Culture and the Canadian Constitution

Patrick J. Monahan
Osgoode Hall Law School of York University

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Abstract
This article examines the current division of powers over cultural matters in the Canadian Constitution and the manner in which the 1992 Charlottetown Accord would have altered that distribution. During the debate over the Charlottetown Accord, it was argued by the federal government and the provinces that the Constitution allocates primary legislative responsibility over cultural matters to the provinces. Therefore, the cultural amendments in the Accord which would have recognized the provinces’ exclusive jurisdiction to make laws in relation to culture were justified on the basis that they merely codified the status quo. This paper challenges the belief that the provinces enjoy exclusive legislative authority in relation to culture. It is argued that the federal government possesses quite significant legislative authority relating to cultural matters, the most important being its authority to pass laws in relation to matters of national concern. The promotion and strengthening of a distinct Canadian national identity is, it is argued, one such matter of national concern. Thus, over time, the proposed amendments relating to culture in the Charlottetown Accord would probably have significantly reduced federal legislative powers. Assuming that some kind of cultural power is to be entrenched in the Constitution at all, culture should be recognized as an area of shared or concurrent jurisdiction in which both Parliament and the provincial legislatures have legitimate roles to play. This paper also calls into question the whole concept of entrenching a cultural power in the Constitution in the first place, arguing that it is unwise to recognize indeterminate and amorphous concepts like culture as a basis for legislative authority in a federal state.

Keywords
Cultural policy; Federal government; Canada

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CULTURE AND THE CANADIAN CONSTITUTION

BY PATRICK J. MONAHAN*

This article examines the current division of powers over cultural matters in the Canadian Constitution and the manner in which the 1992 Charlottetown Accord would have altered that distribution. During the debate over the Charlottetown Accord, it was argued by the federal government and the provinces that the Constitution allocates primary legislative responsibility over cultural matters to the provinces. Therefore, the cultural amendments in the Accord which would have recognized the provinces' exclusive jurisdiction to make laws in relation to culture were justified on the basis that they merely codified the status quo. This paper challenges the belief that the provinces enjoy exclusive legislative authority in relation to culture. It is argued that the federal government possesses quite significant legislative authority relating to cultural matters, the most important being its authority to pass laws in relation to matters of national concern. The promotion and strengthening of a distinct Canadian national identity is, it is argued, one such matter of national concern. Thus, over time, the proposed amendments relating to culture in the Charlottetown Accord would probably have significantly reduced federal legislative powers. Assuming that some kind of cultural power is to be entrenched in the Constitution at all, culture should be recognized as an area of shared or concurrent jurisdiction in which both Parliament and the provincial legislatures have legitimate roles to play. This paper also calls into question the whole concept of entrenching a cultural power in the Constitution in the first place, arguing that it is unwise to recognize indeterminate and amorphous concepts like culture as a basis for legislative authority in a federal state.

I. INTRODUCTION ............................................................ 810


* Associate Professor, Osgoode Hall Law School and Director of the York University Centre for Public Law and Public Policy. An earlier version of this paper was originally prepared for the Common Agenda Alliance for the Arts, a coalition of thirty arts organizations which was formed during the Canada Round constitutional debate to defend the role of the federal government in the cultural field. The author is particularly grateful to Mr. Timothy Porteous, President of the Ontario College of Art and a member of the Alliance, for his encouragement, advice, and suggestions. He would also like to thank Mr. Michael Pratt, a member of the 1994 graduating class of Osgoode Hall Law School, for his excellent research assistance.
II. BACKGROUND: THE CHANGING ROLE OF GOVERNMENT IN
THE CULTURAL FIELD .................................................... 817
A. Culture and the Constitution Act, 1867 ................................. 817
B. Contemporary Government Regulation of Culture ...................... 819

III. CULTURE AND THE CHARLOTTETOWN ACCORD ...................... 828

IV. TOWARDS A NEW UNDERSTANDING: FEDERAL CULTURAL
POLICY AND THE PEACE, ORDER AND GOOD
GOVERNMENT POWER .................................................... 845

V. CONCLUSION .............................................................. 861

I. INTRODUCTION

In the 1992 debate over the Charlottetown Accord, there was relatively little public attention focused on the implications of the Accord on cultural policy. To be sure, a number of arts groups argued that the Accord would have shifted cultural responsibilities from Ottawa to the provinces, and that this devolution was unacceptable. But, during the referendum campaign, public attention tended to focus elsewhere, on issues such as Senate reform or the guarantee of 25 per cent of the seats in the House of Commons to the province of Quebec. When Canadians were asked to explain why they voted the way they did, the cultural issue was rarely mentioned.

This low profile attached to the cultural issue can be attributed, at least in part, to confusion over whether the Accord was even intended to change the way in which the constitution allocated responsibility for culture. While many cultural groups complained that the Accord would have shifted power to the provinces, the federal government maintained

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1 The Accord, intended to be a draft legal text detailing proposals for the amendment of the Constitution of Canada, was issued on 9 October 1992. The text of the Accord is contained in the appendices of K. McRoberts & P.J. Monahan, eds., The Charlottetown Accord, the Referendum, and the Future of Canada (Toronto: University of Toronto Press, 1993).


that the amendments dealing with culture merely codified the existing constitutional position. This benign interpretation of the Accord's implications for cultural policy was accepted by at least some cultural organizations. In view of these divisions within the arts community itself, it is hardly surprising that the cultural issue failed to push any "hot buttons" in the public consciousness and seemed to fade into the background during the cacophonous referendum campaign.

This paper seeks to revisit the issue of culture and the Canadian Constitution. My purpose is a limited and descriptive one. My objective is simply to describe the way in which the Constitution currently divides responsibility between the federal and provincial governments over cultural matters. Such an attempt to map the status quo may be dismissed by some as pedestrian or unimportant. But the fact is that the recent debates over culture and the Constitution have revealed very profound disagreements over how the Constitution currently divides responsibility for culture. Given the lack of consensus about the status quo, it becomes almost impossible to conduct a reasoned discussion over the merits of any proposed amendments or reforms.

Although this paper is primarily descriptive, the analysis is not without normative implications. In particular, any description of the existing constitutional position in relation to culture will obviously reflect upon the recent debate over the cultural amendments in the Charlottetown Accord. The federal government's justification of the Accord's cultural amendments depended to a very considerable extent on the proposition that these amendments merely codified the status quo. Thus, by describing the existing constitutional position, it becomes

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4 See J. Portman, "Ottawa to keep firm grasp on arts: New Accord no threat to the CBC or film board, minister says" The Toronto Star (28 August 1992) A14. Portman quoted Communications Minister Perrin Beatty as saying that, contrary to some media reports, "Ottawa was losing no powers in the area of culture under the new unity accord."


6 The reference to the "cultural amendments" in the Charlottetown Accord is to proposed ss. 92B and 92C, which were to have been inserted in the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3. Section 92B would have recognized "culture in the province" as a head of provincial power, while s. 92C provided for the negotiation of federal-provincial cultural agreements. Other aspects of the Accord which would have indirectly affected culture (such as the requirement of a double majority in the Senate for amendments affecting cultural matters) will not be discussed in this paper.

It should also be noted that this paper will not discuss the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter], and its implications for cultural regulation in any detail. The focus here is on the division of powers between the federal and provincial governments, without reference to the Charter.
possible to test the extent to which the federal government's characterization of these aspects of the Accord was accurate.

The analysis in this paper also has a number of indirect implications for any future constitutional reforms that might be proposed in relation to culture. By clearly delineating the status quo, we create a benchmark against which any future constitutional changes in the cultural field can be assessed. That such changes will be proposed at some point in the future cannot be doubted. The word "constitution" has ostensibly been excised from the vocabulary of all practising Canadian politicians, even those in the province of Quebec. Yet it would be folly to suppose that this state of affairs will be permanent, as the election of Bloc Québécois leader Lucien Bouchard as Her Majesty's Loyal Opposition in the 1993 federal election demonstrates.

The current breathing space on the constitutional front provides an opportunity to re-examine the cultural issue in a way which was simply impossible in the crisis atmosphere which prevailed in the fall of 1992. Freed of the tyranny of political deadlines, it becomes possible to undertake a measured and principled analysis of the way in which responsibility for cultural matters is allocated under the existing Constitution. This kind of measured analysis can then serve as a reference point in any future political discussions which might develop on the constitutional front.

The paper is divided into three main parts. The first part describes the changing role that governments in Canada and elsewhere have played in the cultural domain. It is now commonplace for governments in industrialized countries to formulate cultural policies that are designed to assist cultural industries and promote a sense of common values. I trace the emergence of such a strategy by the Canadian government in the years following the Second World War. I also describe the constitutional controversy which has always surrounded federal involvement in this field, and the ways in which the federal government has attempted to deflect criticisms that it was intruding on an area of exclusive provincial jurisdiction.

The second section of the paper deals in some detail with the way in which the cultural issue was defined and debated in the "Canada Round" of constitutional discussions in 1991-92. What becomes evident is that all the main players in this debate shared a common understanding of the way in which the Constitution now allocates responsibility for culture. The central element in this common understanding is the belief that the Constitution allocates primary legislative responsibility over cultural matters to the provinces. While the most vocal proponents of this view are (understandably) the
provincial governments themselves, even the federal government appeared to subscribe to the notion that the provinces have primary responsibility for cultural matters under the current Constitution.

There is an immediate and obvious problem with the idea that the provinces have primary constitutional responsibility for cultural affairs in Canada. The theory of provincial primacy does not seem to accurately reflect the real world of government behaviour. The federal government has been far more active and has had a far more pervasive impact in the cultural field over the past forty years than have the provinces. Most of the landmarks in government involvement in this area, including the establishment of the Massey Commission in 1949, the Canada Council in 1957, or the Canadian Radio-Television and Telecommunications Commission (CRTC) in 1968, have been initiatives of the federal government which were later copied by the provinces (in some cases). The preponderance of the federal government in the cultural field is also reflected in the relative expenditures by the two levels of government. In the 1990-91 fiscal year, the federal government spent a total of over $2.8 billion in the cultural field, which was over $1 billion more than the expenditures of all the provinces combined.\(^7\) Within the province of Quebec alone, the federal government spent almost two-thirds more than the provincial government.\(^8\) Given the dominant role of the federal government, how can it be that the provinces are supposedly the primary custodians of cultural responsibilities under the current constitution?

The key element in the explanation is based on a distinction between legislative or regulatory responsibility on the one hand, and the exercise of the so-called federal spending power on the other. While the federal government is obviously more active in the cultural field, this is said to be a product of the power of the federal government’s purse—its spending power—rather than a reflection of the true division of constitutional responsibilities between the two levels of government. The spending power, of course, refers to the ability of the federal government to spend, lend, or contract in areas of exclusive provincial jurisdiction. The most obvious use of this power is the system of federal grants to the provinces for use in areas of exclusive provincial jurisdiction.

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\(^7\) Letter of N. Verma, Project Manager, Government Expenditures on Culture Project, Culture Statistics Program, Statistics Canada to the author (5 March 1993). The data for the 1990-91 fiscal year are the most recent available at the time of writing.

\(^8\) Ibid. Federal spending in Quebec in 1990-91 amounted to $877.5 million; provincial spending was $536.3 million.
jurisdiction, such as health care, social welfare, and education. The extensive federal involvement in the cultural field, which to a large extent consists of federal grants or contributions, is thus characterized as simply another illustration of the ability of the federal government to expend funds in areas of exclusive provincial jurisdiction. Indeed, characterizing the federal involvement in cultural matters in this manner creates the impression that Ottawa is somehow intruding into an area which is implicitly reserved to the provinces. This leads to arguments that some kind of restrictions or limits ought to be placed on the ability of the federal government to expend monies in the cultural field.

This orthodoxy went virtually unchallenged throughout the discussions leading up to the Charlottetown Accord. All the significant governmental players in the 1991-92 process began with the assumption that the current Constitution allocates primary responsibility over cultural matters to the provinces. Federal involvement in cultural matters was typically assumed to be based on the federal spending power rather than on any grant of direct legislative authority. The main area of disagreement in the Charlottetown process appeared to be over the question of whether the federal spending power was a legitimate basis for past or future federal involvement in this area.

In the third section of the paper, I critically examine this conventional wisdom regarding the constitutional primacy of the provinces. I suggest, contrary to the current orthodoxy, that it is simply wrong to characterize the provinces as possessing primary jurisdiction over cultural matters. I argue that the current constitutional position regarding culture can be described in the following manner:

1. There is no distinct cultural power under the existing Constitution. The division of powers in 1867 did not contemplate direct regulation of cultural affairs by either the federal or provincial governments.

2. Although there is no distinct cultural power per se, both levels of government have very extensive authority to legislate in ways which affect culture. This is because many of the existing powers possessed by each level of government authorize legislation with cultural purposes or impact.

3. The very extensive federal involvement in the cultural field is not based simply on the exercise of the federal spending power. Rather, federal involvement is based on a number of specific heads of authority, the most important of which is its authority to

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9 See, for example, the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, R.S.C. 1985, c. F-8.
pass laws in relation to matters of "national concern."\textsuperscript{10} The promotion and strengthening of a distinct Canadian national identity is, I argue, one such matter of national concern.

4. Thus, it is wrong to argue that the provinces have primary jurisdiction over cultural matters, and that the federal activity in this area has no sound constitutional foundation. The goal of strengthening Canada's national identity provides the constitutional authority for a wide range of federal legislation and expenditures in the cultural area.

