria placed by the federal government on its contributions;

(d) the open-endedness or closed-endedness of the contributions - whether there is a fixed limit to the federal contributions; and

(e) the flexibility of the arrangements - whether it is easy or difficult to make changes so that a federal contribution will be available for new or expanded programs.

These factors provide key indicators of how federal-provincial fiscal arrangements impact on social policy. We shall return to them in the consideration of specific arrangements which follows.²

² There have been several excellent recent studies of federal-provincial fiscal arrangements in the social policy field. The interested reader is referred to:
II. THE CANADA ASSISTANCE PLAN: PRINCIPLES AND LIMITATIONS

OVERVIEW

CAP is a federal statute enacted by Parliament in 1966 after consultation with the provinces. As stated in the preamble, its objectives are "the provision of adequate assistance to and in respect of persons in need" and "removal of the causes of poverty and dependence on public assistance". These objectives are to be attained through a fuller sharing by the federal government in the costs of social programs than had existed prior to 1966. The basic formula is 50/50 cost-sharing between the two levels of government.


3 Despite its importance, the number of studies of CAP available are limited. The sources in footnote 2 above are helpful. The only full-length monograph on CAP is: Derek P.J. Hum, *Federalism and the Poor: A Review of the Canada Assistance Plan* (Toronto: Ontario Economic Council, 1983). Other accounts have been developed by government or for government-sponsored reviews. There is the study of CAP by the "Nielsen Task Force": *Canada Assistance Plan: A Study Team Report to the Task Force on Program Review* (Ottawa: Minister of Supply and Services Canada, 1986). A brief overview was prepared for Ontario's Social Assistance Review by Des Byrne as a discussion paper simply entitled "Canada Assistance Plan". The author has also used the briefing notes on CAP and VRDP prepared for provincial organizations by Government of Ontario officials involved in the Federal-Provincial Review of Fiscal Arrangements Affecting Persons with Disabilities.
government for "assistance" and "welfare services" as these are defined within the Act. "Assistance" may be understood generally as income maintenance or social assistance, while "welfare services" are social or human services. Their precise definitions will be considered below.4

CAP does not directly establish either assistance programs or welfare services. Nor does it require the provinces to establish them. Rather, it is enabling legislation permitting the federal government to enter into cost-sharing agreements with the provinces. All of the provinces have entered into Part I CAP agreements and receive 50% federal cost-sharing for the great majority of their income maintenance and social service programs.5 To be eligible for cost-sharing, these programs must meet certain conditions (to be discussed shortly). While CAP does not directly require the provinces to establish assistance and welfare programs complying with these conditions, obviously the availability of a 50% federal contribution is a factor to be weighed heavily by the provinces in considering program design.

The wording of CAP is very general statutory language. Since 1966, there has been only one amendment (in 1972) and that was relatively minor. The CAP regulations are also quite general and definitional, and they too have been amended infrequently. Essentially the same "standard form" cost-sharing agreement has been used with all of the provinces since 1966. These are basic documents which define the broad parameters of cost-sharing but do not provide detailed rules.

More specificity comes from additional government documents:6

(a) The standard form CAP agreement has three schedules which are particularized to each province and which are revised from time to time. Schedule "A" lists "Homes for Special Care", schedule "B" lists "Provincially Approved Agencies" and schedule "C" lists "Provincial Law" recognized

4 CAP is actually divided into three parts. Part I covers assistance and welfare services: this is the major part of the statute to which our attention is restricted in this paper. Part II deals with "Indian Welfare" but in fact has not been used to provide cost-sharing to the provinces for this purpose. Part III relates to "Work Activity Projects" and agreements in this area do exist with all provinces: however, the payments under Part III are less than 1% of the payments under Part I. See Byrne, Canada Assistance Plan discussion paper, supra, note 3 at 2.

5 Quebec has a slightly different payment mechanism (involving a partial substitution of tax transfers for cash payments) but for all practical purposes has the same arrangements as other provinces. In discussions with federal and provincial officials, the author discovered a difference of opinion as to whether Quebec is "in CAP" but the issue appears to be one of semantics.

6 This account is based on Byrne, "Canada Assistance Plan" discussion paper, supra, note 3 at 7.
for cost-sharing purposes. (These terms are all defined under CAP).

(b) There have been guidelines issued from time to time under the authority of the Minister of National Health and Welfare (under whose Ministry the Canada Assistance Plan Directorate comes). The guidelines on assistance are: Earnings Exemption Guideline (1982/85); Liquid Asset Exemption Guideline (1980); Special Flat Rate Allowance for the Aged and Disabled Guideline (1984); and Guideline Concerning Supplementation of Low Income Earnings (1980). The guidelines on welfare services are: Guidelines on Likelihood of Need Under the Welfare Services Provisions (1983); Guidelines on Community Development Services; and Guidelines on Eligibility for Welfare Services Provided by a Child Welfare Authority. The latter two guidelines are found in a more comprehensive document entitled "Notes on Welfare Services under the Canada Assistance Plan" (1985) which gives cost-sharing requirements in more detail. There is a guideline on work activity projects (with which we are not directly concerned in this paper). Finally there is the formidable-titled "Guidelines on Cost-Sharing under the Canada Assistance Plan as modified by the Extended Health Care Services Program under EPF, 1977-84" (1985). (EPF is explained briefly in the next section of this paper.)

(c) Various policy positions and legal interpretations relating to CAP have been developed internal to government. These may be communicated in letters from the Minister of National Health and Welfare or Ministry officials to provincial governments.

The administrative manner in which CAP has been developed has important consequences. The programs cost-shared under CAP have evolved and changed over the past two decades. Yet it has not been necessary to amend the statute, regulations or standard-form agreement on a regular basis to accommodate these changes. This shows that CAP is flexible (to a degree) —it creates a system which can be adapted at the bureaucratic level to new developments without waiting for law reform. On the other hand, the system created has been made somewhat immune from the political process, and this may well have worked to the disadvantage of groups wanting to advocate in the social policy field. Changes in legislation provide important opportunities for public advocacy, so a very general statute like CAP which governments can leave unamended (while making substantive changes through notes, guidelines and policy statements) is a barrier to public participation in the development of policy.
CAP cost-sharing has tended to become an esoteric specialization really understood only by "insiders"—the federal and provincial officials involved in day-to-day administration and negotiation. While interest by advocates in CAP and related cost-sharing arrangements has become greater (in large part due to the prospects for reform discussed later in this paper), their knowledge base still tends to be quite limited. Part of the reason for this has been the restricted distribution of key documents. While the Act itself, the regulations and the Annual Reports have always been widely available, more detailed and informative documents such as the agreement, the schedules, guidelines, notes, policy statements and legal interpretations have not been circulated as much. These documents must be reviewed by anyone seeking to understand CAP.

