

10-1-1996

Providing Essential Services: Canada's Constitutional Commitment Under Section 36

Aymen Nader
McGrady, Askew & Fiorillo

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19:2 Dal LJ 306.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

This paper explores the history of constitutional negotiations that have led to the entrenchment of section 36 of the Constitution Act, 1982. The author argues that the intention of the federal proponents of this section was to entrench the federal spending power. The author further demonstrates that section 36 entails not just constitutional recognition of the spending power, but also a constitutional commitment or obligation for the exercise of that power to provide "essential public services of a reasonable quality to all Canadians": s. 36 (1)(c).

Cette étude explore l'histoire des négociations constitutionnelles qui ont abouti à l'enchâssement de l'article 36 de la Loi constitutionnelle de 1982. L'auteur soutient que l'intention des proposeurs fédéraux de cet article visait l'enchâssement du pouvoir fédéral de dépenser et gérer les fonds publics. Il démontre que l'article 36 implique non seulement la reconnaissance du pouvoir de dépenser et gérer les fonds publics, mais aussi un engagement constitutionnel ou une obligation pour que l'exercice de ce pouvoir de dépenser et gérer les fonds publics "[fournisse] à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels": s. 36(1)(c).

The period of constitutional renewal in Canada which resulted in the *Constitution Act, 1982*,¹ was inspired largely by the passing of Canada's centennial, and by 1971 several provisions of the present Constitution had already been substantially formulated, including the present section 36. The phrasing of this provision, however, was as challenging to interpret then as it still is now. This section reads:

- 36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

* Aymen Nader B.A., LL.B., M.A. is presently articulated with the firm McGrady, Askew & Fiorillo in British Columbia. The author was awarded a J.S.D. Tory Writing Award for an earlier version of this paper and thanks the Toronto firm of Tory DesLauriers & Binnington.

This paper has benefited from numerous discussions with Vincent Calderhead and helpful comments by Leon E. Trakman. Work on this paper would not have been possible without the generous support which I received from my partner, Marina.

1. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

- (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

The central challenge to interpreting this section lies in unlocking the idiosyncrasy in constitutional law which it appears to contain.

Section 36 commits the federal government and Parliament to providing essential public services. These services, however, were generally regarded as falling within the authority of the provincial governments. How then was the federal government to meet its commitment without acting outside of its jurisdiction? Or, more directly, how was the federal government going to meet its commitment without appearing to regulate in the provincial domain? The answer to this dilemma was that the federal government would only subsidize provincial expenditures in the areas of essential public services and, in return, would have a say in the way provinces delivered these services.

This arrangement, however, raised another constitutional problem: the federal government did not have firm constitutional authority to spend its money in areas not within its jurisdiction, or at least this power, the federal “spending power”, was a hotly debated issue. In order to safeguard national interests in the provision of essential public services, the federal government would need to shore up its spending power, and constitutional renewal provided the ideal opportunity to do just that. This is the history of section 36.

Today, that history collides with the federal retreat from its commitment to exercise its spending power under s. 36. Led by Prime Minister Jean Chrétien, the federal government is seeking to save seven billion dollars through cuts in transfer payment which were, *ab initio*, designed to subsidize essential provincial public services, primarily those of health, education and welfare.² This federal initiative, known as the Canada Health and Social Transfer (CHST), will significantly undermine the viability of national standards in the social services area. Effective as of April 1st, 1996, the CHST now allows provinces to roll back their

2. *An Act to Implement Certain Provisions of the Budget tabled in Parliament on February 27, 1995*, S.C. 1995, c. 17.

delivery of welfare services by lifting the conditions which had, up until that time, required provinces to make their social services accessible to all in need, reasonable in terms of adequacy and comprehensiveness, and subject to fairness through the availability of an appeal system. Depending on provincial budget planning strategies, welfare services may soon vary widely from one province to another. Indeed, the CHST does not even require provinces to set in place a welfare system of any kind as a prerequisite to their receiving full federal funding, thus auguring the end of national standards in the field of welfare services. The implications of these structural changes in the delivery of social services may have a significant impact on national unity, national identity, the mobility of labour, and the health and well-being of Canadians living in poverty.

Section 36 of the *Constitution Act, 1982* would appear at first glance to ensure that essential public services of a reasonable quality will be provided to all Canadians, in spite of the current climate of debt and deficit reduction. Subsection 36(1)(c) in particular commits both levels of government to providing essential public services of reasonable quality to all Canadians. This would seem relatively straightforward. Despite this obvious commitment, this section of the Constitution has never formed the basis of a court action. Perhaps this is because, until recently, the maintenance of social programmes had always been addressed as a priority by governments.

Overview

In order to provide a cogent interpretation of this section this inquiry will examine the manner in which essential public services are provided to all Canadians. Part I of this paper will follow the federal-provincial structure of essential public service delivery in Canada and explore the attendant problems, both practical and constitutional.

National standards in public services are achieved through the fiscal mechanism of "conditional grants", federal money sent to the provinces to pay for a portion of the cost of health, education and welfare (generally). Such a federal transfer to the provinces is necessary. The federal government cannot itself provide these services because it is the provinces which have the constitutional jurisdiction for these social concerns, according to the division of powers enumerated in the *Constitution Act, 1867*.³ Thus, in return for a significant fiscal contribution to the provinces, the federal government gains provincial compliance with certain federally determined conditions when delivering essential public services.

3. (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act 1867*].

“Conditional grants”, then, serve to make essential public service delivery relatively uniform in Canada. Those conditions, which require the provincial service in question to be broadly universal, accessible and comprehensive,⁴ have (up until the CHST) ensured that Canadians right across the country would enjoy the same or similar quality services. Conditional grants, in short, significantly redressed the ‘checkerboard’ standards which existed in essential public service delivery in Canada.

The authority which enables the federal government to effect these conditional grants is its spending power. This power, however, is not specifically referred to in the *Constitution Act, 1867*. As a result, federal governments have historically derived their spending power from the basis of more than one section of the Constitution. Such construction of constitutional power was, of course, and still is, a much weaker authority for the exercise of government power than if the authority were to be specifically identified in the Constitution as expressly belonging to one order of government or another.

In addition to the indirect nature of their authority, conditional grants were also problematic because they cast the federal government in a role of providing *provincial* public services, services which fell clearly within the ambit of provincial jurisdiction according to the 1867 constitutional division of powers. Accordingly, the division of powers became a site of dispute with respect to the spending power. On the one hand, the federal government asserted that it had the power to spend for purposes on which Parliament does not necessarily have the power to legislate—in spite of the weak basis for that power. On the other hand, some provinces and government critics viewed the use of the spending power to establish conditional grants as an unconstitutional intrusion by the federal government into the provincial domain.

Faced with this situation at the time of the first major conditional grant programmes in the late 1960s, the federal government acknowledged that as long as the spending power was disputed, both its ability to establish conditional grant programmes, as well as the continued survival of existing programmes, would be in jeopardy. In other words, its very undertaking to curtail regional disparities in public services by establishing “national standards” for them, was threatened by the dispute over the constitutional validity of the spending power.

4. Although these conditions are specifically stated in the *Medical Care Act, 1966–67*, c. 64, they are also broad principles which apply to conditional grants in the social services. As *The Content of Governments’ Commitment* section of this paper will argue, these broad conditions are implied in s. 36(1)(c) of the Constitution.

The atmosphere of national rebirth around the time of Canada's 1967 centennial celebrations also proved to be a time of constitutional renewal, and the opportunity was ripe for the federal government to shore up the weak foundation of its spending power. The federal government believed that if the spending power were provided for explicitly in a new constitution, then contention and uncertainty about continued federal participation in the provision of provincial public services would cease. Article 46 of the 1971 Victoria Charter became that provision.⁵ It was also the first version of the current s. 36.

Article 46 committed Parliament, the Government of Canada and the legislatures and Governments of the provinces to the assurance that essential public services would be available to all individuals in Canada; these public services were specifically identified by the 1969 federal government Working Paper on the Constitution⁶ as including the provincial areas of health, education and welfare. Yet, a commitment by Parliament to participate in these fields for the purpose of "standardizing" public services in order for *all Canadians* to benefit necessarily implies the use of conditional grants, the only device by which this goal can be achieved. Authority for the making of conditional grants, in turn, derives from the federal spending power. By recognizing that Parliament had a role to play in the provincial fields of public services, then, this provision in the Victoria Charter was intended to acknowledge indirectly the federal spending power, at least to the extent of the promotion of equality of opportunities, the availability of essential public services, and the promotion of economic development, objects identified under paragraphs (1), (2) and (3) of Article 46.

The provision received substantial support from the provinces and remained more or less unchanged until eight years later when, for the first time, subsection (2) was added.⁷ The history of this subsection belongs to this period of intervening years. Once sufficient time had passed to ensure the integration of conditional grants into provincial budget planning, the open ended structure of these grants became a significant factor which contributed to their burgeoning costs. From the federal perspective, however, the ability to anticipate the extent of its contributions in any given year became impossible because programme expenditures were determined by the provinces.

In a variety of unilateral alterations and adjustments to the structure of conditional and unconditional grant programmes in the 1970s, the federal

5. See Appendix A.

6. *Infra* note 18.

7. See *infra* text at Appendix A.

government tried to limit the rate of growth of its contributions to the provinces. These transfer payments, however, were significant for provincial budgets. Each decision from Ottawa about new adjustments to transfer payments exacerbated provincial insecurities. Provincial fears were based on the realization that if the federal government were free to alter conditional and unconditional grant programmes unilaterally, then it could just as easily curtail or even terminate such programmes. A constitutional guarantee was thus sought, one which would at least bind the federal government to the provision of equalization payments. In the end, the federal government committed itself to the "principle" of making equalization payments, a weaker commitment than that found in subsection (1). Still, subsection (2) was won by the provinces in the hope that it would ensure continued federal equalization payments.

Part II of this paper focuses on a more legal analysis of s. 36 itself, based on the history of its formation. Whether or not this section is justiciable will be the starting point of this examination. Peter Hogg suggests that the commitment in subsection (2) is too vague to be justiciable.⁸ The commitment in subsection (2) is to the "principle" of making equalization payments to the provinces. The undertaking in paragraph 36(1)(c), on the other hand, is to "providing" essential public services. As such the commitment found in subsection (1)(c) is more direct, and thus, more imperative. Sufficient jurisprudence exists to suggest that if the issue put to a court has a constitutional feature or a sufficient legal component then, in spite of its more open texture or political dimensions, the court will take cognizance of it. The question of remedy is also briefly explored. Although a coercive remedy may or may not be available in an action based on this section, considerable authority exists to suggest that the courts have the power to make "binding declarations of right, whether or not any consequential relief is or could be claimed."⁹ A statement by the courts that a government is acting in violation of the Constitution without further judicial requirement that its actions be rectified remains a viable remedy. The actual strength of the "commitment" of both orders of government to the concerns listed under paragraphs (a), (b) and (c) will of course determine the standard against

8. Peter Hogg, *Constitutional Law in Canada*, 3d ed. (Toronto: Carswell, 1992) at 144.

9. *Judicature Act*, R.S.A. 1980, c. J-1, s. 11; *Rules of Court*, Alta. Reg. 390/68 (O.C. 2208/68), r. 410(c), (e); *Supreme Court Rules*, B.C. Reg. 310/76, as amended r. 5(22); *The Queen's Bench Act*, R.S.M. 1970, c. C-280, s. 63, r. 8; *Rules of the Supreme Court*, scheduled to the *Judicature Act*, C.S. Nfld. 1916, c. 83, O-24, r. 53; *Civil Procedure Rules and Related Rules*, r. 5.14; *Courts of Justice Act*, S.O. 1984, c. 11, s. 110; *Civil Procedure Rules*, r. 5.14; *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(17); *Federal Court Rules*, C.R.C. 1978, c. 663, as amended by SOR/79-57 and SOR/79-58, r. 1723. (*infra*).

which government action will be judged pursuant to ss. 36(1). The view held by some that this subsection only identifies “objectives” for government action is untenable. As already noted, the commitment under ss. 36(1)(c) is in fact stronger than that found under ss. 36(2). The French version of this provision also suggests a very binding commitment.¹⁰

Lastly, the content of governments’ commitment under this section will be considered. Subsection 36(1), in particular, will be examined to determine the substantial requirements for governmental action as established by their commitment to promoting equal opportunities, furthering economic development, and providing essential public services. Canada’s international undertakings to promote conditions of economic and social progress and development will also be referred to in order to illuminate the content of government action. To the extent that s. 36 entrusts Canadians’ social and economic rights to Parliament and the provincial legislatures, international instruments to which Canada is a signatory should provide a set of standards useful to inform the actual content of the constitutional commitment.

I. *Historical and Constitutional Questions*

1. *History of Conditional Grants*

Since World War II, at least 100 conditional grants, or shared cost programmes,¹¹ have been established in Canada.¹² This device has been used by the federal government to subsidize the cost of certain social programmes (usually on a 50–50 split) within a province. “[J]oint ventures” of this sort have always been initiated by the federal government, and include such well known programmes as Medicare, the Post

10. 36(1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les gouvernements fédéral et provinciaux, s’engagent a:

- a) promouvoir l’égalité des chances de tous les Canadiens dans la recherche de leur bien-être;
- b) favoriser le développement économique pour réduire l’inégalité des chances;
- c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

(2) Le Parlement et le gouvernement du Canada prennent l’engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d’assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

11. Technically, conditional grants are those fiscal transfers which have conditions, or program criteria, attached to them in exchange for payment of the grant. Shared-cost programs are fiscal transfers which are usually tied to provincial expenditures on a 50–50 cost sharing basis. Because the conditional grants relevant to this paper are also shared-cost, these terms will be used interchangeably in the text unless otherwise noted.

12. *Supra* note 8 at 145.

Secondary Education programme, and the Canada Assistance Plan (CAP). The underlying motivation for these programmes stemmed from a realization that certain regions of Canada were unable to provide the level or quality of services which other more prosperous regions could. As Canadian nationhood matured, Canadians adopted the view that an individual should enjoy the same opportunities and benefits no matter what region that individual lived in. J. H. Lynn writes about this “national sentiment”:

[A] . . . major problem confronting federal states . . . is to implement suitable policies to enable all regional governments to provide a nationally acceptable level of services without having to levy relatively high tax rates. Although many reasons have been advanced . . . to justify such policies, the fundamental justification of all policies designed to ensure a more uniform level of public services in the various regions of a federal state is the national sentiment which opposes extreme variations in service levels within the nation and which endorses the sacrifice that may be necessary to raise service levels in low income areas. This sentiment inevitably arises and expresses itself through a national political process.¹³

The national sentiment which did express itself through the political process became known as “national standards” in social services, and was realized through conditional grants.

The CAP¹⁴ for instance, ensures that persons in need, anywhere in the country, are given the assistance to meet their basic requirements.¹⁵ This national standard is ensured by the device of the conditional grant, i.e.: providing assistance to a person in need is a condition which must be fulfilled in order for a province to receive federal transfer payments made under this programme. Thus, in return for a 50 per cent subsidy for the cost of certain social programmes, the federal government “bought” conditions (or programme criteria) which attached to the provincial programmes.

13. James H. Lynn, “Federal-Provincial Fiscal Relations,” in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality* (Toronto: Methuen Publications, 1968) at 198. See also: K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963) at 10.

