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Constitutional
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4 Since 1945

Donald V. Smiley

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and Canadian Federalism
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Federalism
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Donald V. Smiley

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Catalogue No. Z1-1963/1-2/4

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Queen's Printer for Canada
Ottawa, 1970

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A major difficulty in this investigation was that crucial developments in federal-provincial relations were taking place while it was underway. The study was begun in the summer of 1964 and a first draft completed in October 1965. By the spring of the next year both events and my assessment of the general situation had changed so markedly that a complete revision of the last two chapters was undertaken. The body of the study is substantially the final draft submitted in April 1966. Other commitments have prevented me from making a further revision to take into account the important developments in federal-provincial relations which have occurred since that time. However, I have written a short appendix analyzing these developments up to mid-1967 and this will, I hope, help to make the study more useful than it would otherwise have been.

Donald V. Smiley
Vancouver, July 1967

The major concern of this study is the making and implementing of public policy within the framework of Canadian federal institutions. It is focused primarily on relations between executive officials, both elected and appointed, of federal and provincial governments. Under the circumstances which have developed, each jurisdiction retains responsibilities for broad areas of public functions but there are an increasing number of situations in which the action of each in pursuing its objectives impinges on the activities of the other. The ways by which the central and regional administrations respond to this kind of mutual dependence have been neglected by students of the Canadian and other federal systems.

Traditional discussions of federalism emphasize the co-ordinate and independent powers of federal and regional governments rather than their interdependence. According to the juridical analysis found in the textbooks of law and political science, there are three possible ways of legally organizing a particular territory. The first alternative is unitary—the government whose jurisdiction includes the whole territory is sovereign and whatever other public authorities there may be are legally subordinate to it. At the other end of the spectrum is the confederacy where the powers of the central jurisdiction are held at the discretion of the regional governments. The third alternative is federalism and there would be broad agreement among constitutional scholars that a federal constitution has these characteristics:

1. The totality of governmental powers which can legally be wielded within a territory are divided by a written constitution between a central and two or more regional governments.
2. Those parts of the constitution which delineate governmental powers are not subject to interpretation or amendment by the unilateral action of the executive or legislature of either level of jurisdiction.

3. At least one of the legislative chambers of the federal government is chosen by popular election.

4. Individual residents of the federation are directly subject to the laws of both the central and the regional governments.

The kind of definition given above is static and concerns the formal constitutional features of federal systems regardless of how these systems operate. Using this definition one could read the constitutions of various countries and intergovernmental associations and quickly and mechanically determine which qualified as federations. In most cases, however, the actual workings of political systems diverge widely from what one would expect by a literal reading of their constitutions. K. C. Wheare, whose influential book emphasizes the co-ordinate authority and mutual independence of central and regional governments as the essential features of federalism, recognizes this difficulty and makes an important distinction between "federal constitutions" and "federal governments."¹ According to Wheare's analysis, the Canadian constitution is only "quasi-federal" because of the powers conferred upon the federal executive to disallow provincial legislation and to appoint the provincial lieutenant-governors and judges of the principal provincial courts. Examining the actual practices of Canadian government, however, he concludes that, "... although the Canadian constitution is quasi-federal in law, it is predominantly federal in practice. Or to put it another way, although Canada has not a federal constitution, it has a federal government."² This conclusion seems to be deficient because the somewhat facile dichotomy between the law of the constitution and the practices of government allows one to avoid analysis of the intricate relationships between the two kinds of matters when studying particular political systems. Furthermore, the undue emphasis on the co-ordinate and independent relationships of the central and regional governments predisposes the student either to ignore patterns of interactions between the two levels which are so much a part of the workings of established federations or to consider these interactions as somehow a deviation from the federal principle.

Federalism may thus usefully be considered as a continuing process by which governmental powers are exercised. In his recent work Carl J. Friedrich contrasts federalism as "consensual world order" with imperialism as "coercive world order" and he states:

... Federalism should not be considered a term for a static pattern, designating a particular and precisely fixed division of powers between governmental levels. Instead, "federalism" seems the most suitable term by which to designate the process of federalizing a political community, that is to say the process by which a number of separate political organizations, be they states or any other kind of association, enter into arrangements for working out solutions, adopting joint policies and making joint decisions on joint problems.

Conversely, federalism is the process by which a hitherto unitary political community, as it becomes differentiated

into a number of separate and distinct political communities, achieves a new organization in which the differentiated communities, now separately organized, become capable of working out separately and on their own problems they no longer have in common. It is not only a matter of decision-making, but of the entire range of power and its exercise. . . . The federalizing process accompanies, so to speak, the communal development as its organizational counterpart. If values, interests and beliefs exhibit a stable and structured pattern in which the commonly shared values, interests and beliefs are counterbalanced by values, interests and beliefs that are not shared, though territorially distributed, then a federal development becomes possible.³

Friedrich regards as an essential element of federalism the constitutional protection of each level of the political order against the other. His definition thus excludes instances of international relations or senior-local authority relations where such legal protection does not exist. A recent book on the American federal union concludes with the most useful definition of federalism from the public-policy-process viewpoint that I have found:

Federalism is a system of government in which central and regional authorities are linked in a mutually interdependent political relationship; in this system a balance is maintained such that neither level of government becomes dominant to the extent that it can dictate the decisions of the other, but each can influence, bargain with, and persuade the other. Usually, but not necessarily, this system will be related to a constitutional structure establishing an independent legal existence for both central and regional governments, and providing that neither shall be legally subordinate to the other. The functions of government will be distributed between these levels (exclusively, competitively, or co-operatively), initially perhaps by a constitutional document, but thereafter by a political process, involving where appropriate the judiciary; in this process the political interdependence of the two levels of government is of the first importance in order to prevent one level absorbing all effective decision-making power.⁴

Established federal systems are characterized by the growing importance of the relations between the executives of the central and regional governments. Several interrelated influences contribute to the development of what might be called "executive federalism."

1. The constitutions of most federations have proved somewhat resistant to evolution through amendment or changing patterns of judicial review. Amending procedures in most established federal systems are inflexible, i.e. small minorities can block attempted changes in the text of the constitution. For several reasons the courts in several federations now play a more restricted role than previously in maintaining the federal balance. Thus political and administrative processes have become the chief instruments of change.

2. The increasing interdependence of modern social and economic life makes it impossible for the regional governments to carry out their responsibilities in the absence of appropriate action by the other regional jurisdictions and the federal authorities. Maurice Lamontagne wrote of Canada a decade ago " . . . l'attribution de responsabilités exclusives aux différents gouvernements n'est pas possible parce que la politique économique et sociale est devenue quasi indivisible."⁵

3. Nationalist and egalitarian sentiments focused on the federations as such have propelled federal governments into collaboration with regional governments to establish minimum country-wide standards in public services regarded as being within the social minimum. Under the constitutions of most federations the regional authorities are assigned the primary responsibilities for health, welfare and education. The only way that this circumstance can be reconciled with the demand for equal services on a national basis is through inter-governmental collaboration.

4. Contemporary rates of taxation and the deliberate use of fiscal policy to provide for economic stability and growth mean that particular tax and spending policies of one level have consequences for the other. The central and regional jurisdictions increasingly compete for tax sources. Federal governments, like other national governments assume responsibility for overall economic direction. This direction will be ineffective if appropriate actions are not taken by regional and local authorities. In Canada, as in other federal systems, the fiscal relations between the central and regional governments have become increasingly complex and increasingly crucial for the stability of the federation.

5. The widening scope of public activity gives rise to an increasing number of situations where federal and regional objectives must be coordinated if intolerable stresses on the system are not to result. 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.

The relations between the executives of the federal and regional governments are extraordinarily complex in most federations. Many of these interactions are of an informal and *ad hoc* nature. Furthermore, in many matters the significant decision-making units are not the federal and regional administrations but functional groups constituted across jurisdictional lines. Edward W. Weidner after several intensive studies of federal-state relations in the American system wrote about functionalism in this way:

It is a thesis of the present discussion that in the federal system in the United States there are relatively few direct clashes or compromises between state and national governments on large issues of domestic policy. Furthermore, in the

administrative sphere positive cooperation is the pattern rather than aloofness or conflict. The disagreements and conflicts that do arise and that may be encouraged by federalism's structural features are not basically clashes between state and national governments. Instead, they are clashes between much smaller groups of people and the opposing groups are concentrated within a single governmental level as often as not.⁶

Similarly, in a 1963 study I found that in the administration of federal conditional grants to the Canadian provinces the attitudes and interests of programme specialists and financial officials were very different and that conflicts related to the grant-in-aid arrangements characteristically resulted in divisions along these lines rather than between federal and provincial governments as such.⁷

Although the analysis of public policy processes seems to me a useful focus for studying contemporary federalism, it is a partial approach. It concentrates on a relatively small number of executive officials who devise and implement public policy. However, political scientists increasingly question the validity of studying the law and practices of government in isolation from the attitudes, social groupings, economic structures and so on which condition and are conditioned by governmental activity.⁸ This study examines how policy is made and implemented in the Canadian federal system. Another more difficult kind of investigation would concentrate on the sociology and politics of Canadian federalism. An American scholar has asserted: "The essence of federalism lies not in the institutional or constitutional structure but in the country itself. Federal government is a device by which the federal qualities of a society are articulated and protected."⁹ In all developed societies there are groups striving to secure governmental actions that they perceive to be favourable to their aspirations and interests. Federal governments can be sustained only in societies which are themselves federal, that is societies where people believe that their interests in respect to a number of important matters are specific to geographical divisions of the country rather than to the country as a whole. On the other hand, federalism has little relevance if the major incidences of political differentiation relate to class, religious, occupational or other groupings which are not territorially located. In his study of four Latin-American republics with federal constitutions (Mexico, Argentina, Brazil and Venezuela) William S. Stokes concludes that certain economic and cultural features make federalism as government in the usual sense impractical in these countries:

Most Latin Americans are conditioned by their historical traditions and social and economic institutions to understand and accept concentrated, centralized power, usually of a highly personalized sort. The strong, frequently exalted role of the father in the family, the importance of the elite in the class system, the honor, dignity, power and influence of the *doctor* from the *aula* (lecture hall), the significance of centralized leadership in the Church, the paramountcy of the "general" in politics, and the position of the public and private monopolist

in the economic system—these characteristics of Hispanic culture all suggest powerful, centralized government. In addition, the political experience and traditions of hundreds of years were with a powerful monarchy operating by means of a centralized administrative hierarchy. The modern constitutions all provide for "interventionist" states.¹⁰

Federal governmental institutions to be stable must correspond with particular kinds of social structures and cultural predispositions so that regionally-based particularisms can find an outlet while making possible common action in respect to matters where these particularisms are of less importance.

The sociological and governmental aspects of federalism are thus intimately related. When relatively stable federal systems have been established, some groups come to press their claims primarily through the federal government and others through the states or provinces. In the United States, for example, those hostile to the public regulation of business usually favour "states'" rights while those striving for civil rights for the Negro look to action from the federal legislature, executive and courts. If most of the influential groups in any federation came to look exclusively to either one level of government or the other it is not likely that federalism could long survive, although the federal rituals might remain. But once the division of legislative and executive powers between the central and regional governments is established, there are influences at work to sustain the federal quality of the society itself and they create new country-wide and regional centres of influence where none existed before. The Report of the Committee on Manitoba's Future published in 1963 stated:

The Province of Manitoba is more than a political division of the nation. During the more than 90 years since its establishment a distinctive social and economic entity has been developed within the essentially artificial political boundaries. When the Province joined the Canadian Confederation, "Manitoba" was not much more than a block of land surrounded by lines on the map. In the intervening years, however, it has become an organic unit; trading patterns have developed, transportation systems have been established, educational and administrative systems have been organized, and all the other social, economic and political institutions of a modern society have evolved. The people of Manitoba, now, therefore, are responsible for dealing with many of their own problems. . . .¹¹

The establishment of important centres of political power thus provides the setting for the growth of other influences within the same territorial limits and social and governmental federalism reinforce one another. Conversely, a federation under great stress may be expected to feature tensions in both its public and private institutions. The drives for provincial autonomy in contemporary Quebec have corresponded with influences toward a greater measure of

independence for the French Canadian elements in nongovernmental organizations. These influences in some cases (such as those involving university students, the Junior Chambers of Commerce and the municipal associations) have culminated in the withdrawal of the French-speaking members.¹² In the period immediately preceding the outbreak of the American Civil War many formerly national organizations such as churches and political parties separated into northern and southern components.

There has been almost no systematic examination of the kinds and distributions of popular attitudes which are compatible with the maintenance of federalism in government. Some years ago J. A. Corry spoke of the "stresses and conflicts" in the Canadian federal system "which need to be negotiated and compromised (by the governments) in *ad hoc* arrangements, particularly where the electorates do not seem disposed to say clearly whether they are federal or unitary in spirit."¹³ Does contemporary cooperative federalism require widespread popular attitudes which are pragmatic and equivocal as to the appropriate level of government for carrying out particular public responsibilities? It seems unlikely that the federation could survive if the prevailing attitudes came to the point of considering one or the other level more legitimate in respect to all public activities believed important. If there were a consensus throughout the country about this matter the system might either disintegrate in a peaceful and orderly way or evolve into a unitary state. It is more likely, however, that no such agreement will be established and if the conflicts about legitimacy are pushed to the limits we have a "recipe for civil war."

It is common to assign the political parties a central role in the maintenance of federal systems. The usual analysis in Canada and the United States has been that these unions can be sustained only if there are country-wide parties drawing strength from all regions.¹⁴ In examining eight established federations the American political scientist William H. Riker addresses himself to the question, "What maintains federalism?" and systematically dismisses the arguments that the crucial elements are the sharing of administrative responsibilities, dual citizen loyalties or the existence of dissident provincial patriotism.¹⁵ He concludes:

Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all the instances here examined and in all the others with which I am familiar. This is the structure of the party system, which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain.¹⁶

According to Riker's analysis, a federation is centralized or "peripheralized" to the degree that "the parties organized to operate the central government control the parties organized to operate the constituent governments."¹⁷ Although federal-provincial party relationships have received little systematic attention in Canada,¹⁸ my

tentative conclusion is that executives of the federal and provincial governments, working in isolation or in collaboration, have assumed the crucial role in effecting changes in the political system. On the other hand, the influences pushing these executives towards federal-provincial integration are not reinforced by corresponding pressures on the party organizations. Because of this cooperative federalism may fail.