5. The proposed amendments in relation to culture in the Charlottetown Accord would probably have reduced federal legislative authority in this area. The Charlottetown amendments seemed to assume that federal authority in the cultural field was limited to the exercise of the federal spending power. There was no recognition of the authority of the federal Parliament to pass laws promoting the Canadian national identity. At the same time, there was explicit recognition of a provincial legislative authority in relation to culture, and the proposed cultural agreements were to "recogniz[e] the lead responsibility of the province for culture in the province."\textsuperscript{11} Over time, these amendments would likely have reduced the effective authority of the federal Parliament and government, particularly its authority to promote a distinct national identity.

6. It is questionable whether a distinct cultural power should be entrenched in the Constitution at all. The Supreme Court of Canada has, especially in recent years, cast doubt on the wisdom of recognizing indeterminate and amorphous concepts like inflation or environment as a basis for legislative authority. Culture would appear to be at least as indeterminate as these other matters and would be inconsistent with this emerging Supreme Court jurisprudence.

7. Assuming that some kind of cultural power is to be entrenched in the Constitution at some point in the future, culture should be recognized as an area of shared or concurrent jurisdiction in which both Parliament and the provincial legislatures have legitimate roles to play. Recognizing culture as an area of functional concurrency would be a far more accurate reflection

\textsuperscript{10} Federal authority to legislate in relation to matters of "national concern" is one aspect of its so-called residual power, the authority to pass laws for the "Peace, Order and Good Government of Canada." See discussion infra at text accompanying notes 95-100.

\textsuperscript{11} See proposed section 92C, infra note 68.
of the existing constitutional position than were the amendments proposed in the Charlottetown Accord.

This analysis offers some important lessons which ought to be kept in mind in any future debates over constitutional reform. One important lesson is that there is no substitute for very careful analysis and understanding of the existing constitutional position before proposing possible reforms. I suggest that the debate over culture in the Charlottetown Accord proceeded on the basis of a misconception about the nature of federal authority in this area. This misconception—that the provinces have primary authority over culture—produced amendments which were said to be a mere codification of the status quo. In fact, however, these amendments had the potential to significantly reduce or erode federal authority. This was a result which most of the key players in the debate—including the Prime Minister of Canada and the federal Communications Minister—repeatedly claimed they wished to avert. What this reveals is the extent to which the full implications of the proposed amendments may not have been grasped even by some of their authors.

A second important lesson which emerges from this analysis relates to the process of constitutional reform. The analysis in this paper focuses on one very small and narrow aspect of what was a vast package of amendment proposals presented to Canadians. But there is no reason to suppose that the misconceptions and miscalculations which were evident in the cultural context were an isolated phenomenon. It seems safe to assume that the implications of many other aspects of the Accord were imperfectly understood, even by the government decision makers who drafted the Accord. That such misconceptions would arise is not surprising, given the vast range of matters under consideration and the extremely short time-frame within which the Accord was negotiated. Of course, our knowledge of the implications of any proposed constitutional amendments will always be imperfect, regardless of the process that is utilized. But the potential for misconceptions and mistakes is increased dramatically when the package is as vast and all encompassing as was the Charlottetown Accord. A far more prudent and responsible approach would be to proceed in a limited and incremental fashion, permitting adequate time for careful consideration and debate of the implications of what is being proposed.
II. BACKGROUND: THE CHANGING ROLE OF GOVERNMENT IN THE CULTURAL FIELD

A. Culture and the Constitution Act, 1867

The term "culture" does not appear in the catalogue of federal and provincial powers in sections 91 and 92 of the Constitution Act, 1867. The absence of any reference to jurisdiction over culture is hardly surprising, for at least two reasons. First, the drafters of the Constitution Act, 1867 had a conception of the appropriate role of government which, to modern eyes at least, appears extremely limited. Government in mid-nineteenth century England (and its colonies) was seen as primarily focused on such matters as administering justice, ensuring collective defence, collecting taxes, and providing an infrastructure for economic development. The suggestion that government ought to regulate or promote the cultural development of the nation, had such a suggestion ever been made, would have been regarded as ludicrous.\(^{12}\) Lord Melbourne's 1835 dictum, "God help the Minister that meddles with art,"\(^{13}\) was one of the self-evident truths of public policy for nineteenth-century British and colonial politicians.

Yet even if the nineteenth-century view of government had been more expansive, there would have been a second, equally fundamental objection to the idea of including culture as a head of legislative authority in the Constitution Act, 1867. The term "culture" is so indeterminate and all-encompassing that its inclusion in either sections 91 or 92 of the Act would have rendered the entire division of powers almost incoherent. While the term "culture" is notoriously difficult to define, experts in the study of culture commonly describe it in broad terms, such as "the broad spectrum of human activities, symbols, values, and artifacts that identify a human group and distinguish it from others."\(^{14}\) Other definitions suggest that culture is a "collective way of

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\(^{13}\) As quoted in Minihan, ibid. at 60.

If this definition of culture is accepted, it would appear that virtually all government activity could be seen as falling within the cultural realm. Because almost everything government does affects, directly or indirectly, our "collective way of being," it follows that "[e]very government decision, every public action, entails cultural implications."16

To illustrate this proposition, consider the wide variety of legislation which, although not normally regarded within the category of cultural policy, affects directly our "collective way of being." The Canada Health Act,17 for example, is nominally about health care funding. But it is also a law about culture in the sense that medicare is thought to be a defining feature of the Canadian identity. The Canada-United States Free Trade Agreement18 is nominally a treaty regulating trade relations, but it also involves a very important choice about our "collective way of being" and, hence, our cultural identity.19 The National Transportation Act20 is nominally about the regulation of transportation, but it also involves culture in the sense that certain modes of transportation (particularly railways) have come to be seen as vital to the Canadian way of life. There are countless other examples which are not usually classified as cultural, but which have important and direct cultural significance. The point is simply that it is impossible to draw a bright-line boundary around cultural policy or cultural legislation. Because the concept of culture is itself so amorphous and all-encompassing, laws which at first glance are regarded as outside of the cultural realm are, on closer examination, of direct cultural

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15 See The Task Force on Canadian Unity, Coming to Terms: The Words of the Debate (Hull: Minister of Supply and Services, 1979) (co-chairs: J.-L. Pepin & J. Robarts) at 4, which offered the following definition of culture:

In day-to-day usage, culture is often considered to be the intellectual and artistic aspect of life in a community or society.

Culture has a broader meaning, however, when related to the character of the whole community. In this context, culture may be defined as the sum of the characteristics of a community acquired through education, training and social experience. It includes knowledge in all fields, language, traditions and values. It adds up to a collective way of thinking, feeling, and doing, a collective way of being.

16 Ostry, supra note 12 at 14.

17 S.C. 1984, c. 6.


19 This is recognized in the Free Trade Agreement itself, which specifically exempts "cultural industries" from its provisions. See Free Trade Agreement, 2 January 1988, art. 2005.

relevance. In this sense, virtually all government policy could be characterized as cultural policy, in the sense that it affects who we are and how we see ourselves as a society.

This observation is important in terms of the division of powers in a federal state such as Canada. Because there is such a wide variety of laws which directly affect a society’s culture, allocating exclusive authority over culture to one government would appear to be inconsistent with the very idea of a federal division of powers. If a single level of government were granted exclusive authority over culture, it would be the equivalent of allowing the entire field of legislative activity to be the exclusive preserve of a particular order of government.

The fact that the term “culture” was not used in the Constitution Act, 1867 meant, in effect, that either level of government was free to enact laws with cultural impact. Of course, government is always required to demonstrate that any particular piece of legislation flows from some specific authority contained in the Constitution Act, 1867. But, assuming such a proper constitutional foundation, the fact that a law might affect culture was simply irrelevant for constitutional purposes. The federal Immigration Act,\(^21\) for example, would obviously have important cultural impact, in the sense that successive waves of immigrants in the late nineteenth and early twentieth centuries would bring their traditions to Canada and, in the process, redefine our “collective way of being.” But since section 95 of the Constitution Act, 1867 made it clear that immigration was a matter of concurrent jurisdiction, the cultural impact of immigration laws was simply beside the point: either level of government was free to regulate immigration, subject to the paramountcy of federal laws in cases of inconsistency. Another way of expressing this point is that culture is not a category with any constitutional significance under the 1867 Constitution Act. Either level of government is perfectly free to enact laws which might directly affect culture, as long as there is an appropriate constitutional foundation for such laws in the Act. This, simply put, is the constitutional position as established by the 1867 Act.

B. Contemporary Government Regulation of Culture

Over the course of the past century, our understanding of the proper role of government has changed fundamentally. Modern governments have assumed responsibility for a vast array of matters that,
a century ago, would have been regarded as the preserve of the private sector. One aspect of this transformation is the way in which governments have come to assume responsibility for promoting cultural development. Whereas mere decades ago cultural development was seen as a matter best left to individuals and groups in society, today governments the world over regard cultural policy as an important part of their mandate. As one recent survey concluded, "Every major industrial nation now has a significant cultural or arts policy which involves the expenditure of significant sums of money and is able to have a real impact on cultural development and distribution."  

While all western governments now assume an active role in promoting cultural development, Canadian governments have come to see cultural policy as a particularly important part of their mandate. This Canadian emphasis on cultural policy is a result of the pressures and challenges facing the development of a distinct Canadian identity. Canada is an ethnically and culturally mixed society with a small population spread over an immense territory. We are located next to the culturally vital United States, a society with whom most Canadians share a language and have increasingly close economic and political ties. At the same time, our traditional links to the United Kingdom, which for many Canadians provided a basis for a distinctive Canadian tradition, have become increasingly attenuated. These and other developments have meant that Canadians, particularly since 1945, have seen their own sense of collective identity increasingly called into question. This, in turn, has produced the universally shared assumption that Canadian governments have a vital role to play in defending our collective cultural autonomy. The 1951 Report of the Massey Commission represented the watershed event in this regard, in the sense that it "crystallized a Canadian train of thought ... that, unlike its southern neighbour, the government of Canada had a role to play in fostering culture as it had in building roads, railways and communication systems." Four decades later, the proposition which was regarded as a novelty in 1951 has become the primary article of faith of Canada's cultural community. Today, the "single pivotal principle of arts policies in Canada ... [is] that

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24 Ostry, supra note 12 at 77.
the arts are of public concern and therefore within the jurisdiction of public policy."\(^{25}\)

As the Canadian government began to assert a responsibility for promoting cultural development in the post-war years, questions about constitutional authority in this field began to surface. Whenever the federal government asserted responsibility to promote culture on the national level, it was met by suggestions that this would intrude into an area of exclusive provincial jurisdiction. It was never entirely clear how such an intrusion would arise since, as we have seen, there was no explicit reference to jurisdiction over culture in the 1867 Constitution Act.\(^{26}\) Moreover (as noted above), both levels of government had, since 1867, been enacting laws which directly affected the country's cultural development. The only thing that had changed was that governments were now explicitly acknowledging a responsibility for promoting cultural development.

As the federal government began to define its new role in relation to cultural development, it sought at every turn to reassure the provinces that this federal responsibility would not intrude into areas of provincial jurisdiction. The Order-in-Council (oic) establishing the Massey Commission in 1949 illustrates the caution and restraint which characterized the early federal efforts in this field. The oic begins by reciting the fact that it is "in the national interest to give encouragement to institutions which express national feeling, promote common understanding, and add to the variety and richness of Canadian life, rural as well as urban."\(^{27}\) But this suggestion is apparently far from novel since, as the oic continues, "there exist already certain Federal agencies and activities which contribute to these ends."\(^{28}\) Thus, while it is desirable that an inquiry be held into these "Federal agencies and activities," such inquiry would be conducted with "full respect for the constitutional jurisdiction of the provinces."\(^{29}\)

This careful wording suggests that the Royal Commission was nothing more than a refinement of existing federal policy that would pose no threat to the provinces. Notice, in particular, that the oic

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\(^{26}\) It would appear that the provinces took the position that a federal role in the cultural field would conflict with provincial jurisdiction over education. But this provincial argument was open to serious question. See the discussion below at text accompanying notes 28–30.

\(^{27}\) P.C. 1786, reproduced in Report: Royal Commission on National Development in the Arts, Letters and Sciences (Ottawa: King's Printer, 1951) at xi [hereinafter Royal Commission].

\(^{28}\) *Ibid.*

\(^{29}\) *Ibid.*
describes the national role rather narrowly, as involving “institutions” that will encourage the expression of national feeling and common understanding. The OIC then points out that many such institutions already exist, and that the Royal Commission will merely recommend “their most effective conduct.” There is no suggestion that the federal responsibility extends beyond existing institutions or, for that matter, that the federal government might have a broader policy role in this area, quite apart from specific federal institutions or agencies. There is no mention of any general federal responsibility to promote national values or to strengthen ties amongst Canadians.

Further, one is left slightly puzzled by the reference to the fact that the inquiry will be conducted with “full respect for the constitutional jurisdiction of the provinces.” No attempt is made to define the nature or extent of this provincial jurisdiction, or to explain how such authority might be compromised by the conduct of the Massey Commission. One might have thought, for example, that the establishment of federal institutions to “express national feeling, promote common understanding and add to the variety and richness of Canadian life” would, by definition, be a matter which could not possibly interfere with the role of the provinces. The promotion of “national feeling” seems a matter which necessarily extends beyond the mandate of any particular province and is a responsibility which could only be undertaken by a national government. The fact that it was thought necessary to include this genuflection in the direction of the provinces is a telling sign of the extreme hesitation which governed Ottawa’s official attitude towards these issues.