14. *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1. In 1965, federal and provincial governments entered into a series of discussions on reforming the existing cost-sharing agreements. These negotiations eventually resulted in the *Canada Assistance Plan Act* of 1966, which consolidated and expanded the provisions of the prior specific-purpose cost-shared programs, and for the first time paid federal cost-sharing toward provincial social service expenditures.

Under CAP, the federal government paid 50 per cent of provincial and municipal costs of social services to persons in need or likely to become in need if they do not receive such services. For a person or family to be “in need,” they must have assets less than a maximum specified ceiling and their needs must be greater than their financial resources. The CAP also cost-shares work activity projects designed to improve the employability of persons who have unusual difficulty finding and retaining jobs.

15. *Ibid.* at s. 6(2)(a).

Since these conditions were the same for every province choosing to participate in the programme (and they all did), the conditions became national in scope, binding the country under one standard.

2. *Provincial Objections*

Shared-cost programmes have often been criticized by the provinces, in spite of the fact that provinces opt into these programmes voluntarily. The most ardent critics of these programmes have been Quebec, Alberta and Ontario. One allegation consistently raised is that the federal government is intruding into areas of provincial jurisdiction when it attaches programme criteria to programmes which fall within the provincial sphere. This constitutional argument is one of the bases of provincial criticism of conditional grants. Practical concerns have also inspired provincial discontentment. The provinces have criticized the fact that conditional grants force them to reorder their spending priorities. They argue that by offering to subsidize half the cost of a given programme, the federal government compels them to implement a programme which they might not otherwise have introduced, or which they might have introduced in a different form.¹⁶ As a result of the substantial expenditures involved for the provinces, and, despite the one-half subsidy, a significant portion of their budgets becomes earmarked, in effect, not by the provinces which raise the money, but by the federal government.¹⁷

A second but related criticism raised by the provinces has been that, despite the voluntary nature of shared-cost agreements, if a province were to exercise its prerogative not to participate in a programme, its residents would nonetheless be required to pay the federal taxes which finance the federal share of that programme. As a result, residents of the province in question would be taxed without benefit to them.¹⁸ Provincial criticisms of shared-cost programmes in large measure stemmed from these and other practical concerns. The provinces argued that these programmes constituted a hijacking of their fiscal and social policy priorities, that "taxation without benefit" was the consequence a provincial government would inflict on its residents if it were to refuse to participate in a

16. Economic Council of Canada, *Financing Confederation: Today and Tomorrow* (Ottawa: Supply and Services Canada, 1982) at 54.

17. As of 1992, more than one third of provincial budgets were locked into shared-cost programmes. See *supra* note 8 at 146.

18. Government of Canada Working Paper on the Constitution, *Federal-Provincial Grants and the Spending Power of Parliament*, by P.E. Trudeau, (Ottawa: Queen's Printer, 1969), Catalogue no. Z2-1969/2-2. Also in A.F. Bayefsky, ed., *Canada's Constitution Act 1982 & Amendments* (Toronto: McGraw-Hill Ryerson, 1989) at 146.

programme, and that, for Quebec, these programmes were a device of unwarranted centralization.¹⁹ Along with these criticisms, which rang louder in some provinces than in others, was the charge that the federal government was encroaching on provincial jurisdictions through the use of conditional grants.²⁰ This constitutional argument, based on the division of powers, warrants special attention.

3. *Division of Powers*

The areas of health, welfare and education have generally been regarded as domains of provincial jurisdiction pursuant to the *Constitution Act, 1867*. Through the exercise of its spending power,²¹ the federal government has initiated and established shared-cost programmes which brings the federal authority generally into the fields of health, welfare and education. Accordingly, this constitutional problem of the federal government acting in provincial jurisdictions must be regarded as a parallel concern with the practical difficulties experienced by the provinces which participate in shared-cost programmes.

a. *Provincial Jurisdictions*

Section 92 of the *Constitution Act 1867*, defines the areas in which the provinces have exclusive power to make laws. The provinces have jurisdiction over matters of a "private Nature in the Province," including all municipal institutions, pursuant to s. 92(16). Provinces are also given

19. Criticisms raised by Quebec, for example, reflect that province's particular distrust of Ottawa and often advance the position that shared-cost programmes are an instrument of unwarranted centralization. In 1952, for instance, the federal government introduced a program for postsecondary education. In order to avoid allegations that it was interfering in an area of provincial jurisdiction, the federal government sought to channel funds to the provinces via the Association of Universities and Colleges of Canada. Quebec was adamant, however, that its jurisdictional domain over education in the province would not be tampered with by Ottawa. The province threatened to reduce its transfer payments if federal assistance were accepted, and a stand-off ensued until 1959, when the federal government agreed to make tax room available to Quebec (rather than making the usual grant payments). Quebec in turn agreed to provide grants to postsecondary education in the province equal to the grants made under the federal initiative.

20. Quebec's Tremblay Commission, for instance, argued that Parliament had no power to make grants of any kind, including unconditional grants, in areas of exclusive provincial jurisdiction, *Report of the Royal Commission of Enquiry on Constitutional Problems*, vol.2 (Ottawa: Queen's Printer, 1956) at 217-23.

21. The term "spending power" refers to "the power of Parliament to make payments to people or institutions or governments for purposes on which it (Parliament) does not necessarily have the power to legislate". *Supra* note 18 at 146.

sole responsibility for the establishment, maintenance, and management of hospitals, *per* s. 92(7), and for "Property and Civil Rights in the Province," *per* s. 92(13).²² It is generally agreed that these provisions give the provinces sole legislative responsibility for welfare support and services in the most general sense, and for health care and insurance as well. In addition, s. 93 gives the provinces the exclusive right to legislate in the area of education.²³ Accordingly, jurisdiction over health, welfare and education is presumed to be delegated to the provinces, at least more clearly than is Parliament's or the government of Canada's responsibility for these areas.

22. 92. In each Province the Legislature may exclusively make Law in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

(7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

...

(13) Property and Civil Rights in the Province.

...

(16) Generally all Matters of a merely local or private Nature in the Province.

23. 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

b. *Federal Jurisdictions*

As noted earlier, the federal government has had to use its “spending power” in order to establish shared-cost programmes since no explicit delegation of authority over the areas of health, welfare and education is conferred upon the federal government under the *Constitution Act, 1867*.²⁴ Before examining the constitutional authority for the federal spending power, however, it will be useful to highlight the constitutional difference between federal contributions in the form of unconditional grants, and contributions to shared-cost programmes or conditional grants.

Unconditional grants to the provinces (usually to less prosperous ones) are payments with no strings attached, intended to equalize provincial revenue. Accordingly, the provinces in receipt of such grants are free to spend the money for their own purposes. These grants, known as “equalization payments,” are contemplated under s. 36(2) of the *Constitution Act, 1982*, and are generally accepted as being constitutionally unproblematic since they do not interfere with the exercise of provincial authority.

Conditional grants, however, involve payments to the provinces *on condition* that the programme in question accord with federal stipulations. In order to “spend” its money in areas of provincial jurisdiction and to attach conditions to the way this money is spent, the federal government has had to rely on its “spending power” as the source grounding its authority. The federal position with respect to conditional grants is precarious because the spending power itself is not explicitly authorized by the *Constitution Act, 1867*. Rather, it must be inferred from the federal powers to levy taxes, *per* s. 91(3), to legislate in relation to “public property”, *per* s. 91(1A), and to appropriate federal funds, *per* s. 106.²⁵

24. The only exceptions to this are unemployment insurance and old age security, which were transferred to federal jurisdiction by constitutional amendment.

25. *Supra* note 8 at 150. See also A. Petter, “Federalism and the Myth of the Federal Spending Power” (1989) 68 Can. Bar Rev. at 448.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

(1A) The Public Debt and Property.

...

The question remains, do these powers confer sufficient authority on the federal government to spend in areas which are outside their jurisdiction?²⁶

Canadian courts have in fact upheld the federal spending power indirectly, most notably in *Re Canada Assistance Plan* (1991),²⁷ while at the same time holding that the use of the spending power should not amount to "regulation" in a provincial field. This judgment assessed CAP in order to determine its intrusiveness into the provincial domain and concluded that CAP was not "regulatory" and therefore not *ultra vires* the federal government. This broad interpretation of the federal spending power, however, is relatively recent. During the period of discussions leading up to the patriation of the Constitution, no judicial decision had yet affirmed the use of the federal spending power for purposes within the provincial domain as clearly as did *Re Canada Assistance Plan*. As a result, it is important historically to consider the precarious status of the federal spending power, especially with respect to conditional grants, during the period of constitutional renewal, up to 1982.²⁸ During that time, the debate had pit those who advanced a narrow view of the federal spending power against the proponents of a broad view. Importantly, both positions relied implicitly on competing interpretive approaches to the Constitution.

(3) The raising of Money by any Mode or System of Taxation.

...

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

26. Some commentators have argued that the general pattern of division of powers in the *Constitution Act, 1867*, implicitly restricts the federal taxing power under s. 91(3) to raising money for federal purposes only, and not for those within the provincial sphere. It is further argued, politically, that "fiscal responsibility" requires each level of government to finance its own expenditures through its own taxation (*Supra* note 8 at 150).

Other scholars conclude that the only limitation on the federal spending power is that it not be used as a means of "legislating" or "regulating" a program within the provincial domain (see B. Laskin, *Canadian Constitutional Law* (Toronto: Carswell, 1966) at 666; and G.V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (Toronto: The Canadian Tax Foundation, 1967) at 36-41).

Others, still, hold the view that the spending power is part of the uncodified framework of government. The Crown has the right to make gifts, and attach conditions to them, while the provinces are at liberty to accept the offer or refuse it, the only stipulation being that Parliament approve the offer. F.R. Scott writes: "These simple but significant powers . . . derive from doctrines of the Royal Prerogative and the common law," (see F.R. Scott, "The Constitutional Background of Taxation Agreements" 1955 McGill L.J. 2 at 6. See also *supra* note 8 at 152).

27. *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at 567.

28. I argue later in this paper that entrenching the federal spending power, and especially with respect to conditional grants, was one of the major underlying imperatives which led to the creation and inclusion of s. 36(1) in the *Constitution Act, 1982*.

c. *Interpretations of the Division of Powers*

The narrow interpretation of federal spending power was founded on the conviction that the constitutional division of powers was absolute, and that the respective federal and provincial jurisdictions, as they had been originally assigned in the *Constitution Act, 1867*, were akin to “watertight compartments”.²⁹ Thus, the respective levels of government were strictly barred from each other’s jurisdictional fields. The broad interpretation was based on the belief that the framers of the Constitution could not have foreseen the unavoidability, indeed the necessity, of overlapping authority in the “modern world”.³⁰ Those who held this view insisted that the division of powers, as it is found in the *Constitution Act, 1867*, should be interpreted more flexibly, and thus more broadly.³¹

The broad interpretation of the division of powers has most recently been affirmed in part because it considers more than the strict textual construction of the Constitution. By taking into account the reality of the modern world as being different from that of 1867, those who would advance a broad interpretation gain for their argument the force of reason. Donald Smiley writes:

The old classical federalism in which each level carried out the functions assigned to it by the constitution in relative isolation from the other had some relevance to a period when governmental responsibilities were limited in scope and importance. It has no relevance today.³²

Other scholars, of course, would agree. Speaking before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, in 1978, Gerard V. La Forest responded to a challenge on the division of powers in the following manner:

Senator Denis: But if there is a distribution of power, a clear-cut distribution of power, the federal [sic] will have the right to do those kinds of things then and the provincial legislation the same. If the powers are divided adequately there will be no need of a new *chambre haute*.

Mr. La Forest: The simple fact is, you know, that in 1867 a great attempt was made at dividing powers so that they did not overlap. They do overlap. I am sure that if we tried in this year they would overlap next year. In fact,

29. This metaphor was first coined by Lord Atkin: *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326 at 354.

30. *Supra* note 8 at 151.

31. For a thorough analysis of the division of powers in a federal state, see: D.V. Smiley, “Federalism and the Public Policy Process” in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality*, 3d ed. (Toronto: Methuen Publications, 1977) at 366.

32. *Ibid.* at 369.

the world is not so simple that you can divide it on highly abstract principles. There will be overlap, there is overlap, and it will continue.³³

In spite of the reasoned arguments of scholars about the necessity of taking a broad view of the division of powers, however, the issue remained contentious with respect to the federal spending power. Having its authority constructed as it was on more than one provision of the Constitution, no federal government could say with certainty that it had the right to initiate conditional grant programmes. Consequently, one of the dominant underlying concerns for the federal government during the constitutional renewal process was to anchor securely its own spending power by making it more explicit in a new constitution.

4. *Constitutional Renewal*

The effort to patriate the Constitution was initiated at the Federal-Provincial First Ministers' Conference, held in Ottawa on February 5, 6 and 7th, 1968.³⁴ At that time, the federal and provincial leaders agreed to begin a review of the Constitution without limiting the general scope of the review.³⁵ This process lasted until 1982, when the *Constitution Act, 1982* was at last realized for Canadians.

The first steps taken by then Prime Minister Trudeau was to outline, for discussion purposes, the broad objectives of confederation as a basis which could give rise to a more substantial document. The four objectives identified by the Government of Canada were presented to both the heads of the provincial governments and to the people of Canada in a 1968 federal publication entitled, *The Constitution and the People of Canada*,³⁶

33. Special Joint Committee of the Senate and of the House of Commons, *Minutes of Proceedings and Evidence on the Constitution of Canada* (6 September 1978) at 10:61.

34. At the conclusion of this conference, it was decided that a continuing Constitutional Conference be set up, composed of the Prime Minister and Premiers or their delegates, to supervise the process of constitutional review; that a Continuing Committee of officials be set up to assist the Constitutional Conference; that a secretariat be formed by the federal government, after consultation with the provinces, to serve both the Constitutional Conference and the Continuing Committee of officials; that the Continuing Committee of officials be allowed to set up sub-committees on specific questions; with the approbation of the Prime Minister, "Federal-Provincial First Ministers' Conference, Feb. 5-7, 1968" Document no. 13-CD-004-E (Ottawa: 5-7 February 1968). Bayefsky, *supra* note 18 at 74.

35. P.E. Trudeau, "Government of Canada Working Paper on the Constitution" in *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Queen's Printer, 1969), Cat. No. CP 32-9-1969. Bayefsky, *supra* note 18 at 78.

36. *Ibid.*

and authored by the Prime Minister himself. These objectives were to be included in the preamble of the Constitution. The third of these objectives made broad reference to concerns listed under what has now become s. 36(1) of the present Constitution:

*To promote national economic, social and cultural development, and the general welfare and equality of opportunity for all Canadians in whatever region they may live, including the opportunity for gainful work, for just conditions of employment, for an adequate standard of living, for security, for education, and for rest and leisure.*³⁷

Although intentionally broad, Prime Minister Trudeau explained that the goal of individual fulfillment for all Canadians is meant to be realized in two ways. Firstly, “[t]his goal, if it is to have any meaning, must embrace all aspects of individual development—economic, social and cultural—and it must apply to *all* Canadians . . . In our view, however, economic, social and cultural development should be thought of primarily as the creation of opportunity for individual Canadians—the opportunity to realize their full potential.”³⁸ Secondly, “equal opportunity for all Canadians,” as contributing to Canadians’ individual fulfillment . . . should be thought of in terms of the equalization of opportunity as among the regions of Canada. There is no room in our society for great or widening disparities as between the opportunities available to individual Canadians, or disparities in the opportunities or the public services available in the several regions of Canada.³⁹ Thus, from the start of the constitutional renewal process, “equal opportunity for all Canadians” was intended to include the opportunity for gainful work, for just conditions of employment, for an adequate standard of living, for security, for education, and for rest and leisure. In short, this phrase, which later appears as ss. 36(1)(a), was intended to bear substantive content.⁴⁰ In addition, “equal opportunity for all Canadians” was said to include the availability of public services for individual Canadians irrespective of the region in which they live.