The preceding brief analysis of the sociology and politics of federalism is meant to suggest only that the public policy approach is a limited one and that executive federalism cannot realistically be considered in isolation from the other influences impinging on the maintenance of federal institutions. The underlying assumptions of this study are, first, that federal systems, like other institutions, must have the capacity to adapt to changing circumstances if they are to survive and, second, that it is more doubtful than most of us would have believed a few years ago that the Canadian federation can develop the necessary resources of adaptability. For analytical purposes, I make a distinction between two kinds of processes of evolution. The first I call "devices of adjustment"—the procedures by which the respective powers, resources and responsibilities assigned to the federal and provincial governments by the original constitution are dynamically redelineated as new circumstances arise. The second category of processes is named "devices of articulation"—the procedures through which the activities of the two levels are related to one another by their respective executives. It seems reasonable to believe that a federal system could not survive under modern circumstances unless it developed resources of flexibility through both kinds of devices. We have only the crudest of measures to determine whether a federation is responding effectively to the demands made upon it. In a negative sense one might judge that the resources of adaptability in a particular federal system were being strained if any or all of the following circumstances existed:

1. If no political party were able to draw significant strength from all regions of the country. In any federation much of the political conflict at the federal level will revolve about divergent regional interests. When at least one of the parties comprehends these interests, however, tolerable compromises can ordinarily be worked out through the procedures of intraparty accommodation. When no such inclusive party exists these procedures cannot be used for this purpose.
2. If there were widespread public attitudes which attribute to the inherent nature of federal institutions those deprivations that people feel strongly about. Federations, like other human institutions, can survive only if people regard them as legitimate.
3. If most of the politically influential elements of the country sought their objectives exclusively or almost exclusively through one or the other level of government. Such a situation attenuates the tension between national and regional interests necessary to the maintenance of federalism.

Between about the middle of 1942 and the end of the war in Europe the Government of Canada devised and committed itself to an interrelated group of programmes and policies for domestic reconstruction in the postwar period. These initiatives were so comprehensive in scope that, taken together, they can reasonably be regarded as a "New National Policy" comparable to the original National Policy of 1878.

By the beginning of the First World War the social and economic objectives of the Confederation settlement and the National Policy of 1878 had in the main been achieved. The West had been acquired by the Dominion and settled; the country had been linked by transcontinental railroads; a thriving and highly protected commercial and manufacturing sector had been established. In spite of the controversies surrounding the Ontario schools and military conscription issues, the war committed most Canadians to an overriding objective. The return of peace, however, left the country without important purposes to be realized through federal leadership and in the 1920s provincial and regional interests were more dominant than at any time since Confederation. The decade of the Great Depression failed to produce a commitment to comprehensive national reforms and in the desperate circumstances of the time the reactions of the Dominion and the provinces were haphazard, hesitant and confused.¹

From the early days of the Second World War until its conclusion, elected and appointed officials of the federal government devoted a considerable amount of time and energy to planning for postwar domestic reconstruction. Those involved were determined that the social and economic conditions of the Depression should not recur. A conjunction of events and currents of thought and sentiment made it seem both possible and desirable to commit the Canadian people to a set of coordinated national objectives in the postwar period. The experience of the war had revealed the productive potentials of the Canadian economy under federal direction. The perspectives of Keynesian economic analysis suggested to the senior officials of the civil

service that the federal government might move effectively to ensure high and stable levels of employment and income within the framework of the private enterprise system. Humanitarian sentiments fostered by the deprivations of depression and war combined with what seemed to be the economic need of guaranteeing high levels of consumption expenditures in the postwar period made more ambitious schemes of income-maintenance than had previously been seriously considered in Canada appear both feasible and appropriate. The successes of the war against the background of the obvious failures of the Depression made aggressive federal leadership seem the necessary precondition of progress. The balance of bureaucratic vigour and competence was heavily in favour of the federal government as against the provinces. These and other factors were favourable to ambitious federal plans for domestic reform. This planning was intensified as the European conflict reached its conclusion and culminated in several important pieces of legislation enacted in the parliamentary session of 1944: the White Paper on Employment and Income issued by the Minister of Reconstruction in April 1945 and the so-called Green Book proposals presented to the provinces by the federal government at the opening of the Conference on Reconstruction in May 1945.

Federal activities in postwar planning prior to the 1944 session need be mentioned only briefly. On December 9, 1939 a cabinet committee on reestablishment and demobilization was created. Its terms of reference were extended to include all phases of reconstruction by orders-in-council in February and October 1941. A House of Commons Committee on Reconstruction and Re-establishment was set up in 1942 and continued its work through the two subsequent sessions. In 1943 a Senate Committee on Economic Re-establishment and Social Security was set up and there was also a special House of Commons Committee on Social Security in 1943 and 1944. From 1941 onward national health insurance was under discussion by the Dominion Council of Health and in 1944 an advisory committee on this matter which had been set up by the government presented a report including a draft bill for a country-wide plan of health insurance. These and other planning activities began to take more concrete form in several enactments sponsored by the government in the 1944 session of Parliament.

A. The Session of 1944-45

The session of Parliament which began on January 27, 1944 and was prorogued on January 31, 1945 saw the enactment of several important pieces of legislation providing for postwar domestic reconstruction. The Speech from the Throne asserted that "while the post-war objective of our external policy is world security and general prosperity, the post-war objective of our domestic policy is social security and human welfare."² Thus:

. . . plans for the establishment of a national minimum of social security and human welfare should be advanced as rapidly as possible. Such a national minimum contemplates useful

employment for all who are willing to work; standards of nutrition and housing adequate to ensure the health of the whole population; and social insurance against privation resulting from unemployment, from accident, from the death of the bread-winner, from ill-health and from old age.³

The planning for this programme was defined in terms of three inter-related requirements—the rehabilitation into civilian life of former members of the Armed Forces, the reconversion of the economy to peacetime conditions so that there would be employment for all those able and willing to work, and the provision of various kinds of social insurance against major hazards. More specifically, the Speech from the Throne promised federal leadership in establishing first, a comprehensive system of social security and health insurance to be worked out in collaboration with the provinces; second, an integrated system for veterans' rehabilitation; and, third, the extension of housing legislation. The Speech committed the government to creating three new departments to carry out these new federal responsibilities—Departments of Reconstruction, Veterans Affairs, and Health and Welfare.

The major legislation related to postwar domestic reconstruction enacted in the 1944-45 session is outlined briefly below.

1. The National Housing Act provided for federal loans and federal guarantees of other loans for those wishing to build residences for their own use; guaranteed loans for rental housing and for home improvement and extension, grants to municipalities to acquire land for slum clearance and federal initiative in stimulating research in housing and community planning.

2. The Family Allowance Act provided for allowances for the children of residents after July 1, 1945 at rates ranging from \$5 for a child under six years to \$8 for children between their thirteenth and sixteenth birthdays.

3. Under the Agricultural Prices Support Act a federal agency was established with wide powers to determine, with the approval of the governor-in-council, the prices which the government would pay for agricultural products and to dispose of the products so acquired. Other legislation made similar provision for fisheries products.

4. An Industrial Development Bank with an authorized capital of \$25 millions, to be secured by the Bank of Canada, was established for the purpose of providing funds for enterprises that would otherwise have had trouble securing capital.

5. Under the Farm Improvement Loans Act provision was made for federal guarantees of intermediate-period and short-term loans for agricultural improvement.

6. An Air Transport Board was established with regulatory powers over civil aviation.

7. A Department of Reconstruction was established with wide powers of coordination to ensure the smooth transition to peacetime circumstances.

8. A Department of National Health and Welfare was created to discharge the responsibilities of the federal government in these matters.

9. A Department of Veterans Affairs was created.

B. The White Paper on Employment and Income

The White Paper on Employment and Income presented to Parliament by the Minister of Reconstruction in April 1945⁴ is the most coherent and closely reasoned statement of the New National Policy made by the government. The White Paper dealt explicitly with "the initial period of Reconstruction," defined as the time between the ending of the European war and the cessation of hostilities in the Pacific, and much more broadly with the postwar period. These latter perspectives are our concern here.

The White Paper committed the federal government to ensuring a high and stable level of employment and income after the war. This aim was not only to "pervade" all federal economic policies but "must be wholeheartedly accepted by all economic groups and organizations as a great national objective, transcending in importance all sectional and group interests."⁵ The White Paper proceeded straightforwardly in terms of Keynesian analysis, which postulated that remunerative employment and income are generated by the expenditures made on exports, private investment, consumption and public investment. Specific suggestions were made as to how the government would act so as to ensure adequate levels of expenditure in each of these categories after the war in the Pacific ended.

1. Export trade

The White Paper looked to an expansion of world trade so that Canada and other countries might increase their exports. This result would be pursued by the government through international action towards "the reduction and restriction of trade barriers, especially trade barriers of an arbitrary and discriminatory type." The expansion of multilateral trade also required comparative stability of exchange rates and cessation of the competitive depreciation of rates which had so aggravated the world economic situation in the 1930s. The government pledged itself to cooperate with other nations to this end.

2. Private investment

The White Paper committed the government to policies which would encourage a high level of private investment in the postwar period. During the war, taxation had been designed to discourage investment

for other than war purposes. Such taxes were to be reduced. In particular government policy was to "minimize taxation which contributes to a higher level of production costs." Monetary policy was to encourage low interest rates; "the investment of funds in productive capital contributing to employment" was to be undertaken. The Industrial Development Bank created in 1944 would provide credit for the establishment and expansion of enterprises which had previously been unable to get adequate financing from private institutions. Under the Farm Improvement Loans Act government-guaranteed bank loans would be available to meet the needs of farmers for capital. The provisions of the National Housing Act of 1944 would provide for various kinds of federal assistance to stimulate residential construction and slum clearance.

3. Consumption expenditures

The White Paper committed the government to ensuring a high level of expenditures on consumer goods through measures to encourage employment and through various social security plans, some to be undertaken exclusively under federal control and others in collaboration with the provinces.

4. Public investment

Although the White Paper recognized that the "deliberate use of public investment expenditures as a permanent instrument in employment policy" had never been undertaken anywhere in the world, it was suggested that progress might be made along two lines.

First, the federal government would itself undertake to plan in advance a "shelf" of "desirable Dominion projects" which would be undertaken when employment conditions made this desirable. The federal authorities would encourage the provinces and municipalities to participate in similar kinds of advance planning and to cooperate in the counter-cyclical timing of capital expenditures.

Second, the federal government in collaboration with the provinces would implement a new policy of expenditure on the development and conservation of natural resources, with special attention to those expenditures which might be varied in accord with income and employment levels.

In the field of public expenditures, the White Paper also committed the government to the development of the natural resources of the Yukon and the Northwest Territories and to a "planned pattern" for the development of civil aviation.

In lucid language the White Paper explained the general economic rationale of the New National Policy and the kinds of policies the federal government had accepted to attain and ensure high and stable levels of income and employment. Because the end of the war in the Pacific was imminent, the government made its projected policies more detailed and explicit. These were presented to the provincial

leaders at the opening plenary sessions of the Conference on Reconstruction on August 6-7, 1945.

C. The Dominion-Provincial Conference on Reconstruction

At the Conference on Reconstruction convened by the federal government in the late summer of 1945 policies outlined in the White Paper on Employment and Income were embodied in a group of interrelated proposals to the provincial authorities.⁶ What came to be called the Green Book proposals looked forward to a more fundamental redelineation of federal and provincial functional responsibilities, revenues and revenue sources than had ever been seriously considered before.

1. Fiscal arrangements

Under the federal plan the provinces would forego levying personal and corporate income taxes and succession duties, apart from taxes on profits from logging and mining operations, and would receive in compensation annual unconditional subsidies from the federal government. These subsidies would be \$12 per capita, decreased or increased in proportion to the value of the gross national product as compared with 1941 but subject to an irreducible minimum equal to \$12 per capita of 1941 population.

2. Public health

The federal government offered to share with the provinces the costs of a comprehensive health insurance plan to be implemented in stages and when fully developed to include general practitioner services, hospital care, nursing care, specialized medical and nursing care, dental services, laboratory and x-ray services and pharmaceutical drugs. The federal government would pay to each participating province a basic grant of one-fifth of the *estimated* costs of each class of service and one-half of the *actual* costs of providing each class of service, with the limit that the total federal contribution should not exceed a schedule for each service adopted by the federal government or a maximum of \$12.96 per capita when the complete plan was developed.

Along with its proposed contributions to health insurance, the federal government offered to give financial assistance to provincial health services in two forms.

1. A group of eight specific health grants for specific purposes would be paid including those relating to professional training, research, mental illness, tuberculosis, venereal disease and crippled children.

2. In those provinces entering the health insurance scheme the federal government would assist in hospital construction by loaning money to the provinces and/or local authorities at a rate "equal to, or only slightly above the costs of such loans to the Dominion." Such

loans would be repaid with interest from the proceeds of the Health Insurance Plan or other specific federal health grants.

3. Social security

The federal government made four major proposals in the field of social security.

1. The Dominion would assume the exclusive responsibility of paying a \$30 per month pension to all residents of Canada 70 years of age and over without a means test.

2. The Dominion would pay to the provinces up to 50 per cent of the cost of old age assistance pensions to a maximum of \$30 per month for persons of 65 to 69 years of age who met the requirements of provincially administered means tests.

3. The federal government would assume complete responsibility for unemployment to persons who were employable but who were unable to obtain work and whose benefits under the existing unemployment insurance scheme were exhausted.

4. Eventually, the federal unemployment insurance scheme would be extended to cover all employed persons.

D. Natural Resources Development and Public Investment

The Green Book proposals suggested that a large amount of public investment was necessary for the conservation and development of agricultural, forestry, mining and fishing resources. The government would expand its activities in these fields within its own jurisdiction but would also enter into agreements to assist the provinces in such matters as the conservation of agricultural and forestry resources, the construction of a trans-Canada highway and the building of roads and airports facilitating resource development.

The federal government proposed that the provinces and municipalities cooperate in the timing of their public works for counter-cyclical reasons. Under the federal proposal these governments would be given planning grants to survey their needs in this respect and would receive up to 20 per cent of the costs of postponable projects if these were executed in a period designated by the Dominion authority.

Before the conference adjourned on August 10 it was evident that the leaders of the Quebec, Ontario and Alberta governments took issue with the federal vision of the postwar future on grounds of fundamental constitutional principles. Premier Drew of Ontario, speaking before the detailed federal proposals were presented to the conference, spoke of the necessity of provincial fiscal autonomy and of a clear-cut "redefinition and reallocation" of both taxing and administrative powers between the two levels of government. This point of view was quite incompatible with the perspectives of the New National Policy. The later debates of the plenary sessions of the conference on

April 29-May 3, 1946, were almost entirely concerned with payments to be received by the provinces for renting the personal income, corporation tax and succession duty fields to the Dominion rather than with the much broader issues raised by the Green Book proposals. In the meantime the federal government had agreed to modify its preliminary financial offers in several respects, including the following:

1. The tax rental payments for exclusive access to the direct tax fields would be \$15 per capita per year.
2. Provincial taxes on logging or mining operations would be recognized as deductible expenses for federal income tax purposes.
3. The Dominion agreed for the duration of the agreement not to raise its special excise taxes on gasoline, amusements and pari-mutuel betting except in the event of a national emergency.
4. The federal government would refund to the provinces half of the net corporate income tax collected from companies generating or distributing electricity, gas or steam.