When the Massey Commission reported two years later, it returned to these same themes in its opening chapter. But Massey, unlike the federal cabinet headed by Louis St. Laurent, was much less reticent about asserting the necessity for active federal involvement in the promotion of Canadian culture. On the opening page of the Report, Massey made it clear that it was not particularly concerned about the narrow way the government had framed its terms of reference. Massey observed that, according to the strict terms of the OIC, its mandate was simply to examine “certain national institutions and functions and to make recommendations regarding their organization.” Nevertheless,

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30 Ibid.

31 The reference to Massey is intended to denote the entire Commission, as opposed to its Chair personally.

32 Royal Commission, supra note 27 at 3.
Culture and the Canadian Constitution

according to Massey, while the OIC defined its “primary duty,” there was a broader aspect to the mandate: “The agencies and functions with which we were required to deal are only certain threads in a vast fabric.” In order to appreciate the meaning and importance of these “certain threads,” the Commission had to inquire into the “vast fabric” into which they had been woven. In short, in order to fulfil the terms of reference, the Commission had found it necessary to undertake a “general survey of the arts, letters and sciences in Canada, to appraise present accomplishments and to forecast future progress.”

Having discovered in its apparently narrow terms of reference the necessity to undertake this vast and sweeping general survey, Massey illustrated yet again the universal tendency of Royal Commissions to exceed their original mandates. But, in this instance at least, Canadians have reason to be grateful that Massey chose to overlook the wording of its OIC and undertake a general survey of the field. The resulting Report represents nothing short of an intellectual and political tour de force which continues, forty-two years later, to guide public policy in the field.

Having staked out its territory, Massey moved on to point out that governments in the middle of the twentieth century have come to assume a new role in relation to culture. This new role, while “not foreseen a generation ago,” has now come to be accepted “in all civilized countries whatever political philosophy may prevail.” Massey explained that what is new is that governments have come to accept “official responsibility” for cultural development of their societies.

Massey pointed out that it was particularly important for the Canadian government to embrace wholeheartedly this new responsibility. Massey claimed that Canada was in a unique position, since it alone faced three great challenges which impeded the development of a distinctive Canadian way of life. First, Canada has “a small and scattered population in a vast area;” second, Canadians are “clustered along the rim of another country many times more populous and of far greater economic strength;” and third, a majority of Canadians share their mother tongue with Americans, “which leads to peculiarly close and intimate relations.” The upshot of these three conditions was to create a situation of Canadian cultural dependency, in

33 Ibid.
34 Ibid.
35 Ibid. at 5.
36 Ibid.
which some Canadians were uncritically “accepting tacit direction from New York that they would not think of taking from Ottawa.”

Massey traced the pernicious effects of this cultural dependency on our schools, universities, publishers, broadcasters, periodicals, and institutions. In 1948, for example, there were only 14 works of fiction published in Canada, compared to 1,102 in the United States and 1,830 in Britain.

The Commission proposed that only a concerted policy at the national level could possibly hope to counter these American influences and to develop an indigenous cultural community.

But what of the provincial governments and of the concern expressed in the 1949 Massey report over provincial jurisdiction? Massey observed that this problem had “troubled a number of those presenting briefs to us,” and that it was “of sufficient importance to warrant attention at the beginning of this Report.”

Massey explained that what seemed to be troubling the provinces was that an expanded federal role in cultural affairs would interfere with provincial jurisdiction over education. But, according to Massey, these concerns were misplaced. Provincial jurisdiction extends to “formal education” in schools and universities. The Commission was concerned with “general non-academic education through books, periodicals, radio, films, museums, art galleries, lectures and study groups.”

The Commission advanced two reasons justifying active federal involvement in regulating and promoting “general non-academic education.” The first was technical and tentative. Massey observed that there was no law prohibiting anyone from contributing to the general education of the individual. Since no such prohibition existed, activities of the federal government in advancing Canadian cultural development “[were] not in conflict with any existing law.” This seems an odd rationale for justifying federal involvement in cultural affairs, since it is entirely negative and fails to provide any positive justification for federal responsibility. Massey went on to offer a second rationale which, while speaking in more positive terms, also seems somehow beside the point.

38 Ibid. at 15.
39 Ibid. at 228. Massey also noted that, in addition to these works of fiction, there were a total of thirty-five Canadian books of poetry and drama and a mere six “general” books published in Canada in 1948.
40 Ibid. at 6.
41 Constitution Act, 1867, supra note 6, s. 93.
42 Royal Commission, supra note 27 at 6.
43 Ibid. at 8.
Massey suggested that all civilized societies strive for a common good, which includes "not only material but intellectual and moral elements." If the federal government renounces its right to promote general education and the common good, then it "denies its intellectual and moral purpose." This, according to Massey, means that Canada would become a "materialistic society."

Presumably, the spectre of materialism, driven by vast cultural importation from south of the border, was a frightening prospect to Canada at mid-century. Federal involvement in cultural affairs could, therefore, be justified through an appeal to this anti-materialistic consensus. Yet if such a consensus existed (even at the elite level) in the 1950s, it seems doubtful that it has survived into the globalized 1990s. Also, Massey seemed to overlook a much more straightforward justification for a federal role in cultural affairs which continues to ring true today. This is simply the fact that Canadian culture cannot hope to survive, much less flourish, without active intervention by the national government. Because of the particular challenges facing Canada, challenges which Massey itself outlined elsewhere in masterful fashion, "national unity cannot be regarded as a foregone conclusion." A coherent effort to foster common values amongst Canadians was essential to the very survival of the nation.

Although Prime Minister St. Laurent carried the Massey Report into the House of Commons "with tongs ... careful to say no one in the government had read it," the government eventually implemented almost all its recommendations in one form or another. In the forty years since the Massey Commission brought down its landmark report, the federal government has put in place an ambitious and far-reaching programme of support and regulation of cultural activity. Federal involvement includes direct regulation, either by the government itself or through agencies such as the CRTC and the Copyright Board; grants, tax

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44 Ibid.
45 Ibid.
46 Ibid.
47 See Chapter II of the Royal Commission, discussed supra, text accompanying note 25.
48 Ostry, supra note 12 at 28.
49 Ibid. at 63.
50 Government regulation in the cultural field is often directed at restricting foreign control or domination of various Canadian cultural industries. See, for example, the so-called "Baie-Comeau Policy" adopted in 1985 to control foreign investment in the Canadian book publishing industry (Communications Canada, News Release 85-5324E (6 July 1985)) and more recently,
expenditures, and subsidies to cultural institutions or artists often administered through arms-length agencies like the Canada Council; and public ownership of institutions like the Canadian Broadcasting Corporation (CBC). The ever-expanding role of the federal government reflects the belief that cultural development is "the essence of our national being and the [instrument] of our identity as a country," but that this identity will atrophy without vigorous state support.

As the federal role in the cultural field has expanded dramatically over the past thirty years, there have been complaints from time to time that some of these initiatives intruded on provincial jurisdiction. Yet even the staunchest defenders of provincial rights have recognized the necessity for some form of continuing federal role in cultural affairs. For example, the Quebec Liberal Party's Beige Paper, published in 1980, proposed that the provinces be granted a general legislative power in relation to cultural matters while, at the same time, conceding that the federal government ought to have specific powers necessary to protect and develop the cultural identity of all Canadians. This federal authority included the power to create or maintain national

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51 For example, in 1976 the Income Tax Act, R.S.C. 1952, c.148, regulations were amended to allow for a greater rate of capital cost allowance on investments made in Canadian films (SOR/76-748). In 1976, Bill C-58, An Act to Amend the Income Tax Act, 1st Sess., 30th Parl., 1974-75-76, was proclaimed so as to disallow, for Canadian income tax purposes, advertising expenditures made in foreign magazines and on foreign television stations.

52 The Canada Council initiated direct federal support to cultural industries after 1957. This was extended in 1968 with the establishment of the Canadian Film Development Corporation, later to become Telefilm Canada. In recent years, the government has introduced a programme of support for the sound recording industry and established a Cultural Industries Development Fund, administered by the Federal Business Development Bank.

53 For an overview of the range of activities currently undertaken by the federal, provincial, and municipal governments in the cultural field, see Report of the Standing Committee on Communications and Culture: Culture and Communications: The Ties that Bind (Ottawa: House of Commons, 7 April 1992) [hereinafter Ties], especially c. 2, "The Role of Governments." See also Statistics Canada, Government Expenditures on Culture in Canada: 1982-83 to 1986-87 Culture Statistics (Ottawa: Minister of Supply and Services, 1990) at 11-16 [hereinafter Government Expenditures].

54 See Ties, supra note 53 at 26.


56 See The Constitutional Committee of the Quebec Liberal Party, A New Canadian Federation (Beige Paper) (Montreal: 1980) at recommendations 15(4),(5) and (6) [hereinafter Beige Paper].
institutions such as the CBC, the National Film Board, and the National Art Gallery.

Other reform proposals developed during the constitutional discussions of the late 1970s and early 1980s, if they discussed jurisdiction over culture at all, were to the same effect—culture was an area of shared jurisdiction, with both levels of government playing a legitimate and necessary role. The 1979 Report of the Pepin-Robarts Task Force on Canadian Unity,\(^5\) which was among the more decentralist proposals of this era, observed that “[t]he central government has for many years been the prime mover in Canadian cultural and artistic life,” and that Ottawa has played “an invaluable pioneering role in many crucial fields [relating to culture] which might otherwise have been neglected.”\(^5\) Moreover, the central government “is the only government in Canada which has the resources and the breadth of perspective to develop cultural programs directed at the country as a whole.”\(^5\) Pepin-Robarts concluded that “[c]learly both orders of government have important responsibilities in the cultural field …”\(^6\) In particular, the Task Force recommended that any adjustments to the division of powers should take account of the fact that the federal government has a responsibility to strengthen the Canadian identity.\(^6\) Pepin-Robarts also recommended that the federal government be recognized as having a responsibility to preserve and to enhance the integrity of the Canadian state.\(^6\) While the Task Force also recognized similar roles for the provinces, in general terms it would have left culture as an area of concurrent jurisdiction.

These and other proposals dealing with jurisdiction over culture were never the subject of serious negotiations by governments during the “patriation round” of constitutional reform.\(^6\) The primary focus of the bargaining between governments in the 1980-82 period was over the entrenchment of a charter of rights and a new domestic amending

\(^5\) A Future Together: Observations and Recommendations (Hull: Minister of Supply and Services, 1979) [hereinafter A Future Together].
\(^6\) Ibid. at 60.
\(^6\) Ibid.
\(^6\) Ibid.
\(^6\) Ibid. at 85.
\(^6\) Ibid. at 125.

\(^6\) The “patriation round” began in the spring of 1980 after the re-election of the Trudeau government in the February 1980 general election, and concluded with the signing of the Canada Act 1982 by the Queen in Ottawa on 17 April 1982.
formula. In the *Constitution Act, 1982*, culture is mentioned in only two instances; but in neither case is there any substantive change in the division of powers. Section 27 of the *Charter* provides that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the “multicultural heritage of Canadians.” But, whatever the scope or import of this clause, it does not apply to the *Constitution Act, 1867* and, thus, cannot affect the division of powers. The only other mention of culture in the *Constitution Act, 1982* is found in section 40, which deals with amendments transferring provincial legislative powers “relating to education or other cultural matters.” However, section 40 merely grants a provincial right to compensation in the event that provinces agree to transfer powers relating to cultural matters at some point in the future. It does not purport to effect any change in the existing distribution of legislative authority, nor does it even attempt to define what might be included within the term “cultural matters.”

Similarly, the Meech Lake discussions between 1987 and 1990 did not deal with jurisdiction over culture. Quebec's five conditions, which formed the basis for the Accord, made no mention of federal-provincial jurisdiction over culture. Other items added to the agenda during the ensuing three-year debate included Senate reform, Aboriginal rights, a “Canada Clause,” and gender equality. But jurisdiction over culture did not even make it to the long list of items for the “second round” of constitutional discussions which was to have followed the ratification of the Accord.

III. CULTURE AND THE CHARLOTTETOWN ACCORD

In the recent “Canada Round” of constitutional discussions, culminating in the Charlottetown Accord of 28 August 1991, governments for the first time agreed to entrench a cultural power in the Constitution. The Charlottetown Accord proposed to add a new section (92B) to the *Constitution Act, 1867* stating that the provincial legislatures “may exclusively make laws in relation to culture in the province.”

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same section would also have provided that the Government of Canada "retains its role in relation to national cultural matters, including national cultural institutions and grants and contributions delivered by such institutions." A separate section provided that the Government of Canada would negotiate cultural agreements with any province that so requests, so as to ensure that "both governments work in harmony, recognizing the lead responsibility of the province for culture in the province."

The drafters of the Accord, including Constitutional Affairs Minister Joe Clark, sought to downplay the apparent novelty of proposed sections 92B and 92C by arguing that they merely entrenched the constitutional status quo. Of course, one must always be rather sceptical of such predictions, since the ultimate meaning and impact of constitutional provisions will be determined by the courts, and not by politicians. In any event, in order to assess the correctness of this particular claim it would be necessary to clarify the drafters' understanding of the existing constitutional position. If it turned out that the drafters' understanding of the status quo was itself incomplete or misleading, then there would be little reason to suppose that these amendments would be as innocuous as was being claimed.