The standard form agreement, together with all of the guidelines and notes referred to above are available (in a package with the statute and regulations) from Health and Welfare Canada. In discussions with federal and provincial officials, the author has formed the general impression that the schedules to CAP agreements would be available from provincial governments, while internal policy positions and legal interpretations would not be, but he has not had the opportunity to research this in detail (nor to consider the possible implications of freedom of information legislation). The view of the officials consulted was that the complexity and extent of the information involved, rather than policies of confidentiality, constitute the major barrier to better public understanding of CAP.

The importance of CAP may be indicated by a few figures. As of fiscal 1984-85, CAP contributions by the federal government totalled about $4 billion. As total federal expenditures for that year were approximately $109 billion, CAP represents slightly less than 4% of the total federal budget. The breakdown of CAP expenditures was:

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7 Write to: Canada Assistance Plan Directorate  
Social Service Program Branch  
Department of National Health and Welfare  
Brooke Claxton Building  
Tunney's Pasture  
Ottawa, Ontario  
K1A 1B5

8 Canada Assistance Plan Annual Report 1984-85, Table 1, p. 13.

9 Michael J. Prince, "The Mulroney Agenda: A Right Turn for Ottawa?" in How Ottawa Spends 1986-87: Tracking the Tories, ed. Prince, Table 1.7, pp. 52-53.
Thus assistance (meaning primarily income maintenance or social assistance) is the major category under CAP, which we now examine in more detail.

CONDITIONS FOR ASSISTANCE

The following conditions for assistance are set by the CAP statute:

(a) the support provided must fall within one of the categories listed in the definition of "assistance" (Section 2);

(b) the province must provide assistance to any "person in need" as defined (Section 6(2)(a); definition of "person in need" in Section 2);

(c) the province must take into account a person's budgetary requirements and the income and resources available to the person to meet them in determining eligibility and level of payments - that is, the province must use a needs test (Section 6(2)(b));

(d) the province may not require a period of residency in the province as a condition of eligibility (Section 6(2)(d));

(e) the province must establish an appeals system with respect to assistance (Section 6(2)(e));

(f) assistance must be provided pursuant to "provincial law" (Section 4; "provincial law" defined in Section 2);

(g) assistance must be provided "by or at the request of provincially approved agencies", where "provincially approved agencies" include branches of government as well as non-profit organizations - note, however, that the phrase "at the request of" opens the door to the provision of assistance to be

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10 Canada Assistance Plan Annual Report 1984-85, Table 3, p. 15.

11 Technically "assistance" under CAP includes care in homes for special care, certain health care expenditures, and the majority of child welfare expenditures, but income maintenance or social assistance is the largest component and what we shall focus on.
used to purchase services from for-profit agencies, although for-profits themselves cannot be "provincially approved" under CAP (Section 4(a); "provincially approved agency" defined in Section 2); and

(h) the province must provide records and accounts to the federal government (Section 6(2)(f)).

Aside from technical and administrative matters, these provisions set out the criteria for CAP cost-sharing of provincial assistance programs.

Of the requirements just listed, the needs test (c) has had the greatest impact on assistance programs in the provinces and we shall concentrate on it.\(^\text{12}\) The key definition is that cost-shared assistance is limited to a "person in need" as defined (Section 2):

"a person who, by reason of inability to obtain employment, loss of the principal family provider, illness, disability, age or other cause of any kind acceptable to the provincial authority, is found to be unable (on the basis of a test that takes into account that person's budgetary requirements and the income and resources available to him to meet such requirements) to provide adequately for himself, and for himself and his dependants or any of them."\(^\text{13}\)

The needs test has three components:

(i) an asset test;

(ii) rules for the budgetary assessment of the applicant's requirements; and

(iii) rules for determining deductions with respect to available income.

If the applicant qualifies under (i), the social assistance payable is the result of (ii) less the result of (iii), with certain qualifications.\(^\text{14}\)

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\(^{12}\) The definition of "assistance" is quite general and has not limited significantly what the provinces can do. The appeals system requirement has not been further detailed under CAP and the federal government has not played an active role in the development of provincial appeals systems. Similarly, the other requirements have not had the impact on provincial policies that the needs test has had.

\(^{13}\) A second part of the definition (left out here) includes children in the child welfare system.

\(^{14}\) See Byrne, "Canada Assistance Plan" discussion paper, supra, note 3 at 5.
ASSET TEST

The first component, the asset test, may be used to illustrate how CAP works. The statutory provision cited above requires only in very general language that the provincial test "takes into account . . . resources available". But the Minister of National Health and Welfare has issued a Liquid Asset Exemption Guideline (1980) which much more specifically sets out the following rules:

"The Canada Assistance Plan will recognize, for cost-sharing purposes, provincial asset exemption regulations that,

1. exempt up to $2,500 for a single person and $3,000 when that person is aged or disabled.

2. exempt up to $5,000 for a person with one dependent (a couple and/or a single parent with one child) and $5,500 when the applicant and/or spouse is aged or disabled.

3. exempt, where there is more than one dependent, an additional $500 for the second and each additional dependent.

4. exempt an additional amount (no dollar limit) where the amount is or has been placed in a special fund or trust arrangement for purposes which the province deems to be socially important (e.g. equipment to overcome disabilities, future maintenance of education of a child who is declared dependent at the time of application).

5. accord discretionary authority to senior provincial officials to waive asset exemption regulations for applicants who have extraordinary circumstances.

6. permit the province to apply the above exemptions, unless otherwise specified in "provincial law", to all segments of its social assistance caseload."

These rules are in no way implied by the statute or regulations. They are simply Ministerial guidelines which are developed, it may be assumed, in consultation with the provinces.

If a province exceeds these guidelines, cost-sharing is lost. For example, a province which supplements the federal Guaranteed Income Supplement (GIS) to seniors without using an asset test must do so with 100% provincial funds. (GIS itself is income-tested, but not asset-tested, so it is not needs-tested.) The province would have to asset-test in accordance with the guideline quoted above to get CAP cost-sharing for this program. Another example would be a province using higher asset levels in its social assistance program than those indicated in the guideline.
CAP cost-sharing would be lost (at least with respect to those on the caseload who would not meet the more restrictive guideline levels). Provinces may, of course, implement such programs but they have to do so with "100% provincial dollars" rather than with "50% dollars". As noted above, this is a significant disincentive.

