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WORKING PAPER
SUBMITTED BY THE GOVERNMENT OF
NEW BRUNSWICK
ON
"FURTHER OBSERVATIONS ON THE
MATTER OF SHARED-COST PROGRAMS
AND A NATIONAL CONSENSUS FORMULA"

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1- General Observations

1. While such respect must be paid to all governments that have conscientiously sought to evolve an arithmetical formula to determine the 'national consensus' in the matter of providing a framework for federal spending on shared-cost programs, it is quite clear that almost any such formula has 'arbitrary' characteristics. In the hands of a well-trained statistical theorist such formulas, that have been presented by some governments, would be quite vulnerable to the demonstration that these 'numbers games' do not exhaust all the possible variables and factors that might be selected to calculate something called a "national consensus." So far only population, provinces, regions and senate divisions have been employed. Others might be found equally significant and the permutations and combinations with which they are managed are likely to be much more extensive than is now realized without such expertise to guide the perplexed.

2. More fundamental is the question of how wise it is to freeze a formula in the Constitution when it is very difficult to forecast the effect of the freezing on the long future -- assuming great difficulty with the amendment process which is likely to be the case once an amending formula is found. A premature freezing, therefore, of an unpredictable future must give all governments pause.

3. The desire of the First Ministers for a formula or formulas to be studied by the CCG included obviously not merely arithmetic types but non-mathematical models as well and the CCG is quite within its mandate on this question to discuss arithmetic and non-arithmetic approaches to "consensus."

4. A further difficulty with arithmetic consensus formulas may be that they become in a sense a kind of quasi-delegation, ad hoc, of provincial power to the federal government in the limited sense of being confined to that situation and exercised through the federal spending power. Assuming that something approximating the Fulton-Favreau Formula dominates our thinking about the amending process and becomes a model for future amendment procedures, there will be a multiplicity of amendment formulas which would include the three types of procedure included in the Fulton-Favreau proposals plus this further arithmetic consensus formula which has its semi-delegation aspect -- thus resulting in four operating formulas. Is it really necessary, therefore, to bind the hands of governments by such a fourth formula in an area that may not really justify so rigid a process, i.e. the management of federal-provincial relations in the case of shared-cost programs.

5. The arithmetic type proposals so far presented make several assumptions about the nature of the idea of consensus itself, which assumptions may or may not be valid:

- a) It is assumed that consensus can best be achieved, given our recent political history and difficulties, through the obligations to follow a fixed formula rather than to engage in political bargaining in each case.
- b) It is assumed that Parliament, the Courts and public opinion between them are unable to achieve a consensus psychology and methodology that does not have to rely upon a fixed arithmetic framework.
- c) Most important it assumes that a constitutionally defined consensus is necessary, as between the federal and provincial governments, in order to limit the abuse of the federal spending power.

6. But in the latter case there is surely no long-term evidence yet, only the recent short-term disputes on the shared-cost programs issue. Time and subject matter may change the whole nature of federal-provincial cooperation, particularly as the federal initiative moves out of areas which seem purely provincial and emphasizes instead programs which require, from the very beginning, consultation and common administration by both levels of government, e.g. the water pollution problem.

7. The central issue in this debate over consensus is how to limit the federal spending power in areas of clear provincial jurisdiction which spending creates new costs for the provinces and/or imposes new priorities on a province not entirely of its own making. (Although even here it should be borne in mind that the Courts have made it clear that the federal spending power cannot be used as an indirect thrust into provincial jurisdiction per se.)

8. This debate, therefore, is not a debate over:
a) the acceptability and correctness of federal unconditional grants (equalization payments);
b) regional disparities programs which have always remained outside this present discussion of finding a consensus to limit the federal spending power (in shared-cost programs.)

9. The discussion, therefore, should confine the analysis and the search for formulae to that limitation on the federal spending power which has caused, where there was no limitation, a new shared-cost burden on a province in matters otherwise within provincial jurisdiction and where there was really no whole-hearted agreement on the part of the province concerned.

For provinces often found themselves for political, financial and popular opinion reasons, unable to resist participation in federally initiated programs, whatever the government's own views and priorities really may have been.

10. It is clear that some limitation is required that caused the irritations of recent years. It is equally clear that something better than a too rigid arithmetical type of formula is required for the reasons already put forward above. And, moreover, that "something better" can now envisage some new and constitutionalized machinery of consultation which will, by its very definition, prevent the impression and sometimes the fact that consultation was inadequate and often too late for effectiveness. It is no answer here that the arithmetical method really compels consensus by definition. It is equally true that it restricts consensus by definition because all the formulas leave to a given minority the ability to hold up the effective operation of the scheme, and all the formulas so far presented suffer from this defect.

11. Finally, it is the New Brunswick view that nothing should limit the federal right to spend in the national interest when Parliament, representing all Canadians, deems the matter to be of national concern by applying its own simple but crucial test, namely, does the issue go beyond the interests or the boundaries of a single province or region. This ultimate right to spend, for the peace, order and good government in Canada, is a reserve of power that a truly effective federal government must have. Its abuse is equally of concern and between the balancing forces of public opinion, provincial opposition and the judicial process, there is sufficient countervailing weight to prevent extreme usages of this reserve power.

II- A Possible Non-Arithmetic Approach

I. If the central issue is not only the prevention of intrusions on provincial jurisdiction through the federal spending powers but also to prevent the creation of new provincial costs and new provincial priorities, without the positive will of the province being afforded a chance to express itself adequately, then a sound approach to this central question could well be a package consisting of the following:

- a) There should be a constitutional duty to consult whatever form its institutionalization may take (a matter yet to be explored fully by all governments and related to the general question of the new inter-governmental institutions for consultation and cooperation).
- b) Shared-cost programs should be based on bilateral agreements arrived at through bargaining politically, in good faith, and after using the constitutional machinery of consultation as described in a).
- c) Possibly some clearer description of the distribution of powers may reduce some of the difficulties that heretofore gave rise to disputes about shared-cost programs intruding upon areas of provincial jurisdiction.
- d) There will be the difficult question about compensating the provinces not agreeing to enter into the bilateral arrangement concerned. While the compensation question need not by itself affect a decision on the consensus formula issue, New Brunswick wishes to suggest that if the two questions are related, the following approach might be considered among others: some equitable formula based upon need should be considered.

and among the possibilities are payments to governments by the federal government in lieu of amounts they would have received had they entered into the bi-lateral agreement, but only to such governments whose per capita GNP is equal to or less than that of the province or provinces agreeing to the scheme bi-laterally. Public opinion would support, or conversely would not be opposed to the absence of payments to provinces whose GNP per capita was appreciably higher than the provinces accepting the program. It will be argued, of course, that such provinces not receiving (in lieu) compensation are thus paying double because the residents have contributed to the consolidated revenues of the federal government from which the payments are made, and yet they are not receiving a share from that fund when other provinces are obtaining grants bi-laterally. The answer to this surely is that this already takes place in a variety of forms of which the regional disparities program and equalisation payments are established illustrations.

3. The First Ministers must have an opportunity to discuss these options.