The origins of the cultural amendments in the Charlottetown Accord can be traced to the Quebec Liberal Party's Allaire Report published in January 1991. The Allaire Committee was established by

67 Proposed section 92B provided as follows:
(1) The legislature of each province may exclusively make laws in relation to culture in the province.
(2) The Government of Canada retains its role in relation to national cultural matters, including national cultural institutions and grants and contributions delivered by such institutions.
(3) Nothing in subsection (2) extends the authority of the Parliament of Canada.

68 Proposed section 92C provided as follows:
(1) The Government of Canada shall negotiate with the government of any province that so requests an agreement on culture for the purpose of ensuring that both governments work in harmony, recognizing the lead responsibility of the province for culture in the province.
(2) The Government of Canada shall negotiate with the government of any territory that so requests an agreement on culture for the purpose of ensuring that both governments work in harmony.

69 The courts have made this explicit, holding that the intentions of the drafters of the Constitution have minimal weight in their legal interpretation. See Reference Re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, [1985] 2 S.C.R. 486.

Premier Robert Bourassa to develop a new constitutional position for the Quebec Liberal Party following the failure of the Meech Lake Accord. The Committee's Report concluded that there must be a profound decentralization of powers in favour of the provinces if Canadian federalism were to meet the challenge of the 1990s. One of its main recommendations was that Quebec should exercise "exclusive, discretionary and total authority in most fields of activity."\(^{71}\) One of the areas which would be "repatriated" to Quebec would be the field of culture. The Report noted that the two levels of government compete with each other in the field of culture, "leaving the way open to one-upmanship, conflicts and inefficiency."\(^{72}\) According to Allaire, the federal government had assumed a prominent role in cultural affairs thanks to national institutions, such as the CBC, the National Research Council, and the National Gallery. Federal jurisdiction over communications was also identified as having a significant impact on Quebec's cultural sector. The Report argued that culture was of central importance to the development of Quebec's identity, and that it was "impossible to overestimate the urgent need to repatriate powers in this area."\(^{73}\) It concluded that Quebec must have exclusive jurisdiction in all areas affecting culture and communications.

This recommendation had sweeping implications. As we noted earlier, it can be argued that virtually all forms of government activity have a direct and tangible impact on cultural identity. Thus, if Quebec were to have exclusive power in all areas of jurisdiction affecting culture, it is difficult to see what would be beyond the powers of the province and left to the central government.\(^{74}\)

As the federal government prepared its own package of reform proposals over the summer of 1991, there were widespread fears within the arts community that Ottawa was planning to devolve cultural responsibilities to the provinces. These fears were fuelled by discussions between federal Communications Minister Perrin Beatty and arts organizations in June 1991. Beatty reportedly asked the arts groups to suggest which areas of cultural activity the federal government could

\(^{71}\) Ibid. at 2.

\(^{72}\) Ibid. at 28.

\(^{73}\) Ibid.

\(^{74}\) Allaire's proposal on culture is consistent with the remainder of the Report, which contemplates the federal government being limited to areas such as defence, monetary policy, equalization, and debt servicing.
best turn over to the provinces. While Beatty denied that the federal government would abandon culture, he maintained that the current division of responsibility was not “immutable,” and that there were fields where cultural funding and other activities could be ceded to the provinces. As the talk of devolution became more widespread, arts and cultural associations banded together to form the Common Agenda Alliance for the Arts, “to express concern over the political focus of the federal government.”

The federal government unveiled its package of reform proposals, *Shaping Canada’s Future Together: Proposals,* in late September. The Federal Proposals included a brief reference to jurisdiction over culture, noting that it was important to “ensure ... the maintenance of important Canada-wide institutions that help us promote our identity.” At the same time, the federal government observed that it was important to permit the provinces to play “the roles they deem appropriate in the cultural field.” This was particularly critical for the province of Quebec, which has “special responsibilities for the preservation and promotion of Quebec’s cultural identity.” Accordingly, the federal government proposed to negotiate cultural agreements with the provinces that would “define clearly the role of each level of government.” These agreements would recognize the important “community dimension of culture and the special responsibilities of the Government of Quebec,” but would also provide for the maintenance of “existing Canadian cultural institutions ... that allow for the expression and dissemination of Canada’s identity.” Where appropriate, these agreements would be constitutionalized.

In the related area of broadcasting, the federal government argued that continued federal regulation was appropriate since activities in this field cross provincial and international boundaries. However, the

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76 Ibid.

77 (Hull: Minister of Supply and Services, 1991) [hereinafter Federal Proposals].

78 Ibid. at 35.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.
federal government proposed some modest enhancements of the role of the provinces, such as greater consultation on the issuance of new licences or in nominating regional commissioners for the CRTC.84

The Federal Proposals rejected the Allaire Committee's recommendation to recognize culture as an area of exclusive provincial jurisdiction. Rather than entrench a specific cultural power in the Constitution itself, the federal government proposed the negotiation of cultural agreements which would then be constitutionalized. A similar approach had been proposed in the Meech Lake Accord in the field of immigration. Under this model, federal-provincial agreements would be constitutionally entrenched in the sense that they would be protected from unilateral amendment by either level of government. Yet, the agreements themselves would not be incorporated into the main body of the Constitution and would be subject to the Charter.85

There is no difficulty in principle with negotiating federal-provincial agreements (on any subject) and then protecting the agreements from unilateral abrogation or amendment. What matters, of course, are the terms of any such agreement. In particular, if the federal government enters into an agreement which unduly limits its powers or authority, and then binds all future federal governments by constitutionalizing the agreement, the practical result is a permanent and unacceptable erosion of federal authority.

It was fear of precisely this kind of scenario which prompted many arts organizations, particularly those based outside of Quebec, to react negatively to the Federal Proposals. While the Federal Proposals did not contain any details as to what the proposed cultural agreements might contain, there were some broad hints as to the approach that Ottawa would bring to the negotiating table. The Federal Proposals made reference to the fact that the federal government would “maintain responsibility for existing cultural institutions.”86 Many arts groups were concerned about the use of the term “maintain.”87 This seemed to suggest that the existing national cultural institutions would become the ceiling for federal involvement in the cultural field, and that the federal

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84 Ibid. at 35-36.
85 See proposed section 95A of the Meech Lake Accord for the elaboration of this approach.
86 Federal Proposals, supra note 77 at 35.
87 See, for example, The Alliance of Canadian Cinema, Television and Radio Artists, "Enhancing the Federal Role in Culture and Communications" (Submission to the House of Commons Standing Committee on Culture and Communications, Ottawa, 15 November 1991); and Ontario Arts Council, “A Strong National Presence in Arts and Culture is a Necessity Declare Provincial Arts Agencies in Joint Statement” (Toronto: 22 January 1992).
presence would never exceed, but could certainly fall below, this ceiling. A focus on merely maintaining existing institutions would mean that Ottawa would be unable to expand or to adjust its role in light of changing circumstances.

This interpretation of the Federal Proposals in relation to culture was entirely plausible, particularly in light of a later reference to cultural institutions in the discussion of the federal spending power. The federal spending power refers to the authority of the federal government to spend or grant money in areas of exclusive provincial jurisdiction. Significantly, in describing the spending power, the Federal Proposals stated that Canada Council grants to individuals and organizations are an example of the exercise of this power.\textsuperscript{88} This is very important for what it tells us about the federal government's belief as to the basis of its authority to establish an agency like the Canada Council. What the federal government is admitting is that national cultural agencies like the Canada Council are operating in areas of exclusive provincial jurisdiction.\textsuperscript{89} Apparently, the only constitutional footing for a national institution like the Canada Council is the ability of the federal government to spend money in areas of exclusive provincial jurisdiction.

It goes without saying that the spending power is a most uncertain source of constitutional life-support. The Supreme Court has recognized the existence of this power in a number of recent judgments.\textsuperscript{90} But the provinces have consistently sought to impose restrictions on the manner in which the power can be exercised. The Meech Lake Accord had proposed certain restrictions which would have applied to the establishment of new, national shared-cost programmes in areas of exclusive provincial jurisdiction.\textsuperscript{91} The Federal Proposals in September 1991 contemplated restrictions similar to those in Meech Lake which would not have affected existing spending programmes, including those involving national cultural institutions like the Canada Council. But who could say what the future would hold? The Federal Proposals noted that the exercise of the federal spending power had given rise to "serious and often impassioned debate."\textsuperscript{92} It was certain that some provincial governments, particularly Quebec, would continue

\textsuperscript{88} Supra note 77 at 40.

\textsuperscript{89} Although the specific provincial jurisdiction is not spelled out, presumably it would be property and civil rights in s. 92(13).

\textsuperscript{90} See, for example, \textit{Reference Re Canada Assistance Plan (B.C.)}, [1991] 2 S.C.R. 525.

\textsuperscript{91} See s. 106A of the Meech Lake Accord.

\textsuperscript{92} Supra note 77 at 40.
to press for wider restrictions on the use of the federal spending power, such that even existing federal spending might come under provincial scrutiny.\textsuperscript{93}

In any event, the assumption that national cultural institutions operate in areas of exclusive provincial jurisdiction would surely play a major role in the promised negotiations over cultural agreements. Having acknowledged that national cultural institutions operate in areas of exclusive provincial jurisdiction, Ottawa had provided the provinces with the political leverage to limit, or even whittle down, the role of these agencies. At best, Ottawa might be able to "maintain" its existing agencies. The idea of creating new institutions, or even of expanding the mandate of existing ones, would be denounced by the provinces as an intrusion into their exclusive domain. In support of this argument, the provinces would be able to rely upon the position articulated by the federal government in its own Proposals.

By admitting that national cultural institutions were based on the spending power, Ottawa had indirectly called into question their political and constitutional legitimacy. As we shall see, this concession by the federal government was wholly unnecessary. The creation of agencies like the Canada Council can be justified on a basis which is quite independent of the federal spending power. For the moment, it is worth observing that the federal government regarded this basic premise about the source of its powers as requiring no explanation or elaboration of any kind. It was apparently self-evident that national cultural agencies like the Canada Council operated in an area of exclusive provincial jurisdiction, and that they owed their existence to the frail reed of the federal spending power.

After the Federal Proposals were released, they were studied by the House of Commons Standing Committee on Communications and Culture. The Committee, chaired by Conservative MP Bud Bird, held three months of public hearings and heard from more than one hundred witnesses. The Standing Committee also received a background paper from the Research Branch of the Library of Parliament on the existing constitutional setting in this field.\textsuperscript{94} The Background Paper, written by Mollie Dunsmuir of the Law and Government Division, is illuminating and important, since it provides a detailed constitutional argument

\textsuperscript{93} The Charlottetown Accord did, in fact, include wider restrictions on the use of the spending power. See the proposed amendment to s. 37 of the Constitution Act, 1982, providing for a framework to govern the use of the spending power.

which reinforces the assumptions underlying the September 1991 proposals on culture.

The Paper sets out the conventional understanding of the current constitutional position in relation to culture. Dunsmuir noted that culture is not specifically referred to in the Constitution Act, 1867. However, after a brief discussion, she concluded, "It seems clear ... that the provincial legislatures were originally intended to have legislative jurisdiction over most cultural issues as matters of a merely local or private nature in the province." The only exceptions to provincial jurisdiction were areas where national standards were necessary, such as copyright (section 91(23)), patents (section 91(22)), naturalization (section 91(25)), and marriage and divorce (section 91(26)). Dunsmuir summarized the constitutional division of authority in the following terms:

In fact, the provincial legislatures do have exclusive legislative jurisdiction over most cultural matters. On the whole, the federal government's role involves only the spending power—the ability to fund cultural institutions and programs such as the Canada Council, the National Film Board and the national museums. It is possible that the federal government could also justify some legislative control over national cultural institutions through the use of the "national concern" branch of the "peace, order and good government" power, as was done with the National Capital Commission, or by declaring various works, such as the national museums, to be for the general advantage of Canada. They have not done so to date, however, and the spending power seems to be the most relevant issue.

Thus, although Dunsmuir adverted to the possible relevance of the "national concern" doctrine, she concluded that the role of the federal government in the cultural domain is mainly dependent on the spending power. The remainder of the discussion of culture is devoted to an analysis of the spending power and, in particular, of various proposals or arguments to the effect that the spending power is an intrusion into provincial jurisdiction. She concluded that "the only real alternative to the existing constitutional situation is for restrictions to be placed on the ability of the federal government to fund cultural programmes." She presented two alternatives for achieving this goal: federal-provincial agreements, or "a constitutional amendment prohibiting or regulating federal spending in areas outside its express legislative authority." Dunsmuir seems to prefer the first option, since

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95 Ibid. at 7.
96 Ibid.
97 Ibid. at 11.
98 Ibid.
federal-provincial agreements are simpler and more flexible than a constitutional amendment, which would have consequences extending far beyond the cultural field.

The Background Paper illustrates how the choice of starting points has a habit of determining end points. Having begun with the premise that the federal role in culture is based on the exercise of the spending power, Dunsmuir is immediately driven to consider arguments that this involves an intrusion into provincial jurisdiction. The debate then devolves into a choice between the different kinds of limits which might be placed on the ability of the federal government to fund cultural programmes. Dunsmuir is certainly correct in pointing out that limiting federal spending through federal-provincial agreement is far preferable to limits imposed through a formal constitutional amendment. But where does the need for any such limits arise at all? The answer is supplied by the initial premise—that the federal role is based on the exercise of the spending power, as opposed to some other, more robust source of federal constitutional authority. By questioning or rejecting this initial premise, we are no longer faced with an unpalatable and unnecessary choice between different kinds of constraints on federal authority.