An income maintenance program which sets permissible asset levels as low as the CAP guideline requires has a significant negative impact on applicants and recipients. The senior citizen with modest savings, the single parent with a divorce settlement, and the disabled person with a bequest from a parent's estate are all placed in the same unfortunate position. Their modest funds must be spent down to the liquid asset exemption level before any assistance will be provided. If the funds could be preserved, they could be used to meet special needs, to provide future security and an on-going source of income (which in turn might reduce the need for government support on a long-term rather than short-term basis). The policy reflected in the CAP guideline, on the other hand, encourages depletion of the fund over a short period so that the client can receive social assistance again. Low asset levels serve to keep disadvantaged people in poverty—to take away the resources which may give them a margin of safety or which may provide opportunities to support independence. This outcome is contrary to the stated objectives of CAP but it is the result of the liquid asset exemption guideline nevertheless.

The liquid asset exemption guideline in effect as of the time of writing this paper (August, 1987) was issued in July, 1980. The permitted asset levels have not been increased since then. And prior to the 1980 guideline, the levels had remained at the same level for a decade (at about half the 1980 levels). This indicates clearly how the CAP system has failed to keep pace with changing economic and social conditions. The failure to change the liquid asset rules appropriately is a joint responsibility of the federal and provincial governments. While the Minister of National Health and Welfare has not improved the guideline, it is reasonable to infer that little provincial pressure has been brought to do so.

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15 It is clear in the guideline that provinces are free to establish lower liquid asset levels if they wish.

16 It might appear that there is room within the guideline to be more flexible in the treatment of liquid assets, in that a "special fund or trust arrangement" can be exempted (paragraph 4) and in that discretion can be given to waive asset rules in "extraordinary circumstances" (paragraph 5). However, the provinces have not used the "special fund or trust arrangement" provision (perhaps because of the technical and administrative complexities it would raise). And a discretion, reserved to "senior provincial officials" to be exercised on a case-by-case basis is not an effective solution in a system like social assistance which has a very large caseload.
Other CAP rules as well have negative consequences for provincial social assistance programs. The earnings exemption guideline (1982) is too restrictive to provide appropriate supports and incentives to social assistance recipients returning to the work force, and inhibits provincial programs to support the working poor.\textsuperscript{17} The CAP agreement with the provinces requires that income from federal programs such as unemployment insurance (UIC) or the Canada Pension Plan (CPP) come dollar-for-dollar off social assistance.\textsuperscript{18} So, for example, federal improvements in CPP do not benefit at all many provincial income maintenance recipients who derive part of their support from CPP. The province must take 100\% of any CPP increase off their social assistance cheques or lose CAP cost-sharing.\textsuperscript{19}

In the field of social assistance, then, under CAP needs-testing rules have been developed which effectively limit the income maintenance policies of provincial governments in important respects. (Not, however, with respect to rates - the provinces are free to set rates of assistance at any level without losing cost-sharing.) If provinces wish to establish asset or income tests which will be fairer to clients, which will help them to escape poverty, which will help them to benefit from other resources which may be available, they must do so with "100\% dollars" rather than "50\% dollars", a very significant disincentive given the cost and magnitude of income maintenance programs.

WELFARE SERVICES

As discussed above, Part I of CAP provides for cost-sharing agreements to cover welfare services as well as assistance. "Welfare services" under CAP cover social and human services. The conditions for cost-sharing of welfare services are:

(a) the services must fit within the following definition (Section 2):

\"... services having as their object the lessening, removal

\textsuperscript{17} Hum, \textit{Federalism and the Poor: A Review of the Canada Assistance Plan}, supra, note 3, Chap. 5, pp. 54-68.

\textsuperscript{18} Paragraph 2 (b) (iii).

\textsuperscript{19} In January, 1987, CPP disability benefits were increased, but many disabled persons receiving both CPP and social assistance wound up with no effective gain at all because of this rule. The Minister of National Health and Welfare, the Honourable Jake Epp, offered to amend the CAP agreement to avoid this result but the majority of provinces refused on the grounds that it was unfair to treat those receiving CPP more favourably than other social assistance recipients.
or prevention of the causes and effects of poverty, child neglect or dependence on public assistance, and, without limiting the generality of the foregoing, includes

(a) rehabilitation services,
(b) casework, counselling, assessment and referral services,
(c) adoption services,
(d) homemaker, day-care and similar services,
(e) community development services,
(f) consulting, research and evaluation services with respect to welfare programs, and

(g) administrative, secretarial and clerical services, including staff training, relating to the provision of any of the foregoing services or to the provision of assistance,

but does not include any service relating wholly or mainly to education, correction or any other matter prescribed by regulation or, except for the purposes of the definition "assistance", any service provided by way of assistance;

(b) the province "will continue, as may be necessary and expedient, the development and extension of welfare services" (Section 6 (2)(c));

(c) cost-sharing is limited to welfare services provided "to or in respect of persons in need or persons who are likely to become persons in need unless such services are provided" - that is, the province must use a "likelihood of need test" (Section 2: definition of "welfare services in the province");

(d) welfare services must be provided pursuant to "provincial law" (Section 4: "provincial law" defined in Section 2);

(e) welfare services must be provided "by provincially approved agencies" - these include branches of government as well as non-profits - note that, unlike assistance, for welfare services the additional phrase "by or at the request of" is not used, so for-profit agencies cannot be directly funded to provide welfare services (Section 4 (b); "provincially approved agency" defined in Section 2); and

(f) the province must provide records and accounts to the federal government (Section 6 (2) (f)).

There are additional technical and administrative requirements.
As with assistance, the CAP welfare services rules have important implications for social services such as day care, homemaker services and counselling developed by the provinces. The "likelihood of need" basis for cost-sharing has been interpreted by guideline narrowly on the basis of income levels, and this has required provinces to inquire into the incomes of clients receiving services (at least on a statistical basis). While likelihood of need is more flexible as a criterion than a needs test, it still provides disincentives to provinces to provide services to deserving individuals and families whose incomes are above the guideline levels. For example, persons with severe disabilities and correspondingly substantial needs may not qualify if they have moderate incomes (or if their families do in the case of children). Provinces which provide or fund services to them must do so with 100% dollars (unless they are in a class qualifying through proxy indicators or sampling). Alternatively, the province may charge user fees to reduce its own contribution. In fact, the CAP guideline assumes as a primary model a two-stage system of user fees, with a 50% "tax-back" (user fee) past an initial turning point and a 100% "tax-back" at a higher level. So there is an incentive to impose user fees for services on those of modest means even if their special circumstances may entail extraordinary costs.

The "likelihood of need" test also creates obstacles through the perception it creates of social services on the part of providers as well as clients. Income-testing has a stigmatizing effect which may lead those who should benefit from the services to forego seeking them out altogether. Where services are provided, income-testing makes clients seem to be recipients of charity with service providers as their benefactors. This view is reinforced by the limitations as to the kinds of services cost-sharable as welfare services. An examination of the definition of "welfare services" cited above shows a strong emphasis on casework and direct support. While these are essential, other components of what Hum calls a "social investment strategy" are left out, as he notes.