At the end of the conference it was apparent that the federal authorities were unwilling to accede to the heavy fiscal demands of Ontario. At no time did the government of Quebec state with any precision the circumstances under which it would be prepared to rent the three tax fields.

E. The Rationale of the New National Policy

The postwar reconstruction policies of the federal government contained four interrelated elements.

First, the federal authorities would assume the primary responsibility of ensuring high and stable levels of employment and income. At the Conference on Reconstruction the Minister of Finance asserted that this responsibility would be discharged:

. . . (1) by achieving the best possible agreements with other United Nations in the field of economic relations, agreements which would encourage and permit the expansion of world trade and full use of our resources; (2) by pursuing fiscal and other policies which will create favourable conditions within which the initiative, experience and resourcefulness of private business can contribute to the expansion of business and employment; (3) by so managing its public investment expenditures and making it financially advantageous to provincial and municipal governments so to manage theirs, that they will contribute to the stability and not to the instability of employment; further, to direct these expenditures to the development and conservation of our natural resources, improving thereby the opportunities of the Canadian people and the financial position of the provincial governments who administer them; (4) by maintaining and stabilizing by a comprehensive system of old age security, incomes

which are largely spent on consumption and by contributing thereby to the health, welfare and productive capacity of the Canadian people and to their employment.⁷

Second, the federal government would have exclusive access to personal income taxes, corporate taxes and succession duties. The Minister of Finance put it in these terms:

The continuing expenditures arising out of the war will be heavy. National progress and the fulfillment of necessary international commitments both require the Dominion Government to undertake a large programme of national development and national welfare. It will clearly need to make full use of its power to impose national taxes on personal incomes, corporations and estates. Its revenue needs will be so great that the duplication of these taxes by other governments would seriously restrict enterprise and output and would jeopardize Canada's employment programme.⁸

Exclusive access to these tax fields was necessary, argued the Minister, not only because of the expected high levels of federal expenditures but also in the light of the demands of counter-cyclical fiscal policy. The Minister asserted:

All taxes affect the volume of spending, but income and corporation tax rates, and changes in these rates, also have a vital bearing upon the incentive to produce and to undertake capital expansion. It is therefore important that these taxes be levied exclusively by the Dominion Government. It is the only government which, because it can budget for the whole business cycle, is able to set rates in such a way as to contribute to a high and stable level of employment.⁹

Further, "Exclusive jurisdiction over taxes on incomes, corporations and estates is also necessary in order to protect Canadian interests abroad. With divided authority it is difficult to conclude reciprocal agreements with other countries which will prevent double taxation of Canadian incomes and estates."¹⁰

Third, the federal government would assume the initiative in the establishment of a comprehensive system of social security, including health insurance and income-maintenance plans for the aged and unemployed and family allowances. The Minister of National Health and Welfare summarized the justifications for these measures:

A nationally based and nation wide social security system can strengthen true Canadian unity. It is the practical expression of our common interest in protecting the individual against economic hazards beyond his control.

The Government believes that the social security proposals which it is putting before the Conference would make a threefold contribution. They would provide a network of protection for the Canadian people that justifies itself on social and humanitarian grounds. They would provide an important degree of protection to buttress the nation's economy as a whole in times of

stress and strain. Less tangible perhaps, but in some ways most important of all, they would make a vital contribution to the development of our concept of Canadian citizenship and to the forging of lasting bonds of Canadian unity.¹¹

Fourth, the federal government would assume more responsibility for ensuring the adequacy and stability of provincial revenues by annual per capita grants related to the level of the gross national product. By making the payment of these grants conditional on the provinces renting the personal income and corporation tax and succession duty fields, the federal authorities of necessity decided to forego measures of interprovincial equalization as recommended by the Rowell-Sirois Commission and embodied in the fiscal arrangements prevailing from 1957 onward. The federal government in 1945 and 1946 seems to have judged that the more prosperous provinces, particularly Ontario, would not have been willing to rent the income tax and succession duty fields if interprovincial equalization was undertaken.

The New National Policy assigned the provinces a subordinate role in the Canadian federal system. The rationale of the proposals was to mobilize the efforts of Canadians in the fulfilment of well-defined social and economic objectives and, as wartime experience seemed to demonstrate, this mobilization could come about only through the dominance of the federal authorities. Prime Minister King expressed the federal attitude in his opening speech to the Reconstruction Conference:

The lessons of war have taught us the vital importance of co-operation in an effort to reach a common goal. Without unity there is frustration. Now that we are coming face to face with the problems of the post-war years, the need for unity and co-operation is not less than it has been: From some points of view it is greater. The enemies we shall have to overcome will be on our own Canadian soil. They will make their presence known in the guise of sickness, unemployment and want. It is to plan for a unified campaign in Canada against these enemies of progress that we have come together at this time. . . .¹²

To realize these objectives it was proposed that the provinces go into what the Prime Minister called a "partnership" with the Dominion. However, the terms of this new relationship and the design of the postwar future were to be formulated by the federal authorities. Although provincial representatives had participated in the Advisory Committee on Health Insurance and although there had been some consultation with the provinces by the House of Commons Committee on Reconstruction, the comprehensive and detailed Green Book proposals were accepted as federal policy with little involvement of the provincial administrations. These proposals were made available to the press some hours before the provincial leaders had seen them and the casual way in which the Prime Minister dealt with this inadvertent slight to the provinces reveals the dominant position the federal government assumed in defining the situation and designing the shape of the postwar future. Between the opening of the Conference and its

adjournment *sine die* nearly nine months later the federal government made concessions to the provinces by increasing per capita grants and by offering to withdraw from certain tax fields. However, the Green Book proposals were presented as a package, and at the end of the conference the federal authorities had proved unwilling to modify them in any important way.

The federal government believed that the New National Policy could be implemented without explicit constitutional changes. Exercise of the federal spending power would permit the federal authorities to assume the role of leadership and coordination concerning many matters within provincial legislative jurisdiction. It was believed possible that the federal government could obtain exclusive access to the personal income, corporation and succession duty tax fields through agreements with the provinces. There was confidence in the possibilities of constructive federal-provincial collaboration in matters as varied as the anti-cyclical timing of public works, vocational training and the marketing of agricultural products. Thus in the major pronouncements of the New National Policy there was an implicit denial of what was axiomatic among those who favoured reform in the previous decade—that reform required explicit constitutional changes enhancing the power of the federal government. In J. A. Corry's terms the postwar strategy was to "turn the flank of the constitutional issue,"¹³ the issue which had so preoccupied those concerned with Canadian federalism in the 1930s. In the policy statements of federal officials in 1944 and 1945 the constitutional issue was somewhat clouded. Under the British North America Act as judicially interpreted the federal government had the authority to exercise what were normally provincial powers in dealing with the economic and other dislocations resulting from the war after actual hostilities had ceased. It was clear that the government was determined to exercise these powers and to decide unilaterally the pace at which the peacetime delineation of legislative authority was to be restored.

There can be no doubt, however, that a basic assumption of the new version of Canadian federalism was that the dominance of the federal authorities could be perpetuated after the exercise of emergency powers had ended.

F. A Digression: Federal Policies towards Culture

The New National Policy as it emerged in 1944 and 1945 dealt almost exclusively with the social and economic shape of postwar Canada. In the early postwar years there also grew up a demand that the federal government assume leadership in cultural development. There had been federal involvement in these matters from time to time. The National Museum had its origins in the pre-Confederation period, the Public Archives were established in 1872 and the National Gallery in 1880. A 1932 enactment of Parliament provided for the establishment of the Canadian Radio Broadcasting Commission with the dual responsibility

of providing a national broadcasting service and of supervising all broadcasting in Canada. In the same year the National Research Council opened its first scientific laboratories. The National Film Board was established in 1939 and in 1941 was given the responsibility for the production and distribution of films. In spite of these and other federal initiatives, there was nothing that could be called a coordinated federal policy concerning cultural development.

The Royal Commission on National Development in the Arts, Letters and Sciences under the chairmanship of the Right Honourable Vincent Massey was appointed in April 1949 with broad responsibilities to report on radio and television broadcasting, the work of the various cultural agencies of the federal government, Canadian participation in international cultural activities and relationships between the government of Canada and its agencies with national voluntary groups in the cultural field. The commission reported to the government in May 1951. Much of the spirit of the Report was contained in two sentences justifying federal involvement in what some persons had believed was the provincial field of education. "All civilized societies strive for a common good, including not only material but intellectual and moral elements. If the federal government is to renounce its right to associate itself with other social groups, public and private, in the general education of Canadian citizens, it denies its intellectual and moral purpose, the complete conception of the common good is lost, and Canada, as such, becomes a materialistic society."¹⁴ The commission recommended the creation by the federal government of a "Council for the Arts, Letters, Humanities and Social Sciences" with responsibilities for Canadian cultural policy and for fostering Canada's cultural relations abroad through UNESCO and other international cultural agencies. It was proposed that the federal government vastly increase its support for various kinds of cultural activities. A national plan of undergraduate and graduate scholarships was also recommended along with annual federal contributions "to support the work of the universities on the basis of the population of each of the provinces of Canada."

Apart from the provision of university scholarships, most of the more important recommendations of what came to be called the "Massey Commission" have been implemented. Per capita grants of 50 cents to the universities were provided by Parliament in the 1951-52 fiscal year and this amount was progressively raised to the present level of \$5 per person in the provinces. The Canada Council with responsibilities very much like those envisaged by the commission was established in 1957 and was given a \$50 million permanent endowment fund and a \$50 million University Capital Grants Fund. More effective development of federal cultural policies was provided for in 1963 when all federal agencies concerned with cultural affairs were grouped under the Department of the Secretary of State.

G. *The New National Policy 1946-60*

The adjournment of the Conference on Reconstruction *sine die* on May 3, 1946 demonstrated the impossibility of federal-provincial agreement on the federal government's comprehensive and interrelated plans for creating a new pattern of financial and administrative relationships between the two levels. From the time the conference ended however, the federal authorities sought and in many cases obtained provincial agreement on particular elements of the New National Policy. By this process of piecemeal adjustment over the subsequent years many of the objectives formulated by the federal government during the last years of the war have been wholly or partially achieved.

1. *Fiscal arrangements*

After the Conference on Reconstruction federal strategy in fiscal matters was to go further than in the original proposals to design options meeting the needs of individual provinces in an attempt to persuade them to rent the three direct tax fields. This strategy was only partially successful. Also, interprovincial equalization through unconditional federal subsidies played an increasingly important role in federal-provincial financial relations.

2. *Public health*

In 1948 the federal government decided that the failure of the two levels to agree on a comprehensive reform of their financial and administrative relations should not be allowed to forestall federal leadership and financial assistance in improving particular public health activities within the jurisdiction of the provinces. The National Health Programme of that year provided for 10 separate but interrelated conditional grants, including one for hospital construction. As modified from time to time, these programmes have continued.

The Hospital Insurance and Diagnostic Services Act enacted by Parliament in 1957 provided for federal financial assistance to approved provincial hospital insurance plans. By January 1, 1961 all provinces were participating in this programme.

3. *Social security*

Under the Old Age Security Act which came into effect on January 1, 1952, the federal government assumed the total financial and administrative responsibility for paying pensions of \$40 per month to all persons in Canada aged 70 or over who had resided in the country for at least 20 years. This amount was progressively raised to \$75 in 1965.

In the period after 1946 three "categorical" public assistance programmes were developed in which federal and provincial governments shared the costs of pensions to persons who were 65-69 years old,

blind, or permanently and totally disabled and who met the requirements of provincially-administered means tests.

Under the Unemployment Assistance Act of 1955 the federal government moved part of the way toward accepting responsibility for the relief of unemployed employables as recommended by the Green Book proposals. The Act provided that the federal authorities would reimburse the provinces for 50 per cent of the costs of general social assistance when the number of persons in receipt of such assistance exceeded 45 per cent of the provincial population. This threshold provision was removed by a 1957 amendment.

H. Natural Resources Development and Transportation

In the postwar years the federal government participated with the provinces in several ventures in the resource development and transportation fields. Some of the most important of these are discussed below.

1. The Canada Forestry Act of 1949 conferred on the governor-in-council the authority to enter into agreements with the provinces to assist them with various activities in the conservation and development of forest resources. Agreements were concluded concerning forest inventories, reforestation, forest fire protection and forest access roads. In 1962 these agreements for particular activities were replaced by a composite agreement covering wider forestry functions.

2. In 1958 the federal government inaugurated a programme of financial assistance to the provinces for construction of access roads to places where there were prospects for natural resource development.

3. Under the Trans-Canada Highway Act of 1949, as amended in 1956, the federal government contributed to the building of a paved two-lane highway from St. John's, Newfoundland to Victoria, B.C.

4. The Agricultural Rehabilitation and Rural Development Act of 1960-61 empowered the Minister of Agriculture to enter into agreements with the provinces to deal with the social and economic problems of unproductive agricultural areas.

As well as the general programmes mentioned above, the federal government in the postwar years participated in several schemes for the conservation and development of natural resources with particular provinces or groups of provinces—the Maritime Marshland Rehabilitation programme, the South Saskatchewan River Development Project, the St. Mary's Irrigation Project, agreements under the Atlantic Provinces Power Development Act and other ventures.

Although many of the major objectives of the New National Policy were successfully pursued in the 15 years after the Second World War, others were not. After the expiration of the Wartime Tax Agreements in 1947 the federal government at no time attained exclusive occupancy of the income tax and succession duty fields. No progress was

made in evolving procedures for coordinating the capital expenditures of federal, provincial and municipal governments for counter-cyclical reasons. The Green Book proposals for comprehensive prepaid health insurance were implemented only so far as care given in general hospitals was concerned. The federal government assumed only partial responsibility for social assistance to unemployed employables. In spite of these deficiencies, however, Canadian federalism developed in the postwar years in directions not entirely unlike those projected by the formulators of the New National Policy.

Between the latter half of the 1950s and the present time the vigour and purpose which led to the formulation and implementation of the New National Policy became weakened. Part of this can be explained in terms of the accomplishment of several objectives set forth by the federal government in 1944-45. Other developments contributing to the decrease of federal dominance have taken place, however, and in many important matters provincial rather than the federal authorities now hold the initiative. In other circumstances where previously the federal government had a wide range of freedom of action it now seeks the collaboration of the provinces. It is extraordinarily difficult to isolate the various factors influencing this shift and almost impossible to assess their relative importance in altering the roles of federal and provincial governments. This chapter attempts to explain the attenuation of federal dominance as a background to the subsequent analysis of how the Canadian federal system has adjusted to the new circumstances.

A. Deficiencies in Federal Economic Policies

The dominance of the federal government established during the war and the subsequent decade could endure only so long as it achieved results which met popular expectations. After the mid 1950s, the country encountered a set of economic circumstances which were not dealt with effectively. The following tables illustrate these deficiencies in terms of economic growth and unemployment.