The hearings before the Standing Committee on Communications and Culture were dominated by various arts organizations, most of whom called for an affirmation of a strong national presence in cultural affairs. But when the Standing Committee came to draft its submission to the Beaudoin-Dobbie Committee and, later, its report to the House, it proceeded on the basis of the same assumptions about the limited scope of federal constitutional authority in this field. The Standing Committee noted that the Constitution is silent on the issue of jurisdiction over culture.\textsuperscript{99} However, the Committee continued, "it was clear that provinces generally were to retain control over provincial and local matters,"\textsuperscript{100} and that this would include culture. Thus, federal interventions in the field of culture were based on the power to spend or to establish national institutions:

Specifically, if we consider the constitutional power to legislate in cultural areas such as dance, music, theatre, sound recording, film or book publishing, it seems clear that the federal government does not have such legislative powers. However, it does have the power to spend and to establish national institutions in the fields of culture ...

\textsuperscript{99} See Ties, supra note 53 at 23.

\textsuperscript{100} Ibid. at 26.
Accordingly, the federal government's cultural initiatives are normally undertaken on the basis of its non-legislative constitutional powers: its taxing (or expenditure) powers and its power to establish national institutions (such as the CBC or The Canada Council).101

Thus, the Committee's analysis of the existing constitutional position is based on the same distinction between legislative and non-legislative powers (such as the spending power). The Committee conceded that the federal government does not have legislative powers in the field of culture, since such powers have been allocated to the provinces. The federal role is said to be based on its non-legislative powers such as the power to tax and to spend.

While the Committee accepted this narrow definition of the scope of federal authority, the overwhelming majority of the witnesses who appeared before it argued for continued federal leadership in the cultural field. The Committee's task was thus to square the circle between the constitutional and the political imperatives—to justify a wide political role for the federal government on an extremely narrow constitutional foundation. The Committee responded by proposing the need for partnerships between all levels of government, and called on federal, provincial, and municipal governments to negotiate a *Canada Cultural Accord*.102 While the Committee did not specify exactly what such an Accord would contain, it spoke in general terms of a framework of national cultural goals and objectives. The *Cultural Accord* would have specified how resources would be allocated amongst different cultural sectors, and how these resources would be delivered through existing national institutions and federal-provincial funding arrangements. The *Cultural Accord* would reflect a consensus amongst governments and would be administered by a Council of Ministers for Cultural Affairs in Canada. The Standing Committee also recommended that the *Cultural Accord* should not be constitutionalized, thus rejecting the federal government's approach to cultural agreements in its Proposals.

Whether a strong federal leadership role would have been maintained within the framework proposed by the Committee is certainly open to some question. The Committee's *Cultural Accord* would have been administered by a Council of Ministers in which the federal government would have been badly outnumbered by the provinces. But debating the merits of the Committee's proposal is, for our purposes at least, beside the point. It is important to note, yet again,

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101 Ibid. at 26 (emphasis in original).
102 Ibid. c. 2.
how the choice of starting points has a tendency to determine end points. Once it is assumed that the federal government lacks legislative power over culture, it becomes extremely difficult to justify a leading political role for the national government in this field. The idea of a Cultural Accord with the provinces and municipalities seemed the most attractive way of guaranteeing a strong federal presence within a most unattractive constitutional framework.

At the same time as the Standing Committee on Communications and Culture was considering the cultural aspects of the Federal Proposals, the Beaudoin-Dobbie Committee was reporting on the Proposals as a whole. The Beaudoin-Dobbie Report, dated 28 February 1992, made a number of specific recommendations with respect to culture. Essentially, the Committee recommended an asymmetrical approach, in which special cultural powers for Quebec would be explicitly recognized in the Constitution. The Committee left open the possibility that other provinces may be interested in the future in having their legislative jurisdiction over cultural affairs “affirmed” in the Constitution. The Committee used the term “affirmed” since it was of the view that “under the Constitution, the provinces have the primary legislative role with respect to general cultural matters.” While noting that culture is not an enumerated head of power, the Committee stated that “cultural activities have a direct relationship to provincial jurisdiction over education, property and civil rights, and matters of a local or private nature in the province.” Thus, entrenching a provincial role in relation to culture would merely be making explicit what is already implicit.

In addition to proposing that Quebec’s legislative authority over cultural affairs be affirmed, the Beaudoin-Dobbie Committee recommended a Canada-Quebec cultural agreement which would clearly define the role of each government in the cultural field. While the Committee spoke in terms of such an agreement clarifying responsibilities, on closer examination, it appeared that the main

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103 Special Joint Committee of the Senate and the House of Commons, *A Renewed Canada* (Co-chairs: Hon. G. Beaudoin & D. Dobbie) (Ottawa: Supply and Services Canada, 28 February 1992) at 75-80 [hereinafter Beaudoin-Dobbie Committee].

104 The Committee, at 118, recommended the enactment of a new section (93B) which would have provided as follows:

93B: The authority of the Legislature of Quebec exclusively to make laws in relation to cultural matters in Quebec is hereby affirmed.

105 Ibid. at 76.

106 Ibid. at 76-77.
objective was to limit federal spending on culture. The Committee stated that the Canada-Quebec cultural agreement would “identify areas where direct payments to individuals and private cultural organizations would be the exclusive responsibility of the province.”

Under the agreement, Quebec would receive its share of federal spending programmes on culture to be spent in accordance with the priorities established by the province. In addition, any further use of the federal spending power to fund cultural activities in Quebec would require the approval of the Quebec government, subject to federal programmes meeting “fundamental national objectives.” While this latter term was not defined, the Committee identified international or interprovincial cultural exchanges as one programme which was “clearly identified as related to national objectives.”

The Beaudoin-Dobbie Committee observed that there was strong political support for continued national funding of the arts, since such funding is “essential for national unity and the survival of Canada as a nation.” Yet the Committee’s proposals in relation to culture seemed to adopt a devolutionist logic which would inevitably lead to a reduced federal presence in the cultural sector across the country. The constitutional recognition of Quebec’s exclusive authority over cultural affairs, while presented as a mere codification of the status quo, would have significantly reduced the federal presence in the province of Quebec. Further, the Committee held open the possibility that the same approach might be applied to the other provinces in the future. While the other provinces were not pressing for increased authority over culture, it would surely have been only a matter of time before such demands would be forthcoming. Under the Beaudoin-Dobbie approach, the Quebec government would receive its share of federal spending on culture programmes and dispose of the funds in accordance with priorities established by the province. The political attractiveness of this arrangement was overwhelming and utterly irresistible—the federal government would levy taxes and then immediately turn the funds over to the province to determine how they should be spent. Once such an arrangement was in place for Quebec, the other provinces could not be expected to wait too long for similar treatment. The beauty of it, from the provinces’ point of view, was that their demands on the federal purse

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107 Ibid. at 79.
108 Ibid.
109 Ibid.
110 Ibid. at 77, quoting the Prince Edward Island Council of the Arts.
could be justified on the basis of high constitutional principle, rather than as a grubby attempt to get their hands on more money.

As it turned out, the devolutionist logic implicit in Beaudoin-Dobbie did not take very long to manifest itself. In mid-March 1992, the federal, provincial, and territorial governments, along with the four national Aboriginal organizations, began the Multilateral Meetings on the Constitution.\footnote{For an analysis of the multilateral process, see P. Monahan, “The Sounds of Silence,” in McRoberts & Monahan, supra note 1.} The government of Quebec boycotted the first stage of these talks, which produced a tentative agreement involving all the other governments and the Aboriginal organizations on 7 July.\footnote{See “Status Report: The Multilateral Meetings on the Constitution,” 16 July 1992.} Quebec then joined the talks for the second stage, which resulted in the Charlottetown Accord of 28 August.\footnote{See “Consensus Report on the Constitution: Charlottetown,” 29 August 1992.}

In terms of the division of powers between the federal government and the provinces, the Charlottetown Accord tended to favour arrangements which placed all provinces on an equal footing. The vast majority of the constitutional amendments proposed would not have recognized any special powers or authority for the province of Quebec. In terms of authority over culture, the Charlottetown Accord used the Beaudoin-Dobbie proposals as a base, but generalized from this base so as to grant all provinces the additional recognition which Beaudoin-Dobbie had proposed for Quebec alone. Thus, whereas Beaudoin-Dobbie had proposed that Quebec should have its legislative jurisdiction over culture affirmed, the Charlottetown Accord proposed that this affirmation should apply to all provinces. Similarly, the Beaudoin-Dobbie proposal to negotiate a Canada-Quebec cultural agreement was transformed into a constitutional amendment requiring the federal government to negotiate cultural agreements with all the provinces.

In defending the Charlottetown proposals, the federal government argued that it was not losing any of its existing powers in the cultural sphere. According to Communications Minister Perrin Beatty, the recognition of provincial legislative responsibility over culture “merely facilitate[s] the ability of the provinces to act in this area.”\footnote{See J. Portman, “Ottawa to keep firm grasp on arts: New accord no threat to the cbc or film board, minister says” The Toronto Star (28 August 1992) A14.} According to Beatty, Ottawa would not be abandoning any of its existing powers, nor would it be shutting down federal institutions like the CBC or...
the Canada Council. Beatty’s reassuring interpretation of the Accord was based on proposed section 92B(2), which stated that “[t]he Government of Canada retains its role in relation to national cultural matters, including national cultural institutions and grants and contributions delivered by such institutions.”

In the next section of the paper, when we consider the scope of the federal government’s existing cultural authority, it will become apparent that this interpretation of the Charlottetown Accord’s cultural provisions was rather misleading. For now, it is sufficient to offer a number of preliminary observations about the cultural provisions in the Charlottetown Accord.

First, the proposed amendments are based on the same assumptions about the broad character of provincial powers (and the narrow scope of federal powers) that we have already encountered. The baseline assumption is that the provinces have legislative authority over cultural matters, with the federal role being limited to the exercise of the spending power. This is made plain by the important differences between subsections (1) and (2) of proposed section 92B. Subsection (1) describes provincial authority in expansive terms. According to subsection (1), provincial legislatures may “exclusively make laws in relation to culture in the province.” This language, and particularly the use of the term “exclusively” to describe provincial authority, tracks the language of section 92 as a whole. Moreover, 92B(1) makes no reference to “affirming” legislative authority, language that is used elsewhere in the Accord. The use of the term “exclusively” to describe provincial authority, tracks the language of section 92 as a whole. Moreover, 92B(1) makes no reference to “affirming” legislative authority, language that is used elsewhere in the Accord. The absence of this language in subsection (1) leaves open the possibility that a new source of provincial authority is being recognized.

The differences in the terminology used to describe federal authority in subsections (2) and (3) of 92B are quite striking. Subsections (2) and (3) of proposed 92B provided as follows:

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115 See text of proposed section 92B supra note 67.

116 For example, section 93A states that “it is hereby affirmed” that certain matters “come within the exclusive legislative authority of the legislature of the province;” the same “affirming” language is used elsewhere, in describing the role of Quebec to preserve and promote the distinct society of Quebec.

117 See P.W. Hogg, Meech Lake Constitutional Accord Annotated (Toronto: Carswell, 1988) at 12.
(2) The Government of Canada retains its role in relation to national cultural matters, including national cultural institutions and grants and contributions delivered by such institutions.

(3) Nothing in subsection (2) extends the authority of the Parliament of Canada.

Whereas subsection (1) had referred to the exclusive authority of the provincial legislatures, subsection (2) refers only to the government (but not the Parliament) of Canada. The omission of any reference to Parliament in subsection (2) is not due to mere oversight, since Parliament is explicitly referenced in subsection (3), where it is stated that subsection (2) does not extend Parliament's powers. By referring to the Canadian government—but not to Parliament—the implication is that federal authority over culture is limited to the exercise of the federal spending power in areas of exclusive provincial jurisdiction. In effect, the deliberate omission of any reference to Parliament suggests that there is no federal law-making authority in relation to culture. This interpretation of subsection (2) is reinforced by the reference to the federal role as including "national cultural institutions and grants and contributions delivered by such institutions." The making of grants and contributions, or the establishment of cultural institutions, are the very examples which were utilized by the Beaudoin-Dobbie Committee in describing the limited ambit of federal authority in the culture field.

The other significant feature of subsections (2) and (3) is that they were worded in such a way as to negate any inference that any new authority was being recognized or created. Subsection (2) stated that the federal government "retains its role" in relation to national cultural matters. The clear implication of the word "retain" was that subsection (2) did not itself grant any authority, but merely confirmed authority which was created elsewhere. The use of the word "role" to describe federal authority is also significant. Other provisions in the Constitution Act, 1867 which create or grant legislative power employ terminology such as "may make laws in relation to matters." This same power-granting terminology is used to describe the provincial authority in relation to cultural matters in subsection (1). The use of the term "role" to describe federal authority in cultural matters contrasts sharply with this power-granting terminology found elsewhere. It reinforces the view that what is intended is merely to confirm the existence of federal authority, rather than to create any new authority.