These include:

20 The CAP "Guidelines on Likelihood of Need under the Welfare Services Provisions" (1983) set out eligibility requirements which can be satisfied by: (i) individual income testing of clients to compare their incomes with levels established by a formula; (ii) the use of proxy indicators such as whether seniors receive GIS; or (iii) statistical sampling of clients as to income. All three approaches obviously require provinces to inquire (or to require agencies to inquire) into the income levels of clients of social services.

21 Ibid. at 2-6.

22 Hum, Federalism and the Poor: A Review of the Canada Assistance Plan, supra, note 3 at 70.

23 Hum, supra, note 3 at 72.
• skills training (the definition of "welfare services" excludes "education")

• job creation (see "Notes on Welfare Services" (1985), p. 9)

• public information programs ("Notes on Welfare Services" (1985), p.9)

• volunteer service bureaus ("Notes on Welfare Services" (1985), p. 9)

• advocacy organizations (not providing direct client services)

• funding organizations such as United Way (not providing direct client services).

While these may have public funding from other sources, they do not have the established base which CAP cost-sharing would provide.

It might appear that the heading "community development services" under the "welfare services" definition might open the door to cost-sharing for more innovative services, such as public education and advocacy. But the "Guidelines on Community Development Services" (1985) take away much of this potential through restrictive rules.24 We again have a situation where the guidelines remove what the legislation might be interpreted to provide.

NEED FOR REFORM

The CAP rules for both assistance and welfare services, then, while progressive in 1966, now require fundamental reform. There are limitations in the legislative framework but, more importantly, additional restrictions in guidelines, notes, policies and so on. Public understanding and participation in CAP has been limited by its complexity and by its development through federal-provincial administration and negotiation largely removed from the political process. After describing related cost-sharing legislation briefly in the next section, we return to these CAP-related themes in discussing prospects for reform.

III. RELATED FISCAL ARRANGEMENTS IN THE SOCIAL POLICY FIELD

Besides CAP three other important federal statutes provide for social policy program contributions to the provinces. These are: the

24 "Guidelines on Community Development Services" in "Notes on Welfare Services under the Canada Assistance Plan" (1985).
Established Programs Financing Act (EPF),\textsuperscript{25} the Canada Health Act (CHA),\textsuperscript{26} and the Vocational Rehabilitation of Disabled Persons Act (VRDP).\textsuperscript{27}

**ESTABLISHED PROGRAMS FINANCING ACT (EPF)**

During the post-war period, but especially during the late 1950's and 1960's, the federal government developed major cost-sharing arrangements with the provinces in the areas of hospital insurance, medicare and extended health-care services, and post-secondary education.\textsuperscript{28} By the 1970's concerns emerged at both levels of government about these arrangements. The federal government wanted to control inflation and was concerned about the rising costs of these programs. The provincial governments, while in need of the funding (especially in the poorer provinces), objected to the conditions imposed by the arrangements and wanted to determine their own programs without the constraints imposed by cost-sharing rules.

The result of federal-provincial discussions about these varying objectives was EPF in 1977. Cost-sharing was replaced under EPF in these broad areas by a two-part fiscal arrangement. One part was a cash transfer determined by expenditures in a base year (1975-76) and increasing in accordance with provincial population and growth in GNP, as determined by complex formulas. The other part was a reduction in federal tax rates permitting an increase in provincial rates (a transfer of "tax points"). The conditions imposed on the provincial government to receive the funding under EPF were very general and limited.\textsuperscript{29}

EPF arrangements have remained contentious between the levels of government. Both the federal and provincial levels have accused the other of making inadequate contributions. The federal government has moved to further restrict EPF contributions, while some provinces have reduced

\textsuperscript{25} This is the short title. The full title is: *Federal-Provincial Fiscal Arrangements and Post-Secondary Education and Health Contributions Act, 1977*, S.C. 1984, c. 6.

\textsuperscript{26} *Canada Health Act*, S.C. 1984, c. 6.


\textsuperscript{28} The sources in footnote 2 document this development. *Fiscal Federalism in Canada* is an excellent source of information in particular.

\textsuperscript{29} Following the EPF arrangements in 1977, conditions such as universality of coverage, comprehensiveness of insured services, accessibility, portability and public administration remained legally in effect in the health care field, but no effective mechanisms were available to deal with erosion of these standards. See *Fiscal Federalism in Canada*, pp. 105-112.
their contributions to health and post-secondary education (especially the latter). The stakes are high in this area: the estimated federal contribution for fiscal 1985-86 is $14.7 billion\(^{30}\) which is about 15% of the total federal budget.

\textit{EPF} has inter-relationships with social assistance and social services funding under \textit{CAP} in that there are persons, particularly in institutional settings, who receive support from both.\(^{31}\) But \textit{EPF} illustrates as well an alternative way that \textit{CAP} could work — on an unconditional grant of "block funding" basis with payments determined by a formula rather than by the application of specific criteria to clients and services. The advantage of this approach would be to vest responsibility and accountability for social policy programs at one level of government—the provincial level—which might permit reform and innovation in a manner now hampered by the divided jurisdiction under \textit{CAP}. It is argued as well that provincial circumstances differ and that the provincial social services ministries can be more responsive as they are closer to disadvantaged individuals and groups.

But the risks of "block funding" are very significant, too. It has the potential for being a vehicle to implement fiscal restraint at both levels. The federal government under \textit{CAP} is committed to cost-share with respect to all qualifying income maintenance recipients and social service programs. That is, \textit{CAP} is open-ended—there is no fixed caseload or spending limit. This is especially important with respect to income maintenance. In difficult economic periods, many people exhaust their UI benefits and move to social assistance, which is automatically 50% cost-shared. Under a block funding scheme, support by the federal government for social assistance would be closed-ended, and the increased support from the federal level would not be automatic. On the other hand, the provincial governments under \textit{CAP} have a built-in incentive to spend on social programs (using "50% dollars") which would disappear under block funding, allowing them to restrain social spending as well. The \textit{EPF} history gives reason for concern at both the federal and provincial levels about block funding, a concern which is shared by social policy advocates.\(^{32}\)

\(^{30}\) Maslove and Rubashewsky, "Cooperation and Confrontation: The Challenges of Fiscal Federalism", \textit{supra} note 2 at 104.

\(^{31}\) This is explained in "Guidelines on Cost-Sharing under the Canada Assistance Plan as modified by the Extended Health Care Services Program under \textit{EPF}, 1977-84" (1985).