37. *Ibid.*

38. *Ibid.* [emphasis in original].

39. *Ibid.*

40. The content of this phrase, as outlined by the federal government, is an elucidation of the phrase “national economic, social and cultural development”, used earlier in this passage. This federal initiative reflects its international undertakings as a signatory to the *International Convention on Economic, Social, and Cultural Rights*, *infra* note 128. For a discussion of this international document and Canada’s obligations as a signatory to it, please see the “International Documents as Interpretive Guides” section of this paper.

In order to realize this goal, in general terms, the Government of Canada must be given sufficient constitutional powers to:

... redistribute income and to maintain reasonable levels of livelihood for individual Canadians, if the effects of regional disparities on individual citizens are to be minimized.⁴¹

Securing sufficient constitutional powers for the government of Canada was therefore considered necessary for the realization of the above "national" objective. Yet, some of the concerns identified in this objective, such as "an adequate standard of living" and "education" for example, had been already delegated to the provinces under the *Constitution Act, 1867*. In other words, the federal government clearly believed that its existing constitutional authority to act in these provincial fields was not sufficiently secure. The federal government's resolve to shore up its role in these specific areas of provincial domain continued as an ongoing theme in the constitutional negotiations until 1982.

In "A Briefing Paper on Discussions within the Continuing Committee of Officials", dated December 12, 1968 and forwarded to each of the government delegations, six main points were brought forward from discussions on Regional Disparities. The second of these points expressed the view that:

... there should be some specific constitutional provision respecting a *federal role and responsibility in the reduction of regional disparities*. One suggestion was that the federal government must have the fiscal and economic powers to enable it to contribute through redistribution of income measures to the welfare of individuals, as well as to implement economic development programmes for the benefit of a region as a whole.⁴²

Although it is not certain which delegation made this suggestion, it was clearly of sufficient significance in the discussions of the Continuing Committee for it to be included in their summary report. What makes this suggestion significant is that it identifies the kind of role envisaged for the federal government to play in meeting its responsibility to reduce regional disparities. That role is stated as being the exercise of federal fiscal and economic powers. Given that the federal government would be contributing fiscally towards fields in the provincial domain, this suggestion clearly contemplates the exercise of the federal spending power, thereby endorsing it.

41. *Ibid.*

42. "A Briefing Paper on Discussions within the Continuing Committee of Officials" (12 December 1968) in Bayefsky, *supra* note 18 at 122 [emphasis added].

The Government of Canada publicly suggested that such a provision be considered in addition to the objective already slated for the preamble of the Constitution in 1969. In a Government of Canada Working Paper on the Constitution, *The Taxing Powers and the Constitution of Canada*, the Honourable E.J. Benson, Minister of Finance, writes:

... the Government of Canada would propose two specific constitutional provisions. . . .

First, the Preamble to the Constitution—the statement of objectives—should state as a goal for all governments the provision of equal opportunity for all Canadians, including the availability to them of essential public services. . . .

*Secondly, the Constitution should provide the Parliament of Canada with explicit power to contribute toward the equalization of necessary provincial public services across Canada. . . .*⁴³ [emphasis in original]

Here, for the first time, the federal government openly acknowledged its intention to secure constitutional power to contribute to a jurisdiction which is explicitly cited as belonging to the provinces: “provincial public services”. Again, the explicit power of Parliament to contribute toward the equalization of provincial public services clearly anticipated the exercise of the federal spending power.

As stated earlier, unconditional grants were hardly constitutionally problematic for the federal government because under the equalization payment programme, the federal government was simply giving money to the provinces without directing them on how that money should be spent. Accordingly, the federal government under this programme took very little risk of running afoul of the division of powers. Unlike unconditional grants, however, conditional grants posed a far greater constitutional problem for the federal government in this regard. Conditional grants permitted the federal government not only to determine which *provincial* public services are funded, but also to set conditions on the way these programmes are structured; conditional grants left the federal government particularly vulnerable to allegations of “regulating” in the provincial sphere. Indeed, provincial governments and federal critics alike had severely criticized the federal government on this issue. From a division of powers standpoint, then, the federal government faced far greater pressure to resolve the Constitutional issue surrounding its use of conditional grants than it did for its use of unconditional grants. Accordingly, the provision which the federal government was seeking to include in the Constitution was primarily intended to provide Parliament

43. E.J. Benson, “Government of Canada Working Paper on the Constitution” *The Taxing Powers and the Constitution of Canada* (Ottawa: Queen’s Printer, 1969) Cat. No. Z2-1969/2-1. Bayefsky, *supra* note 18 at 140.

with explicit power to make conditional grants, rather than equalization payments.

a. *Conditional Grants & the Spending Power*

The federal government made its intentions clear in another Working Paper on The Constitution, *Federal-Provincial Grants and the Spending Power of Parliament*, again authored by the Prime Minister in 1969.⁴⁴ After defining the term “spending power” as meaning “the power of Parliament to make payments to people or institutions or governments for purposes on which it (Parliament) does not necessarily have the power to legislate,”⁴⁵ the Prime Minister proceeded to elaborate on the use of the spending power and its benefits for individual Canadians by discussing the CAP, which has the federal government contributing one half of the *provincial* cost of social assistance to individuals in need. The equalization of provincial public services, which is said to include health, welfare, education and roads, was also identified as a benefit arising from the existence of the spending power:

The importance of the spending power in Canada can be illustrated by looking at some of the programmes which are founded primarily upon it (as opposed to being based upon Parliament’s regulatory powers). . . . In particular, family allowances are paid to all mothers in Canada . . . and the federal government pays to the provinces one half of the cost of social assistance payments to individuals in need (under the Canada Assistance Plan—costing over \$400 million). . . .

The equalization of provincial public services—including health, welfare, education, and roads—is also accomplished largely because of the existence of the spending power.⁴⁶

After defining the federal spending power and illustrating its use by drawing from existing conditional and unconditional grant programmes, the Prime Minister acknowledged the fact that the spending power was a constitutionally contentious issue, and discussed the matter in some detail.

(i) *the division of powers*

The issue of whether Parliament may spend in the provincial domain raises questions about how the division of powers should be interpreted

44. *Supra* note 18 at 146.

45. *Ibid.*

46. *Ibid.* at 147.

(as discussed in an earlier section of this paper).⁴⁷ Prime Minister Trudeau began by acknowledging that the provinces were delegated specific authorities under ss. 92 and 93 of the *Constitution Act, 1867*, and that the federal government was given specific jurisdictions under s. 91 of that Act. The constitutional authority of the spending power, pursuant to s. 91(3) and s. 91(1A), was also surveyed.⁴⁸ Finally, the specific and hotly disputed constitutional ruling by the Privy Council in *Reference re Employment and Social Insurance Act*,⁴⁹ was noted, along with the passage which had raised the most serious objections to the validity of the spending power itself. If read in sequence, the following two passages are informative:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. . . .

. . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence.⁵⁰

The latter passage illustrates the precarious constitutional status of the spending power, as well as all conditional if not unconditional grant programmes, at that time.

In defense of the spending power and conditional grants generally, Prime Minister Trudeau cited two scholars for a favorable interpretation of this passage: Bora Laskin and Gerard V. La Forest. Both commentators advanced the view that Parliament may in fact make conditional and unconditional grants provided only that the programme involved does not amount to legislation or regulation of a provincial power.⁵¹ Still, the scholarly interpretations cannot supercede the decisions of the Court or of the Privy Council, and Quebec's Tremblay Commission, thirteen years earlier, had relied on this very passage to argue that both conditional *as well as* unconditional grants to the provinces were unconstitutional.⁵²

47. *Supra* part I.3.

48. *Supra* notes 22, 23, & 25.

49. *Re Employment and Social Insurance Act*, [1937] A.C. 355.

50. *Ibid.* at 366. Bayefsky, *supra* note 18 at 148.

51. *Supra* note 21. Bayefsky, *supra* note 18 at 149.

52. *Supra* note 20.

In spite of the contention, however, Prime Minister Trudeau asserted the federal position by simply stating:

Federal governments consistently have taken the position that Parliament's power to spend is clear. . . .⁵³

The claim that Parliament's power to spend is clear under the *Constitution Act, 1867* obviously side-steps the debate about the federal spending power. Even if the spending power were clearly authorized by the existing Constitution, that power must at least be found to reflect the limitations on it as advanced by even the most favorable interpretation on which the government could rely, that of Laskin and La Forest: that Parliament could make conditional and unconditional grants to the provinces provided only that the programme involved did not amount to legislation or regulation of a provincial power.

Despite the federal claim that Parliament's power to spend was clear, it nonetheless was certainly not clear enough, either to detractors or to the courts, as the decision of the Privy Council illustrated. Yet, the federal government had already committed itself to a great number of conditional and unconditional grant programmes which had been implemented and continued to exist because of the spending power. If the federal government was going to ensure the continued survival of these programmes, it would necessarily have to maintain that the spending power was constitutionally valid.

Accordingly, the issue from the federal government's perspective could not be framed in a manner that would question the legitimacy of the spending power, i.e. whether or not the division of powers permitted the spending power. Rather, the issue would have to be formulated in a way that would both affirm the spending power while at the same time take into account the debate surrounding it. The "problem", then, for the federal government, was not (and could not be) that the division of powers did not affirm the spending power, but rather that the division of powers did not *explicitly* affirm it. In other words, if the Constitution did explicitly recognize the spending power (instead of forcing advocates of the spending power to construct it on the basis of more than one section of the Constitution) then debate and uncertainty over the spending power would end.

Thus, the federal intention at this stage of the constitutional renewal process could not be characterized as an attempt by the federal government to gain powers which it did not have. A more accurate conclusion had to be that the federal government feared that its use of the spending

53. *Supra* note 18 at 149.

power, particularly with respect to conditional grants, was not “explicit” enough and therefore not as “clear” as Prime Minister Trudeau would suggest. As a result, the federal government sought to make its spending power more definitive in a renewed constitution.

A further point ensued from the federal government’s refusal to retreat from the controversy surrounding the division of powers. Since it publicly took the position that the existing division of powers under the *Constitution Act, 1867* was clear and needed no redrafting in order to authorize the spending power, any specific provision in a new constitution explicitly affirming the federal spending power would, from the federal standpoint, neither add to nor otherwise alter the existing division of powers. Such a provision would merely have the effect of clarifying what, up until that point, had been simply implicit.

(ii) *federal constitutional proposal*

Prime Minister Trudeau’s statement regarding the federal government’s consistently held position on the spending power came as no surprise. Nor was it surprising that this federal government, with a review of the constitution under way, would want to make Parliament’s power to spend clearer, or more explicit, in a new constitution. This was, in fact, the first of three proposals advanced by the Government of Canada in the *Federal-Provincial Grants and the Spending Power of Parliament* Working Paper submitted to the Constitutional Conference:

... the Government of Canada has attempted to develop certain principles which it could tentatively advance to the Constitutional Conference as a basis for reviewing this aspect of the Constitution. They are these:

(1) *The constitutional power of the Parliament of Canada to contribute toward the public services and programmes of provincial governments should be provided for explicitly in the constitution;*⁵⁴

With this proposal, then, the federal government sought to entrench the existing practice of financially contributing towards provincial public services.

Of particular importance, too, in this proposal, was the fact that, in addition to the use of the broad term “public services”, the term “programmes of provincial governments” was employed to identify the objects of the federal spending power. In other words, what the federal government was seeking explicit constitutional power to do was not only to contribute financially to provincial public services in a general way, but more significantly, to do so with respect to specific provincial

54. *Ibid.* at 154.

programmes. Contributions to specific programmes, or funds which would be earmarked explicitly for specific programmes such as health, education and welfare, entailed the use of conditional rather than unconditional grants, because only conditional grants permitted federal moneys to be targeted to a specific provincial programme.

The federal government's second principle spoke to the separate matter of unconditional grants:

(2) The power of Parliament to make unconditional grants to provincial governments for the purpose of supporting their programmes and public services should be unrestricted.⁵⁵

The federal government clearly felt confident that unrestricted authority to provide unconditional grants would meet with little resistance from the provinces. Indeed, as unconditional grants, these payments would not bind the provinces' use of the money in any way. By not arguing that the power to make conditional grants be similarly unrestricted, the federal government implicitly accepted the existence of limitations on the use of conditional grants (presumably, from the government's Working Paper, that conditional grants could not amount to legislation or regulation in the provincial fields).

The federal government also advanced, in its third principle, other limitations on its power to make conditional grants:

(3) The power of Parliament to make general conditional grants in respect of federal-provincial programmes which are acknowledged to be within exclusive provincial jurisdiction should be based upon two requirements: first, a broad national consensus in favour of any proposed programme should be demonstrated to exist before Parliament exercises its power; and secondly the decision of a provincial legislature to exercise its constitutional right not to participate in any programme, even given a national consensus, should not result in a fiscal penalty being imposed upon the people of that province.⁵⁶

This principle expressly addressed the practical concerns and criticisms of the provinces. Aside from the constitutional issue of the division of powers, the provinces had complained about the federal government's unilateral selection of the provincial public services which warranted standardization through the use of conditional grants. With this proposal, the federal government appeared to be reassuring the provinces that before the initiation of a conditional grant programme, a broad national consensus in favour of any proposed programme would first be established.

55. *Ibid.*

56. *Ibid.*

The second part of this proposal addressed another provincial complaint about the existing structure of conditional grants. As noted earlier, provinces which did not participate in a conditional grant programme exposed their residents to the same taxation which would be levied if the programme were in place while denying them the benefit of the programme. Such taxation without benefit, or fiscal penalty for a province choosing not to participate in a conditional grant programme, was expressly recognized and rejected by the federal government in this proposal. This federal proposal made guarantees to the provinces about the structure of future conditional grants. What the federal government sought in return was acceptance of its first principle and affirmation of its spending power. Ultimately, however, this formula for future conditional grants was not accepted by the Constitutional Conference.

(iii) *rationale for the spending power*

As noted above, the underlying reason for the federal desire to see its spending power explicitly expressed in the Constitution was the concern that as long as the spending power, as it was then constructed, continued to trigger objection and dispute, it, along with its concomitant programmes, would continue to survive on an uncertain constitutional basis. The federal government went to some length to stress the importance of the spending power, and listed specific reasons why the spending power *should* be explicitly accounted for in a new constitution.

Prime Minister Trudeau advanced four reasons why the spending power was required: the interdependence of the modern state, the interdependence of government policies, the sense of community in a united country, and the role of the Parliament of Canada. The first two arguments, the interdependence of the modern state, and the interdependence of its government policies, were described in terms which clearly distinguished the modern state from the society which produced the original division of powers in 1867. As a result of modern economics and technology, as well as greatly increased mobility of the population, Prime Minister Trudeau argued that it would be impossible to expect that only the people within a particular jurisdiction should be affected by government policies for that jurisdiction:⁵⁷

57. *Ibid.* at 151.