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118 See, for example, the opening words of s. 91, which provide that Parliament may "make Laws for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."
In short, what section 92B of the Charlottetown Accord does is to codify the interpretation of federal and provincial cultural powers which had been widely accepted throughout the Canada Round. According to this prevailing wisdom, the provincial legislatures possess primary legislative authority in relation to cultural matters. The role of the federal government is limited to the exercise of the federal spending power in areas of exclusive provincial jurisdiction. The Parliament of Canada does not possess any legislative power in relation to cultural matters, since such authority is reserved to the provincial legislatures.

We have already seen how these assumptions about the nature and extent of federal authority over cultural matters carry a number of important implications. In particular, accepting the idea that the federal cultural role is based primarily on the exercise of the spending power leads immediately to proposals to limit or to constrain the way in which that power is exercised. This is because the provinces in general, and Quebec in particular, have traditionally regarded the use of the federal spending power as an intrusion into their exclusive domain.

This selfsame dynamic is reflected directly in the Charlottetown Accord. Having recognized in section 92B that the provinces have exclusive authority to make laws in relation to culture, section 92C provides that the federal government shall negotiate cultural agreements with provinces “for the purpose of ensuring that both governments work in harmony, recognizing the lead responsibility of the province for culture in the province.” Section 92C appears to establish a significant new constraint on the exercise of the federal spending power in the cultural field. Although the reference to agreements on culture suggests that any limits on federal spending powers will only arise sometime in the future, the obligation to conclude such agreements is mandatory and immediate. Section 92C stated that the government of Canada “shall negotiate ... an agreement on culture.” This mandatory language can be contrasted with provisions in other parts of the Accord, which provided for the negotiation of agreements, where more flexible wording is employed, such as, “shall negotiate *for the purpose of concluding* an agreement.”

Further, 92B makes it clear that, whatever else the agreements on culture might contain, they *must* recognize the lead responsibility of the province for culture in the province. If any future federal government were to question or reject the lead role of the provinces, it would be open to a province to enforce its primacy through court proceedings. The precise meaning of the term “lead responsibility

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119 See, for example, the obligation to negotiate in sections 93A (six policy fields) or 93B (labour market development and training).
of the province" is not defined. But presumably this would mean that some significant portion of the monies which the federal government is now spending on culture in the province must be handed over to the provinces. This was precisely what Beaudoin-Dobbie proposed in terms of the federal cultural role in Quebec. This is also the approach that is contemplated in other sections of the Accord which provided for the negotiation of federal-provincial agreements.\footnote{See, for example, section 93A, which provides that the federal government shall negotiate agreements in six policy fields "under which the Government of Canada is required to withdraw partially or completely as soon as is practicable from any program of grants or contributions ... and is required to provide reasonable compensation to the province or territory."}

The federal government maintained that sections 92B and 92C would "provide a firm constitutional basis for federal institutions and programs ... [and] allow all governments to support cultural initiatives."\footnote{See letter of Hon. Joe Clark, Minister of Constitutional Affairs to Ms. Penny Dickens, Common Agenda Alliance for the Arts (15 July 1993) [on file with author].} It is true that the Accord does make some reference to a federal role in relation to culture and that, in this sense, it recognizes a "constitutional basis" for federal action in this field. But the question which must be asked is the nature of the federal role contemplated by these provisions. In fact, the Accord assumes that federal authority over culture is limited and circumscribed. It is the provinces which are said to possess lead responsibility over culture in the province.

The federal government was prepared to recognize the primacy of the provinces in this area on the basis that this merely entrenched the constitutional status quo. In one sense, it is hardly surprising that the federal government approached the matter on this basis. All of the studies and reports which had been published in the months leading up to the negotiation of the Accord concluded that the provinces had primary legislative authority in relation to cultural matters, and that the federal role was limited to the exercise of the federal spending power. But the problem was simply this: suppose all these studies and reports had got it wrong? Suppose the scope of federal authority over cultural matters was in fact far broader than had been assumed throughout the discussions leading to the Charlottetown Accord? If that were the case, then the apparently innocuous sections 92B and 92C would in fact represent a significant and unwarranted erosion of federal authority.
IV. TOWARDS A NEW UNDERSTANDING: FEDERAL CULTURAL POLICY AND THE PEACE, ORDER AND GOOD GOVERNMENT POWER

In this section, I suggest that jurisdiction over cultural matters is divided in a way that is quite different from that which was assumed during the Canada Round discussions. Contrary to the Canada Round view, I suggest that it is inaccurate to describe the provinces as having primary jurisdiction over cultural matters. Rather, culture is an area of shared jurisdiction in which both levels of government have a legitimate and important role to play. The federal government, in particular, has a significant responsibility in this regard. Only the federal government is in a position to promote a distinct national identity and a sense of common values amongst all Canadians. The promotion of this national identity and these common values is a matter of continuing importance and, arguably, even urgency, given such factors as our cultural heterogeneity, our dispersal across a vast territory, and our proximity to the United States. The need to protect and promote a distinctive Canadian identity in the face of these challenges furnishes a firm constitutional basis for national policy-making in the cultural sphere.

What this means is that the widely accepted theory that federal jurisdiction over cultural matters is primarily dependent upon the spending power is simply wrong. The spending power theory proceeds on the assumption that culture is an area primarily reserved to the provinces, and that the federal government is able to act in this area only by virtue of its power to raise and spend tax revenues. But once it is recognized that culture is an area of shared jurisdiction, with both levels of government playing valid and legitimate roles, federal cultural initiatives can be viewed in a totally different constitutional light. Rather than being an intrusion into an area of exclusive provincial jurisdiction, federal cultural policy can be seen as a response to the need to promote a distinct national identity. This is a challenge which is inherently national in scope and therefore necessarily beyond the responsibility of the provinces, either individually or collectively.

These general conclusions can be unpacked and broken down into a number of discrete propositions. These propositions, beginning with the most general and proceeding to the more specific, are as follows:
1. Under the existing constitution, neither level of government is allocated exclusive jurisdiction over culture. Indeed, allocating exclusive jurisdiction over culture to a particular level of government appears to be inconsistent with a federal division of powers.

We have already noted the all-encompassing nature of the concept of culture. Culture can be described as all the social, political, economic, and artistic elements that together constitute and define a society's "collective way of being." As such, virtually all government action affects, in some fashion or another, a society's cultural make-up.

A number of important conclusions follow from this observation. The first is that it is simply inappropriate within a federal state to allocate exclusive jurisdiction over cultural matters to a single level of government. To do so would be to violate two basic norms associated with a federal state. The first such norm is the idea that jurisdiction within a federal state is divided between different orders of government. The second is that each order of government within a federal context exercises authority that is limited or circumscribed by the authority of the other orders.

Because culture is such an all-encompassing concept, granting a single order of government exclusive authority over cultural matters appears to be inconsistent with both of these norms. Such a grant of power would violate the principle that jurisdiction should be divided, since a single order of government would effectively have authority over the whole range of policy fields. And it also would violate the principle that authority in a federal state should be limited or circumscribed, since a government that had exclusive authority over culture would effectively have unlimited authority, and would be in a position to negate or to frustrate the autonomy of the other levels of government.

The contradiction between basic federal principles and allocating jurisdiction over culture to a single level of government was apparently overlooked during the recent Canada Round of constitutional negotiations. As we have seen, the Charlottetown Accord would have recognized the exclusive authority of the provincial legislatures to make laws in relation to culture in the province. But if we look back beyond the Charlottetown debate, we discover that it was at one time regarded as virtually axiomatic that it would be inappropriate to allocate exclusive jurisdiction over culture to a particular level of government. This is precisely the point made by Professor Gil Rémillard in a 1974 article in

122 For discussion, see above text accompanying note 13.
Noting that the issue of jurisdiction over culture had often been a source of constitutional conflict, Professor Rémillard (as he then was) explained that it is absurd to think that culture could be an exclusively provincial responsibility within a federal state. The reason, according to Professor Rémillard, was that a federation was not merely a union of provinces, but of individuals. Accordingly, the federal or national government has a legitimate role to play in promoting a sense of national identity amongst all the citizens of the federation. The promotion of national identity was a matter of distinct national concern and, as such, falls under a recognized source of federal authority under section 91 of the Constitution Act, 1867. Rémillard noted that the provinces also enjoyed authority to promote cultural development within the province. Accordingly, he concluded that culture must necessarily be an area of shared or concurrent jurisdiction within a federal state.

Other jurists and commentators writing in the 1970s came to similar conclusions with regard to jurisdiction over culture. Of particular significance was an important article by Professor W.R. Lederman published in the Canadian Bar Review in 1975. In this now classic article, Lederman propounded a theory of the “spirit and philosophy of our Canadian system for the division of legislative powers.” This spirit and philosophy, which Lederman traced through numerous court decisions, was based on the idea that governments should be granted jurisdiction over limited and discrete subject areas. In Lederman’s view, there was a need “to keep the power-conferring phrases of our federal-provincial division of powers at meaningful levels of specifics and particulars.” Very general or all-encompassing categories were

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123 "Impossible en régime fédéral de réserver la culture aux seuls États provinciaux" Le Devoir (11 mars 1974) 5 [hereinafter “Impossible en régime fédéral”].

124 Professor Rémillard became Quebec’s Minister of Intergovernmental Affairs in December 1985 after the election of Robert Bourassa’s Liberals. He played a key role in both the Meech Lake and Charlottetown Accord negotiations.

125 “Impossible en régime fédéral”, supra note 123.

126 Professor Rémillard recited the cases in which this national concern or national dimensions doctrine had been accepted by the Privy Council and the Supreme Court of Canada, including Munro v. National Capital Commission, [1966] S.C.R. 663 [hereinafter Munro].

127 For a similar analysis and conclusion, see G. Rémillard, “La compétence législative des provinces sur le commerce des productions cinématographiques” (1979) 39 R. du B. 91.


129 Ibid. at 611.

130 Ibid.
inappropriate as a basis for allocating jurisdiction, since they would grant sweeping powers to a single level of government and could "lead to constitutional chaos or to the end of federalism." Lederman offered a number of examples of the kinds of sweeping categories which he regarded as inappropriate as a basis for dividing jurisdiction in a federal state. One such category was culture. Lederman noted that today "everything is cultural," including literature, automobiles, tools, computers, home comforts, lifestyle, and the Boeing 747. Lederman concluded that if culture were recognized as an area of exclusive jurisdiction of either the provinces or the federal government, it would effectively spell the end of the division of powers. Lederman suggested that all-pervasive categories such as culture "cannot be allowed to dominate our distribution-of-powers system from within." Instead, these general categories should be regarded as "outside the system ... [and] subdivided into appropriate parts so that necessary legislative action can be taken by some combination of both federal and provincial statutes."

Lederman's theory of the spirit and philosophy of Canadian federalism was soon embraced by the Supreme Court of Canada. In the Reference Re Anti-Inflation, Mr. Justice Beetz cited the Lederman analysis in holding that "inflation" was too diffuse a subject-matter to serve as a basis for federal legislative jurisdiction. Although Mr. Justice Beetz dissented in the result in the Anti-Inflation Reference, his reasoning on this particular point was endorsed by a majority of the Court. The Beetz-Lederman analysis has since been accepted and applied by the Supreme Court of Canada in a number of subsequent cases, most notably in the recent decision in the Friends of Oldman River Society v. Canada (Minister of Transport). In this case, it was argued that the provinces had exclusive jurisdiction over certain aspects of "the environment," and that a federal environmental assessment scheme was therefore ultra vires or inapplicable to provincial projects. Mr. Justice La Forest rejected this argument, noting that the environment was an inappropriate basis for dividing legislative jurisdiction. The reason,

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131 Ibid. at 615.
132 Ibid., quoting from an article by G. Cormier published in La Presse (9 November 1973).
133 The other categories mentioned by Lederman as being an inappropriate basis for dividing jurisdiction were environmental pollution, economic growth, quality of life, and language.
134 Ibid. at 616.
Culture and the Canadian Constitution

according to La Forest J., was that the environment was an amorphous and all-encompassing category that lacked the necessary definition to serve as a constitutional category under section 91 or 92 of the Constitution Act, 1867. The environment "could never be treated as a constitutional unit under one order of government in any Constitution that claimed to be federal, because no system in which one government was so powerful would be federal." 137 Accordingly, the environment was not an independent matter of legislation under the Constitution, rather it was an aggregate of matters. For constitutional purposes, this meant that either level of government could pass laws with environmental purposes or effects. In the result, the Supreme Court of Canada upheld the right of the federal government to apply the environmental guidelines to the Oldman River dam project, while recognizing that the project was also subject to provincial regulation.

Mr. Justice La Forest did not discuss the issue of culture, since it did not arise in the circumstances of the Oldman River case. However, his analysis relating to jurisdiction over the environment would apply with equal force to the issue of culture. The concept of culture is just as amorphous and all-encompassing as that of the environment. The point is simply that granting a single level of government exclusive authority over categories such as culture, the environment, or inflation has been consistently rejected by the Supreme Court of Canada on the basis that it contradicts the very idea of a federal division of powers. Thus, the omission of culture from the list of categories in sections 91 and 92 of the Constitution Act, 1867 is not due to mere happenstance, but rather is a reflection of the desire to keep the constitutional categories in the Act within manageable proportions.

2. Since culture is not a matter that is reserved exclusively to either level of government, both the federal and provincial governments are free to enact laws with cultural impact. Culture is properly understood as a matter of concurrent or shared jurisdiction, rather than as being subject to the primary authority of either level of government.