\(^{32}\) In 1978, the federal government introduced Bill C-55, the \textit{Social Services Financing Act}, which would have brought block funding to the social services area. Both provincial governments (especially in the "have-not" provinces) and advocacy organizations objected that it would reduce the federal contribution. On closer analysis, however, it appeared that federal payments would be \textit{increased}, and the federal government withdrew the bill. Several of the sources in footnote 2 discuss Bill C-55 as part of the history of federal-provincial relations in this area.
CANADA HEALTH ACT (CHA)

During the late 1970's and early 1980's the federal government became concerned about its lack of control over provincial expenditures and program direction under EPF. This was especially true with respect to health care and the particular problem of extra-billing. In order to remedy the problem of inequities in the health care system which extra-billing created (and perhaps to increase its visibility with the public in the health care field as well) the federal government introduced the Canada Health Act. This legislation was introduced unilaterally with several provinces objecting (although the CHA had the support of all three parties at the federal level).

Section 18-21 of the CHA set up a system whereby the federal EPF cash grant is reduced to a province by the amount of extra-billing fees and user charges collected. This penalty clause has proved effective in getting the provinces to ban extra-billing by doctors, often after a bitter political fight that the provincial governments otherwise might well not have undertaken. While the objective of eliminating extra-billing and user fees has been substantially advanced by the CHA, there has, however, been left a legacy of concern on the part of the provinces that the federal government would use its spending power in this way to influence provincial decision-making in an area of provincial jurisdiction.\(^{33}\)

The CHA also sets out other, less controversial, program criteria which provinces must meet in order to get a full EPF cash contribution:

(a) public administration — the health care insurance plan must be administered by a public authority responsible to the provincial government on a non-profit basis (Section 8);

(b) comprehensiveness — the health care insurance plan must insure all insured health services provided by hospitals, medical practitioners, dentists and other health professionals as recognized in provincial law (Section 9);

(c) universality — the health care insurance plan must entitle 100% of the insured persons to the insured health services provided for by the plan (Section 10);

(d) portability — the health insurance plan must not impose a waiting period of more than three months on new residents, and must cover services to those temporarily absent from the province (Section 11); and

(e) accessibility — the health care insurance plan must provide access on uniform terms and conditions in accordance with

a tariff authorized in provincial law to all insured health services provided by doctors, dentists, and hospitals (Section 12).

Comprehensiveness, portability and accessibility are not as strong conditions as might first appear, as no strong requirements are placed under CHA on what health services must be insured. Nonetheless, these are important criteria for provincial health insurance plans.

**VOCATIONAL REHABILITATION OF DISABLED PERSONS ACT (VRDP)**

In many ways, VRDP is similar to CAP. There is a very general statute providing for 50/50 cost-sharing, a standard form agreement with the provinces (except for Quebec which does not participate at present), and "Guidelines Relating to Cost-Sharing under the Vocational Rehabilitation of Disabled Persons Act" (October, 1986). The agreement with each province has seven schedules. There are detailed understandings about VRDP comprehended fully only by federal and provincial officials with access to internal government documentation. The CAP Directorate of Health and Welfare Canada also administers VRDP.

VRDP is a much smaller program than CAP — about one fiftieth its size in terms of the total federal contribution. Nonetheless, VRDP is very important to disabled people requiring rehabilitation services. As with CAP, federal conditions place significant limitations on what the provincial governments can do in this area (if they want to do it with "50% dollars"). For example, the definition of "disabled person" in Section 2 of VRDP is "a person who because of physical or mental impairment is incapable of pursuing regularly any substantially gainful occupation". This generally excludes disabled people who are already working, who may be in need of adaptations or supports to keep their jobs. It makes sense to provide the assistance required rather than to have persons become unemployed (at which point they become eligible for VRDP cost-sharing!) but a province providing this help does so with 100% provincial funds.  

VRDP was first enacted in 1960. Like CAP, it has not had a substantial revision for some time, and should now be reconsidered. Another major set of issues raised by VRDP are those related to sheltered workshops. Workshops were perceived as important innovations in 1960, but their

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34 When the federal government negotiated the 1976-78 renewal of the VRDP agreement with the provinces, it was amended to include coverage of "follow-up goods and services" to disabled persons who become employed, but there is a time-limit of 18 month after employment is obtained.
effectiveness in integrating and training disabled people has been called into serious question in recent years.\(^{35}\) It is now time to reconsider the preferred status which workshops seems to have as models of vocational rehabilitation services within the VRDP framework.

IV. THE FEDERAL-PROVINCIAL REVIEW OF FISCAL ARRANGEMENTS AFFECTING PERSONS WITH DISABILITIES

The Review had its beginnings in federal-provincial negotiations about the renewal of VRDP agreements with the provinces in 1985.\(^{36}\) The federal and provincial Ministers at that time asked their Deputies to begin work on a review of VRDP and some related aspects of CAP. Work progressed rather slowly on the design of the Review, and a public announcement by the Minister of National Health and Welfare, the Honourable Jake Epp, and his provincial and territorial counterparts was finally made on January 23, 1987.

The disabled community welcomed the Review but expressed concern about the limitations in scope which were incorporated. The Review is focussed on rehabilitation and support programs; excluded are residential programs, income maintenance, and programs for children and elderly persons. Thus most of CAP is left out, including issues which of course are critical for people with disabilities. The justification advanced for this is apparently that restricting the scope would offer more opportunity for progress to be made.\(^{37}\) But this is unconvincing, because of the close relationship between rehabilitation and support, on the one hand, and the areas excluded, on the other. It is not possible to make rehabilitation more effective without eliminating the disincentives to work inherent in the income maintenance system, through changing the CAP earnings and asset guidelines. It is not possible to separate the issue of where someone works from the question of where that person lives. What is needed, after two decades, is a complete assessment of CAP and VRDP in the context of a willingness to reform each as required. This has not been undertaken by Mr. Epp and his provincial counterparts.

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\(^{35}\) See, for example, Judge Rosalie Silberman Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) at 42-43.


Federal-Provincial Fiscal Arrangements

Even within the limited framework advanced, consultation has been uneven. The original agreement as expressed in the January 23rd announcement was that provincial and territorial ministers would consult with organizations in their jurisdiction while Health and Welfare Canada would consult with national organizations. As of the date of writing (August, 1987) only some provinces had undertaken an adequate consultation process and the federal government had not begun to consult, at least in any formal sense. This would seem to reflect a low priority attached to the exercise, especially in light of the target date of December, 1987 for the final report.

Disabled Canadians have been disappointed many times before by federal-provincial negotiations and consultations. An important recent example is provided by the "Joint Federal-Provincial Study of a Comprehensive Disability Protection Program" (September, 1983). This study, so important to disabled persons, was completed by a Task Force of federal and provincial officials without public involvement or consultation, and has not held to any further discussion or initiatives with respect to a comprehensive national program. In fact, the Task Force report itself, which does contain considerable valuable information, has had only a very limited circulation.

Disability organizations have attempted to influence governments at both levels to make the Review responsive and effective. Only time will tell if they have been successful and to what extent.