Not only was the general performance of the Canadian economy satisfactory but the deficiencies had a different incidence on different segments of society. Particular industries remained depressed and pressures on prices in some sectors of the economy coexisted with unused capacity in others. The relative prosperity by-passed some groups entirely. As in the past, however, it was the differential

Table III.1

Index numbers of per capita product at constant prices (1958 = 100)
for Canada and selected countries

Country	1955	1956	1957	1958	1959	1960	1961	1962
Canada	98	104	101	100	101	101	102	106
Denmark	92	94	98	100	106	112	118	122
France	90	95	98	100	102	108	112	116
West Germany	89	94	98	100	106	114	118	122
United Kingdom	97	99	100	100	103	107	109	109
United States	103	103	103	100	105	106	106	111
Japan	88	93	101	100	117	132	152	161

Source: United Nations, Department of Social and Economic Affairs, Statistical Office, *Statistical Year Book, 1963* (New York, 1964), Table 170.

Table III.2

Unemployed in relation to total civilian labour force in Canada in
selected years

Year	Unemployed	Total civil labour force	Unemployed as percentage of civilian labour force
	(000s)	(000s)	
1946	163	4,829	3.4
1948	114	4,988	2.3
1950	186	5,163	3.6
1952	155	5,324	2.9
1954	250	5,493	4.5
1956	197	5,782	3.4
1957	278	6,003	4.9
1958	432	6,127	7.1
1959	373	6,228	6.0
1960	448	6,403	7.0
1961	469	6,518	7.2
1962	391	6,608	6.0

Source: Canada, Dominion Bureau of Statistics, *Canada Year Book, 1962 and 1963-64*.

regional impact of national policies which resulted in the most severe stresses on Canadian federalism. This aspect can best be illustrated by the regional rates of unemployment.

It is not within my competence to discuss why federal policies from 1957 onward were deficient. There are conflicting views given by professional economists.

Table III.3
Regional rates of unemployment, percentages

Region	1950-54 average	1955-59 average	1960
Atlantic provinces	5.8	8.8	10.6
Quebec	4.1	6.8	9.1
Ontario	2.4	3.8	5.4
Prairie provinces	2.0	3.1	4.2
British Columbia	4.2	5.3	8.7

Source: *Final Report of the Special Senate Committee on Manpower and Employment* (Ottawa, 1961), 11.

First, according to one explanation, the Keynesian economic analysis which in large measure provided the theoretical rationale for the New National Policy proceeded in terms of aggregates and policies based on such assumptions and tended to be insensitive to the incidence of governmental measures on particular industries and regions. Jacques Parizeau has thus evaluated federal economic policies as those developed from the perspectives of the White Paper on Employment and Income: "The framework of federal action upon the economy had to be quite general, or to put it differently, national in scope. The emphasis was on the variations in the total economic demand and large aggregates. Regional discrepancies in growth and structural bottlenecks were hardly considered and, in fact, at times federal authorities explicitly refused to consider them."¹ In somewhat similar vein, Maurice Lamontagne in his paper to the Study Conference on National Problems in 1960 looked back over the previous economic policies of the federal authorities and suggested new directions for the future:

Stagnation, inflation and unemployment have a very important regional and industrial incidence, especially in Canada. Certain regions or industries grow rapidly while others are depressed. Certain industries may enjoy rising prices while others, at the same time, suffer from relatively low prices. Some industries or regions may experience heavy unemployment while others suffer from a scarcity of labour. Our national aggregates, such as the gross national product, the cost of living index and the national percentage of unemployment, are frequently the result of conflicting tendencies prevailing in different industries and different regions. It is always unrealistic and dangerous to interpret these national aggregates without taking their regional and industrial components into account. It is even more dangerous to attempt to solve such economic problems as unemployment as if they had the same causes and intensity throughout the country and as if they could be effectively met by the same policies in all industries and all regions.²

Second, there is the explanation that the federal government did not pursue aggregative policies towards ensuring appropriate levels

of demand aggressively enough. In November, 1965 Scott Gordon made a root-and-branch attack on federal economic policies over the past two decades.³

Three decades have gone since Keynes' General Theory of Employment, Interest, and Money was first published, and two since our own White Paper on policy, and it must be confessed that Keynesian economics has made virtually no impact on the Canadian public mind or on the business community. It has made little headway in advancing the analytical work in the bureaucracy that underlies the formulation of employment and other economic policies, and despite some brief period of favour, it does not appear to have won its way to any appreciable acceptance as a sound principle of fiscal policy.⁴

In general, Gordon's criticism based on an examination of the budgets of successive Ministers of Finance was that there had been a consistent failure to use expansionist fiscal policies.

The deficiencies in federal policies which became apparent in the latter half of the 1950s had two interrelated results. First, the provinces were propelled into a more interventionist role in economic matters. Second, more selective federal economic policies required more provincial collaboration than did the New National Policy of the immediate postwar years.

These various circumstances encouraged the provinces to engage in certain kinds of economic activities which they either had not undertaken before or had undertaken in a less aggressive way. Referring to the period after 1957, Jacques Parizeau asserted in 1964 that:

In so far as federal policies had been much too broad in scope to deal properly with structural and regional problems, it was logical in the face of these new developments for the provinces to get involved much more deeply than they had ever been in their own economic policies, particularly in those policies directly related to the rate of growth and industrial expansion. Indeed, a number of provinces still lack the personnel required for such responsibilities -- it would still be premature to think that all provincial politicians and civil servants are even roughly aware of these responsibilities. But a new approach has developed that is in remarkable contradiction to the centralist policies of the forties and early fifties. This new approach adopted by public authorities, who now have the means to carry out extensive programs, can have a very sizable impact on the economy.⁵

The circumstances prevailing since the late 1950s have also resulted in new kinds of federal economic measures which required a higher degree of provincial collaboration than did previous ones. In his paper quoted above Maurice Lamontagne called for the federal administration to develop more "selective policies" which would give "a regional and industrial formulation to our national policies."⁶ In concrete terms, this has meant that federal-provincial collaboration in expanding vocational training facilities has been required for

effective action when high rates of unemployment are attributed not only to deficiencies in aggregate demand but also to a relative lack of skill in the labour force. Under the present distribution of powers, measures to mitigate the social and economic problems of marginal farming areas can be undertaken only through some such programme of intergovernmental cooperation as that provided for by the Agricultural Rehabilitation and Rural Development Act of 1960-61. Federal-provincial collaboration is necessary if effective measures are to be taken to stimulate industrial development in chronically depressed areas, including parts of most provinces and the whole Atlantic region. When it was decided that the federal government should undertake programmes on behalf of those groups in society that had been by-passed by the general prosperity prevailing since the war, it was immediately evident that an effective war on poverty could be waged only with provincial cooperation. Both the differential impact of federal policies on regions, industries and occupational groups, and the increasing disposition of the provinces to implement their own measures for economic development and growth, made it almost inevitable that the more selective measures used by the federal authorities required a higher degree of provincial cooperation than had previous federal policies.

B. New Directions in Quebec

The election of the Liberal government in Quebec in June 1960 coincided in time with other influences challenging federal dominance. For the first time since Confederation the administration of a large province was committed to an explicit and comprehensive policy of social and economic reform through public action. Such a commitment in any of the three or four largest provinces would have offered a challenge to federal power. This challenge from the "new Quebec" was of course more direct than otherwise because of the cultural groups dominant in the Quebec and federal governments respectively. For the first time in Canadian history cultural and regional-economic cleavages were compounded.⁷

The Liberal Manifesto issued before the 1960 election in Quebec⁸ committed the party to several important reforms including the following:

- the immediate adoption of a provincial hospital insurance scheme;
- the development of a provincial master plan for highways;
- the development of planning programmes for industrial expansion and the exploitation of natural resources;
- the encouragement of heavy industry to establish in the province "with financial encouragement from the government if necessary";
- the ownership by Quebec Hydro, a public corporation, "of all undeveloped hydro-electric power where it is economically feasible to do so";

- the undertaking of measures to encourage the people of Quebec to invest in the development of the province's natural resources;
- the comprehensive reform of the educational system at all levels.

As well as substantive reforms, the manifesto also committed the party to major changes in the organization of the provincial government. An Economic Planning and Development Council would be established with representatives of labour, industry and the relevant professions to advise the provincial administration on long-range planning. The civil service would be reformed and an independent Civil Service Commission created. A Department of Natural Resources was to be established with wide powers. The existing Department of Industry and Commerce would be given broad authority "to provide industrial development on a regional basis according to an over-all plan." A Department of Cultural Affairs and a Department of Federal-Provincial Relations were to be established.

The pursuit by the Government of Quebec of the policies promised in the 1960 Manifesto and others developed later brought about very different circumstances in the relations between the Quebec and federal authorities, and less directly, between the federal administration and those of the other provinces. In many matters where previously the province of Quebec was inactive, the Lesage government had comprehensive and explicit policies—policies in respect to regional economic development, vocational training, the exploitation of natural resources, cultural affairs (including international cultural relations), the channelling of private savings into provincial economic development and so on. There were new initiatives concerning the establishment of a steel complex, immigration, housing and slum clearance and the creation of a public sector in the mining industry. The federal government was directly or indirectly involved in all these matters. Furthermore, the programme of reform to which the Quebec administration was committed was an extraordinarily costly one and fiscal relations with the federal government became more crucial than before. Thus for the first time the relations between the federal and Quebec governments were not in the traditional terms of centralization versus provincial autonomy. Instead they revolved about specific issues where the objectives of each were not wholly compatible with those of the other.

C. Provincial Economic Interventionism

Quebec was not the only province to begin in the 1960s to develop more comprehensive and aggressive policies concerning economic problems. The developments after the election of the Lesage administration were indeed dramatic, bringing to at least temporary dominance in Quebec those ideas and interests that saw the cultural integrity of French Canada being served by a bold programme of provincial interventionism in economic and other matters. In the other provinces there were, of course, no similar cultural factors at work and no

such spectacular break with the past. The new policies of these provinces were pragmatic responses to what their leaders more or less clearly perceived to be deficiencies in federal policies. The vigour and competence with which these new responsibilities for economic growth and development were assumed varied greatly from province to province. In some provinces interventionism is still at a somewhat embryonic stage. In all of the provinces, however, there was during the early 1960s an increase of governmental activity in respect to industrial and trade development and economic control.

The activities of the Government of Manitoba are an interesting example, although new economic responsibilities have been assumed in a more explicit way in Manitoba than in most of the provinces other than Quebec. In 1961, 42 citizens representing various interests in the province were constituted by the government as the Committee on Manitoba's Economic Future. The major responsibility conferred on the committee by order-in-council was to undertake such investigations, studies and programmes of research as were required of the basic industries in the province and of the various physical, financial and social factors which determine the growth, expansion and employment potential of such basic industries.⁹ The order-in-council indicated in general terms how the provincial administration regarded its own responsibilities by stating that such a committee was necessary "to advise the government in the formulation of appropriate policies and measures in respect of the problems of future growth and development of the economy of the Province and of employment in the Province."¹⁰ The committee's report, presented to the government on March 6, 1963, analyzed comprehensively the possibilities of development in all sectors of the Manitoba economy in the following 15 years with a view to creating 75,000 new jobs. It also made specific recommendations as to how such growth could be secured. The committee's view of appropriate provincial action was this: "At the present stage in the Province's development, Government has a prime responsibility in giving incentive to economic activity by providing specialized aids and services that create the atmosphere in which industrialization can proceed. Establishing these conditions is the most important task of Government at the Provincial level in economic development."¹¹

Two months after the committee's report was presented the Manitoba Development Authority was established¹² with the general purpose of "the furthering of the economic development of the province with a view to increasing employment and employment opportunities and raising the standard of living of the people of Manitoba." In more specific terms, the Authority, composed of five cabinet ministers, was to define provincial economic objectives and to coordinate private and public activities in pursuit of these objectives, to design and implement measures for the "promotion of major economic development projects," to take measures to attract investment capital to the province and to work towards the coordination of Manitoba's economic policies with those of the federal government, the other provinces

and the municipalities. The Act also provided for the establishment of a Manitoba economic consultative board to advise the Authority. The board was to consist of a chairman and not more than 10 members, appointed by the Lieutenant-Governor in Council, and "representative of the leading members of the economic community." The board was also to include not more than four other members who would be deputy ministers or other officers of Crown agencies and who would serve in an *ex officio* capacity.

In 1962 and 1963 six other provinces appointed consultative bodies on economic policy somewhat along the lines of Manitoba—the Nova Scotia Voluntary Planning Board, the New Brunswick Research and Productivity Council, the Quebec Economic Advisory Council, the Ontario Economic Council, the Saskatchewan Economic Advisory Council and the Alberta Economic and Productivity Council. Most of these bodies were composed of representatives of the major economic interests of the respective provinces and in some cases of government as well. The major responsibility of these agencies was to advise the provincial administrations on ways to promote industrial development and external markets for provincial products.¹³

Provincial economic interventionism has the result of making provincial objectives more explicit concerning matters for which the federal government also assumes responsibility. There is no reason to believe that these objectives of the two levels of government will always or usually be in harmony. The substance of these federal-provincial conflicts is outlined in Chapter VII.

The increasing scope of provincial activity is closely related to the improved quality of the provincial public services. During the war years and well into the 1950s, the balance of bureaucratic competence ran heavily in favour of the federal government. In economic policy and other matters the federal Liberals worked in close harmony with civil servants skilled in the sophisticated formulation and implementation of comprehensive objectives. On the provincial level, there was much less expertise and provincial reactions to federal initiatives were often somewhat amateurish. In recent years, however, the situation has changed. Increasingly, the provinces have attracted the kind of civil servant who is trained in the social sciences and who has the will and the ability to play an active role in the formulation of public policy. This development has been most spectacular in Quebec but is occurring elsewhere as well. Thus in federal-provincial relations the federal government can no longer rely on the superior skill of its own officials vis-à-vis those of the provinces.

D. The Increasing Importance of Provincial Expenditures

Another element in the attenuation of federal dominance is that the proportion of total public expenditures made by provincial and municipal governments has shown a secular increase. It is likely that

Table III.4

Federal and combined provincial-municipal expenditures for selected years

Year	Federal as percentage of total	Provincial-municipal as percentage of total
1926	36.8	63.2
1930	32.0	68.0
1934	31.6	68.4
1938	33.0	67.0
1942	83.5	16.5
1946	72.4	27.6
1950	52.2	47.8
1952	63.4	36.6
1954	61.4	38.6
1956	55.7	44.3
1958	55.8	44.2
1960	51.2	48.8
1962	47.5	52.5
1964	47.4	52.6
1965	46.6	53.4

Source: Report of Federal-Provincial Tax Structure Committee (Ottawa, 1966), 6.

this trend will continue unless rapid increases occur in defence expenditures. Canadians have thus come to look to their provincial and local governments for public amenities that are most important in terms of public expenditures.