The fact that culture is not a recognized constitutional category has the practical effect of leaving the field open to either level of government. Even though a federal or provincial law might relate to culture, it will be valid as long as any such law is authorized by particular sources of authority found in the Constitution. It would be pointless to try to list or to identify these "culturally significant" laws because, as we

137 Ibid. at 63-64, quoting D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54 at 85.
have noted, virtually all types of laws have cultural impact. Nevertheless, offering a few examples tends to illustrate the point that the concept of culture is virtually co-extensive with the law-making function itself. Some of the most obvious examples of federal laws which are culturally significant range from the federal Citizenship Act (defining who is a citizen), the equalization programme (providing for access to reasonably comparable levels of public services), the legislation privatizing Air Canada, the Official Languages Act, the Broadcasting Act, and the annual federal budget.

These examples reinforce the inappropriateness of describing culture as a matter that is primarily under provincial jurisdiction. It is certainly true that the provinces have ample authority to legislate in ways that affect culture within their jurisdictions. Provincial education laws are the most obvious example. But to suggest that culture is somehow a matter that is primarily reserved to the provinces ignores the equally wide scope for federal intervention in this field. It also introduces a concept of "primary" versus "secondary" fields of jurisdiction, something that is unknown in Canadian constitutional law. The long-established approach of the courts to division-of-powers analysis is to focus on the particulars of individual statutes, rather than on fields of jurisdiction. The courts identify the pith and substance or main purpose of a statute and ask whether there is authority to enact that particular law. Under this approach, extensive functional concurrency is the norm, since federal and provincial laws dealing with similar fields of jurisdiction may nevertheless be held to be valid under the pith and substance doctrine. The point is that the suggestion that a particular level of government enjoys primary authority in a field of jurisdiction simply fails to account for the manner in which the courts actually approach division-of-powers questions.

3. In addition to its general ability to enact laws with cultural impact, the federal government has a particular role and responsibility to promote a distinct Canadian identity. This is a matter of distinct national concern and permits the federal government to undertake the regulation and support of the arts and cultural industries in Canada.

141 For a lucid discussion of the "pith and substance" doctrine, see Hogg, supra note 64 at 377-91.
I have already referred extensively to the particular challenges facing the development of a distinctive Canadian identity. Ever since the Massey Commission in 1951, it has been widely accepted that the national government has a crucial role to play in responding to these challenges. What remains is to elaborate the constitutional significance of these circumstances. My view is that the promotion of a distinct national identity constitutes a matter of distinct national concern in Canada, and that this, therefore, qualifies as a matter falling within the "Peace, Order and Good Government" (POGG) power of the federal Parliament.

The POGG power refers to the residual authority of the federal Parliament to enact laws in relation to matters falling outside of provincial jurisdiction. One aspect of this POGG power relates to matters of national concern, as defined by Viscount Simon in *Canada Temperance Federation*:

> The true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must, from its inherent nature, be the concern of the Dominion as a whole [as, for example, in the *Aeronautics* case and the *Radio* case], then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the Provincial Legislatures.

What the *Temperance Federation* case establishes, therefore, is that matters which must "from [their] inherent nature be the concern of the Dominion as a whole" fall under the federal Parliament’s POGG power. But what criteria or indicia enable us to identify such inherently national matters? The answer has been somewhat obscure, despite numerous recent attempts by the courts and academic commentators to clarify the relevant considerations. According to the most recent pronouncements of the Supreme Court of Canada, it is relevant to consider a so-called “provincial inability” test. According to this test, it is important to assess the effect on extra-provincial interests of a provincial failure to deal effectively with harm caused by a particular activity. Where the failure of one province to act would injure the

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142 See the opening words of section 91 of the *Constitution Act, 1867*. One of the clearest expositions of the meaning of this clause is found in K. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can. Bar Rev. 531.


144 Ibid. at 205.

residents of other provinces, the matter is beyond the capacity of the provinces and must be regulated nationally.\textsuperscript{146}

However, although this provincial inability test has been endorsed by the Supreme Court of Canada, the Court has not suggested that this is the only or even the primary basis for determining whether a matter is of inherent national concern. Other judgments of the Court in which the national concern doctrine has been applied suggest that a matter may fall under federal jurisdiction even though there may not be an identifiable harm flowing from the absence of provincial regulation.

Two prime examples of such cases are \textit{Munro},\textsuperscript{147} decided in 1966, and \textit{Reference Re Offshore Mineral Rights (British Columbia)},\textsuperscript{148} decided a year later. In \textit{Munro}, at issue was the \textit{National Capital Act},\textsuperscript{149} federal legislation which created a National Capital Commission with zoning and expropriation powers in the Ottawa-Hull region. Zoning and expropriation powers are traditionally matters regarded as falling within provincial jurisdiction over property and civil rights. Thus, it was argued that the federal legislation was \textit{ultra vires} since it purported to confer these powers on a federal agency; but the Supreme Court rejected this argument. In upholding the \textit{Act}, the Court placed particular emphasis on the purposes underlying the creation of the national capital region. According to section 10 of the \textit{National Capital Act}, the purpose of the national capital commission was to ensure that the "nature and character of the seat of the Government of Canada may be in accordance with its national significance." The Court asked whether this was a matter which could possibly fall under provincial jurisdiction under section 92 of the \textit{Constitution Act, 1867}. The answer, according to the Court, was virtually self-evident: only the national government could possibly undertake responsibility for ensuring that the capital region was developed "in accordance with its national significance." The provinces, either individually or collectively, could not possibly undertake this national responsibility, since provinces are necessarily limited to provincial concerns and interests. "I find it difficult," wrote Mr. Justice Cartwright,

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to suggest a subject matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a
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\textsuperscript{146} See, in particular, the discussion by Hogg, \textit{supra} note 64 at 446-48.

\textsuperscript{147} \textit{Supra} note 126.


\textsuperscript{149} R.S.C. 1985, c. N-3.
coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.\footnote{Munro, supra note 126 at 671.}

A similar analysis was applied in the \textit{Offshore Mineral} case. Here the issue was the ownership and control of the minerals in the seabed under Canadian waters off the British Columbia coast. In holding in favour of the federal government, the Supreme Court emphasized the fact that the territorial sea off the B.C. coast had never been part of the colony of British Columbia before it joined Confederation. Nor had British Columbia acquired ownership of the territorial sea in the period after 1871. The Supreme Court concluded that the territorial sea fell outside of the boundaries of any particular province. Ownership rights must, therefore, be accorded to Canada, which had become a sovereign state under international law in the early twentieth century and succeeded to rights previously held by Great Britain. In the words of the Supreme Court, “[t]he mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond provincial concern or interests.”\footnote{Offshore Mineral, supra note 148 at 817.}

The basic approach adopted by the Court in these two cases consists of a two-part test. The Court first examines the purpose or subject-matter of a particular statute and asks whether this purpose or subject-matter falls within the catalogue of provincial powers. In both these cases, the Court finds that the statutes in question deal with matters which could not possibly fall under provincial jurisdiction. In \textit{Munro}, this is because the purpose of the legislation is necessarily national in scope; in the \textit{Offshore Mineral} case, the land in question fell outside of provincial boundaries and thus could not be regulated provincially. Having found in both instances that the matters in question fall outside of the categories in section 92, the Court moves on to the second part of the test. At this stage, the Court looks at the nature of the matter before it to determine whether it is of national scope or significance. In both instances, the answer to this second question affirmative. In \textit{Munro}, we were dealing with the seat of the national government; in \textit{Offshore Mineral}, with ownership over resources that did not belong to any particular province. This leads the Court in both cases to conclude that these matters must necessarily fall under the federal residual power as matters of inherent national concern.

In doctrinal terms, it is important to note that the Court’s conclusion does not depend on any argument about provincial inability...
or the harm that would flow from a lack of provincial cooperation. In the Munro case, the issue was the ability of the federal government to create a National Capital Commission with effective powers; but the justification for creating the commission was not the avoidance of harm that would flow from lack of provincial cooperation. Provincial cooperation, or lack of it, was beside the point. Only the national government could ensure the development of the capital region in accordance with its national significance. Therefore, the legislation establishing the Commission must necessarily be enacted by the national government. Similarly, in the Offshore Mineral case, there was no question of any harm which might have resulted from the absence of federal regulation. The rationale was simply that the lands in question were beyond provincial boundaries and thus must necessarily fall under federal ownership and control.

How is this discussion relevant to federal legislation in the fields of the arts and cultural industries? In my view, the same line of reasoning advanced in Munro and the Offshore Mineral cases can be applied to federal legislation regulating and supporting the arts and cultural industries. In effect, federal legislation in this area deals with a matter of inherent national concern and is therefore within the residual authority of the Parliament of Canada as part of its POGG power.

Federal support for the arts and cultural industries has been prompted by the belief that promoting a distinct Canadian national identity depends upon active state intervention. As the Massey Commission demonstrated so convincingly in 1951, leaving Canadian culture to the vagaries of the market would effectively mean the end of an indigenous Canadian cultural industry. This basic reality has been recognized by all political parties across the political spectrum in Canada; notice that the Conservative government under Prime Minister Brian Mulroney, often criticized for its embrace of market principles in many other areas of policy, specifically sought and obtained an exemption for cultural industries in the 1988 Free Trade Agreement. Of course, programmes of support for cultural industries are certainly not unique to Canada. As we have already observed, it is commonplace in all modern industrialized states to undertake such programmes, in an effort to promote or reinforce common values and national identity.\footnote{152 See, generally, Cummings & Katz, supra note 22.}

The magnitude of programmes to defend a nation’s cultural heritage will vary, depending on “whether the country has a strong national tradition
to defend or still feels the need to develop its own cultural identity.”

In the Canadian case, the imperatives mandating a national cultural policy are particularly pressing, because of the overwhelming cultural influence of the United States. Cultural policy has been a particular feature of the federal government’s mandate since at least the early 1960s.

Thus, there seems little question that a programme of support to the arts and the cultural industries is legitimate and even necessary in Canada. The next question which arises is whether this kind of programme is a matter which falls under legitimate federal jurisdiction under the Constitution. It is here that the Supreme Court’s analysis in *Munro* and the *Offshore Mineral* case becomes particularly relevant and useful. Any programme designed to promote a distinct national identity and common Canadian values could not possibly be a matter of concern to the provinces. Such purposes are necessarily those of the national government, since only the national government is elected by and accountable to Canadians in all parts of the country. In this sense, programmes of support to the cultural industries satisfy both parts of the two-part test developed by the Supreme Court in *Munro* and *Offshore Mineral*. Programmes of support for the cultural industries, since they are designed to promote national values and a national identity, could not possibly fall within any of the categories in section 92 of the *Constitution Act, 1867*, because all such matters are necessarily limited by the description “matters within the province.” By the same token, such programmes are of inherent national concern since they are designed to promote common values and national identity. In effect, they deal with Canadians as citizens of the country as a whole, rather than as residents of any particular province.

This constitutional rationale would apply across the whole range of federal programmes in relation to cultural industries. It would include all the different programmes and regulatory instruments employed by the federal government in this sector, including direct spending, grants and contributions, taxation, regulation, services, and ownership. To the extent that these programmes further the goal of

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153 Ibid. at 9-10.

154 See *Government Expenditures*, supra note 53 at 12, for a detailed description of the different ways in which government intervenes in the cultural sector. Statistics Canada defines the cultural activity of the federal government as falling into the following categories: (1) cultural industries: broadcasting, film and video, book and periodical publishing, and sound recording; (2) heritage: museums, public archives, historic parks and sites, nature and provincial parks, and other heritage; (3) libraries: national, public, school, university and college; (4) arts: performing arts, arts
promoting indigenous Canadian cultural activity and a stronger sense of national identity, they relate to a matter of inherent national concern and are within the authority of the federal government.

This conclusion has a number of quite practical implications. The first is that federal programmes of support to the arts and cultural industries, such as grants and contributions delivered through agencies like the Canada Council, do not depend solely upon the federal spending power as their constitutional justification. This means that such federal programmes are not an intrusion into an area of exclusive provincial jurisdiction. These federal programmes are designed to fulfill national purposes and aspirations, and therefore fall outside of provincial powers and authority. Once this is recognized, the legitimacy of federal grants and contributions to the arts and cultural industries becomes much more secure and acceptable. Moreover, the notion that these federal grants and contributions should be turned over to provincial control, as was contemplated under the Charlottetown Accord, is revealed as both unnecessary and inappropriate. Since federal grants and contributions to the cultural community are a reflection of national aspirations, only the national government is in a position to undertake them. Handing the monies over to the provinces would change the whole nature of such programmes, transforming national aspirations and objectives into provincial ones. This is not to say that there is not ample scope for the provinces to undertake their own programmes of grants and contributions to the cultural sector. The point is simply that there is legitimate constitutional space for both levels of government to undertake programmes of this type. Neither level of government has any right to assert exclusive or primary jurisdiction over such programmes.