Organizations representing disadvantaged groups other than disabled persons have not been offered a consultation with respect to CAP at all. A thorough examination with public input on CAP is essential, however, if social assistance and human service issues are to be addressed properly.

V. REFORM THROUGH ADMINISTRATIVE AND CHARTER LITIGATION

Another route which may be available to disadvantaged persons and their advocates seeking to reform federal-provincial fiscal arrangements

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38 The five volumes of this study were only made available to consumer groups on request as of a meeting of the Minister of National Health and Welfare and his provincial counterparts in January, 1987. It is apparently still under study by government. See: Obstacles Update (Department of the Secretary of State or Canada, 1987), Recommendation 39, p. 31.

39 For example, the Coalition of Provincial Organizations of the Handicapped (COPOH), a national disability consumer group, has prepared a pamphlet entitled "Raising a Voice of Our Own . . . . On Social Assistance / VRDP."
as they impact on social policy is litigation. The first and primary obstacle to this approach is the theory, recognized up to now by the courts, that the federal legislation creating these fiscal arrangements does not determine rights to social benefits, but simply creates the authority to cost-share without impinging on provincial constitutional jurisdiction. The Saskatchewan case *Re Lofstrom and Murphy* illustrates this theory. In this case it was held that CAP does not provide any right to assistance which an individual can claim directly—it is only provincial assistance legislation which creates such rights.

In the next section of this paper we shall consider the validity of this theory, and how it might be impacted on by current proposals for constitutional reform, in more detail. For purposes of the current section we shall assume the basic validity of the sharp distinction between cost-sharing and legislating, as envisaged by the theory, and consider litigation approaches which do not challenge this directly.

In the important decision of the Supreme Court of Canada in the *Finlay* case, one strategy has received judicial recognition. Mr. Finlay is a social assistance recipient in Manitoba. For forty-six months a 5% deduction was made from his allowance by way of recovery of an overpayment. He contended that this deduction was in breach of the CAP legislation as well as the cost-sharing agreement between the federal government and Manitoba, in that the deduction effectively lowered his allowance below his basic requirements (see the discussion of CAP conditions in Section II of this paper). He sued for a declaration that the federal cost-sharing payments to Manitoba were therefore illegal and for an injunction to stop them. This action was brought solely against Ministries of the federal government: the province of Manitoba was not named as a defendant and no relief was sought directly against it (in fact, the province was not even an intervenor and was unrepresented by counsel).

The federal government applied to strike out the statement of claim on the grounds that Finlay had no standing to sue and that no cause of action was disclosed. The Trial Division of the Federal Court of Canada granted this application, but Finlay appealed to the Federal Court of Appeal and his appeal was allowed. A further appeal by the government to the Supreme Court of Canada was dismissed, with the result that Finlay has standing to pursue the case on its merits (at the time or writing, the case on the merits is continuing).

While the Supreme Court of Canada dealt with the matter as a standing issue, and did not in any way decide whether Finlay is entitled to

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40 (1972), 22 D.L.R. (3d) 120.

41 *Finlay v. Minister of Finance Of Canada, Minister of National Health and Welfare and Attorney General of Canada*, 48 N.R. 126 (Fed. C. A.); 71 N.R. 338 (S.C.C.)
declaratory or injunctive relief, the decision is significant nonetheless. Mr. Justice Le Dain, writing the opinion of the Court, emphasized the close connection between the issue of standing and the issue of whether there is a reasonable cause of action, and stated in effect that there is no clear reason for saying that Finlay could not succeed.\footnote{71}{N.R. 338 at 371-372.}

*Finlay* raises the possibility that disadvantaged persons and their advocates could seek to reform federal-provincial fiscal arrangements and their implementation through obtaining administrative law remedies. The other potential route to reform through litigation would be to attack provisions of fiscal arrangements legislation and supporting documents using the *Canadian Charter of Rights and Freedoms*.*\footnote{43}{Constitution Act, 1982.}

An analysis of the potential for using the *Charter* to reform income maintenance and social service programs is beyond the scope of this paper.\footnote{44}{A comprehensive study entitled "The Impact of the Charter of Rights on Social Assistance" was prepared by Sandra Wain for Ontario's Social Assistance Review.}

Such an analysis would involve consideration of fundamental issues such as the relationship between definition of eligibility by categories and equality rights, the extent to which economic rights are protected under sections 7 and 15, and when the exercise of discretionary decision-making powers by public officials is reviewable in the light of *Charter* provisions. Here only a few suggestions will be made as to particular issues which might arise in challenging federal-provincial fiscal arrangements.

Where a provision in a provincial statute, regulation, or guideline is discriminatory or otherwise violates the *Charter*, those applicants or recipients adversely affected may apply pursuant to section 24 for relief against the provincial law. If the *Charter* violation at the provincial level can be traced to a corresponding provision in the federal legislation or supporting documents, it is probable that section 24 would permit a remedy in respect of the federal law as well. While no precedent exists so far for this, the broad language of section 24(1) requires only that a right be "infringed or denied" for an application to be brought, and allows "such remedy as the court considers appropriate and just in the circumstances". Given the broad purposes of the *Charter* and the liberal approach to standing reflected in *Finlay*, it is reasonable to speculate that an applicant or recipient would be given standing to challenge a fiscal arrangements condition.

A simple example of a provision which might be challenged is provided by the *CAP* Liquid Asset Exemption Guideline quoted in Section II. The Guideline rules set a liquid asset limit of $3000 for a single disabled per-
son and $5500 for a couple both of whom are disabled. Arguably this is marital status discrimination in that two single people would together have a $6000 limit, $500 more than that for a couple. A couple in a province who were denied assistance (on the basis of provincial rules mirroring this Guideline) could apply under the Charter for relief against both the provincial legislation and CAP. (Of course there would be arguments advanced to indicate that this does not offend equality rights, such as that the needs of couples are different than those of individuals, that marital status requires a lower "level of scrutiny" as a non-enumerated class under section 15(1), and so on). If the couple's application were successful, an amendment of the Guideline would presumably be among the remedies which the court could order.

An even more speculative area for Charter litigation would be inter-provincial comparisons between benefits and programs. Social assistance and services funded under CAP, EPF and VRDP differ substantially from province to province. The question arises as to whether such inequalities might form the basis for a Charter challenge by an applicant or recipient in a province which provides less.

The Ontario Court of Appeal has decided that section 15 can prohibit discrimination on the basis of place, and in particular, on the basis of which province a person resides in. The case in which it did so, however, was a criminal matter in which the issue was that the federal government has provided in drinking and driving offences that conditional discharges could be provided where the accused underwent a treatment program, but that this alternative to a mandatory fine or imprisonment would only be available in those provinces consenting to it. Thus the accused did not have the conditional discharge alternative available to them in Ontario, but would have had this alternative available in several other provinces and territories. The Ontario Court of Appeal held that this was a violation of the equality rights of the accused, and gave the accused the right to consideration for conditional discharges upon undertaking to receive treatment. The Supreme Court of Canada refused leave to appeal, so this decision stands as authority for the proposition that there cannot be different rights under criminal law in different provinces.