E. Summary and Conclusions

A conjuncture of circumstances after the middle of the 1950s destroyed the federal dominance which was established during the Second World War and perpetuated during the subsequent decade. In part, the weakening of federal power and purpose was the result of the deficiencies of federal policies in satisfying the needs of important sections of Canadian society. Federal power was challenged with increasing vigour and competence by provincial governments that became unwilling to play the relatively subordinate role in economic and other matters assigned to them by the New National Policy. The most spectacular aspect of this challenge was embodied in the policies of the leaders of the new Quebec who assumed that the welfare of French-Canada could be ensured only by aggressive provincial policies in social and economic matters. With great variations from province to province, the other provincial administrations also became increasingly interventionist in economic matters and defined their economic and other objectives with more skill and precision than in the past.

It can reasonably be argued that until the present decade Canadian federalism has been sustained because at every period either one level or the other has been relatively immobilist in respect to economic matters. This circumstance has now ceased to exist.

In Chapter I it was argued that a federal system must develop resources of adaptability if it is to survive. A broad distinction was made between "devices of adjustment," the processes by which the distribution of powers, resources and responsibilities are changed as new circumstances arise, and "devices of articulation," the procedures through which the activities of the central and regional governments are related to one another by their respective executives. This chapter analyzes the devices of adjustment in the context of the formal constitutional framework.¹ The devices of adjustment examined here are: constitutional amendment, judicial review, quasi-unitary features of the constitution, federal spending power, particularity of the position of the individual provinces, intergovernmental delegation of powers, and federal emergency and defence powers. The contracting-out procedure is such a unique contribution to the theory and practice of federalism that I thought it worthwhile to give it a chapter to itself.

A. The Confederation Settlement and the Distribution of Powers

The British North America Act of 1867 gave to the federal authorities what were then deemed to be the most important responsibilities of government and the access to the financial resources necessary to wield these powers effectively. Apart from establishing a new constitutional system to break the political deadlock of the United Canadas, the prime objective of the Fathers of Confederation was to create circumstances under which the military defence and economic integration of British North America might be undertaken effectively. So that the economic aims of Confederation might be pursued, the federal Parliament was given those legislative powers not conferred exclusively on the provinces, including powers over trade and commerce, navigation and shipping and various aspects of interprovincial transportation and communication, banking, interest and legal tender, and

copyrights and patents. By confining the provinces to direct taxation, Parliament was given exclusive access to the most lucrative sources of public revenue of the time. In order that the federal authorities might pursue effective developmental policies, the British North America Act provided that if federal and provincial legislation in the concurrent fields of agriculture and immigration should conflict the former would prevail. Section 145 directed that the immediate construction of the railway linking Canada and the Maritimes be undertaken by the federal government and Sections 147 and 148 outlined the circumstances under which the remaining British territories in the northern half of the continent might be admitted into the Dominion. Thus did the division of powers between the federal and provincial authorities contemplate the political and economic integration of British North America.

The highly centralized constitutional order established by the Confederation settlement stopped short of being a unitary state—in the language of the day "a legislative union"—since the B.N.A. Act gave the provinces exclusive jurisdiction over a group of matters of some importance. It is reasonable to assume that the French Canadian leaders were instrumental in securing a federal rather than a unitary constitution. These exclusive provincial powers can be viewed therefore as reflecting areas where differences between the two founding cultures were believed to be most crucial and thus must be wielded exclusively by the Quebec authorities. The most important of these areas related to education, the matters covered by the Civil Code adopted for Lower Canada in 1865, municipal affairs and health and welfare institutions. On the other hand, Quebec leaders of 1867 apparently believed that the sweeping economic powers conferred on the Dominion did not in any way constitute a challenge to the cultural interests of French Canada. Sir E. P. Taché in the Confederation Debates spoke of the resistance of Lower Canada to representation by population under the existing constitution because that would have placed Lower Canada at the mercy of Upper Canada. He argued that this would not occur under the proposed federal constitution:

It would not be so in a Federal Union, for all questions of a general nature would be reserved for the General Government, and those of a local character to the local governments, who would have the power to manage their domestic affairs as they deemed best. If a Federal Union were obtained it would be tantamount to a separation of the provinces, and Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired.²

Similarly, George Étienne Cartier asserted of the projected union: He did not entertain the slightest apprehension that Lower Canada's rights were in the least jeopardized by the provision that in the General Legislature the French Canadians of Lower Canada would have a smaller number of representatives than all the other origins combined. It would be seen by the resolutions that in the questions which would be submitted to the General

Parliament there could be no danger to the rights and privileges of either French Canadian, Scotchmen, Englishmen or Irishmen. Questions of commerce, of international communications and all matters of general interest, would be discussed and determined in the General Legislature; but in the exercise of the functions of the General Government, no one could apprehend that anything could be enacted which would harm or do injustice to persons of any nationality.³

For the English Canadian side, the expectations of both A. T. Galt⁴ and George Brown⁵ were much like those of Cartier and Taché. The broad division of governmental powers between the Dominion and the provinces would make easily compatible the effective economic integration of British North America and the cessation of cultural strife which had poisoned and paralyzed the constitutional system of the Province of Canada.

The British North America Act thus provided for a highly centralized union in two ways:

First, *what were then* the most important public responsibilities and the most important sources of public revenues were given to the Dominion rather than the provinces.

Second, the federal authorities were given quasi-unitary powers to intervene directly in matters otherwise within the exclusive legislative jurisdiction of the provinces—the powers of reservation and disallowance of provincial legislation and powers under Section 92 10 (c) to bring provincial "works" under federal jurisdiction and to protect the rights of certain denominational schools.

The original distribution of legislative powers, revenue resources and functional responsibilities, however, did not preclude the later development of a much less centralized federal system than the Fathers of Confederation considered appropriate. In some periods in the past century the most important public functions have been those within provincial rather than federal jurisdiction. The distribution of legislative powers and revenue sources set out in the B.N.A. Act was subject to judicial interpretation which could, and would, enhance the scope of activity of the provinces as against the Dominion. Finally, the quasi-unitary devices were to be used at the discretion of the federal authorities and the extent of their use depended entirely on the judgment of the federal executive and Parliament.

B. Constitutional Amendment

The most explicit kind of adjustment in a federal system is one altering the text of the constitution to reallocate particular legislative powers between the federal and regional governments. In Canada, as in most other established federations, this kind of adaptation has proved difficult to effect. Since 1867 there have been only three constitutional amendments altering the respective legislative powers

of Parliament and the provinces—that of 1940 giving the federal government exclusive jurisdiction over unemployment insurance and those of 1951 and 1964 conferring on Parliament concurrent jurisdiction with the provinces in the fields of old age pensions and of survivors' benefits in a proposed federal contributory pension programme respectively. All three amendments were effected only after the federal government had obtained the approval of all the provinces and each change involved the transfer to the federal authorities of costly responsibilities in the field of welfare. Barring a basic re-drafting of the existing constitution, it is unlikely that constitutional amendment will emerge as an important device of adjustment, with the possible exception of future transfers of legislative power to Parliament in respect to very expensive provincial functions.⁶

C. Judicial Review

In Canada, as in other federal systems, evolving patterns of judicial review have proved to be more important than constitutional amendment in changing the distribution of legislative powers. There is a vast literature of analysis and commentary on judicial review of the division of legislative powers between Parliament and the provinces under the British North America Act⁷ and it would be impossible in a study such as this to review even in outline this aspect of Canadian constitutional development. There is general agreement that from the late nineteenth century onward the Judicial Committee of the Privy Council: 1) restricted the powers of Parliament by giving a restrictive interpretation of its authority to enact legislation in respect to the "Peace, Order and Good Government of Canada" and to "Trade and Commerce"; and 2) enlarged the scope of provincial activity to legislate exclusively in respect to "Property and Civil Rights" and to "Generally all Matters of a merely local or private Nature in the Province."⁸ In 1938 F. R. Scott made a summary of the additions to provincial and Dominion powers made by judicial interpretation. To a very large extent these accretions are still operative in the Canadian constitution.

Dominion Additions

1. Liquor control (in small part).
2. Sunday observance.
3. Interprovincial telephones.
4. Labour contracts on Dominion undertakings.
5. Radio broadcasting.
6. Aeronautics.
7. Criminal trade practices.
8. Dominion companies cannot have their capacity destroyed by provincial laws.
9. Customs dues leviable on the importation of provincial crown property.
10. Farmers-Creditors Arrangements.
11. Trade and Industry Commission.

Provincial Additions

1. Treaty legislation upon any subject belonging to the Provinces.
2. Regulation of intra-provincial trade.
3. Regulation of intra-provincial marketing.
4. Regulation of intra-provincial production.
5. Regulation of intra-provincial prices.
6. Wages control.
7. Hours of labour by day or by week.
8. Weekly day of rest.
9. Unemployment insurance.
10. Workmen's compensation.
11. Health regulations.
12. Trades Union laws.
13. Industrial disputes.
14. Liquor control (in large part).
15. Insurance laws.
16. Control of security sales: "blue sky" laws.
17. Right to create companies with power to act outside the Province.
18. Taxing power extended to taxes on consumption and sales.
19. Escheats.
20. Ownership of Indian lands and beds of navigable rivers.
21. "Property and Civil Rights" over-rides Dominion residuary clause except in extreme emergency.⁹

Since the end of the Second World War judicial review has assumed a much more limited role in determining the respective legislative powers of federal and provincial governments. There are many fewer judicial challenges than in the past to the validity of federal and provincial legislation.¹⁰ The most spectacular disputes between the federal and provincial governments have been resolved by means other than judicial interpretation, for example, the issue of fiscal powers between the Quebec and federal governments in 1954, Newfoundland's financial rights under the terms of union, and the long dispute between the federal and British Columbia administrations about hydro-electric development. Prime Minister Pearson on December 31, 1964 announced that the question of ownership of offshore mineral rights was being submitted to the Supreme Court of Canada for decision. This announcement came after several years of fruitless negotiation about the matter between the federal government and the provinces concerned. Even in taking this action, Prime Minister Pearson made it clear that a judicial decision did not lessen the necessity of subsequent federal-provincial negotiations about offshore rights. On the basis of the declining role of the judiciary in delimiting the powers of the two levels, J. A. Corry asserted in 1959 that "The courts are retiring, or being retired, from their posts as the supervisors of the (federal) balance."¹¹ Corry attributed this trend to developments outside the judiciary itself. According to his explanation, the tradition of judicial review of the Judicial Committee of the Privy Council, by restricting the powers of Parliament and enlarging those of the provinces, had caused those concerned with finding ways

of taking national action to meet national needs to try to "turn the flank of the constitutional obstacles." The new methods for accomplishing this lay in the exercise of the federal spending power and in the various forms of federal-provincial collaboration. Further, neither the provinces nor the big business interests seemed now disposed to support judicial challenges to the validity of federal legislation as they had done in the past.

It seems plausible that the failure to resolve federal-provincial disputes by resort to judicial interpretation has a cumulative quality, that the absence of such interpretation over the years leads to increasingly wider areas of uncertainty about what the courts would do if asked to rule on particular exercises of federal or provincial powers. In such circumstances individuals and governments may well be inhibited from resorting to the judicial process. At the end of the Federal-Provincial Conference of March 1964 Premier Lesage made a press statement that his government was prepared to seek its rights through the courts. This was widely interpreted as a direct challenge to Canadian federalism because it revealed the Quebec leader's extreme impatience with the workings of the procedures of intergovernmental consultation. It also gave the other governments involved cause for concern as it was reasonable to believe that many established arrangements were vulnerable to judicial challenge.

A combination of circumstances thus indicates that judicial review will probably play a relatively minor role in federal-provincial relations in the foreseeable future. Most of the major issues between the federal and provincial governments seem not to be susceptible to judicial resolution. Business interests are less disposed than in the past to support judicial challenges to federal power. The machinery of intergovernmental consultation is becoming increasingly institutionalized and legitimized. The other "devices of adjustment" analyzed in this chapter offer alternative possibilities for constitutional adaptation. Judicial review results in a delineation of federal and provincial powers where the perceived needs of the federal system are for a more effective articulation of these powers. In general, the prospects are remote that the courts will resume a major role as keepers of the federal balance.

D. The Quasi-Unitary Features of the Constitution

The Confederation settlement gave the federal authorities powers to intervene unilaterally on matters otherwise within the exclusive legislative jurisdiction of the provinces.

1. Under Section 93 (applied later to Manitoba, Prince Edward Island, Alberta and Saskatchewan as these entered the Dominion as provinces) the federal authorities were given powers to protect the rights of denominational schools existing at the time of Confederation or subsequently established.

2. Under Section 95 both Parliament and the provinces might enact legislation in respect to agriculture and immigration but any provincial enactment in these fields was operative only so long as it was not "repugnant to any Act of the Parliament of Canada."

3. Under Section 92, 10 (c) Parliament might declare any "work" wholly within a province to be "for the general advantage of Canada or for the advantage of two or more of the Provinces" and thus bring the "work" within federal jurisdiction.

4. Under Sections 55 and 90 the governor-in-council might disallow any provincial bill within a year after its enactment and the lieutenant-governors of the provinces might reserve provincial bills for the consideration of the cabinet with such reserved legislation being inoperative in the absence of positive action by that body.

What we have called the quasi-unitary features of the constitution have not in the past two decades been significant in the evolution of Canadian federalism.

1. The federal authorities have only once—in 1896—exercised their powers to protect the rights of denominational schools under the provisions of Section 93 and the resolution of the matter at hand was later made through an agreement between the Manitoba and the new federal administration. The provisions of Section 93 dealing with federal protection of denominational rights in education can thus be said to be a dead letter.

2. In only two important circumstances in the period since the Second World War has Section 92, 10 (c) been used to bring significant provincial matters within federal jurisdiction. This provision was employed in the Atomic Energy Control Act¹² of 1946 to bring under federal control the production and use of atomic energy and the production and refining of certain substances from which atomic energy was made as well as research into such matters. The National Capital Act¹³ of 1958 declared that all works of the Federal District Commission were to be for the general advantage of Canada. Apart from these two instances, this section has been used only in private bills to bring certain local railway companies and bridges under federal jurisdiction.

3. The last provincial statute disallowed by the federal Executive was a 1943 Alberta enactment prohibiting the sale of land in the province to Hutterites and enemy aliens for the duration of the war. The disallowance power appears to be in abeyance, at least temporarily.¹⁴ During the last two decades successive federal governments have been requested by influential groups to disallow such controversial legislation as the Saskatchewan Mineral Taxation Act of 1944, the Quebec Freedom of Worship Act of 1954 and enactments of Prince Edward Island, Newfoundland and British Columbia restricting certain trade union activities. In explaining his government's refusal to disallow Newfoundland labour legislation enacted in 1959 Prime Minister Diefenbaker gave a narrow definition of the grounds upon which, according

to his understanding of the evolving conventions of the constitution, disallowance might appropriately be used: "Whatever one's feelings with respect to legislation passed by provincial legislatures may be, however much one may dislike it, the gradual development has been that the federal government, through the Governor-General in Council, does not exercise that power where there is on the face of it an apparent conformity with the legislative authority of the legislature which passes it."¹⁵

A somewhat less restrictive interpretation of the grounds for disallowance was contained in a federal order-in-council validating a Saskatchewan bill of 1960 which had been reserved by the Lieutenant-Governor of the province: "And whereas it is the established policy in these matters to consider first the question of whether the bill is within the competence of the legislature to enact and second the question of whether it is in conflict with national policy or interest, and if these two questions be resolved favourably, to recommend that assent be given unless the bill is otherwise objectionable."¹⁶

There are no legal limitations to the federal cabinet's authority to disallow provincial statutes, apart from the requirements that the federal veto must be exercised within one year after a bill's enactment by a province and that this power must be used against such enactment in its entirety. It is impossible to predict with any certainty the way in which this device may be employed in the future. The traditions which seem to be in the making, however, call into question the appropriateness of disallowance except under circumstances where an enactment is perceived by the federal cabinet to be clearly outside the legislative competence of a province or where some very fundamental federal objective is directly challenged. It seems also that the use of disallowance in any but the most unusual circumstances would almost inevitably inhibit the kinds of federal-provincial collaboration that are necessary if the federal system is to operate in a tolerably effective manner.