There are benefits which flow to the people of the whole of Canada from certain of the services of provincial governments, when such services take into account national as well as provincial interests, and there are costs which are borne by the people of the whole of Canada when the programmes of a particular province fail to take into account the extra-provincial effects.⁵⁸

According to his argumentation, this interdependence of the modern state becomes problematic if provincial interests conflict with national interests. Such conflict is expected to arise by the very nature of the "provincial" versus "national" strata of a federation. The terms of reference, for instance, by which provincial governments are guided are said to be different from those which guide the national, or federal government. The priorities imposed upon provincial governments by their constituencies are often different from priorities demanded of the national government by its constituencies. Thirdly, the objectives of provincial policies will be directed more to the needs and wishes of the provincial constituency than to those of the national constituency. Lastly, the consequences of provincial policies will be gauged by politicians with regards to their provincial constituency, and not the national interest.⁵⁹

In order to ensure that provincial policies do not harm national interests in a modern state, then Prime Minister Trudeau argued that there must exist a "mechanism" by which the national government may co-ordinate provincial actions which may impact on national interests. He identified the spending power and specifically shared-cost initiatives as being that mechanism.

The sense of community in a united country is the third essential reason for a federal spending power. This sense of community, in Prime Minister Trudeau's terms, signifies a sense of responsibility amongst Canadians for their compatriots in other parts of the country, and finds expression in the belief that an individual living in one part of Canada will be able to receive the same or similar standards of public services as an individual living in another part of the country.⁶⁰ Such a "vehicle", or mechanism by which this can be achieved, is the spending power, and in particular conditional grant programmes, Mr. Trudeau argued.

58. *Ibid.*

59. *Ibid.* at 151-53.

60. "[O]ne of the most important ways of giving expression to this concern is by the provision to every citizen, wherever he lives, of adequate levels of public services—in particular of health, welfare and education services. Again, some vehicle is required by which Canadians can achieve this goal—by which the "national interest" in the level of general provincial public services or of a particular public service can be expressed." *Ibid.* at 153.

Lastly, the role of the Parliament of Canada was advanced as another reason why the spending power was required. Since Parliament is the only body which is elected by all the citizens of a country, it is uniquely able to represent the “national interest” of its citizens. Furthermore, citizens of a federation look to Parliament to assert and protect the national interest.⁶¹ The importance of the role of Parliament in a federation is the reason why Parliament *should* be playing a role in the provincial domain in the provision of provincial health, welfare and education services, because that role is a necessary one from a national interest point of view, and Parliament is the only appropriate body to meet that responsibility. Prime Minister Trudeau concluded:

because the people of Canada will properly look to a popularly elected Parliament to represent their national interests, it should play a role, *with* the provinces, in achieving the best results for Canada from provincial policies and programmes whose effects extend beyond the boundaries of a province.⁶²

Thus, because of the interdependence of the modern state and its government policies, the sense of community in a united country, and the role of Parliament in a federation, Prime Minister Trudeau argued that Parliament had a valid role to play in the provision of provincial public services. Moreover, this role was one which Parliament must *be able* to play because a significant national interest exists in the way provincial public services are provided. It is through the mechanism, or vehicle, of conditional grants that Parliament fulfills this responsibility. Accordingly, Prime Minister Trudeau and the federal government were determined to see the spending power explicitly affirmed in the new Constitution.

b. *Realization of Federal Proposal (1969–71)*

Consensus on the inclusion in the Constitution of a substantive provision affirming the federal spending power was arrived at incrementally between 1969 and the emergence of the Victoria Charter in 1971. At the Federal-Provincial First Ministers’ Conference, Ottawa, December 8–10,

61. “[T]he nationally elected Parliament has a unique and legitimate role to play in determining the national interest, even where provincial jurisdiction is involved. And it is to suggest, further, that Parliament is the appropriate body to make grants to the provinces for the purpose of equalizing provincial public services and for the purpose of compensating the provinces for adapting their programmes to meet national as well as provincial needs.” *Ibid.* at 154.

62. *Ibid.* [emphasis in original].

1969, the Conference made the following conclusions with respect to Regional Disparities:

The Conference reiterated the earlier agreement that the objective of reducing disparities across the country should be written into the preamble of a revised Constitution as a basic goal of the Canadian people.

It was recognized that both levels of government had responsibility for the achievement of this goal and that each should have appropriate powers for this purpose. *Eight provinces and the federal government agreed that the federal government should have the power to alleviate regional disparities in relation to the income of individuals, inequality of economic development and standards of public services.* . . .

There was some support for the inclusion of a substantive provision in the body of the Constitution which would set forth the obligation, not subject to judicial review, of the federal and provincial governments related to regional disparities.⁶³ [emphasis added]

Thus, the federal government was already beginning to realize its intention to secure a role for itself in the standards of provincial public services delivery through the use of its spending power. The fact that the federal government should have the power to alleviate inequitable standards of public services, a direct reference to the federal use of conditional grants to establish national standards of public services, reflected the Conference's expectation that the federal government's role would be fulfilled through the exercise of its spending power.

The substantive provision identified by the Conference as receiving "some support" would entail a statement of the federal and provincial governments' obligation with respect to the alleviation of regional disparities, inequalities of economic development and standards of public services. Naturally, these obligations were expected to be different for the federal and provincial governments. The phrase used in the Conference's conclusions was that "each should have appropriate powers for this purpose" (i.e., the reduction of disparities across the country). The obligation of the federal government in this respect would entail the exercise of its spending power in the fields of provincial public services to ensure that national interests therein would be asserted and protected. The obligation of the provincial governments would arise out of their own constitutional power and responsibility for delivering the public services. As noted by the Conference, the obligations of the federal and provincial governments to alleviate disparities was not meant to be subject to judicial review.

63. "Federal-Provincial First Ministers' Conference, Ottawa" (8–10 December 1969) Document no. 13-CD-051-E. Bayefsky, *supra* note 18 at 200.

At the second working session of the Constitutional Conference, Ottawa, September 14–15, 1970, the Conference concluded on Regional Disparities:

26. The Constitutional Conference unanimously agreed that it is one of the foremost purposes of the country to ensure that disparities in the well-being and in the economic, social and cultural opportunity of individuals in all regions throughout Canada should be alleviated.

27. To this end, the First Ministers reaffirmed their agreement that the objective of reducing such disparities across the country should be written into the preamble of a revised Constitution as a basic goal of the Canadian people.

28. *The Conference agreed, further, British Columbia dissenting, that the Constitution should contain, in addition, a statement of the moral obligation of both the federal and provincial governments to take appropriate action for the purpose of realizing this objective. . . .*⁶⁴ [emphasis added]

Thus, by as early as 1970, inclusion of a substantive provision which explicitly recognized a role for the federal government to play in provincial fields which were affected by regional disparities received almost unanimous agreement. That role was the practice of using the spending power to contribute to provincial public services. Five months later, the federal government gained the support it needed for constitutional recognition of the spending power. The third Working Session of the Constitutional Conference, Ottawa, February 8–9, 1971, provided the rough outline of a substantive provision which the federal government had been seeking. The Conference's statement of conclusions on Regional Disparities stated:

(a) The preamble should state that one objective of Confederation is the social, economic, and cultural development, and the general welfare and equality of opportunity for all citizens in whatever region they may live;

(b) In the body of the Constitution there should be a statement of obligation of all governments, federal and provincial

i - to promote equality of opportunity and well-being for all individuals;

ii - to ensure, as nearly as possible, that essential public services of reasonable quality will be available to individual citizens.

iii - to promote economic development which will reduce disparities in the social and economic opportunities of individual Canadians in whatever region they may live.

This obligation would not be enforceable by the Courts and would not have the effect of altering the distribution of legislative powers.⁶⁵

64. "Constitutional Conference, Ottawa" (14–15 September 1970) Document no. 13-CD-070-E (Ottawa, Sept. 15, 1970). Bayefsky, *supra* note 18 at 205.

65. "Constitutional Conference, Ottawa" (8–9 February 1971) Doc. 13-CD-082-E. Bayefsky, *supra* note 18 at 210.

For the federal government to have an “obligation” with respect to jurisdictions acknowledged as being part of the provincial domain suggested that the federal government had the power to meet its obligation. The federal spending power constituted that power which would enable the federal government to meet its obligation in the provision of provincial public services, especially the setting of national standards in relation to public services (par. ii).

Accordingly, the federal government won clearer affirmation of the spending power than had as yet existed. Although it fell short of a provision which boldly states that “the federal spending power is affirmed”, yet, by recognizing that the federal government had a role to play in the provision of provincial public services, the preliminary draft advanced by the Conference implicitly acknowledged the federal spending power. Such acknowledgment was the kind of recognition for the “power of the Parliament of Canada to contribute toward the public services and programmes of provincial governments”⁶⁶ which Prime Minister Trudeau and the federal government had been seeking from the outset.

The last sentence of this preliminary draft provision asserted that this obligation would not have the effect of altering the division of powers. As suggested earlier, the federal government did not believe that an actual redistribution of legislative powers was required for it to secure the spending power. Indeed, the federal government felt that it already had that power under the existing Constitution. What, however, was wanting was “explicit recognition” in the Constitution of the status-quo in federal/provincial fiscal relations. Thus, with a provision such as the one advanced by the Conference, the federal government could agree that the division of powers need not be altered, while at the same time attaining the much sought after recognition of the spending power—which was lacking up until this time. The substantive provision on regional disparities, which until then had been only contemplated, appeared in the body of the Victoria Charter issued after the Federal-Provincial First Ministers’ Conference in Victoria, June 14–16, 1971:

66. The first principle advanced by the federal government to the Constitutional Conference in Trudeau, *supra* note 18 at 154.

Part VII

Regional Disparities

Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:

(1) the promotion of equality of opportunity and well being for all individuals in Canada;

(2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and

(3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Art. 47. The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.⁶⁷

According to the foregoing text, both orders of government made a commitment to equality of opportunity, national standards of essential public services, and equality of economic opportunities.

The role which the federal government was anticipated to play in meeting its commitment under this provision was the use of its spending power. This was particularly apparent in light of the federal commitment assuring that essential public services of reasonable quality would be available to *all individuals in Canada*, para. (2), a commitment met by the federal use of its spending power to initiate and maintain conditional grant programmes with respect to public services. Only by this device could a crazy-quilt of provincial programmes give way to national standards. As a result, the federal government succeeded in gaining substantial recognition of its spending power—indeed, the conditional use of the spending power.

c. *History of s. 36 (1972–1982)*

Articles 46 and 47 of the Victoria Charter were redrafted five times (1975, 1978, 1979, 1980 and 1981) before their final version appeared as s. 36 of the *Constitution Act, 1982*. In substance, the provision remained the same from 1971 to 1982, with two significant exceptions: the addition, in 1979, of the precursor to the present subsection 36(2), and the abandonment of the ‘non-compellability’ clause. This section of the paper will highlight these as well as some of the more noteworthy changes that were made to this provision.

67. *Canadian Constitutional Charter, 1971*, Doc. 13-CD-095-E, (Ottawa: Queen’s Printer, 1971) Cat. No. Z2-1971/1. Bayefsky, *supra* note 18 at 217.

Less than a year after the Victoria Charter had been delivered to Canadians, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada fully endorsed, in its Final Report of March 16, 1972, the principles stated in Articles 46 and 47 on Regional Disparities.⁶⁸ More importantly, the Final Report illuminates the legislators' thinking at that time on the relationship between two of the principles stated in Article 46: The principle of "equal opportunity and well being for all individuals in Canada" (para. (1)) and the obligation of assuring "as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada" (para. (2)). The two principles are said to follow logically from each other:

... the Constitution should provide that every Canadian should have access to adequate Federal, Provincial and municipal services without having to bear a disproportionate tax burden because of the region in which he lives. This recommendation follows logically from our acceptance of the principle of equality of opportunity for all Canadians.⁶⁹

What makes this conclusion particularly enlightening is that it provides a specific context by which the principle of "equal opportunity and well being for all individuals in Canada" could be understood. Indeed, this paragraph is vague when read on its own. The Joint Committee, however, believed that "equal opportunity for all Canadians" leads logically to the objective that "every Canadian should have access to adequate Federal, Provincial and municipal services." Thus, equal opportunity for all Canadians may be interpreted to include the availability to all Canadians of essential public services of reasonable quality.

The draft form for a Proclamation of the Governor General, November 10, 1975, was a revised version of the Victoria Charter. As Prime Minister Trudeau stated in a letter circulated to the premiers of the provinces, dated March 31, 1976, changes to the provision on Regional Disparities were cosmetic.⁷⁰ In fact, aside from collapsing Article 47 of the Victoria Charter into Article 46, no further changes were made (see Appendix A, Article 39).

68. "We endorse the conclusions of the First Ministers concerning regional disparities [Feb.8-9, 1971 Working Session No.3] and we believe that Canadians fully support these objectives and want to have them included in the Canadian Constitution." Catalogue no. YC3-284/1-01. Bayefsky, *supra* note 18 at 247.

69. Catalogue no. YC3-284/1-01. Bayefsky, *supra* note 18 at 247.

70. "Part V, which is essentially Part VII of the Victoria Charter on Regional Disparities. The presentation has been slightly altered but there is no change in substance whatever." Bayefsky, *supra* note 18 at 313.

(i) *non-compellability abandoned*

The first significant change to the wording of the non-compellability provision appeared in *The Constitution Amendment Bill*, Bill C-60, given first reading on June 20, 1978. What was previously a non-compellability clause, respecting Parliamentary and provincial legislative authority, was abandoned. The new section read as follows:

96. Without limiting or restricting the generality of the statement of aims of the Canadian Federation set forth in section 4 of this Act and without altering the legislative authority of the Parliament of Canada or of the legislatures of the provinces or the rights of any of them with respect to the exercise of their legislative authority pursuant to law, the Parliament of Canada and the legislatures of the provinces, together with the government of Canada and the governments of the provinces, are committed pursuant to the Constitution of Canada to

- (a) promoting equal opportunities for social and economic well-being,
- (b) assuring as nearly as is practicable the availability of essential public services of reasonable quality, and
- (c) furthering economic development to reduce disparities in opportunities for social and economic well-being and in the availability of essential public services of reasonable quality

for the benefit of all individuals in Canada, wherever they may live.⁷¹

Of immediate interest was the fact that the original proviso to this section, "Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers . . ." was changed to the new phrase, ". . . without altering the legislative authority of the Parliament of Canada or of the legislatures of the Provinces or the rights of any of them with respect to the exercise of their legislative authority pursuant to law. . . ." The term "compel" was dropped. This phrasing clearly varied the meaning of the original statement. The new phrase identified 'rights' of the Parliament of Canada and legislatures of the provinces which were not being altered.

The words "pursuant to law", however, were dropped from the revised (1979) draft of this provision. Whereas the Parliament of Canada and the legislatures of the provinces were previously free from *compulsion* (at least under what had been the proposed art. 47) with respect to the exercise of their legislative powers, an interdict which would have precluded the courts' compelling the exercise of legislative powers, the new phrase only sought to maintain in the clearest terms the legislatures' existing rights with respect to the exercise of their legislative authority.

71. Catalogue no. XB-303-60/1; Document no. 800-8/069. Bayefsky, *supra* note 18 at 386.

The new phrase was so significantly different from the previous one that its meaning was also changed. The clear intention in the earlier version that the Parliament of Canada and the legislatures of the provinces could not be compelled to exercise their legislative power was changed to a statement which could not bear the same meaning.