The situation with respect to inter-provincial differences in social allowances and benefits may seem similar to the criminal law situation just outlined. The important difference, however, is of course that criminal law is clearly within federal jurisdiction, whereas social programs are provincial. The Ontario Court of Appeal in its decision made it plain that section 15 did not require provinces to pass the same laws within their own jurisdiction. The open question is whether a basis


46 57 O.R. (2d) 412 at 431.
could be found in federal-provincial fiscal legislation such as CAP, EPF, CHA and VRDP to counter the argument that the social policy field is wholly provincial.

Once again we are back to the theory, up to now recognized by the courts, that federal statutes of this type just create a mechanism for spending or cost-sharing and do not legislate substantive entitlements or limitations. That this is something of a fiction is clear from the account already given of how the federal government puts in half the money and participates with the provinces in on-going development of these programs. It might well be possible to get a court to consider reviewing inter-provincial differences under section 15 of the Charter where this degree of federal involvement exists.

To take a simple example, suppose social assistance recipient X lives in province A and recipient Y lives in province B, that their circumstances are identical, and that X receives $100 more monthly than Y in assistance provided under CAP. Then the reality of the situation is that X is getting $50 more in federal money than Y despite having the same needs, assets and income. Put in these terms, the situation does not seem so much different from that considered by the Ontario Court of Appeal. (As with the previous example, this is put forth by way of illustration only and is not intended to minimize counter-arguments that could be brought, eg. that it costs more to live in one province than another, that it would be within province B's jurisdiction to provide alternate benefits in kind such as a dental plan, clothing or reduced transportation rather than the additional $100, and so on).

The impact of administrative and Charter litigation on federal-provincial fiscal arrangements in the social policy field is difficult to predict. The issues raised by such litigation are complex and novel. It will take time to develop a body of case law in this area detailed enough to have major impact. So, while litigation has an important role to play in social policy reform in Canada, it will have to proceed in tandem with community advocacy and political action if fundamental reform is to be achieved.

VI. THE IMPACT OF CONSTITUTIONAL REFORM

In the introductory section of this paper, it was pointed out that federal-provincial fiscal arrangements in the social policy field have arisen in the context of the division of powers between the federal and provincial levels of government set out in the British North America Act. Social assistance, welfare services, health and education were placed in provincial jurisdiction while the primary taxation powers were federal.47 48

47 Constitution Act, 1867, s. 92, para. 7, 8, 13, 16.
48 Constitution Act, 1867, s. 91, para. 3.
Starting in the 1930's, the necessity for the federal government to become involved in the social policy field became clearer and clearer, and the result was a variety of cost-sharing mechanisms and block grants, culminating in present-day fiscal arrangements such as CAP, EPF, CHA and VRDP.

The constitutional doctrine justifying these arrangements has become known as the federal spending power doctrine— the principle that the federal government can make payments to individuals, organizations or other levels of government for purposes not within its own constitutional jurisdiction, and that it can make these payments subject to conditions if it wishes. As we have seen, an impressive array of federal-provincial programs has been created based on the theory of the spending power. Yet the constitutional status of the spending power has never been definitively established and remains controversial.

Only a very limited number of cases have touched on the spending power. In the Employment and Social Insurance Act Reference case in 1937 the Judicial Committee of the Privy Council upheld a Supreme Court of Canada decision ruling that an unemployment insurance scheme was ultra vires the federal government. While in this case the basic concept of the federal spending power was upheld, it was also established that the spending power could not be used to enact legislation infringing upon civil rights in the provinces or any other matter within provincial jurisdiction. By providing in detail for an unemployment insurance scheme, the proposed federal legislation went over this line. (In 1940 a constitutional amendment was enacted which permitted the federal government to introduce unemployment insurance.)

Later decisions tended to mitigate this approach by the courts and to permit some use of the federal spending power. In 1957, the Exchequer Court upheld the validity of the federal Family Allowance program in the Angers case. Twenty years later, the Ontario Court of Appeal upheld the authority of the federal government to make National Housing Act loans for university student residences. But the issue of the

49 For a clear explanation of the spending power doctrine see: Banting, The Welfare State and Canadian Federalism, supra, note 2 at pp. 52-54.

50 For more on the attaching of conditions see Forget, "The Harmonization of Social Policy", in Krasnick (ed.) Fiscal Federalism, supra, note 2 at pp. 109-112.


53 Constitution Act, 1867, s. 91, para 2A.


federal spending power has never been dealt with directly by the Supreme Court of Canada since the unemployment insurance Reference in the 1930's and there has been no clear judicial theory developed as to what conditions the federal government can impose on funding to areas of provincial competence. The uncertainty which remains is underscored by the 1986 Winterhaven Stables Ltd. case in which the plaintiff is suing for a declaration that federal-provincial fiscal arrangements including CAP, EPF and CHA are ultra vires the federal government as trenching on provincial jurisdiction (the plaintiff seeks to challenge federal taxation to pay for these programs). While the power of the federal government to enter into these arrangements pursuant to its spending power was upheld in the Alberta Court of Queen's Bench, the case is under appeal and, as it proceeds, will require the higher courts to elaborate on the spending power theory in more detail than has been required in many years.

Political as well as legal controversy has surrounded the federal spending power, and its use in developing programs in the social policy field. There are strong advocates of federal involvement. They would like to see the spending power established in the Canadian Constitution to allow the federal government to take a leadership role in developing social policy initiatives, to deal with regional disparities, and to set national standards which will limit the powers of the provinces (in practice, although not constitutionally) to establish programs different from the national models. On the other hand, there are those who are strongly opposed to the federal government using its spending power to attach conditions in the social policy, health and education fields to the monies it shares with provinces. This group includes those who emphasize the importance of provincial initiatives in developing new social policies, those opposed to present federal policies, and those who accept as a fundamental principle of Canadian federalism that the provinces should be able to set their own policies in these areas. Of particular importance in this last group is the government of Quebec, which has historically opposed federal involvement in this area and

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56 This has been the most commonly held view among social policy advocates in Canada since the Depression. The majority of national organizations of and for disadvantaged persons tend to lean towards this approach.

57 Especially the birth of medicare in Saskatchewan in the 1940's.

58 Such as physicians opposed to the CHA provisions which have effectively meant the end of extra-billing.

59 The stronger and richer provinces such as Ontario, Alberta and British Columbia especially tend to take this position (as well as Quebec, as noted below).
which has consistently defended its own sovereignty in the social policy field.  