The evolving traditions in respect to reservation parallel those of disallowance. In the spring of 1961 the Lieutenant-Governor of Saskatchewan, Frank L. Bastedo, reserved a provincial act relating to mineral contracts.¹⁷ Mr. Bastedo had not consulted with the federal cabinet prior to the action and later a federal order-in-council was enacted validating the provincial statute. The statements of Prime Minister Diefenbaker in the House of Commons made plain that the federal government believed that the Lieutenant-Governor had acted outside of the conventions of the constitution. The Prime Minister asserted that the government was considering authorizing instructions to the lieutenant-governors that provincial bills should be reserved only upon direction from the federal cabinet, although these instructions appear not to have been issued. As is the case with disallowance, reservation appears to be in abeyance, temporarily at least.

In summary, the quasi-unitary features of the British North America Act have not in the past two decades been extensively used to enhance

the position of the federal government at the expense of the provinces. The exercise of these powers in most cases involves direct challenges to the provincial administrations concerned. Although one cannot with assurance predict the circumstances under which these powers will be wielded, their exercise will almost inevitably inhibit what have come to be regarded as the necessary conditions of constructive federal-provincial relations.

E. The Federal Spending Power

In Canada as in other federations it has become increasingly common for the federal government to give financial support to activities within the legislative jurisdiction of the regional administrations. Characteristically, those who receive such payments—individuals, private associations, local authorities and state or provincial governments—must meet the conditions of eligibility determined by the federal authorities.¹⁸ The widespread use of this device has permitted the federal government to involve itself in a large number of matters otherwise outside its jurisdiction.

The limits of the federal spending power in the Canadian constitution have never been judicially determined with any precision. The Judicial Committee of the Privy Council in declaring invalid the federal Employment and Social Insurance Act of 1935 declared:

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 Section 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. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. . . .¹⁹

By upholding the "general proposition" that Parliament might tax and spend as it chose and at the same time qualifying the power with imprecisely worded restrictions, the 1937 decision did little to clarify the limits of the federal spending power. Federal policy-makers seem to have taken this decision to mean that federal authorities are

precluded from supporting activities within provincial jurisdiction wholly or partly from the proceeds of a levy made explicitly for these purposes. Thus in 1950, when the federal government decided to finance the projected Old Age Security pensions from three special taxes, a constitutional amendment was sought and secured to give Parliament concurrent jurisdiction with the provinces in that field. No amendment was believed necessary, however, in 1944 when provision was made for family allowances financed wholly from the general revenues of the Dominion.

In 1957 the Exchequer Court of Canada upheld the validity of the federal Family Allowance Act.²⁰ F. A. Angers had claimed deductions on his federal income tax as if his children did not qualify for family allowances although they were so eligible. The court refused to accept Angers' claim for such deductions. Professor Bora Laskin has said that this decision "... lends emphasis to the view that the courts have no concern with the disbursement of federal funds which have been validly raised."²¹

Commentators on the Canadian constitution have defended on two grounds the exercise of the federal spending power in respect to matters within the legislative jurisdiction of the provinces. First, it has been justified under Parliament's jurisdiction enumerated in Section 91 (1) of the B.N.A. Act to legislate in respect to "The Public Debt and Property."²² Second, it has been claimed that under British parliamentary traditions the prerogative power permits the Crown to disburse as it chooses subject only to prior parliamentary authorization.²³ However, there has been no definite determination of this matter by the courts. L. M. Gouin and Brooke Claxton undertook a detailed examination study of the spending power as part of their investigation for the Rowell-Sirois Commission²⁴ and their conclusions would lead one to doubt the constitutional validity of several existing programmes of federal expenditures on matters within provincial jurisdiction.

The exercise of the federal spending power has been the chief mechanism by which the influence of the federal government has been enhanced vis-à-vis the provinces in the past two decades. The nature and extent of such federal involvement through conditional grants to the provinces and local authorities will be analyzed in Chapter VI. Federal financial assistance has been made available to individuals and non-governmental associations in such diverse forms as family allowances, per capita grants to universities, and grants-in-aid of cultural and athletic activities. The federal power to spend is also interpreted as encompassing the federal power to lend to governments or to private individuals and groups or to guarantee loans made for purposes specified by the federal authorities. Since Canada's constitutional system has proven relatively resistant to change through amendment or evolving patterns of judicial review, important readjustments in the relative roles of the federal and provincial governments have come to be effected in two main ways—through the exercise of federal power to spend on objects within provincial legislative

jurisdiction and through the concomitant of this power, that the federal authorities may determine the conditions under which such financial benefits will be conferred.

The use of the spending power results in a situation where the sharing of the financial burdens and functional responsibilities between the federal and provincial governments is affected in many important matters by policy decisions of the federal authorities, acting either unilaterally or in collaboration with the provinces, without reference to the constitutional delineation of legislative powers under Sections 91-95 of the British North America Act. For the most part, the B.N.A. Act and its subsequent interpretation by the courts relate to the regulatory activities of government rather than to the provision of services. There is a large body of judicial decision defining the respective legislative powers of Parliament and the provinces in such spheres as the regulation of insurance, agricultural marketing, the incorporation of companies, the control over trade and transportation, and industrial relations. The courts have pronounced relatively little, however, about the limits of federal involvement in health, welfare and education either through (a) direct financial assistance to provinces, local authorities, private groups and individuals; or (b) the exercise of federal ancillary powers concerning such federal responsibilities as Indian affairs, immigration, defence and penitentiaries.

The distribution of legislative powers under the B.N.A. Act as judicially interpreted has, however, a significant effect on the way in which the federal power to spend is exercised. In general terms, federal control through financial assistance to an activity within provincial legislative jurisdiction proceeds through indirection. The federal authorities provide financial inducements for those eligible — provincial or local governments, private individuals or groups — to conform to federal conditions, but refusal to do so is not an offence under federal law. Further, in such matters, the federal authorities often accomplish their objectives through the collaboration of private groups, local authorities or provincial governments rather than by the direct action of their own administrative agencies.

The exercise of the federal spending power has been a device making for both stability and change in the Canadian constitutional system. This device has made a stable division of legislative powers between Parliament and the provinces compatible with evolving expectations about the appropriate roles of each. It is reasonable to believe that had the federal government been confined to matters within its legislative jurisdiction there would have been strong pressures in the period after the Second World War to effect major changes through constitutional amendment or delegation. The evolution of the contracting-out device to be used in combination with the spending power offers yet a new dimension to flexibility under the existing constitution.²⁵

A related question concerns the constitutional limits, if any, of the power of a province to expend funds on matters outside its legislative jurisdiction. There are no such limits according to the argument of F. R. Scott that "making a gift is not the same as making a law" and that the Crown may spend as it chooses after appropriate authorization by the legislature.²⁶ In the past, the government of Quebec has from time to time made grants for educational and cultural activities outside provincial boundaries and the establishment in 1963 of a Service du Canada français d'outre frontières in the Department of Cultural Affairs indicates that provincial policy is to increase this kind of assistance. Like federal spending power, this matter has not had definitive judicial interpretation.

F. The Particularity of the Position of the Individual Provinces

One of the more distinctive features of the law and practice of Canadian federalism is that the relations between the federal government and the individual provinces vary. This differentiation was defined in the British North America Act of 1867 and continued by the circumstances under which the later six provinces entered Confederation. With the exception of Alberta and Saskatchewan (which were established in 1905 under almost identical legislation) no province is, in a constitutional sense, precisely "comme les autres."²⁷ These particularities in law have been combined with the willingness of the federal authorities, since Confederation, to meet the special needs of particular provinces and groups of provinces. The resulting situation gives the federal system resources of flexibility it would not otherwise have.

Like other politicians in the British parliamentary tradition those responsible for the British North America Act of 1867 made no clear-cut distinction between fundamental constitutional law and other kinds of statutory provisions. The Act thus contained not only what one can reasonably regard as the constitution of the new Dominion, including the constitutions of the provinces of Ontario and Quebec which it created, but also a large number of transitional measures to effect the establishment of the new federation. The most characteristically federal features of the Act (Sections 91, 92, 93 and 95), conferring their respective legislative authority on Parliament and the provinces, applied equally to Ontario, Quebec, Nova Scotia and New Brunswick. However, five important provisions elsewhere in the Act gave recognition to the particularity of Quebec.

1. In Quebec alone of the provinces English and French had equal official status in the proceedings and records of the legislature and in the courts in the province established either by the Dominion or Quebec (Section 133).

2. It was provided that with the consent of the common-law provinces *i.e.* those other than Quebec, the Parliament of Canada might make provision for the uniformity of any or all laws related to

property and civil rights (Section 94). If this section had been implemented, as was apparently expected by the Fathers of Confederation, there would have resulted a significantly different distribution of legislative powers between the Quebec legislature and Parliament than prevailed in respect to the other provinces.

3. It was provided that Senators from Quebec should either hold the qualifications of \$4,000 in unencumbered real property within one of the 24 electoral divisions outlined in the Act and from which they were chosen or be a resident of such division (Section 23,6). Apart from Quebec it was provided only that a Senator be a resident of the province from which he was appointed.

4. It was provided that in 12 electoral divisions sending members to the legislative assembly of Quebec the boundaries could not be altered without the concurrence of a majority of the members of those districts specified in the Second Schedule of the Act (Section 80).

5. It was provided that judges of the courts of Quebec should be selected from the bar of that province (Section 98). There was no such provision in respect to the other provinces.

The complex financial settlement enacted in Sections 102 to 124 of the B.N.A. Act provided for varying patterns of financial relations between the original provinces and the Dominion.

The differentiated position was extended as new provinces entered Confederation.

1. Under Section 30 of the Manitoba Act of 1870, Section 21 of the Saskatchewan Act of 1905 and Section 21 of the Alberta Act of 1905, Crown lands of these provinces were to be administered by the Dominion. This situation lasted until 1930 when the Prairie provinces had these lands brought under their control.

2. Under the Schedule of the Imperial Order-in-Council admitting Prince Edward Island to the Dominion in 1873 the federal government accepted permanent responsibilities for

Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the Mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion.

The maintenance of telegraphic communication between the Island and the Mainland of the Dominion; . . .²⁸

3. Section 17 of the Terms of Union with Newfoundland enacted as federal legislation in 1949 provided for the protection of denominational rights in the Newfoundland school system differently than did Section 93 of the B.N.A. Act applying to the other provinces. According to the 1949 provision the Legislature of Newfoundland was denied the authority to make laws "prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges" existing at the time of Union.

These institutions are to receive funds voted by the legislature on a non-discriminatory basis. Although these denominational privileges are broader than those under Section 93, and the definition of prejudicial provincial action more specific, the Terms of Union did not give the federal executive and Parliament any powers to protect the rights of an aggrieved minority and such an appeal must thus be directed to the courts.

One of the major themes of the tangled history of federal-provincial financial relations has been the willingness of the federal government to accede to the needs and pressures of individual provinces or groups of provinces. The process was begun in 1869 when the federal authorities moved away from the financial provisions which were specified in the B.N.A. Act to be "in full Settlement of all future demands on Canada" to meet the exigencies of Nova Scotia.²⁹ Since that time the financial relationships between the federal government and the provinces have remained stubbornly resistant to any general rationale. On three occasions—in 1907, 1941 and 1945-46—federal governments have attempted to arrive at a stable financial settlement with the provinces. On the latter two occasions the suggested financial terms were related to comprehensive reallocations of functional responsibilities between the two levels. None of these attempts was successful and although since 1947 the general principle of equalization has been established the federal government has continued to respond positively on occasion to the needs of particular provinces. In the last 30 years also, successive federal administrations have taken measures to mitigate the particular difficulties of the Prairie and Atlantic provinces. Since the establishment of the Prairie Farm Rehabilitation Administration in 1935, the federal authorities have participated in a series of programmes with the Prairie provinces specifically designed to aid western agriculture, including various *ad hoc* measures such as those to move fodder into drought areas, the compensation of farmers for unharvested crops, and studies undertaken under the auspices of the Federal-Provincial Prairie Provinces Water Board. The difficulties of the Atlantic provinces have been recognized in such federal policies as those related to the Maritime Marshland Development Programme begun in 1948, the activities of the Atlantic Provinces Power Development Programme since 1958 and the unconditional subsidies paid since 1958-59 as Atlantic Provinces Adjustment Grants. Over the years also, the federal government has been willing to share with individual provinces the financial responsibilities for particular capital works including among many others the South Saskatchewan River Development project, the St. Mary's, Bow River and Eastern Irrigation projects in Alberta, the Metro Toronto Conservation Programme and Expo 1967. In general then, federal-provincial financial and administrative relations have been characterized from the first by a differentiation between the various provinces and groups of provinces.

Several other actual or projected procedures involve some recognition of the particularity of the provinces:

1. The delegation of legislative powers between Parliament and the provinces both under the existing conditions and the terms of the so-called Fulton-Favreau formula provides possibilities for provincial differentiation.

2. The contracting-out device as it relates both to conditional grant programmes and to wholly federal programmes makes possible a different sharing of financial and administrative responsibilities between the federal government and those provinces that choose to participate and those that do not.

3. It is possible that in the future more explicit recognition will be given to the more populous provinces in the making of certain kinds of decisions.

- a) The federal enactment of 1965 setting up the Canada Pension Plan provides that any future federal enactment changing certain basic features of the Plan shall not be proclaimed to be in effect until after consent has been secured from the lieutenant-governor-in-council of at least two thirds of the included provinces having at least two thirds of the population of the included provinces.
- b) The Fulton-Favreau formula for constitutional amendment provides that certain amendments can be made only with the consent of Parliament and that of two thirds of the provinces having at least 50 per cent of the population of Canada. Those amendments relate in general to the structure and functioning of the federal executive and legislature.

In summary, the law and practice of the Canadian constitutional system provide for many kinds of differentiation between the positions of individual provinces and groups of provinces in their relations with the federal government. This tradition has provided a major resource of adaptability in the Canadian federal system.