How much of the original intent of “non-compellability” was meant to abide remains a question. Was non-compellability only made weaker, or was it abandoned for another intention altogether? One may reasonably suggest that this phrase signified an entirely new intention: i.e., that non-compellability was dropped and replaced by a statement showing that the constitutional *status quo* was not being altered. This new phrase remained intact and was included in the present s. 36. It would be entirely consistent with the parties’ respective positions to suggest that, through this new wording, the provinces were seeking to prevent the section from being construed as granting Ottawa any spending power rights additional to that which may have existed prior to the enactment of s. 36. While the federal government was trying to entrench the spending power via section 36, the provinces inserted the new wording seeking to avoid just such an outcome. As will be discussed in the conclusion of this paper, the provincial attempts at preventing spending power entrenchment under s. 36 appear to have been unsuccessful.

(ii) *subsection (2): The Equalization Commitment*

The precursor to the present subsection 36(2) first appeared in the “Best Effort” Draft Proposals assembled for the Federal-Provincial First Ministers’ Conference, Ottawa, February 5 & 6, 1979. Here for the first time, explicit reference was made to equalization payments as a separate and further commitment to those already listed under subsection (1). This commitment flowed from the Parliament and the government of Canada to the provinces, as opposed to the focus of s. 36(1) which was on individual social and economic protections. The new subsection read:

(2) Parliament and the Government of Canada are further committed to the principle of making equalization payments to the provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation, or to the principle of making arrangements equivalent to equalization payments to meet the commitment specified in Section 96(1)(c).⁷²

72. Document no. 800-010/036. Bayefsky, *supra* note 18 at 565.

The relevant historical question which arises at this juncture is why, after eight years of relative consensus on the existing provision, the present s. 36(1), should the provinces begin to seek a constitutional assurance that the payments made pursuant to the equalization programme would continue to be made to them by the federal government? Certainly, if there were any provincial doubts about the viability of conditional or unconditional grant programmes, those doubts would have been aired earlier in the negotiation process. What led to this provision being requested and included in the discussions on regional disparities?

In order to answer these questions, it will be important to recall that conditional grant programmes were still relatively new even in the mid-seventies. Since most, in fact, had only been established in the late sixties, the problems they triggered for both the federal and provincial governments did not begin to appear until the early seventies. For the federal government, conditional grant programmes turned out to be more costly than had been estimated. The fact that these programmes were fiscally open-ended largely explains the rapid ballooning of costs. From their inception, conditional grants had been designed as an equal sharing of the costs of public services between the federal and provincial governments. Since the provinces were in the position of providing the services, however, it was the provinces that made and, thus, controlled the expenditures for these services. For every dollar a province invested in services which fell under the umbrella of a conditional grant programme, it would receive fifty cents back from the federal government. Actual programme costs, as determined by the provinces, governed the extent of federal contributions in a given year. Thus, because the programmes did not have fixed ceilings in place for how much a province could spend in a particular field, and because some provinces did take advantage of a "fifty cent" dollar to purchase more services at a higher quality, the level of Ottawa's contributions rose at a rate alarming for the federal government.⁷³

From the provincial side, the very structure of the programmes, imposed by the federal government, led to inefficiency in the delivery of services. In the field of medical care, for instance, federal contributions were limited to services performed by doctors. As a result, provinces were not free to use the lower-cost services of paramedics or nurses. In addition, convalescent homes were under-utilized in favour of the much more costly option of hospitalization, because convalescent homes, not subject to federal approval, did not receive federal contributions.

73. G.E. Carter, "Established Programs Financing: A Critical Review of the Record" (1988) 36 Can. Tax J. 1225 at 1227.

Structural inefficiencies such as these, as well as an open-ended fiscal arrangement whereby the provinces could spend “fifty cent” dollars, combined to force the federal government to seek cost cutting measures, and to devise new arrangements that would give them more certainty over their own expenditures in these areas.⁷⁴ In its attempt to adjust the mechanics of conditional grant programmes in order to control their costs, the federal government unilaterally instituted a number of measures. The following table has been included in order to convey the magnitude of these federal actions for provincial treasuries and budget calculations, and to illustrate the importance of conditional and unconditional grants for provincial revenue. The figures listed under each column represent the percentages of federal conditional and unconditional grant contributions in relation to a province’s own gross revenues (POGR). These figures relate to fiscal year 1975/76:

**Major Federal-Provincial Financial Flows
1975/76**

Province	Conditional ⁷⁵	Unconditional ⁷⁶
Nfld.	26.2	51.0
P.E.I.	25.2	57.5
N.S.	32.1	50.8
N.B.	26.9	43.3
Que.	20.7	16.0
Ont.	22.1	—
Man.	24.3	16.8
Sask.	18.6	8.8
Alta.	12.3	—
B.C.	16.2	—

These figures clearly illustrate the importance of federal conditional and unconditional grant contributions for provincial revenue. Self evident, too, should be the fact that even a small adjustment in the contributions made to a province like P.E.I. or Nova Scotia would have a significant impact on its budget planning.

In 1972, Ottawa modified the 1967 Post Secondary Education programme by placing a ceiling on the federal overall contribution, restricting its rise to a maximum of 15 percent annually.⁷⁷ In 1973, the federal government proposed a new formula for financing the medical

74. T.J. Courchene, *Refinancing the Canadian Federation: A Survey of the 1977 Fiscal Arrangements Act* (Toronto: C.D. Howe Research Institute, 1979) at 11.

75. For medicare, hospital insurance, and postsecondary education.

76. *Supra* note 74 at 4.

77. T.J. Courchene, *Social Canada in the Millennium* (Toronto: C.D. Howe Research Institute, 1994) at 110.

care and hospital insurance programmes, one which would have given the provinces responsibility for financing the programmes. The provinces rejected the offer in 1974, however, because they considered the compensation offered as insufficient.⁷⁸ Then in July of 1975, the federal Minister of Finance, Marc Lalonde, issued notice to the provincial governments that agreements under the *Hospital Insurance and Diagnostic Services Act* would be terminated as of July 15, 1980 (observing the mandatory five year notice provision as required by the Act). Although he reassured the provinces that new financing arrangements would come into place at that time, if not sooner, Mr. Lalonde was quick to establish more immediate cost cutting measures. In the 1975 federal budget, the Minister of Finance placed ceilings on the rate of growth of federal per capita contributions under the *Medical Care Act*. As part of the same federal anti-inflation programme, contributions under the *Medical Care Act* were rolled back even further in 1976. Both actions were made unilaterally.⁷⁹

The resulting impact on provinces was severe. The unilateral imposition of limits on federal contributions, and the possible termination of at least one conditional grant programme, brought instability to provincial budget planning.⁸⁰ Mounting provincial dissatisfactions gave way to insecurity about the continued viability of conditional grant programmes altogether. In the Prime Minister's address to the Federal-Provincial Conference of First Ministers, Ottawa, June 14–15, 1976, on Established Program Financing (EPF), yet another attempt to adjust conditional grants, Prime Minister Trudeau acknowledged the atmosphere of uncertainty which had come to overshadow conditional grants:

Because of the difficulty in controlling costs, and federal uncertainty about the future extent of its financial commitment, the federal government has had to impose for two of the programs a ceiling on the rate of increase in its contribution;

This has led to uncertainty on the part of the provinces about the extent of continued federal participation or "partnership" in the programs in question;⁸¹

78. Report of the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, *Fiscal Federalism in Canada* (Ottawa: Queen's Printer, 1981) at 40.

79. *Ibid.* at 54.

80. *Supra* note 73 at 1227.

81. P.E. Trudeau, *Established Program Financing: A proposal regarding the major shared-cost programs in the fields of health and post-secondary education* (Ottawa: Queen's Printer, 1976) Document no. FP-8-003 at 4.

This atmosphere of uncertainty also led Finance Minister, Donald S. MacDonald, to state openly in the House of Commons that transfer payments were "a source of tension and deception among federal and provincial governments."⁸²

The 1977 *Established Programs Financing Act*⁸³ (EPF Act), was an attempt to redress many of the problems which had arisen during the previous decade of conditional grants. Perhaps the most notable adjustment in the grant programmes, in order to ensure that costs would not escalate beyond the federal government's ability to meet them, was the termination of the programmes' open-endedness. The cost of hospital insurance, medicare and post secondary education programmes would no longer be determined by actual programme costs, but by a formula which placed fixed limits on federal contributions in these areas.

Despite these measures, however, the federal government soon became concerned that its contributions were still escalating at too high a rate. In August and September of 1978, the Minister of Finance announced to the provinces his desire to re-negotiate, yet again, a new formula that would see federal contributions increase at a slower rate:

The remaining \$220 million [of expenditure cuts] which is included in the reallocation package will have to be found in the major unconditional transfer programs such as Equalization, the Canada Assistance Plan, the proposed Social Services Act, Established Programs Financing, and other programs. We have advised the provincial governments of our intention to discuss the reduction of federal contributions to their municipalities. In some cases, there are contractual obligations that must be re-negotiated.⁸⁴

As was their right under the Act, the provinces refused outright to re-negotiate EPF and Ottawa responded by postponing for one year the proposed Social Services Act, designed to provide provinces with additional resources.⁸⁵

The atmosphere of insecurity and tension surrounding transfer payments re-emerged. It was exacerbated when, in late 1978, the federal government announced that it would unilaterally amend the equalization, or unconditional grant, formula.⁸⁶ In spite of the fact that the federal government did enter into negotiations with the provinces over equalization payments, and that the structure of the programme emerged virtually intact,⁸⁷ the federal government's inconsistent, and at times contradictory

82. *House of Commons Debates* (18 February 1977) at 3205.

83. *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*, S.C. 1976-77, c. 10.

84. *Supra* note 74 at 23.

85. *Ibid.*

86. *Ibid.* at 1.

87. *Ibid.* at 30.

steps, generated enormous provincial frustrations. Stop-gap measures, unilaterally imposed by the federal government, had not only disrupted provincial budget planning, but more importantly, had significantly eroded provincial confidence in their federal partner's commitment to conditional and unconditional grants. Provincial vulnerability to a federal retreat from these programmes was based on the fact that many provinces relied heavily on conditional and unconditional grants to augment their revenues. The ultimate effect was that tension around transfer payments spilled over into the constitutional arena.

In 1978, just as the federal government was announcing further limits on its transfer payments to the provinces, members of the Senate took up the issue at the Special Committee of the Senate on the Constitution of Canada. Their First Report on regional disparities echoed the issue of equalization which had been raised with Prime Minister Trudeau in 1976:

Your committee agrees that, in principle, the reduction of regional disparities is a matter that should be dealt with in the Constitution. The references in the Bill are in clause 96 and in the Statement of Aims. It is noted, however, that the operative clause does not give clear expression to the question of ability to pay and does not create any enforceable obligation to assure, as nearly as is practicable, that each province is able to supply to its people a national average level of public services without a greater burden of taxation than the national average.

The matter of making this commitment enforceable is obviously a difficult one and your committee recommends that it be given further consideration by an appropriate Senate committee.⁸⁸

In light of the federal government's record of unilaterally shrinking transfer payments the move by the provinces to secure some guarantee for continued federal transfer payments for the equalization programme continued on the heels of the Senate hearings. Discussions at the Continuing Committee of Ministers on the Constitution, Toronto, December 14–16, 1978, focused on specific proposals that would curb the arbitrary character of federal actions. The Committee as a whole sought some formula which the federal government could be compelled to follow. Those provinces which relied more heavily on federal money sought minimum guarantees to secure some certainty for themselves about the amount and timing of federal equalization contributions:

88. *Proceedings of the Special Committee of the Senate* (18 October 1978) at 5. Bayefsky, *supra* note 18 at 434.

Governments should examine together, with a view to possible further constitutional change at a later stage:

- (1) the practical possibility of a constitutional provision which would spell out, by principles or formulae, the minimum help to be guaranteed to poorer provinces respecting levels of services and the levels of taxation required to finance them;
- (2) the practical possibility of a federal-provincial equalization system towards which both levels of government might contribute, with all governments perhaps giving a certain percentage of their total revenues for distribution in accordance with principles or formulae.⁸⁹

A month after the Continuing Committee made these proposals, the Task Force on Canadian Unity specifically recommended the following:

With respect to the sharing of Canadian wealth:

- i - the constitution should recognize and entrench the principle of equalizing social and economic opportunities between regions as an objective of the federation, and it should be the responsibility of the central government to maintain a system of equalization payments.
- ii - a program of provincial revenue equalization along the lines of current arrangements should be maintained.
- iii - for the purpose of better balancing provincial resources with the developmental requirements of their economies a new type of equalization program should be developed.

The Task Force explicitly noted that it was the responsibility of the federal government to maintain a system of equalization payments in order to achieve the objective of alleviating regional disparities. Such specific denotation of the federal government's fiscal responsibility underscored the provinces' desire to ensure that the federal government maintain its contributions to permit them to maintain public services.

The even more explicit recommendation of paragraph ii, referred to equalization payments as "revenue equalization". This was a direct reference to unconditional grants, as these monies were meant to equalize provincial revenues between the have and have-not provinces. The recommendation that unconditional grants be maintained "along the lines of current arrangements", as recommended by the Task Force, reflected the provinces' apprehension that the federal government may one day abandon the transfer payments, or at least unilaterally curtail them to the serious detriment of provinces.

In the midst and as a result of, the existing atmosphere of tension, uncertainty and distrust between Ottawa and the provinces over federal

89. Meeting of the Continuing Committee of Ministers on the Constitution (Toronto: 14-16 December 1978) Document no. 830-67/033. Bayefsky, *supra* note 18 at 526.

transfer payments, subsection (2) of the provision on regional disparities was included for the first time for discussion at the Federal-Provincial First Ministers' Conference, on February 5–6, 1979. This subsection reads:

(2) Parliament and the Government of Canada are further committed to the principle of making equalization payments to the provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation, or to the principle of making arrangements equivalent to equalization payments to meet the commitment specified in Section 96(1)(c).

The subsection was clearly dedicated to ensuring that the federal government continue to make contributions to the provinces, at least to those which could not provide essential public services of a reasonable quality without imposing an undue burden of taxation. The alternative in this subsection, that the federal government be committed to making arrangements equivalent to equalization payments to meet the commitment specified in s. 96(1)(c), was equally reassuring to the provinces. In short, the entire subsection was meant to ensure that the federal government be bound by some constitutional commitment to the continued making of transfer payments for equalization. Given the history of unilateral federal adjustments to provincial transfers, it is clear why the have-not provinces in particular would have sought such a provision. However, the provinces were not content with the relatively weak wording of subsection (2). A revised and simpler draft of the provision appeared in the October 6, 1980 Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada:

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.⁹⁰

Although this provision was an assurance to the provinces that federal contributions would continue, the provinces felt that it was still too vague and they raised the issue at every opportunity.

Addressing the Senate on October 28, 1980, Saskatchewan Senator Buckwold reflected his province's sentiments on the new provision:

90. Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, Tabled in the House of Commons and the Senate (Ottawa: Queen's Printer, 1980) Catalogue no. YC3-321/5-57. Bayefsky, *supra* note 18 at 752.