The 1987 Constitutional Accord (the "Meech Lake/Langevin Block agreement") contains a provision intended to resolve these conflicting legal and political considerations. Section 106a of the Accord reads:

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

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

The intent of Section 106a is apparently to provide a constitutional basis for the spending power, but to balance this with a "compensation principle" which will allow the provinces to "opt out" of a program. The difficulty with this proposed compromise between the federal and provincial roles is, however, that the language is not precise enough to allow a clear interpretation of what the "solution" is.

A short list of the interpretation problems raised by this provision will serve to illustrate the difficulties it creates:

(a) what is "reasonable compensation" - does it mean an equivalent amount to what participating provinces would get (and if it does, how is "equivalent" determined?) or would it allow a "deduction" where the non-participating province falls short of the national model?

(b) what is a "shared-cost program" - does it refer only to programs like CAP and VRDP which proceed on a matching costs basis (this is the way some commentators use the term "shared-cost") or does it include EPF/CHA and other block-funding?

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60 Quebec's objections to federal proposals to entrench the spending power played a key role in that Province's decision to reject the Victoria Charter (a constitutional proposal in the early 1970's).

61 Constitution Amendment, 1987, s. 7.

62 For example, Maslove and Rubaskewsky in "Cooperation and Confrontation: The Challenges of Fiscal Federalism", supra, note 2, clearly characterize CAP but not EPF as "shared-cost". It appears to have a technical meaning which may not carry over into its use in the Accord.
(c) what does "established ... after the coming into force of this section" mean - this presumably is intended to exempt existing programs from the operation of Section 106a but it is not clear (given the comprehensiveness of CAP and EPF) when amendments might constitute new programs caught by this section.

(d) does "program or initiative" mean more than just "program" and, if so, what?

(e) what are "national objectives" - in the context of the Accord, a distinction is made between "objectives" and "standards", so "objectives" must have some generality, but it is still unclear what an "objective" may include;

(f) what does "compatible" mean - is this a weaker term than "conforming", for example?

(g) what are the procedures whereby this section is implemented - for example, if a "new" program is proposed, when do provinces have to elect whether or not to participate?

These problems are not hypothetical but relate directly to current issues of great concern. The validity of the CHA condition that provinces not permit extra-billing if they are to receive full EPF cost-sharing, the question of whether the CAP restriction on direct funding of for-profit services will be carried into a new day care initiative, the possibility of provinces moving from needs-testing to other social assistance models - all of these will be determined in large part by how section 106a is interpreted (if the Accord becomes a constitutional amendment).

These issues and others would be determined, not just by the specific working of section 106a, but also by what the courts take to be the legislative intent of the provision in the context of the Accord as a whole. Despite subsection (2), most commentators have viewed the intent as a limiting of the federal role in social policy and related fields previously achieved through the spending power. The section appears to address Quebec's concerns for provincial autonomy, together with the concerns of other provinces particularly about the use of the spending power in the

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63 Proposed new section 95 b(2) uses the phrase "national standards and objectives" in the context of immigration, while as we have seen section 106a just refers to "objectives".

64 Perhaps a more difficult question is what constitutes a "new" program or initiative - for example, if reforms of CAP were extensive enough, could this section come into play?

65 The whole of the Meech Lake/Langevin Block Accord is viewed by some (Pierre Elliot Trudeau being the most famous) as a surrender of power (and responsibility?) to the provinces by the federal government.
extra-billing dispute, and to restrict the effective use of the spending power by giving an explicit right to "opt out" to the provinces.

Advocates of a stronger federal role in social policy will no doubt propose amendments to Section 106a to resolve some of the difficulties identified above—such as replacing "objectives" by "objectives and standards" or even by removing the compensation principle altogether. The prospects for such amendments have to be viewed in the context in which the Meech Lake/Langevin Block agreement was formulated, however. The Accord is unanimously supported at the time of writing by the federal government and all ten provincial governments, as well as the two opposition parties federally. It is seen by them as a way to rectify the situation with respect to the 1982 constitutional "deal" in which a constitution was imposed on Quebec over the objections of its government, containing provisions which Quebec clearly could not accept. A fundamental amendment in an area of such importance as social policy will be difficult to achieve over Quebec's objections (although of course the whole future of the Accord in the political arena is far from settled).

Whether disadvantaged groups and their advocates can reach consensus on amending section 106a or not, and whether they can have an impact or not, a major concern remains about the uncertainties of interpretation created by this kind of wording. We have seen in this paper how obstacles have prevented reform of federal-provincial fiscal arrangements—in particular the obstacles created by the esoteric nature of the arrangements and the "internal" way they are developed between governments without the ordinary flow of information and public accountability that usually attaches to important laws. Section 106a surely makes this problem more difficult to address. It creates new parameters for cost-sharing and related fiscal models which may be defined by the courts—although

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66 Of course, this would not resolve all uncertainty - the term "standards" too would admit of varying interpretations. But it clearly would seem to permit more specificity than does "objectives".

67 However, the federal Liberal party is drafting amendments, as is the federal New Democratic Party, and strong representations have been made to the ruling Liberals in Ontario and New Democrats in Manitoba in particular to reconsider various provisions. While no party has said formally that it will reject the Accord unless it is amended, there is certainly movement towards a more critical stance at least.

judges are not the most appropriate persons to make these decisions—or which may simply be left more or less undefined and unclear. The lack of accountability and responsibility which would result in itself would serve as a deterrent to reform at both the federal and provincial levels.

It is incumbent on groups representing and advocating for disadvantaged Canadians to require more clarity from both levels of government as to what this constitutional "deal" means in the social policy field. At the very least, more particulars as to the interpretation questions outlined above should be demanded during the consultation process regarding the Accord.

VII. CONCLUSION

Because of the current initiatives and events discussed above, there is more opportunity and need than ever before for organizations of disadvantaged persons and their advocates to become informed about federal-provincial fiscal arrangements in the social policy field, to carry out an analysis of them, and to communicate their views clearly and forcefully. If this paper has served in some small way as a stimulus to this activity, the author will view it as a success. Now more than ever, it is essential to counteract any subordination of the needs of disadvantaged persons to the political realities of Canadian federalism and to work toward reforms which will bring all excluded individuals and groups into the mainstream of Canadian life where a full range of opportunities and expectations is available.

69 Aside from philosophical considerations about the appropriate role of non-elected judges in a democracy, there are simply the practical considerations that judges (save in exceptional cases) do not have the expertise or resources to do effective social policy analysis. Yet this is what section 106a would require them to do on a very large and complex scale.

70 The author would welcome questions and comments from readers, as well as suggestions regarding further work to be done in this area.

4 See the Introduction to Ismael (ed.), Canadian Social Welfare Policy, supra, note 2 at XV.