Thus, the first practical consequence of this view of federal authority is to secure the legitimacy of a continuing federal role in this area. A second, related consequence is to provide the federal government with the flexibility to redesign or to expand its existing programmes in the future, in order to respond to changing or unforeseen circumstances. This kind of flexibility is essential, given the fact that changes in technology can render existing forms of government regulation in the cultural field redundant almost overnight. Consider, as a practical example, the recent debate over the decision by Sports Illustrated to publish a separate Canadian edition. It was alleged that Sports Illustrated had produced a "split-run," which occurs when a foreign publisher produces a magazine elsewhere and then substitutes

education, visual arts and crafts, and artists; and (5) other: multiculturalism and multidisciplinary activities.
Canadian advertisements in issues sold in Canada. The Canadian edition of *Sports Illustrated* contained most of the stories of the U.S. parent publication, but some stories were dropped and replaced with Canadian content. The problem with split-runs, from the perspective of the domestic magazine industry, is that foreign publishers can offer lower advertisement rates than Canadian competitors since they have already produced the magazine for the foreign market. A series of tariff measures dating back to 1965 permit the federal government to prohibit the sale of split-runs. However, these tariff measures apply at the Canadian border and catch situations where a magazine is printed elsewhere and then an attempt is made to physically transport the product across the Canadian border. The publishers of *Sports Illustrated* have taken advantage of new technology to electronically transmit the magazine’s pages to a printer in Richmond Hill, Ontario. In effect, the magazine is being printed in Canada even though the editing and much of the production work is done in New York. According to Revenue Canada officials, electronic publishing was unheard of when the tariff code was put in place, and thus the *Sports Illustrated* situation simply is not covered.

How can the federal government respond to the situation created by this advance in technology? In particular, does it have the constitutional authority to regulate or to prohibit the production of the Canadian edition of *Sports Illustrated*? The magazine’s publisher, Time Warner Inc., might argue that the federal government lacks the required authority. Time Warner might claim that the regulation of printing and publishing which occurs entirely within a single province is a matter subject to exclusive provincial jurisdiction as a matter relating to property and civil rights in the province. Accordingly, because the magazine is transmitted electronically into the country and is printed here, it is not subject to federal control and regulation.

The analysis advanced in this paper reveals the fallacy in this approach. According to the argument I have advanced, the prohibition on split-runs does not depend constitutionally on the federal government’s ability to control goods entering the country. Rather, this is an aspect of the federal Parliament’s authority to defend and promote a distinct Canadian identity, a matter of inherent national concern. Whether foreign magazines are physically or electronically transported

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156 Ibid.
into the country is simply irrelevant; in both cases, the effect on domestic publishers is the same. Therefore, the federal government has full authority to regulate in either situation, since the pith and substance of the law remains the same.

4. The proposed amendments in relation to culture in the Charlottetown Accord would almost certainly have reduced federal legislative authority.

As should now be evident, the problem with the proposed cultural amendments in the Charlottetown Accord is that they were based on a premise that was fundamentally flawed. This premise was that culture was a matter primarily reserved to the provinces. The main source of federal authority over culture was supposedly the ability of the federal government to spend money in an area of exclusive provincial jurisdiction. Thus, the Charlottetown Accord would have entrenched culture as an area of exclusive provincial jurisdiction and required the negotiation of federal-provincial agreements recognizing the lead responsibility of the provinces in relation to culture in the province.

Had these amendments been enacted into law, they would have reduced federal authority in at least two significant respects. First, there was no recognition that the Parliament of Canada had any legislative authority in relation to cultural matters.\textsuperscript{157} This is important since Parliament's existing power in this field depends upon the POGG power, which is a residual power. In other words, the POGG power applies only in relation to matters which do not fall within classes of subjects assigned exclusively to the provinces. At present, since culture is not listed as a section 92 provincial power, it is open to the federal government to rely on the POGG power in order to legislate in the cultural field. But all this would have changed had section 92B of the Charlottetown Accord been enacted. Under Charlottetown, culture was to be included within the classes of matters allocated exclusively to the provinces. Therefore, any residual power which the federal government currently possessed in relation to culture might well have been subsumed within the new head of provincial power. The result would have been that Parliament could not rely on the POGG power in order to justify legislation in the cultural field.

This change would not have been of merely academic or doctrinal curiosity. As the \textit{Sports Illustrated} example demonstrates, changing technology and industrial innovation require new and creative responses on the part of the federal government. I have argued that the

\textsuperscript{157} Recall that s. 92B would have recognized the role of the government, but not the Parliament of Canada.
federal government does possess the required flexibility at present, because it is able to recast its existing regulations to take account of these changing circumstances. But this might not be the case if the federal government were deprived of the ability to argue that it possesses the right to promote Canadian cultural industries as a matter of inherent national concern. If the federal government were reduced to this weakened position, it might find it more difficult to put in place new regulations to deal with situations such as that presented by *Sports Illustrated*. Deprived of the ROGG power, the federal government would be forced to identify some source of authority in the enumerated categories in section 91 to justify regulation of electronic publishing. Whether or not the federal government would be ultimately successful, were it faced with this scenario, is difficult to predict. The point is simply that its constitutional and policy manoeuvring room would have been significantly reduced had the Charlottetown cultural amendments come into force.

The second negative impact of the Charlottetown Accord would have resulted from the requirement to negotiate federal-provincial agreements recognizing the lead responsibility of the province in relation to culture in the province. Under these agreements, the federal government would have been forced to turn over some portion of its existing expenditures in the cultural field to the provinces.\textsuperscript{158} This would have transformed federal initiatives, designed to promote national values and cohesion, into provincial ones. Moreover, it would have made it much more difficult for the federal government to alter any of its existing cultural programmes without provincial consent, much less undertake new programmes. Having recognized the lead responsibility of the provinces in the constitution, how could the federal government justify any new initiatives without first obtaining provincial approval?

Some might argue that the federal government is already abandoning its support for the cultural industries and thus the implementation of the Charlottetown Accord would have made little practical difference. With or without Charlottetown, it might be argued, the end result is the diminishment of the federal role in relation to culture. However, this argument fails to notice the important difference between policy change and constitutional change. It is one thing for the federal government to alter or to reduce its cultural programmes at the level of policy choice; but it is another thing entirely to entrench those changes in the Constitution. What was significant about the

\textsuperscript{158} That this was the practical result of these agreements is made clear by the discussion in the Beaudoin-Dobbie Report. See *supra* note 103 at 78-79.
Charlottetown Accord was that it proposed to constitutionally entrench a primary role for the provinces in relation to culture. This would have meant that any future federal government which sought to reverse the decisions taken in 1992 would have been unable to do so. In fact, any future federal government which sought to assert a leading role in the cultural field would have been vulnerable to legal challenges from the provinces on the basis that provincial governments had the lead responsibility over culture.

Thus, the Charlottetown Accord, although justified on the basis that it merely entrenched the constitutional status quo, in fact represented a significant change to the existing division of authority over culture. It entailed a permanent reduction in the ability of the federal Parliament to intervene in the national interest. Had the drafters of the Accord wished merely to reflect the existing division of powers, rather than reduce national authority, then at least two important amendments would have been required to proposed sections 92B and 92C. The first change would have been to recognize culture as an area of shared or concurrent jurisdiction, rather than as an area of exclusive provincial jurisdiction. Secondly, the reference to the lead responsibility of the provinces over culture should have been changed to refer to the joint responsibility of the federal and provincial governments in the cultural domain.

It may be, as some drafters of the Accord apparently believed, that amendments along these lines would have made the provisions unacceptable in the province of Quebec. Certainly, changes along the lines outlined above would have directly contradicted provincial claims to the effect that culture is already an area of exclusive provincial responsibility under the Constitution. But these provincial claims about exclusive authority bear little resemblance to the existing constitutional reality. If the objective of the exercise is merely to reflect faithfully the current constitutional position, then any amendments dealing with culture must explicitly recognize the legislative authority of the Parliament of Canada. Otherwise the result is an attempt to amend the Constitution by stealth, in which amendments that would effect real and significant changes would be justified on the basis that they merely entrench the status quo.

159 See letter of Hon. Joe Clark to Ms. Penny Dickens, supra note 121: "Some provinces, notably Quebec, have long seen culture as a provincial responsibility: an explicit assertion of federal jurisdiction would simply have been unacceptable."
V. CONCLUSION

When the Massey Commission reported over forty years ago, it found that cultural life in Canada suffered from a profound case of malnutrition. "Good will alone can do little for a starving plant," the Commission noted. "[I]f the cultural life of Canada is anaemic, it must be nourished ... This is a task for shared effort in all fields of government, federal, provincial and local."\textsuperscript{160}

Perhaps the most fundamental accomplishment of the Massey Report was to change our view of the role of government in relation to the cultural sector. In the 1950s, Canadians still debated whether government had a proper part to play in cultural affairs. Today, it is taken for granted that cultural activity in Canada will flourish only with active and continuing state support.\textsuperscript{161} The federal government, in particular, has a key role to play, since only the national government can promote common values which unite Canadians in all parts of the country. As Massey argued so eloquently in 1951, the federal government has a particular responsibility to "nurture what we have in common and resist those influences which could impair, and even destroy, our integrity. In our search we have thus been made aware of what can serve our country in a double sense: what can make it great and what can make it one."\textsuperscript{162}

While this perspective on the important responsibility of the federal government is now commonplace, it somehow failed to surface in the recent debate surrounding the cultural provisions in the Charlottetown Accord. Instead, the primary focus of this recent discussion was on constitutionally recognizing provincial roles and responsibilities in the cultural domain. The motivation behind this approach to the issue was widely understood: in the wake of the failure of the Meech Lake Accord, it was seen as particularly important to recognize or affirm Quebec's constitutional responsibilities. The Quebec government has a particular responsibility for preserving and promoting Quebec's distinct identity. Thus emerged the idea of recognizing or affirming in the Constitution the role of the Quebec government in relation to the cultural sector.

This idea had a deceptive appeal, since it appeared to do nothing more than affirm the status quo. It is widely recognized that the

\textsuperscript{160} See supra note 27 at 272.

\textsuperscript{161} See R. Fulford, "Introduction" in Ostry, supra note 12 at xi.

\textsuperscript{162} Supra note 27 at 271.
provinces in general, and Quebec in particular, are already extremely active in the cultural sphere. What could be the harm in explicitly recognizing Quebec’s existing cultural responsibilities in the Constitution? Indeed, a similar affirmation could be accorded to the other provinces, since their cultural policies, while less developed than Quebec’s, were also surely worthy of constitutional recognition.

The problem, of course, was how to affirm provincial powers without interfering with the legitimate role of the federal government. It is certainly true that the provinces already exercise important responsibilities in the cultural sphere. But those responsibilities are nowhere mentioned in the Constitution. The moment one attempts to write down the precise nature and extent of the provincial role, there is a risk of getting it wrong. Either there will be an error on the side of describing the provincial role too narrowly, in which case the provinces will be upset, or the provincial role will be described in overly broad terms, in which case the federal government will have indirectly been forced to sacrifice its powers.

The chances of making either of these two mistakes would appear to be quite high. The basic difficulty is that different governments and stakeholders may well have quite different and even contradictory perceptions about the way in which current arrangements operate. Those differing and even contradictory perceptions do not pose any real problem as long as there is no need to agree on these matters. But the moment it becomes necessary to write down a common definition of the status quo, the existence of contradictory perceptions poses a major stumbling block. The difficulties are all the greater if it is proposed to include such a description of the status quo in the Constitution, given the permanence and high symbolism of constitutional language.

This appears to be exactly the problem with agreeing on a definition of the constitutional status quo in the cultural field. The different levels of government, as well as the stakeholders in the field, have contrasting ideas about the way in which governments currently share responsibilities in this area. Quebec, in particular, sees itself as having a particular responsibility over cultural affairs. Quebec governments have consistently denounced federal cultural policy as an intrusion into an area of exclusive provincial jurisdiction. This continuing debate is not a real problem as long as the Constitution says nothing about culture. But the moment one attempts to define the responsibilities of the different levels of government over cultural matters, one stirs up a hornet’s nest that will prove very difficult to contain.
Thus, the authors of the cultural provisions in the Charlottetown Accord, although well intentioned, were headed for trouble from the very start. The outcome of the process, as reflected in the text of the Charlottetown Accord, was not terribly surprising, given the parties around the table and the dynamics of the negotiations. The federal government was outnumbered by the provinces, and the negotiations were conducted in the shadow of an overwhelming political imperative to strike a unanimous agreement.\textsuperscript{163} The federal government ended up agreeing to amendments that, although ostensibly justified on the basis that they merely codified the status quo, in reality represented a significant reduction in its own powers. The cultural amendments proposed in the Charlottetown Accord essentially adopted the views of the provinces, and particularly the province of Quebec, as to the nature of the existing constitutional arrangements. The Accord failed to recognize the very broad constitutional authority already enjoyed by the federal government in cultural matters. Had these amendments been incorporated into the Constitution, over time they would have significantly reduced the ability of the federal government to promote national values and a sense of common identity amongst Canadians in all parts of the country.

The larger lesson which emerges is simply that one should not undertake lightly the task of including descriptions of existing political arrangements in the Constitution. Proposals to entrench descriptions of the political status quo in the Constitution have undeniable political appeal, since they appear to be cost-free ways of updating the Constitution. But, as the debate over these recent cultural amendments reveals, such exercises are rarely cost-free or free of trouble. They immediately run the risk of being bogged down in endless debate over the precise nature of the existing arrangements. More troubling is the prospect that certain governments or interests will attempt to make gains and improve their current position, all in the guise of merely describing the status quo. The result is to confuse or to distort a set of existing practices which appear to function tolerably well. If and when Canadians return to the task of debating their constitution, we would do well to keep this fundamental lesson firmly in view of all the participants in the process.

\textsuperscript{163} For a detailed analysis of the dynamics of the negotiations leading to the Charlottetown Accord, see P. Monahan, "The Sounds of Silence", in McRoberts & Monahan, eds., \textit{supra} note 1.