On the equalization formula, our premier has suggested that:

- direct reference be made to "equalization payments" as opposed to the vague reference to-

To quote the words of the resolution:

- "taking such measures as are appropriate."⁹¹

Three days later, Senator Tremblay rose in the Senate to press the provinces' intentions with respect to subsection (2):

A mention of equalization in that paragraph was expected. But no, because equalization is characterized by annual payments which tend to transform equalization into provincial revenue. The reason for equalization is given but not the essential requirement. It is presented only under a negative aspect, namely to avoid an undue burden of provincial taxation. Perhaps it refers also to equalization payments which would enable provinces to avoid an undue taxation burden. But why not say it directly? It is in that sense that equalization payments should have been referred to.⁹²

Senator Stewart argued the same point in the Senate on that day:

I wish now to talk about equalization, which was mentioned by Senator Tremblay. I support what the honourable senator said, that we do not want just a pious statement in the Constitution that we are in favour of equalization. We want a firm statement that equalization payments—I emphasize the word "Payments"—will continue to be made.⁹³

This pressure was redoubled in other fora on the Constitution. The provinces were determined to gain, inasmuch as possible, their guarantee for federal equalization payments. Finally, in the final months of negotiation, the federal government came as close to the province's position as they would go. Speaking to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada on January 12, 1981, then Minister of Justice, Jean Chrétien assented to the use of the term "equalization payments":

Both the Premiers Hatfield and Blakeney and many members of this Committee have made representations to the effect that Section 31(2) should state clearly that equalization payments must be made to provincial governments. I am prepared to accept wording somewhat along the following lines:

31(2) Parliament and the government of Canada are further committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.⁹⁴

91. *Debates of the Senate* (28 October 1980) at 993.

92. *Debates of the Senate* (31 October 1980) at 1094.

93. *Debates of the Senate* (31 October 1980) at 1104.

94. *Proceedings of the Special Committee of the Senate* (12 January 1981) at 36:19.

The new provision was acceptable; and the amendment passed on January 30, 1981. It would remain virtually unchanged and become subsection 36(2) in the *Constitution Act, 1982*.

Of importance in the history of s. 36 is the fact that subsection (2) did not belong to the provision until 1979, eight years after the original formulation of the section in the Victoria Charter. Nor had there been reason for the provinces to insist on it initially. Only after time had passed and economic pressures on the federal government had resulted in a squeeze on provincial treasuries did the provinces become concerned. Numerous unilateral actions by the federal government to control the costs of open-ended programmes, and at least one attempt to restructure unconditional grants altogether, had led to an atmosphere of tension and distrust between the provinces and the federal government. Finally, the provinces had fought for an assurance, at the constitutional level, that equalization payments would continue. The present subsection 36(2) is the fruit of their combined efforts.

II. *Strength of the Commitment*

Under s. 36(1), Parliament and the government of Canada are committed to promoting, furthering and providing those concerns listed under (a), (b) and (c).

How strong is this commitment?

1. Is it justiciable?
2. If it is, then
 - (a) does this pledge create enforceable rights, or
 - (b) are there other non-coercive remedies available?
3. What is the relative strength of this commitment?
4. What is the content of this commitment?

1. *Justiciability*

Canadian courts have taken an expansive view of what is justiciable in the constitutional context, imposing limits on themselves only in those questions that are purely political in nature or that lack objective criteria for judicial scrutiny.⁹⁵ In *Reference re Constitution of Canada*,⁹⁶ the Supreme Court of Canada was asked to determine whether the constitutional convention requiring unanimous consent of the provinces to amend

95. B.L. Strayer, *The Canadian Constitution and the Court—the Function and Scope of Judicial Review*, 2d ed. (Toronto: Butterworths, 1983) at 195–212.

96. [1981] 1 S.C.R. 745 (*sub nom. Patriation Reference*).

the Constitution was enforceable. The majority of the Court rejected the Government of Canada's claim that the issue was non-justiciable, because it would lead the Court into the political as well as legislative arenas, and quoted approvingly from the lower Court's decision on the same case⁹⁷, *per* Freedman, C.J.M.:

In my view, this submission goes too far. Its characterization . . . as purely political overstates the case. That there is a political element embodied in the question, arising from the contents of the joint address, may well be the case. But that does not end the matter. If Question 2, even if in part political, possesses a constitutional feature, it would legitimately call for our reply.

In my view, the request for a decision by this Court on whether there is a constitutional convention, in the circumstances described, that the Dominion will not act without the agreement of the Provinces poses a question that is, at least in part, constitutional in character. It therefore calls for an answer, and I propose to answer it.⁹⁸

This position of the Court has been affirmed by subsequent cases, *Reference re Objection by Quebec to a Resolution to amend the Constitution*⁹⁹, *Operation Dismantle*¹⁰⁰ in 1985, and the reference *Re Canada Assistance Plan*¹⁰¹ in 1991.

The action brought by a peace organization in *Operation Dismantle* sought a declaration from the Court that the Canadian Government's decision to permit the United States to test "cruise missiles" in Canada was a violation of the Charter of Rights. Wilson J., speaking on behalf of a unanimous Court on this issue, stated that if a case raised the question of whether the executive violated the Constitution, then the case would be heard, regardless of the political nature of the dispute:

I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defense, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.¹⁰²

Although an action based on s. 36 may be distinguished from the Court's decision in *Operation Dismantle* on the grounds that s. 36 falls outside

97. *Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1.

98. *Ibid.* at 13. This was reiterated in *Re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793 at 805.

99. *Re Objection*, *ibid.*

100. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441.

101. *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

102. *Supra* note 100 at 472. Wilson J.'s opinion was a separate concurrence, but on this issue Dickson J., who wrote for the rest of the Court, agreed with her: *ibid.* at 459.

the *Charter*, it could be reasonably advanced that legislative or executive action which allegedly violates *any* part of the Constitution could be scrutinized by the Court. *Re Canada Assistance Plan* is squarely on point with this position.

Re Canada Assistance Plan arose because the federal budget of 1990 put a five per cent cap on CAP payments to the “have” provinces of Ontario, Alberta and British Columbia under what to that point had been a regime of open-ended cost-sharing agreements. Although the controversy between the provinces and the federal government was a political one, the legal question raised in *Re Canada Assistance Plan* was whether the federal government could constitutionally amend shared-cost agreements with the provinces? The Supreme Court of Canada held that a “sufficient legal component” existed in the questions posed by the reference¹⁰³ to warrant hearing, and went on to hold that there were no prohibitions in Canada’s constitutional law that would invalidate the proposed legislation.

An action based on s. 36(1) will turn on the question of whether either the federal or provincial governments have failed to meet their commitment to promote, further or provide for the undertakings listed under (a), (b) or (c), thus violating this provision of the Constitution. An action based on s. 36(2) will raise the question of whether the federal government has violated this provision of the Constitution by having failed to meet its commitment to the principle of making equalization payments in order to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Both questions must have a “constitutional feature” (*per Reference re Constitution of Canada*), or a “sufficient legal component” (*per Re Canada Assistance Plan*), however, in order to avoid being purely political and thus non-justiciable. On these tests, s. 36 is as justiciable as all other provisions of the *Constitution Act, 1982*.

2. *Remedy*

a. *Coercive Remedies*

Given that s. 36 is justiciable, does it create enforceable obligations? Opinion would appear to be divided. On the one hand, Michael Robert, Commissioner for the Royal Commission on Economic Union and

103. *Supra* note 101 at 546.

Development Prospects for Canada, for example, suggested in 1985 that Canadians may now, as a result of s. 36, go before the courts and seek a remedy saying: "My provincial government, or any federal government, is not respecting its commitment to provide me with essential public services of reasonable quality."¹⁰⁴ On the other hand, Senator Smith, participating in the Senate debates of November 3, 1980, expressed reservation about the enforceability of s. 36: "Look at this how you will, there is not a single chance—not even the proverbial snowball's chance—of enforcing this commitment as it is written. . . ."¹⁰⁵

Divergence of opinion on the enforceability of a constitutional provision has rarely been so extreme. Although Senator Smith did not specify the basis for his concerns, it may lie in the comparatively open-textured nature of the obligation, styled as a 'commitment'. In addition, the more general wording of the individual equity provision in s. 36(1) and the commitment to the 'principle of equalization' in s. 36(2) lacked the same degree of specificity which other parts of the Constitution initiative contained. Moreover, given the nature of the constitutional undertaking, a commitment, it is more difficult to conceive of the Courts applying the provision to force Parliament or the legislatures to take action. If the Courts were to find that either Parliament or the provincial legislatures had breached their commitments under s. 36 and thereby violated the Constitution, it may be the case that the Courts would not be at liberty to order a mandatory remedy pursuant to s. 52 of the Constitution. Subsection one of that provision reads:

52(1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.¹⁰⁶

Striking down the offending legislation, severing the offending segment of the legislation, and reading into a statute in the case of under-inclusive legislation, are all remedies available to the Court under s. 52¹⁰⁷ for redressing unconstitutional laws.

104. M. Robert, "Challenges and Choices: Implications for Fiscal Federation" in T.J. Courchene, D.W. Conklin & G.C.A. Cook, eds., *Ottawa and the Provinces: the Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28.

105. *Debates of the Senate* (3 November 1980) at 1143. Senator Smith was speaking to s. 31(1) of the *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*, the October 6, 1980 draft of s. 36. Subsection one of each draft is nearly identical while subsection two differs considerably between them.

106. *Supra* note 3.

107. *Shachter v. Canada Employment and Immigration Commission*, [1992] 2 S.C.R. 679.

b. *Declaratory Relief*

If a court were to hold, on an action based on s. 36, that either Parliament or the provincial legislatures had failed to meet their commitment, then it would appear that an appropriate remedy would be a declaration that the legislative body in question is acting contrary to their constitutional commitment. Considerable authority in both statutes as well as the rules of court exist to enable the Court to make “binding declarations of right, whether or not any consequential relief is or could be claimed.”¹⁰⁸ Accordingly, upon a justiciable claim against either Parliament or the provincial legislatures for an alleged breach of their commitment pursuant to s. 36, a Court may declare that the offending action is contrary to their constitutional commitment without thereby attempting to encroach unduly on legislative autonomy. Between hearing a justiciable claim and deciding the matter on its merits, however, a Court will first have to ascertain the strength of Parliament and the provincial legislatures’ “commitment” under s. 36.

3. *Relative Strength of the ‘Commitment’*

Once a Court decides to consider an alleged breach of Parliament or the provincial legislatures’ “commitment” under s. 36(1), it will inevitably have to rule first on the relative strength of this commitment. One suggestion is that this commitment only identifies “objectives” which Parliament and the provincial legislatures have adopted, albeit in a non-binding manner. This is a tempting approach, as it would resolve the apparent contradiction between a constitutional commitment and the unavailability of mandatory remedies. An alternate view is that, as a “constitutional commitment”, Parliament and the provincial legislatures have a greater than usual duty to realize the objects of their commitment. This approach would suggest a much stronger commitment or pledge, whereby a government may be found to be in breach for relatively less grave actions. The interpretive issue at hand stems from the fact that, although the word “commit” is not normally used when a legal duty is being created, it is nonetheless a term which conveys a strong sense of

108. *Judicature Act*, R.S.A. 1980, c. J-1, s. 11; *Rules of Court*, Alta. Reg. 390/68 (O.C. 2208/68), r. 410(c), (e); *Supreme Court Rules*, B.C. Reg. 310/76, as amended r. 5(22); *The Queen’s Bench Act*, R.S.M. 1970, c. C-280, s. 63, r. 8; *Rules of the Supreme Court*, scheduled to the *Judicature Act*, C.S. Nfld. 1916, c. 83, O-24, r. 53; *Civil Procedure Rules and Related Rules*, r. 5.14; *Courts of Justice Act*, S.O. 1984, c. 11, s. 110; *Civil Procedure Rules*, r. 5.14; *Queen’s Bench Act*, R.S.S. 1978, c. Q-1, s. 45(17); *Federal Court Rules*, C.R.C. 1978, c. 663, as amended by SOR/79-57 and SOR/79-58, r. 1723.

"obligation", "binding", and "pledge" according to the Webster's Dictionary.¹⁰⁹ The Oxford Dictionary gives the meaning of "commit" as "to entrust," and "to pledge, bind (esp. oneself) to a certain course or policy."¹¹⁰ *The Oxford English Dictionary* includes a useful reference to the French verb *engager*, the verb used in the French version of s. 36 for the word "commit". The French term is said to mean:

an absolute moral choice of a course of action; hence, the state of being involved in political or social questions, or in furthering a political or social question, or in furthering a particular doctrine or course.¹¹¹

Thus, Parliament and the provincial legislatures are "pledged", "bound", "obligated" and "entrusted" with promoting, furthering and providing for (a), (b) and (c). The French term *engager*, used in the French version of this provision, adds strength to the use of "commit" by suggesting that Parliament and the provincial legislatures have made an "absolute" commitment to "furthering a particular doctrine or course".

It is also noteworthy that the commitment under s. 36(1) is not qualified by the word "principle", as is the federal commitment under s. 36(2): "Parliament and the government of Canada are committed to *the principle* of making equalization payments. . . ." Under s. 36(1)(c), for instance, the commitment is not to the "*principle* of providing essential public services," nor is it, for that matter, to the "*objective* of providing essential public services," but it is rather an unqualified commitment: "to providing essential public services." As such, the commitment under s. 36(1) must be regarded as being substantially stronger even than the commitment found in s. 36(2). The view that the commitment under s. 36(1) connotes "objectives" or "principles" of government action, then, is untenable. Rather than objectives, the commitment in this provision more closely resembles an *obligation*.

Drafters of the 1982 Constitution spoke in terms of entrenching this "obligation" when referring to s. 36. In addressing the House of Commons about the newly tabled *Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada* (the *Constitution Act, 1980*), then Minister of Justice Jean Chr tien said, with respect to the undertakings found under s. 36, (then s. 31):

109. *Webster's New Collegiate Dictionary* (Toronto: G. & C. Merriam Co., 1974).

110. J.M. Hawkins & R. Allen, eds., *The Oxford Encyclopedic English Dictionary* (Oxford: Clarendon Press, 1991).

111. J.A. Simpson & E.S.C. Weiner, eds., *The Oxford English Dictionary* (Oxford: Clarendon Press, 1989).

Sharing the wealth has become a fundamental right of Canadians and that is why the resolution entrenches the principle of equalization and commits both orders of government to promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparity in opportunities and, specifically, providing essential public services of reasonable quality to all Canadians.

By entrenching this principle in the constitution, we are enshrining the obligation of sharing which has been fundamental to the Canadian experience.¹¹²

On October 14, 1980, Senator Perrault, Senate Leader of the Government, reiterated, almost verbatim, Minister Chrétien's comments of the previous week:

The Constitution Act, 1980, entrenches the principle of equalization and commits both orders of Government to promoting equal opportunities for the well being of Canadians, furthering economic development to reduce disparity and opportunities, and specifically providing essential public services of reasonable quality to all Canadians. . . .

This practice of sharing has become a fundamental principle of Canadian federalism.¹¹³

If the practice of sharing had become a "fundamental principle of Canadian Federalism", "a fundamental right of Canadians," and if the drafters of the Constitution had entrenched this principle in order "to enshrine the *obligation* of sharing," then the depth of Parliament's and the provincial legislatures' commitment certainly extended to the level of a "constitutional obligation". This depth of commitment was also the most appropriate interpretation of the term "commit" as it most closely dovetails with the meaning of "engager", the term used in the French version of this provision.

Over and above the Parliamentary speeches pronounced by Senator Perrault and Minister Chrétien, the tradition of sharing was further underscored for the people of Canada. In 1982, the federal government published and made available to Canadians an information booklet entitled, *The Constitution and You*,¹¹⁴ the preface of which reads:

This booklet is published by the Government of Canada in the interest of contributing to public understanding and awareness of the constitutional resolution approved by Parliament in December of 1981.

