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CONSTITUTIONAL CONFERENCE

THE ONTARIO POSITION ON THE SPENDING POWER

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The Ontario Position on the Spending Power

Many of the recent strains on Canada's federal system can be traced to the extent and application of the federal government's spending power. The free-ranging use of this spending power has been a major factor in federal government activity in Canada since the time of the Second World War, most noticeably in the development of new shared-cost programs on subjects in fields of provincial jurisdiction. These programmes have had serious consequences for federal-provincial harmony, in spite of the tangible benefits they have provided. In the course of the present constitutional review, we have the opportunity to reconsider the scope and manner of application of the general federal spending power, with a view to ensuring such harmony, and with a view to ensuring respect for and adherence to the basic principles of a federalism most suitable for Canada.

The BNA Act gives the federal government the power to spend its revenues for any purpose as long as the statute authorizing the expenditure does not in substance invade provincial jurisdiction. It may therefore spend money most obviously on its own constitutional responsibilities, or in areas where its jurisdiction is concurrent with the provinces. The federal spending power has also been used on special projects such as Expo, the Winnipeg flood-control system and the Saint Lawrence Seaway. Further, it has been used since Confederation to combat regional economic disparities by providing unconditional grants to the poorer provinces. In recent years, these grants have evolved into a fairly sophisticated system of equalization payments. Such uses of the federal spending power have in principle been acceptable, and are a necessary element in a flexible, workable federal system.

Use of the spending power in areas of concurrent jurisdiction, or in "grey areas" of the constitution, depends very much on the achievement of one of the basic objectives of the present constitutional review, namely a clear agreement between the two levels of government as to what each other's responsibilities are. This applies in equal measure to the use of the federal spending power to make direct payments to individuals or institutions. In 1966, for example, the federal government was able to assert a jurisdiction unilaterally over manpower training in industry by granting training allowances directly to employees and training subsidies directly to employers. This had the effect in Ontario of sharply curtailing the operations of two of the province's departments and effectively upsetting budget and programme planning. Ontario, therefore, strongly opposes any direct use of the spending power by the federal government in such a way as to effectively enforce a federal government interpretation of the constitutional distribution of powers and to avoid the necessity of negotiations with the provinces to clarify constitutional responsibilities or to establish the mechanisms of shared-cost programs.

Another use of the federal spending power - namely conditional grants to provinces in areas of provincial jurisdiction - has led to most of the controversy over the spending power. While not invading provincial jurisdiction directly, such devices as shared-cost programs are an effective means of indirectly accomplishing the same result. This is not to say that shared-cost programs have not been beneficial. In the absence of a developed system of interprovincial coordination, they facilitated a common provincial approach to common problems. In cases where the extra-provincial effects of one province's action or inaction are particularly great, shared-cost programs ensure that the burden of providing the benefits is more equitably shared among the people of Canada.

Shared-cost programs have also been justified by the argument that they allow the poorer provinces to provide a higher standard of public services than would otherwise be possible. Aside from fiscal considerations, another justification, though not explicitly stated, is that shared-cost agreements encourage provinces to provide programs they might otherwise have rejected. In our opinion, this does not justify the erosion which would thereby take place of the provincial ability to establish its own expenditure priorities.

There are other strong arguments against the use of conditional grants in areas of provincial jurisdiction. To start with, in the most general terms, a federal system assigns certain responsibilities to the central and to the regional governments. Each level of government is then responsible for establishing its own expenditure priorities. There should be a division of revenues between the two levels of government such that each can carry out its assigned responsibilities without requiring financial transfers (with the attendant opportunities for influence) from the other level. Each level of government should be able to operate without interference from another level. For instance, there should be no assumption that the judgement of the central government should take precedence over that of the provincial governments, when the central government believes a matter within an area of provincial jurisdiction is of national priority. Experience has shown only too clearly that shared-cost programs have often compelled a provincial government to divert resources to the centrally-set priority in order to take advantage of the money being offered - money obtained in the first place by taxation of the province's residents. Therefore, whether or not a province joins a particular shared-cost programme, its

capacity to raise revenues is reduced, and its priorities are distorted.

Further, as has been obvious at recent federal-provincial meetings, regional diversities are a fundamental characteristic of Canada. Different patterns of settlement and different degrees of urbanization have produced considerable regional variations, including great differences in administrative, economic and other capabilities. To date, shared-cost programs have taken little account of these regional differences and preferences, tending to enforce a common pattern which is often too rigid and too detailed.