G. The Intergovernmental Delegation of Powers

An alternative to the redistribution of legislative powers between Parliament and the provinces through constitutional amendment or changing patterns of judicial review is the intergovernmental delegation of powers by the mutual consent of the governments concerned. Under the delegation procedure some or all provinces would confer certain powers on Parliament or agencies operating under federal legislation. Alternatively, federal powers might be wielded by provincial legislatures or provincial executive agencies. Many students of the Canadian constitution have believed delegation to be particularly appropriate to the regulatory activities of government where the constitutional division of legislative powers sometimes makes effective public control difficult or impossible and where the sharing of responsibilities through the grant-in-aid device is not feasible.

Section 94 of the British North America Act of 1867 contemplated the early assimilation of the body of legislation relating to "Property and Civil Rights" in the provinces other than Quebec. It was expected that, by provincial agreement, uniform federal law related to these matters would replace the enactments of the individual legislatures in provinces with a common law tradition. This section has never become operative although from time to time constitutional specialists have suggested that it be used to overcome what they regard as an impasse in the division of legislative powers.

The Rowell-Sirois Commission recommended that constitutional provision be made for the intergovernmental delegation of legislative powers as a device for

over-coming . . . the difficulties which arise from the division between the provinces and the Dominion of legislative powers over many complex economic activities. . . . Such a power of delegation would give the constitution a flexibility which might be very desirable. With the present degree of economic integration on a national scale it is extremely difficult for either the Dominion or a province to frame legislation which will deal separately and effectively with the local or with the inter-provincial aspects of business activity as the case may be.³⁰

The Commission suggested that delegation might be useful in respect to the marketing of agricultural products, the control of fisheries, industrial disputes and the regulation of insurance companies.³¹ However, it was recognized as very doubtful that such delegation might validly be effected under the existing constitution.³²

The postwar decisions of the Supreme Court of Canada have clarified the present constitutional position of delegation.³³ Essentially this position is that neither Parliament nor a provincial legislature may delegate any of its legislative powers to the other but that either might so delegate to a body subordinate to the other.

At present delegation is used under two federal enactments to confer federal powers on provincial agencies:

1. Section 2 (1) of the Agricultural Products Marketing Act enacted in 1949 reads:

(1) The Governor-in-Council may by order grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of such agricultural product outside the province in interprovincial and export trade and for such purposes to exercise all or any powers like the powers exercisable by such board or agency in relation to the marketing of such agricultural product locally within the province.

(2) The Governor-in-Council may by order revoke any authority granted under subsection one.

At the end of 1964 the governor-in-council had delegated powers in extra-provincial trade to 36 marketing boards operating under

provincial legislation. In such actions the federal authorities do not attempt to influence boards in the various provinces to make their regulations uniform but simply act to give their regulations extra-provincial effect.

2. In 1954 Parliament enacted the Motor Vehicle Transport Act³⁴ to make the regulations of provincial motor transport boards operative in respect to extra-provincial traffic. In the case of *Winner v. S.M.T. (Eastern Ltd.) and A.-G.N.B.*,³⁵ decided by the Supreme Court of Canada in 1951, the validity of provincial regulation of such traffic was denied. After the decision the federal government apparently concluded that it was inappropriate to enact a system of extra-provincial motor transport regulation itself. At the end of 1964 the powers of extra-provincial regulation had been extended by order-in-council to the motor vehicle transport boards of all the provinces except Newfoundland. Although the power has never been exercised, Section 5 of the Act provides that "The Governor-in-Council may exempt any person or the whole or any part of an extra-provincial undertaking or any extra-provincial motor transport from any or all of the provisions of this Act."

The Fulton-Favreau formula provides a procedure which would permit the mutual inter-delegation between Parliament and the provinces of the authority to enact particular pieces of legislation within the other's competence. The relevant sections of the draft bill agreed upon by the federal and provincial governments in 1964 read as follows:

94A. (1) Notwithstanding anything in this or in any other Act, the Parliament of Canada may make laws in relation to any matters coming within the classes of subjects enumerated in classes (6), (10), (13) and (16) of Section 92 of this Act, but no statute enacted under the authority of this subsection shall have effect in any province unless the legislature of that province has consented to the operation of such a statute in that province.

(2) The Parliament of Canada shall not have authority to enact a statute under Subsection (1) of this section unless

- (a) prior to the enactment thereof the legislatures of at least four of the provinces have consented to the operation of such a statute as provided in that subsection, or
- (b) it is declared by the Parliament of Canada that the Government of Canada has consulted with the governments of all the provinces, and that the enactment of the statute is of concern to fewer than four of the provinces and the provinces so declared to be concerned have under the authority of their legislatures consented to the enactment of such a statute.

(3) Notwithstanding anything in this or in any other Act, the legislature of a province may make laws in the province in relation to any matter coming within the legislative jurisdiction of the Parliament of Canada.

(4) No statute enacted by a province under the authority of Subsection (3) of this section shall have effect unless

(a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and

(b) a similar statute has under the authority of Subsection (3) of this section been enacted by the legislatures of at least three other provinces.

(5) The Parliament of Canada or the legislature of a province may make laws for imposition of punishment by fine, penalty or imprisonment for enforcing any law made by it under the authority of this section.

(6) A consent given under this section may at any time be revoked, and

(a) if a consent given under Subsection (1) or (2) of this section is revoked, any law made by the Parliament of Canada to which such consent relates that is operative in the province in which the consent is revoked shall thereupon cease to have effect in that province, but the revocation of the consent does not affect the operation of that law in any other province, and

(b) if a consent given under Subsection (4) of this section is revoked, any law made by the legislature of a province to which the consent relates shall thereupon cease to have effect.

(7) The Parliament of Canada may repeal any law made by it under the authority of this section, in so far as it is part of the law of one or more provinces, but if any repeal under the authority of this subsection does not relate to all the provinces in which that law is operative, the repeal does not affect the operation of that law in any province to which the repeal does not relate.

(8) The legislature of a province may repeal any law made by it under the authority of this section, but the repeal under the authority of this subsection of any law does not affect the operation in any other province of any law enacted by that province under the authority of this section.³⁶

The discussions on the amending procedure prior to federal-provincial agreement on the proposed formula in 1964 indicate that the delegation provisions are a means of getting around the relatively inflexible method of amending the constitution as it relates to the division of legislative powers between Parliament and the provinces. It is, however, impossible to predict the extent that the delegation procedure would be used if the projected amending formula became operative.

H. The Federal Emergency and Defence Powers

It is a truism of Canadian constitutional law that since the decision of the Judicial Committee of the Privy Council in the *Local*

Prohibition case of 1896 the courts have followed a restrictive interpretation of the general powers of Parliament to legislate in respect to the "Peace, Order and Good Government of Canada" in respect to all matters not assigned exclusively to the provinces. In the broadest of terms, the federal authorities have few opportunities, apart from circumstances related to international hostilities, to extend their jurisdiction to matters otherwise within provincial control on the justification that the subject in question has become of urgent and country-wide importance and thus within the general powers of Parliament under the opening sentence of Section 91. The validity of this statement is not in any significant way qualified by a contradictory trend of judicial decisions beginning with *Russell v. The Queen* in 1882 which would give a less restrictive interpretation to the federal residual power.

In Canada as in other federations the normal distribution of legislative powers between the federal and the regional governments does not operate when the country is engaged in full-scale international hostilities. The constitutional justification for this overriding of provincial powers has been the opening words of Section 91 allowing the federal Parliament to make laws in respect to the "Peace, Order and Good Government" of Canada. There is no incompatibility between the necessities of defence and the long-run survival of federal institutions if emergency powers are invoked only when the country is fully committed to international conflict and if the normal practices of federalism are restored within a short time after such hostilities end. More difficulties arise when emergency powers are exercised (a) after an international conflict is ended in fact, if not in law, to permit the federal government to deal with economic and other dislocations attributed to the war; (b) in periods of acute international tension short of full-scale hostilities. The continuing state of international crisis in which we all live and the nature of modern mobilization on either a partial or a total basis make the normal workings of federalism particularly vulnerable to international developments and the views of the federal authorities about whether such developments require an extension of federal legislative powers.

The War Measures Act enacted by Parliament in 1914 provided that "the Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary for the security, defence, peace, order, and welfare of Canada." Among the powers which might be exercised by Parliament and which were enumerated in the Act were those over "trading, exportation, production and manufacture" and "appropriation, control, forfeiture, and disposition of property or of the use thereof." The Act also provided that the issue of a proclamation by the Governor-in-Council should be conclusive evidence of the existence of a state of emergency.

Most of the orders and regulations made under the War Measures Act were repealed from January 1, 1920 under an order-in-council of

December 20, 1919. From this repeal were excluded, among other specific orders, those related to the control of paper which were to remain in force until the end of another session of Parliament. In *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*³⁷ the Judicial Committee of the Privy Council in 1923 upheld the power of the federal government to continue the controls over paper after the actual hostilities had ceased but "while the effects of war conditions were still operative." The impact of this decision was to give constitutional justification to the federal government's actions in overriding provincial legislative powers to facilitate the transition to peacetime conditions after both the First and Second World Wars and to confer on the federal authorities a wide measure of discretion in determining when conditions were appropriate to the restoration of the normal workings of federal institutions.

The War Measures Act was never repealed and was proclaimed in effect on the outbreak of war in 1939. The sweeping powers conferred on the governor-in-council, enumerated in a sense by other wartime legislation such as the Department of Munitions and Supply Act and The National Resources Mobilization Act, provided the legal basis for federal action towards a more complete mobilization of resources than had been effected in the previous conflict. In the fall of 1945 the government introduced into Parliament the National Emergency Transitional Powers Act³⁸ which read in part:

. . . The Governor-in-Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of . . .

(b) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace;

(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace; . . .

(e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

It was clear both by the government's sponsorship of this enactment and by policy statements made by its leaders at the end of the war that federal emergency powers would be used to effect an orderly transition to peacetime conditions and that the federal authorities would themselves determine the tempo of decontrol and the restoration of the normal division of legislative powers between Parliament and the provinces.

The government did not invoke the War Measures Act during the Korean conflict. However, certain federal emergency powers were wielded under the Essential Materials (Defence) Act of 1950 and the Emergency Powers and the Defence Production Acts of 1951. During the debate on the former legislation, the Minister of Justice defended

somewhat obliquely the overriding of provincial jurisdiction as an exercise of federal powers over trade and commerce and over defence.³⁹ The constitutional validity of these enactments was never tested in the courts. In the House of Commons in 1951 Stanley Knowles outlined concisely the ambiguities of the Canadian constitution as it related to emergency powers:

. . . at the risk of getting into paths where only lawyers should tread I should like to comment on the situation that seems to be developing with respect to the constitutional basis on which we are proceeding in this country. It seems to me that there are three different bases on which we operate. We have the normal situation, although heaven knows when we are going to get back to it, when our constitution is the British North America Act. Then we have the completely abnormal situation which wartime creates when our effective constitution becomes the War Measures Act. Then we have this third stage that comes in between, which is neither a normal time when we are governed by the British North America Act nor an abnormal time when the War Measures Act gives the federal government all powers. We have this in-between stage when Parliament declares an emergency and gives certain powers to the federal government, even though those powers may override the British North America Act.⁴⁰

A related uncertainty is that the courts have never authoritatively defined the limits of Section 91 (7) of the British North America Act which confers upon Parliament the exclusive authority to legislate in respect to "militia, military and naval service and defence." It is possible that this power might validly have been invoked to justify widespread federal intervention in matters normally within the jurisdiction of the provinces in support of what Bora Laskin has called "cold war federal policies in the economic field."⁴¹ In 1951, F. R. Scott suggested tentatively that in the prolonged and perhaps permanent state of international unrest, "It may be that the one word 'Defence' in Section 91 will grow to be a new residuary clause in the Constitution."⁴² This has not in fact happened but on the basis of previous judicial decisions relating to the exercise of the federal emergency powers it seems unlikely that the courts would, except under the most unusual circumstances, challenge the federal government's judgments that certain measures were necessary for the defence of Canada.

I. Summary and Conclusions

In this chapter we have used the term "devices of adjustment" to mean the procedures by which the constitutional division of powers, privileges and responsibilities between the federal and provincial governments has been progressively modified. Our attention has been mainly on the period since the Second World War. In broad terms, the rapid evolution of the federal aspects of the Canadian constitutional system in the past quarter-century has been through the public policy

actions of the federal and provincial governments, sometimes acting unilaterally and sometimes in collaboration, rather than through amendment or judicial review. Contrary to the experience in the decade of the Great Depression, the governments involved have for the most part not found the division of legislative powers as judicially interpreted an overwhelming barrier to their objectives. J. A. Corry has written perceptively of ". . . the political process replacing, or at any rate supplementing more extensively than in earlier years, the judicial process" in developed federal systems, and he has concluded:

The political processes have a flexibility and an easy adaptability to the dominant moods of the country that constitutional amendment and judicial interpretation both lack. There will continue to be regional aspirations which, even if they cannot have free play in a mature federalism, still have to be recognized and reckoned with. There will still be regional resistance by the people in the poorer areas against the tribute levied on them by the metropolitan areas. All these stresses and conflicts need to be negotiated and compromised in *ad hoc* arrangements. . . .

At any rate, we are likely to have to live for a long time with the equivocal structure called co-operative federalism. It has arisen because several separate governments share a divided responsibility for regulating a single economic and social structure. It is most unlikely that any constitution could be devised which would enable each to perform its specific functions adequately without impinging seriously on the others. So their activities are inevitably mingled, and co-operative arrangements must be worked out. In the result, formal powers are not co-terminous with operating responsibilities; the two levels of government as well as the several state and provincial governments interpenetrate one another in many places and ways. Under the heat and pressure generated by social and economic change in the twentieth century, the distinct strata of the older federalism have begun to melt and flow into one another.⁴³

There is of course no assurance that "political processes" will continue to displace amendments and judicial review as the chief procedures of constitutional evolution. It is at least possible that either the federal and some or all of the provincial governments will find that the existing division of legislative powers and the results of intergovernmental interactions are incompatible with their objectives and will seek explicit constitutional changes. Circumstances can be visualized where private interests would give greater support to judicial challenges to federal and provincial legislation. Influences may grow towards making the federal constitution a more effective symbol of what are perceived to be the essential aspects of the Canadian experience. In the meantime the legal-constitutional aspects of Canadian federalism show considerable resources of adaptability.