Under chapter 6, "The Right and Responsibility of Sharing", Canadians were told about *The Tradition of Sharing*: "By guaranteeing it in writing,

112. *House of Commons Debates* (6 October 1980) at 3287.

113. *Debates of the Senate* (14 October 1980) at 853.

114. *The Constitution and You* (Ottawa: Supply and Services Canada, 1982) Cat. no. CP 45-23/1982.

we are simply recognizing a tradition that was established in our country from the beginning.”¹¹⁵ This tradition of sharing, which, according to the booklet, was guaranteed in the Constitution, *committed* the legislatures to the concerns under (a), (b) and (c) of s. 36(1):

A constitutional commitment

The principle of sharing, written into the constitutional resolution and passed by the Parliament of Canada, *commits* both federal and provincial governments to:

- promoting equal opportunities for the well-being of all Canadians
- furthering economic development to reduce disparity in opportunities
- providing essential public services of reasonable quality to all Canadians.¹¹⁶

Thus, this tradition or principle of sharing undergirded the commitment under s. 36(1). It was described repeatedly in the booklet as being “written into the constitution” and as being ‘guaranteed in writing’. If this tradition of sharing were “written into the constitution” by virtue of Parliament and the provincial legislatures’ *commitment* under s. 36(1), then that commitment must bear the force of strength attributed to the tradition of sharing. Standing on its own in this booklet, the strength of this tradition is indeed profound: “By guaranteeing it in writing, we are simply recognizing a tradition that was established in our country from the beginning.” Add to this statement the comments made by Justice Minister Chrétien: “[b]y entrenching this principle in the constitution, we are enshrining the obligation of sharing which has been fundamental to the Canadian experience,” and by Mr. Perrault: “[t]his practice of sharing has become a fundamental principle of Canadian federalism.” Taken cumulatively together with the statements made by the federal government in its booklet, the inescapable conclusion is that the commitment under s. 36(1) is of the most significant nature, and must bear *at least* the strength of a “constitutional obligation”.

Prime Minister Trudeau did not comment a great deal on this particular provision, yet his government’s intention in the use of the term “committed” is reflected in the course of comments he made about the equalization programme and its proposed entrenchment in the Constitution:

the hon. member is raising is a constitutional type of question. . . . *The hon. member knows that these are the payments that we propose to guarantee in the constitutional project before the House. . . .*¹¹⁷

115. *Ibid.* at 20.

116. *Ibid.* at 21 [emphasis added].

117. *House of Commons Debates* (5 December 1980) at 5397 [emphasis added].

Prime Minister Trudeau's statement in the House of Commons clearly affirms the Minister of Justice and the Senate Leader of the Government's intentions that under s. 36(1) the term 'committed' under s. 36(1) is at least a "constitutional obligation", if not a "constitutional guarantee" as stated by the Prime Minister.

Parliament and the provincial legislatures' commitment under s. 36(1) is made stronger still in light of the fact that from the 1971 *Victoria Charter* until the 1977 *Draft Resolution Respecting the Constitution of Canada*, the various drafts of the present s. 36 had systematically stated that the provision shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.¹¹⁸ Clearly, the drafters of the earlier version had contemplated an unambiguous non-compulsion clause by the use of the term "compel". The fact that a non-compulsion clause was initially considered and then subsequently abandoned has the effect of making the s. 36(1) commitment even stronger. Until 1978, Parliament and the provincial legislatures could not have been compelled to exercise their legislative power despite their commitment; there was no way to force them to abide by their commitment if they should renege. However, after 1978, through the *Constitution Act, 1982*, Parliament and the provincial legislatures became subject to judicial review if they breached their commitment. As a result, the commitment itself became stronger. The question that remains is, what government action would constitute a violation of this obligation?

4. *The Content of Governments' Commitment*

a. *Section 36(1)*

Although a ruling of a court will ultimately be based on the specific facts of a case, the content of Parliament and the provincial legislatures' commitment under s. 36 are ultimately gleaned from the wording of the section. Pursuant to s. 36(1), Parliament and the provincial legislatures are committed to:

118. Article 47: The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their Legislative powers. *Canadian Constitutional Charter, 1971*, *supra* note 78. Article 22: Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Province to exercise their legislative powers. . . . *Draft Resolution Respecting the Constitution of Canada, Debates of the Senate* (2 February 1977) at 297–303.

- a) promoting equal opportunities for the well-being of Canadians;
- b) furthering economic development to reduce disparities in opportunities; and
- c) providing essential public services of reasonable quality to all Canadians.

Pursuant to s. 36(2), the commitment by Parliament is to “the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.” In both instances, the subsections anticipate the kind of government action that resulted. At a glance, subsection (2) will appear more general than the three provisions under subsection (1). Under subsection (2), Parliament is committed to making some kind of equalization payments. These are left undefined since the provision speaks only to the “*principle* of making equalization payments”. The general object of these payments is to ensure that provincial governments have sufficient revenues (i.e.: the fiscal ability) to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. Subsection 36(1) is a much narrower provision in that its concern is that of individual equity and in identifying the public services towards which national standards should apply. Parliament and the provincial legislatures are committed to promoting equality of opportunities for all Canadians; in other words, the promotion of individual self-fulfillment and, with it, the possibility of meaningful participation in society.

Disparity in economic strength between and within regions will naturally lead to greater *economic* opportunities for individual Canadians living in more prosperous regions, and less for those Canadians living in less prosperous regions or, indeed, for poor Canadians living in prosperous regions. Accordingly, in order to promote equal opportunities for Canadians inequalities in economic opportunities would naturally have to be addressed, paragraph (a). The paragraph (b) of ss. 36(1) commits Parliament and the provincial legislatures to furthering economic development in order to reduce such disparity in opportunities for Canadians. Thus, paragraph (b) ensues from paragraph (a), identifying as it does one approach which governments are committed to pursuing in order to promote equal opportunities for Canadians. The second dimension of regional disparities exists at the level of public services delivery. Provincial abilities to provide public services, and indeed, the demand for services such as welfare, will vary according to a province’s economic strength. Without federal contributions, many provinces (particularly in the Maritime region) would not be able to provide their residents with public services at the standard enjoyed by Canadians living in more

prosperous regions. Accordingly, regional disparities in public services is another way in which Canadians do not have the benefit of equal opportunities. The logic found in this section (Article 46 of the Victoria Charter) remains the cohesive force behind ss. 36(1).

In addition to reducing disparities in economic opportunities (para. (b)) so as to promote equal opportunities for Canadians (para. (a)), legislators fully intended that access to essential public services should also be ensured in order to promote equal opportunities for Canadians, thus para. (c). Numerous conditional grants fall under the purview of each commitment respectively. While the actual conditional grant programmes which fulfill each commitment will naturally vary, the standard by which governments must abide will be different for each commitment under s. 36(1). The commitment under (b) is to *furthering* economic development. "Furthering" is a word which has a "progressive" connotation. By contrast, the commitment to *providing* does not have the same progressive quality. Under paragraph (b), as long as Parliament and the legislatures act to further, or progressively realize, economic development, then they would be found to be acting in accordance with this standard. This characteristic of progressive realization cannot be attributed to the commitment under paragraph (c). The word "providing" therein lacks that progressive quality. Accordingly, the standard by which a court must judge legislation with respect to s. 36(1) is higher for paragraph (c), because the commitment is to *actually making something available, providing something*.

The commitment under ss. 36(1) is also more substantive and 'down-to-earth' as one moves from paragraph (a) successively to paragraph (c). Paragraph (a) identifies the object of the section as a whole, individual equity, but does not contain a substantive content *per se*, aside from the general equality provision. Paragraph (b) provides that Parliament and the provincial legislatures must *further* economic development, but, due to the progressive nature of the word "further", this provision is to be realized progressively. Thus, the standard of government action under paragraph (b) must be progressive realization of economic development. Regressive government action, or government inaction with the effect that economic development ceases to move forward, or be progressively realized, would naturally fall short of this standard. Paragraph (c) contains the highest standard of government action. Rather than progressive realization, paragraph (c) commits Parliament and the provincial legislatures simply to the realization, or provision, of specific objects: essential public services of reasonable quality. Under this provision, it is not enough for governments to "work towards" providing essential public services. Governments must provide them. Governments must

also provide essential public services which (i) meet a standard of reasonableness, and (ii) are available to all Canadians. These are two further standards which must be observed in the provision of essential public services. The provincial legislatures are expected to meet their responsibilities under this section differently from the role anticipated of Parliament and the federal government. The provinces have powers different from Parliament's, and each is expected to play its distinct role according to its respective powers.

According to the division of powers in the *Constitution Act, 1867*, the provinces have authority over the areas of health, education and welfare. Thus, the provinces are responsible for passing legislation which would govern the provision of these essential services. Provincial responsibility pursuant to s. 36(1)(c), then, would entail the exercise of provincial legislative authority to establish and regulate health, education and welfare programmes in the province. It is also incumbent on the provinces to guarantee legislatively that these programmes be of a "reasonable quality", as per s. 36(1)(c). The actual qualitative standard, however, would not be solely supervised by the provinces. A minimum standard must be determined by the federal government based on criteria contained in conditional grant programmes because only the federal government can set standards which would apply nationally. In other words, provinces would be financially penalized if they delivered services which failed to meet federally set national standards. The assumptions would follow that the provinces could provide higher standards of services to their residents if they so wished.

The content of the federal commitment under s. 36(1)(c) requires somewhat more from Parliament and the federal government than that which is expected from the provincial legislatures. As already noted, the federal government is also implicated in the commitment to providing essential public services "of reasonable quality." In addition, only the federal government can meet that part of the commitment which pledges that essential public services would be provided to "all Canadians". The national scope of this element of the commitment under s. 36(1)(c) would naturally preclude exclusive provincial responsibility with respect to this undertaking.¹¹⁹

119. Indeed, this very element in paragraph (c) had been used by the federal government to argue that only Parliament was suited to consider and assert the national interest as opposed to provincial concerns, and that as a result, Parliament should have clear recognition of its spending power in order for it to attend to the national interest in the provision of *provincial* public services.

Providing essential public services to “all Canadians” clearly anticipates and sets the standard that these services will be both universal and accessible. Firstly, because “all Canadians” are to receive essential public services, regional or provincial boundaries must not impede the provision or the universal availability of these services.¹²⁰ In other words, Canadians in Newfoundland must receive broadly similar essential public services as those that would be available to Canadians in Saskatchewan or British Columbia. Secondly, Canadians moving from one province to another must not be hindered from receiving the benefit of essential public services as provided by the province to which they move or from which they have moved.

The universal availability of essential public services is, alone, insufficient to meet the federal commitment under s. 36(1)(c). What must concomitantly attend universal availability is the principle of accessibility. If “all Canadians” are to be provided with essential public services, then all residents of a province must, in principle, have access to each programme. The federal commitment of providing essential public services to “all Canadians” will thus only be met if those services (i) are made universally available, (ii) preclude a residency requirement in any particular province, and (iii) are accessible. These, in fact, are the broad conditions which the federal government has placed on its grants to the provinces in the health and welfare areas in order to ensure that equal opportunity with respect to essential public services is achieved. These conditions also provide much of the foundation for national standards in the provision of essential public services, establishing, as they do, national availability and accessibility to provincial public services.

The last element in the cement of the foundation for national standards speaks to the standard of “reasonableness” in the provision of essential public services. As a principle, “comprehensiveness” will suggest that each programme provide an adequate range and quality of services in order to meet its commitment, be it in the field of education, health or welfare. Thus, the provision of essential public services of “reasonable quality” to “all Canadians” will require the federal government to place, as a condition for the receipt of federal grant monies, the stipulation that provincial programmes meet a standard of comprehensiveness and intrinsic adequacy. This standard of comprehensiveness will be the

120. This principle has often been referred to as “portability”, i.e. that Canadians can “take with them” their right to essential public services when they move from one province to another. This principle has also been incorporated into conditional grants as that condition which prohibits a province from imposing a residency requirement before a Canadian can receive the services they require.

minimum by which provinces must abide in order for them to meet their commitment of providing essential public services of "reasonable quality".

The content of the federal commitment under s. 36(1)(c), then, will exceed the mere provision of fiscal assistance to the provinces. Since only Parliament has the responsibility for "all Canadians", and because only Parliament can impose conditions nationally in order to ensure that essential public services of reasonable quality be provided to "all Canadians", Parliament and the federal government must do more than provide monetary grants to the provinces. In order to meet its commitment under s. 36(1)(c), Parliament and the federal government must also place conditions on the use of federal grants to the provinces in order to ensure that "all Canadians" are provided with essential public services of "reasonable quality".

The conditions which must be attached to federal transfer grants are expressed broadly: universality, a prohibition on a residency requirement, accessibility, adequacy and comprehensiveness. If Parliament or the federal government were to abandon any one of these conditions, then it may be argued forcefully that the federal government is failing its end of the commitment to provide essential public services of "reasonable quality" to "all Canadians".

b. *International Documents as Interpretive Guides*

In order to determine the scope of Parliament's and the provincial legislatures' obligation under this provision, it will be necessary to examine Canada's international commitments which reflect the concerns listed under (a), (b) and (c) of s. 36(1). Canadian courts have on numerous occasions sought to interpret ambiguous statutes as far as possible in accordance with Canada's international legal obligations.¹²¹ Two underlying reasons explain judicial regard for international treaties to which Canada is a signatory. The first is that, by interpreting ambiguous statutes in conformity with international law, legislation that would otherwise lead to a breach of international law is made to accord with it. Thus, a balance is sought between the supremacy of Parliament and the international legal system. Secondly, international law may be used as a benchmark against which to measure a domestic statute's efficacy.

The Supreme Court has utilized international treaties as an aid to interpreting both the Constitution as well as statutes. Dickson C.J.,

121. *Re Powers to Levy Rates on Foreign Legations*, [1943] S.C.R. 208; see also E.A. Dreidger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 215-16.

dissenting in *PSAC v. Canada*,¹²² suggests that the principles of constitutional interpretation require that Canada's international obligations be considered when construing the Charter:

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation.¹²³

Dickson C.J. cited his dissent in *PSAC* with approval in his majority judgment in *Slaight Communications Inc. v. Davidson*.¹²⁴ The Chief Justice further cited with approval both *PSAC* and *Slaight Communications* in *R. v. Keegstra*,¹²⁵ where he relied upon the International Convention on the Elimination of All Forms of Racial Discrimination¹²⁶ and the International Covenant on Civil and Political Rights.¹²⁷

Although the above cases involve the Charter, it should be recalled that the Charter is only one part of the Constitution. As such, Dickson C.J.'s earliest comments in *PSAC* about applying the general principles of constitutional interpretation to the Charter must also bear on s. 36 interpretation. Thus, Canada's international obligations which relate to "equal opportunities for the well-being of Canadians," *per* s. 36(1)(a), "economic development to reduce disparity in opportunities," *per* s. 36(1)(b), and "essential public services of reasonable quality," *per* s. 36(1)(c), are not only important aids for interpretation, but in the Chief Justice's words, should be "a relevant and persuasive factor" in interpreting this provision.

c. *International Conventions*

International legal instruments such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights are among the first full statements of social and economic rights and have served as models both for regional conventions and for national constitutions. To the extent that s. 36 of the Constitution entrusts

122. *PSAC v. Canada*, [1987] 1 S.C.R. 313.