Ontario therefore proposes:

1. as a basic ground-rule, the sharing of tax fields between the two levels of government in such a way that each can meet its own expenditure responsibilities in a manner of its own choosing;
2. the use of conditional grants only when there is a clear federal-provincial consensus that the proposed program is the best way of handling a particular problem.
(The means of determining whether or not a consensus exists is discussed on pages 6 and 7).

In addition, Ontario suggests that all alternatives should be carefully considered before the adoption of a shared-cost program is decided upon. Some alternatives are as follows:

1. Problems requiring national solutions:
 - a) In the event that most or all provinces find themselves facing a problem so complex and with so many extra-provincial ramifications that it is beyond their capacity to handle, consideration should be given to formal constitutional amendment to change the locus of responsibility.

- b) Problems common to many provinces might also be dealt with by an expanded degree of inter-provincial cooperation, in order to achieve coordination and compatibility of programs within provincial jurisdiction. The example of the Council of Ministers of Education, which now has a permanent secretariat, could well be followed in other fields, including overall interprovincial relations.
- c) Another alternative to shared-cost programs would be through block or unconditional grants. While these approaches violate the basic Ontario position regarding the sharing of revenues, they do not involve the same degree of interference with provincial priority-setting.
- d) The development of a much more sophisticated system of federal-provincial coordinating machinery is a further alternative. Such machinery would facilitate the flow of technical assistance and help to equalize technical information and communication among the provinces.
- e) A more extensive use of administrative and/or legislative delegation.

2. Problems requiring regional solutions:

Where the main purpose of a shared-cost program is to benefit particular regions of the country, consideration should be given to these alternatives:

- a) a more extensive use of administrative and/or legislative delegation;
- b) an increase in equalization payments; and
- c) a greater channelling of funds to regional agencies. Alternatively, the federal government and the provincial governments comprising a region might participate in regionally-oriented shared-cost programs, which would not require approval by the national interest formula.

Failing these alternatives, a nation-wide shared-cost program, such as we are familiar with today, could prove to be an appropriate means of meeting the problem, provided that the program's time-limits and conditions were very clearly spelled out. However, difficulties arise when one or more provinces are not in favour of the establishment of a shared-cost program in a provincial field. It is therefore necessary to devise a formula to determine whether a consensus exists among the federal and provincial governments on the need for a particular proposed shared-cost program. The process of arriving at this consensus should mitigate many of the problems experienced with past shared-cost programs, such as the lack of consultation, the effective compulsion on provinces to enter, and the serious distortion of provincial priorities.

Briefly, we would suggest as a formula the following: a proposed shared-cost program may only be initiated with the approval of seven of the ten provinces, containing at least 60% of the country's population. The manner of determining a province's position is a matter for the province's government to decide.

Where a proposed program has received the required approval, financial loss should not be suffered by the province or provinces which have declined to participate. This can be arranged in the following alternative ways:

- a) the federal government should raise the funds for shared-cost programs only in the provinces which decide to participate. This could be done by some form of premium or an income-tax surcharge in order to avoid differential bases and differential general rates across the country; or
- b) the fiscal equivalent (or at least 90% of it) of what the province would have received had it decided to participate in the shared-cost program should be paid directly to the government of the province. (Less than full fiscal equivalence is suggested because an unconditional grant or equivalent tax room has the added advantage of greater provincial flexibility in allocation of such funds within the provincial budget than grants tied to a specific program.)

Either of these we believe to be an improvement on the federal proposal to make payments directly to individuals in the non-participating provinces. Such a scheme could lead into an administrative morass, and would contain elements of equalization and income-redistribution,

objectives better attained through the general tax system and through equalization payments. Direct payments could not precisely return the tax money to the individuals who paid it; thus the province would not have the option of increasing its tax take to the full extent of the federal repayment.

To sum up: while our views, as expressed in this paper and in our propositions, are still subject to modification, the Ontario Government believes that shared-cost programs in areas of provincial jurisdiction should be kept to a minimum, and should be employed only when a federal-provincial consensus exists as outlined in this paper. Further, the details and conditions of such programs should be spelled out in formal agreements. Such agreements should help to eliminate many of the differences that have arisen in recent years as a result of changes in interpretation in the course of an agreement, or because of a freezing or stretching-out of payments. Our basic position is that an equitable sharing of tax fields between the two levels of government in line with expenditure responsibilities would eliminate one of the basic reasons why, since the war, shared-cost programs have been so frequently initiated in spheres of provincial jurisdiction.