123. *Ibid.* at 349.

124. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

125. *R. v. Keegstra*, [1990] 3 S.C.R. 697.

126. *International Convention on the Elimination of All Forms of Racial Discrimination* (1966), Can. T.S. 1970 No. 28, 5 I.L.M. 352.

127. *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171, 6 I.L.M. 368.

Canadians' social and economic well-being to Parliament and the provincial legislatures, the Court should use international instruments such as the above to inform the interpretation of s. 36(1) so as to determine whether or not these legislative bodies are meeting their obligation under s. 36(1).

The United Nations Charter makes it a duty for member states to "promote . . . higher standards of living, full employment and conditions of economic and social progress and development." As a member, Canada is pledged to take both joint as well as separate action in cooperation with the UN organization for the achievement of the purposes set forth. Canada's international pledge is made domestically to the people of Canada under s. 36. The Universal Declaration of Human Rights, adopted by the U.N. in 1948 with Canada's support, ensures the right to social security, education, and an adequate standard of living including food, clothing, housing and health and welfare. Again, these rights are reflected to Canadians via s. 36.

The International Convention on Economic, Social and Cultural Rights¹²⁸ supersedes other international documents for its comprehensiveness in the area of social and economic rights. Among the rights which Canada has undertaken under the Covenant, to promote domestically, are the right to social security under article 9, the right to an adequate standard of living, including adequate food, clothing and housing under article 11, the right to the highest attainable standard of physical and mental health under article 12, and the right to education under article 13.¹²⁹

The implementation of the Covenant is based on the principle of "progressive realization". Article 2(1) of the Covenant provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

128. *International Convention on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46.

129. The *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1, which guarantees many of these rights to Canadians, falls within the purview of s. 36(1) as a shared-cost program. These rights include: the right to financial assistance for persons in need, s. 6(2)(a), the right to have the level of financial assistance take into account each individual's budgetary requirements, s. 6(2)(b), the right to legal appeal procedures to challenge denials of financial assistance, s. 6(2)(e), and the right not to be forced to work as a condition for receiving financial assistance, s. 15(3)(a).

Although the principle of progressive realization is not a fixed standard by which to measure compliance with s. 36(1), a standard is realized if the corollary of this principle were advanced: the general obligation not to take “deliberately retrogressive measures”.¹³⁰ Principle 72 of the interpretive principles for the Covenant drafted by a group of international legal experts in Maastricht, the Netherlands, in June of 1986, states that a violation of the Covenant will occur if, *inter alia*, the state

deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *Force majeure*.¹³¹

Consequently, deliberately retrogressive measures in Canadian legislation with respect to social or economic rights protected by the Covenant will violate Canada’s commitment under the Covenant pursuant to Article 2(1). This standard for the legitimacy of governmental action is also a suitable standard by which Courts may judge either Parliament or the provincial legislatures’ compliance with their commitment to similar social or economic concerns under s. 36(1) of the Constitution.

If Parliament and the provincial legislatures’ commitment does indeed have the strength of a “constitutional obligation”, then deliberately retrogressive measures in legislation will surely fall short of the obligation to promote, further or provide for concerns under (a), (b) and (c) which Canada is internationally committed to realizing.

Conclusion

The inspiration for section 36 of the present *Constitution Act, 1982* arose in a dramatically bouyed political climate during the late 1960s and early 1970s. The Liberal government of Lester B. Pearson and Pierre E. Trudeau presided over Canada’s centennial in 1967 while ushering in a new century of Canadian nationhood. Expo 67, the Centennial World Fair Celebration hosted in Montreal, was both an international success and an inspiration at home. A current of pride rippled through Canadians from one end of the country to the other, and the Liberal government saw the

130. C. Scott, “Covenant Constitutionalism and the Canada Assistance Plan” (1995) 6(3) *Constit. Forum* 79.

131. *Ibid.* at note 27. See “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Hum. Rts. Q.* 122 at 131. See also C. Scott & P. Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a new South African Constitution” (1992) 141 *U. Pa. L. Rev.* 1; H. Karapuu & A. Rosas, “Economic, Social and Cultural Rights in Finland” in A. Rosas, ed., *International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives* (Dordrecht: Martinus Nijhoff Publishers, 1995) at 195.

opportunity as one to be seized. The federal government's initiatives were broad in scope and focused on modernizing the country, as befitted the spirit of renewal which attended Canada's centennial celebrations.

When Prime Minister Pearson turned over the helm of the federal government to Prime Minister Trudeau in 1968, proposals for constitutional renewal were already on the table. The nation's rebirth, coming at a time of relative prosperity for Canada, would be honoured by a new Constitution, one drawn up by Canadians, for Canadians, and with a new Canadian era ahead. This spirit of renewal had captured parliamentarians and legislators as well as ordinary Canadians.

The newly elected, young and ambitious Prime Minister at this time had already extricated the government from the "bedrooms of the nation" in one civil libertarian effort to modernize the country. In the same spirit, Prime Minister Trudeau responded to historical regional disparities between provinces, between rural parts of the country and urban centers and among individuals, by recognizing that such disparities were not reflective of a modern, twentieth century nation:

There is no room in our society for great or widening disparities—disparities as between the opportunities available to individual Canadians, or disparities in the opportunities or the public services available in the several regions of Canada.¹³²

The project of equalizing opportunities for Canadians in fact had only just been barely launched by 1968: the Canada Assistance Plan was initiated in 1966, the Post Secondary Education Plan in 1967, and the Medical Care Plan in 1968. These programmes were designed to provide essential public services of a reasonable quality to all Canadians. By offering to pay for half of all costs generated by the programmes, the federal government "bought" conditions, or programme criteria, which it attached to the various provincial programmes. Thus, because all provinces participated in these programmes, and programme conditions were both significant and the same for each province, Canadians were able—for the first time—to benefit from high quality public services irrespective of the geographic region in which they lived.

By 1982, s. 36 emerged as a very similar provision to the original Article 46 of the 1971 Victoria Charter. Aside from the addition of subsection (2) in 1979, Parliament, the Government of Canada and the provincial governments and legislatures were still committed to the promotion of equality of opportunity, the furtherance of economic development, and the provision of essential public services of reasonable quality to all Canadians, paragraphs (a), (b) and (c) of s. 36(1).

132. *Supra* note 35.

After all was said and done, the federal government was successful in gaining sufficient constitutional authority for its spending power in s. 36(1). As was recognized by the Alberta Court of Appeal in *Winterhaven Stables v. Canada*, per Irving J.A.:

Moreover, as then Professor La Forest notes in *The Allocation of Taxing Powers Under the Federal Constitution*, 2nd ed. (1981), at pp. 50–51, payments to the provinces for provincial purposes are contemplated by the *Constitution Act, 1867*. Such payments are also contemplated by s. 36(1) of the *Constitution Act, 1982* . . .¹³³

Peter Hogg arrived at the same conclusion: By expressing a commitment to redress regional disparities and to make equalization payments, section 36 of the *Constitution Act, 1982*, also seems to reinforce, by implication, a broad interpretation of the spending power.¹³⁴ In addition to the recognition of the spending power, of course, the federal government also acquired, through the wording of this provision, a responsibility to the people of Canada for meeting its commitment under this section. This is, in fact, what the people of Canada gain from this provision: that the federal government will promote equality of opportunity, further economic development, and provide essential public services of reasonable quality to all Canadians, and will do so together in concert with the provinces.

Under the current division of powers, the role of the federal government in its commitment pursuant to s. 36(1)(c) is the use of conditional grants to ensure (i) the provision of essential public services which are (ii) of a “reasonable quality”, and (iii) are provided to “all Canadians”. Accordingly, the federal government is bound by its commitment to require that essential public services be comprehensive and adequate, thus ensuring their “reasonable quality”, and that they be made universal, accessible and free of a residency requirement, thus ensuring their availability to “all Canadians”. Only the federal government can effect such a commitment for the nation as a whole, and it can only do so through the device of conditional grants.¹³⁵ If the federal government were to fail (i) to meet standards of reasonable quality, or (ii) to serve all Canadians, then the national government would have reneged on its commitment pursuant to s. 36(1)(c). Since the spending power is the basis of federal action under this section, and because conditional grants are the means by which that power can be used to effect standards in public services nationwide, the federal government is constitutionally obligated by its

133. *Winterhaven Stables v. Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.) at 432.

134. *Supra* note 8 at 151.

135. Conditional grants or another, new device which will have the same result.

commitment to maintain national standards at least in the areas of health and welfare, pursuant to s. 36(1)(c). Those standards, of course, must be of a reasonable quality.

Although a failure on the part of the federal government as described above may or may not lead to a coercive remedy, the Courts have the power to issue declaratory relief.¹³⁶ With a declaration from the Court that the federal government has failed to meet its commitment pursuant to s. 36(1)(c), the government will be found to have been acting unconstitutionally. Such a declaration in the context of s. 36(1)(c) is fitting. This provision is ultimately about Canada's commitment to maintaining national standards for individual social and economic protection—"essential public services". This provision involves a political decision to recognize constitutional, fundamental human rights; it is political, however, in terms not of legislative action, but of constitutional entrenchment. This 'decision' was made during the constitutional patriation process by elected members of every level of government. The decision to maintain national standards was entrenched in the *Constitution Act, 1982* and it exists there pursuant to s. 36(1)(c). If a federal government fails to meet its commitment under this provision, then its action must be interpreted to mean that it is seeking to redraw the federal commitment under this section. By issuing a declaration that the federal action in question is unconstitutional pursuant to that government's commitment under s. 36(1), the Court will be signalling to the federal government that it is attempting to change the political resolution already arrived at when s. 36(1) was constitutionally entrenched. If, despite an adverse ruling by the Courts, the federal government continues to believe that its own position on national standards should be the one to follow, then it will have to return to the premiers and to the people of Canada for a new constitutional debate to determine which approach to take with respect to national standards. The choice will be between the 1982 constitutional decision of federally maintained national standards of a reasonable quality, or its own idea about the role of the national government in the provision of public services.

As earlier stated, this is ultimately a political decision, one which must be made by the body politic itself. If the federal government should wish to deviate from its present constitutional commitment, then the question would have to be decided by the people of Canada. Accordingly, a declaration of unconstitutionality would be most appropriate, as the Court itself would not be attempting to balance difficult political issues

136. *Supra* note 108.

with respect to the spending power by seeking to coerce a solution. This is not to say that the courts do not have a role to play in this process. The courts are well situated to assess, or declare, whether federal legislation complies with the constitutional requirements in s. 36(1)(c). If the federal government wants to restructure the country by amending the Constitution through the political process, however, then that is what it should set about doing but, in the meantime, it is bound by the Constitution. By not compelling the federal government to rectify a legislative action in violation of s. 36(1)(c), while declaring that action unconstitutional pursuant to s. 36(1), the Court will effectively be returning the matter to the political arena. This would force the federal government, unless it is willing to remain in violation of the Constitution, either to fix the offending legislation by amending it to comply with constitutional norms, or to seek an amendment to its commitment under s. 36(1). The process of amending the Constitution is that political process by which a new public resolution may be made about Canada's continued commitment to national standards in essential public services. In a democracy such as Canada, a declaration of unconstitutionality by the Courts would thus be most fitting.

APPENDIX A
Historical Drafts of Section 36

June 14–16, 1971

Fed-Prov. First Ministers' Conference, Victoria.
(the Victoria Charter)

Part VII, Regional Disparities

Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:

- (1) the promotion of equality of opportunity and well being for all individuals in Canada;
- (2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
- (3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Art. 47. The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.

November 10, 1975

Draft Form for a Proclamation of the Governor General.

Part V, Regional Disparities

Art. 39. Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers, the Parliament of Canada and the Legislatures of the Provinces, together with the Government of Canada and the Governments of the Provinces, are committed to:

- (a) the promotion of equality of opportunity and well-being for all individuals in Canada;
- (b) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
- (c) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

[Article 40 has no bearing on Part V above]

January 19, 1977

Draft Resolution Respecting the Constitution of Canada/ Proclamation Respecting the Constitution of Canada

Part IV - *Regional Disparities*:

Art. 22. Without altering the distribution of powers and without compelling the Parliament of Canada or the Legislatures of the Provinces to exercise their legislative powers, the Parliament of Canada and the Legislatures of the Provinces, together with the Government of Canada and the Governments of the Provinces, are committed to:

- (a) the promotion of equality or opportunity and well-being for all individuals in Canada;
- (b) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
- (c) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

June 20, 1978

The Constitution Amendment Bill (Bill C-60)

Part I, Provisions Respecting the Constitution of Canada;

II Statement of Aims of the Canadian Federation:

4. To these ends, the stated aims of the Canadian Federation shall be:
... to pursue social justice and economic opportunity for all Canadians through the equitable sharing of the benefits and burdens of living in the vast land that is their common inheritance, through the commitment of all Canadians to the balanced development of the land of their common inheritance and to the preservation of its richness and beauty in trust for themselves and generations to come, and through their commitment to overcome unacceptable disparities among Canadians in every region including disparities in the basic public services available to them;

Part IX, *Regional Disparities*

96. Without limiting or restricting the generality of the statement of aims of the Canadian Federation set forth in section 4 of this Act and without altering the legislative authority of the Parliament of Canada or of the legislatures of the provinces or the rights of any of them with respect to the exercise of their legislative authority pursuant to law, the Parliament of Canada and the legislatures of the provinces, together with the government of Canada and the governments of the provinces, are committed pursuant to the Constitution of Canada to

- (a) promoting equal opportunities for social and economic well-being,
- (b) assuring as nearly as is practicable the availability of essential public services of reasonable quality, and
- (c) furthering economic development to reduce disparities in opportunities for social and economic well-being and in the availability of essential public services of reasonable quality for the benefit of all individuals in Canada, wherever they may live.

Explanatory Note:

96. This provision expresses a new commitment to promote equal opportunities for social and economic well-being, assure essential public services and promote the reduction of disparities in all regions of Canada. . . .

February 5–6, 1979

Fed-Prov. First Ministers' Conference, Ottawa.

“Best Effort” Draft Proposals, with Joint Government Input, Discussed by First Ministers.

96(1) Without altering the legislative authority of Parliament or of the Legislatures or of the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the Governments of the Provinces, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities for social and economic well-being; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the Government of Canada are further committed to the principle of making equalization payments to the provinces that are unable to provide essential public services of reasonable quality without imposing an undue burden of taxation, or to the principle of making arrangements equivalent to equalization payments to meet the commitment specified in Section 96(1)(c).

(3) The Prime Minister of Canada and the First Ministers of the Provinces shall review together the questions of equalization and regional development at least once every five years at a meeting convened pursuant to section 97.

October 6, 1980

Proposed Resolution for Joint Address to Her Majesty the Queen Respecting the Constitution of Canada.

Tabled in the House of Commons, Oct. 6, 1980.

Part II, *Equalization and Regional Disparities*

31(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.

Explanatory Notes:

31(1) New. Subsection (1) would affirm the commitment by Parliament and the provincial legislatures to promote equal opportunities, further economic development and provide essential public services.

(2) New. Subsection (2) would affirm the commitment of the Parliament and government of Canada to take measures to ensure the provision of essential public services at reasonable levels of provincial taxation.

January 30, 1981

Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada.

Amendment tabled by Mr. Irwin on behalf of Fed. Gov't party. Amendment Passed.

31(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

CONSTITUTION ACT, 1982

Part III, Equalization and Regional Disparities

36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.