A conditional grant is a subsidy paid by one government to another with the requirement that the receiving jurisdiction will expend the funds in ways deemed appropriate by the authority making the payment. In a federal system the extent and nature of conditional grants are a useful indicator of the relative strength and vigour of the central and regional governments. When currents towards country-wide integration are running strongly we can expect grant-aided activities to proliferate and the federal authorities to be willing and able to enforce their own standards of appropriateness on the state or provincial administration. Conversely, when influences towards regional autonomy are strong we see resistance by these jurisdictions to the restrictions on their autonomy inherent in such procedures. So it has been in Canada. Between 1945 and 1960 the conditional grant device assumed a central importance in federal-provincial relations. Although provinces on occasion were dissatisfied with the way particular federal actions were taken, there was, apart from Quebec, little sustained provincial concern about the over-all impact of the device and little opposition to its extension to new matters within provincial legislative jurisdiction. In a sense, federal-provincial relations had become "factored." The failure of the 1945-46 Conference on Reconstruction to agree on a comprehensive redistribution of revenues, revenue sources and functional responsibilities gave rise to piecemeal collaboration on matters of more limited scope. However, by the early 1960s the magnitude of the grant payments, the policies of Quebec towards this procedure and the increasing vigour and administrative maturity of the provinces generally projected the conditional grant device into the forefront of federal-provincial controversy.

A. Circumstances Favouring Development of Conditional Grants

The development of conditional grant programmes in Canada has been traced elsewhere and does not need to be repeated here.¹ During the period from 1918 to the great Depression several programmes were

established. However, the federal Liberal party which was in power during most of this period had an ideological distaste for the procedure and failed to renew the arrangements when the agreements with the provinces expired. The one exception was the old age pension arrangements begun in 1927. During the 1930s very large sums were paid by the federal government to the provinces and municipalities to assist them with the desperate problems of the Depression but these arrangements were almost all of an *ad hoc* nature.² It was only after the Second World War that the grant-in-aid device assumed a place of central importance in federal-provincial relations.

In the years after the war, within the English Canadian context at least, there was a developing consensus favouring a more equalized range and more equalized standards of basic public services throughout Canada. It had become a widespread belief that wide interprovincial or interregional disparities in these services were indefensible and that the federal government had a moral if not a constitutional responsibility to mitigate these disparities. This point of view was usually associated with a belief that federal decisions in these matters were almost inherently better than those of the provinces and with a profound lack of concern that the functions concerned were within the legislative jurisdiction of the provinces. The federal government might, of course, have relied on unconditional subsidies based on some criteria of fiscal need to solve the problem of wide disparities in the abilities of the provinces to provide services. However, at least from a partisan-political point of view this would have been an inadequate response. Specific pressures were being placed on federal authorities to assist particular provincial functions and these pressures were being exerted against a background of growing public disposition to favour, or at least tolerate federal action to achieve countrywide equalization in basic services.

Successive federal governments had in the postwar period both the desire and the financial resources at their disposal to respond positively to the influences described above. The New National Policy called for both a high degree of fiscal centralization and aggressive federal leadership in a number of matters within provincial legislative jurisdiction. Although provincial agreement could not be secured on the comprehensive Green Book proposals, the general rationale of this plan was undoubtedly the frame of reference accepted by federal elected and appointed officials in the succeeding decade, and perhaps after. The conditional grant device was a useful expedient for the piecemeal accomplishment of some of the objectives of the New National Policy, particularly in the fields of public assistance and health services. The distribution of the tax sources between the two levels allowed the federal authorities to support an increasing range of provincial services within the limits of federal tax rates and budgetary surpluses or deficits believed appropriate. It also put pressures on the provinces to receive the subsidies and to meet required conditions of eligibility.

The growth of specialization and professionalization within the federal and provincial governments saw the growth of Canada-wide groups concerned with particular public functions, groups that pressed for greater expenditures on these functions and for minimum Canada-wide standards of service. J. A. Corry has spoken of the "nationalization" of sentiment among the Canadian elites and the disposition of these groups to pursue their objectives through federal action.³ So far as conditional grants were concerned, the most important of these elites were those whose working concerns were in particular public functions in such fields as health, public assistance, forestry and natural resource development. Within these particular professional and sub-professional groups there was considerable agreement about appropriate kinds of public action in these activities and of course about the necessity of having more public revenues spent on them. The actual workings of conditional grant agreements insulated those administering the programmes to some degree from normal cabinet and treasury control and almost completely from the grosser forms of partisan-political jobbery.⁴ The increasing influence of these specialized bureaucratic elites, normally with allies outside government, worked in conjunction with the influence of other federal administrative groups that were disposed to favour federal leadership in relations with the provinces. Together these groups encouraged and fostered the growing public disposition to favour Canada-wide standards in public services.

B. The Interaction of Federal and Provincial Purposes

It would be impossible without a detailed investigation of the establishment of each grant-in-aid to determine the specific objectives which the federal authorities were attempting to attain by such action. For purposes of analysis three kinds of federal aims can be distinguished, although these are not mutually exclusive and in the case of most programmes Ottawa was probably trying to pursue more than one of them.

First, the federal government may be primarily interested in securing a measure of Canada-wide uniformity in the range or standard of the public amenities which have come to be regarded as within the social minimum. This presumably was the kind of motivation which prevailed in respect to hospital insurance, pensions for the blind and for the permanently and totally disabled.

Second, the federal authorities may find it impossible to discharge certain of their own responsibilities in the absence of provincial action which is not expected unless federal financial inducements are offered. This consideration prevailed when in 1960 the government radically increased its levels of contribution for vocational training facilities after the Senate Report on Manpower and Employment had shown that the labour force was deficient in skills.

Third, the federal involvement may be almost entirely on the basis of cost-sharing in an expensive provincial activity. This seems to have been the primary motivation in the enactment of the federal Unemployment Assistance Act in 1956. The Act committed the federal government to pay 50 per cent of general social assistance cost incurred by the provinces and municipalities but did not set conditions about the procedures by which such assistance was paid.⁵

A federal-provincial conditional grant programme can influence a particular public function in three ways.

First, such an arrangement almost always encourages a higher total expenditure on the function than would have occurred in absence of the grant. However, the precise amount of the extra expenditure which is induced by the grant-in-aid cannot be accurately determined except in those circumstances where it is almost certain that the activity would not have been undertaken in the absence of federal involvement. It is probable that the more prosperous provinces would have provided the service, or one like it, anyway and that the proceeds of the grant are like a windfall. In the poorer jurisdictions, however, the federal inducement triggers commitments of provincial revenues which might in its absence have been spent on other provincial purposes.

Second, the grant-in-aid arrangement may encourage some or all of the receiving jurisdictions to undertake a function that would not otherwise have been carried on. In such cases conditional grants work towards a uniform countrywide *range* of services. For example, it is unlikely that all the provinces would now have universal hospital insurance schemes in the absence of federal financial assistance for this purpose.

Third, the programme can induce the provinces to carry out the aided function in a way they would not have otherwise chosen. Frequently discussions of conditional grants talk about national standards which are brought about by this device.⁶ This term connotes a precision which does not accurately describe the ways in which the federal authorities characteristically act to influence provincial and local action. It is quite unrealistic to believe that in most cases anything approaching uniformity in standards of service throughout Canada can be attained through federal grants-in-aid. In some circumstances federal influence is exerted by requiring prior federal approval of the physical plans for capital projects or the administrative structures for services. In other cases, as with the health grants, federal approval is required for the object on which federal moneys are to be spent. The federal government may also try to influence provincial action by defining certain kinds of costs as shareable and others as not or by providing a higher rate of contribution towards particular costs than for others. Federal influence may also take the form of indirection by efforts to encourage training and research in a particular field or the provision of consultative and advisory services.

There are several constraints on the ability of the federal authorities to influence the range and standard of provincial services through the conditional grant device. The federal government is after all seeking to pursue its own objective when it decides to embark on a shared-cost venture. It can be frustrated by the refusal of one or more of the provinces to participate. Experience has shown that this participation can never be taken for granted, particularly in the case of the larger and more prosperous provinces. In most circumstances the conditions under which federal moneys will be available are worked out in collaboration with the provincial officials who will implement the arrangements and federal officials are understandably concerned to secure the future cooperation of their provincial counterparts. Once a grant-in-aid programme is in operation it is ordinarily not feasible for the federal government to refuse to make payments to a province whose actions concerning the programme are not in harmony with federal procedures or objectives. Because of this kind of interplay of federal and provincial influences, grant-in-aid arrangements characteristically provide for a relatively wide range of variations among provinces concerning the aided programme. Growing provincial confidence and competence can be expected to increase provincial influence in conditional grant programmes as in other matters. In particular, the contracting-out device which will be analyzed in the next chapter may enhance provincial discretion respecting existing or projected programmes. This could occur where contracting-out with a fiscal equivalent is a real alternative to participation in a programme.

To come to definite conclusions about the impact of grants-in-aid on the provinces is impossible because to do so one would have to make judgements about what would have happened in the absence of grants. The following points can, however, be made:

First, in some matters—for example, civil defence, research in public health and occupational rehabilitation—federal inducements may well have resulted in the development of activities which the provinces would otherwise have had little predisposition to undertake. In respect to the Trans-Canada Highway, roads-to-resources and some aspects at least of vocational training, federal involvement probably has given rise to activities which in a relative sense the provinces would have neglected.

Second, federal participation has resulted in the standards of aided functions conforming more closely to prevailing standards in such professional fields as social work, forestry, public health and so on than would otherwise have been the case, even with equivalent provincial expenditures on these functions. In most grant-in-aid programmes federal approval must be given to the physical plans for a capital project or the proposed administrative arrangements for a new grant-aided activity. This means that such matters are scrutinized by federal programme officials whose frames of reference are those prevailing in these specialized fields. As we have seen, aided activities are to a degree insulated from the partisan-political and

other such influences to which provincial activities are sometimes subjected and federal and provincial programme officers usually cooperate to sustain this insulation. The devising and implementing of a grant-in-aid programme usually involves close and continuous collaboration between federal and provincial officials with a common professional background and gives rise to a pattern of formal and informal contacts on this professional axis.⁷ This kind of cooperation is perhaps most influential in respect to the standards of aided services in the smaller provinces where bureaucracies are relatively unspecialized and where administrative activity usually takes place under relatively close partisan-political supervision.

Third, federal grants-in-aid of hospital insurance and of general and categorical public assistance go a very long way in making it possible for Canadian residents to move freely among local jurisdictions within provinces and between provinces without prejudicing their access to these services. Left to itself, even the most liberally-minded provincial or local jurisdiction can be expected to impose residence requirements in respect to such services. The grant-in-aid programmes are effective in mitigating these restrictions. The Hospital Insurance and Diagnostic Services Act requires the participating provinces to make insured services available to residents on "uniform terms and conditions" (i.e. without local residence requirements) and under federal leadership the provinces have been able to achieve a high degree of interprovincial reciprocity. Statutory provisions for reciprocity are contained in the federal enactments relating to general public assistance and to pensions for the blind, the permanently and totally disabled and those persons between 65 and 69 years of age who meet the requirements of provincial means tests.

Fourth, in some provinces at least the enhancement of standards induced by federal involvement has probably taken place at the expense of functions for which no federal assistance was available.⁸ Because "fifty-cent dollars" are available for some kinds of activities the provincial governments are often under pressure to commit more provincially-raised revenues to these activities than they would otherwise do and consequently to deny resources to non-aided services. It is reasonable to suppose that these difficulties are more acute in the less prosperous provinces, where otherwise aided functions might not have been undertaken and where action to bring these activities up to the standards required for federal reimbursement results in the depression of standards in non-aided activities to levels further below Canada-wide averages than they would otherwise be. To take one striking example, elementary education in the Atlantic provinces may well have borne heavy disabilities because of federal grants-in-aid for other provincial programmes.

Fifth, the grant-in-aid procedure in some cases inhibits both the federal and provincial governments from realizing precise objectives and results in a more indiscriminate expenditure of public funds than if only one jurisdiction were involved. The obstructions in the path of the federal authorities in pursuing precise aims have already been

described and related to the need to secure the participation of the provinces. On the other hand, participation in a grant-in-aid programme requires the provinces both to alter their expenditure priorities and to carry out the aided function in a way they might otherwise not choose to do. These restrictions on provincial discretion may not be onerous if the province is not committed to either long-range budgetary or programme planning and such has in fact been the case in most provincial jurisdictions until recently. If the province has formulated its objectives in these terms fairly explicitly, however, subsequent federal inducements to participate in shared-cost arrangements almost inherently result in more restrictions on its autonomy. Unless there is greater articulation of federal and provincial objectives about comprehensive policy concerns, rather than about policies affecting particular programmes, we can expect that public revenues in Canada will continue to be allocated in a less discriminating way than if each level had exclusive responsibility for particular public activities and was engaged in long-term budgetary and programme planning.

C. Conditional Grants from 1960 Onwards

Apart from Quebec neither the provinces nor the federal government from the end of the Second World War to about 1960 gave systematic attention to the general rationale of the grant-in-aid device. Professor Eric Hanson asserted in 1953 that "the conditional grant lives healthily and lustily because we live in the short-run."⁹ Both levels apparently took up their positions concerning grants-in-aid almost exclusively in terms of short-run considerations relating to individual functions and projects. The major focus of attention in federal-provincial relations for senior elected and appointed officials was the negotiation of the tax agreements for each five-year period and these distributions of tax sources and public revenues seem to have been made without much explicit reference to grants-in-aid. At the federal level and in most if not all of the provinces the activities of programme agencies were not closely integrated with more comprehensive plans or objectives to which the governments as such were committed.

For the first time since the Second World War the rationale of the conditional grant procedure came into high-level discussion as the issue was raised by several of the premiers at the Federal-Provincial Conference of October 1960.¹⁰ The reasons for the voicing of these accumulated dissatisfactions at this particular time can only be conjectured. The relative importance of conditional grant payments in provincial budgets had rapidly increased as total grants rose from \$110,974,000 or 9.75 per cent of provincial expenditures on goods and services in 1956-57 to \$382,837,000 or 26.91 per cent in 1959-60.¹¹ The Federal-Provincial Continuing Committee on Fiscal and Economic Matters had studied conditional grants since its establishment in 1955. Undoubtedly its members, the senior appointed financial

officers, provided their respective governments with evaluations of the grant-in-aid device which were less favourable than those of programme officials and less rooted in considerations related to particular services. The newly-elected government in Quebec took a different policy on shared-cost programmes than had its predecessors.

The premiers expressed their concern with grants-in-aid on several grounds. Manning of Alberta criticized this device because it transferred policy discussions from the provinces to Ottawa, created financial difficulties in requiring the provinces to raise additional revenues, enforced measures of uniformity "beyond the dictates of desirability" and increased the costs of services through centralization. He recommended that conditional grants be replaced progressively by unconditional subventions on a fiscal need basis.¹² The premiers of three of the less prosperous provinces—New Brunswick,¹³ Prince Edward Island¹⁴ and Manitoba¹⁵—criticized the grant-in-aid arrangements for not taking provincial fiscal capacity into account. Douglas of Saskatchewan spoke of the "rigidities" of these arrangements and suggested that they be carefully reviewed with a view to converting some of them to grants which would be unconditional within specific areas of governmental activity.¹⁶ Shaw of Prince Edward Island spoke somewhat similarly of the "budgetary inflexibility" resulting from these programmes.¹⁷ It was, however, the newly-elected premier of Quebec who introduced the most novel note into the discussions by announcing a radically new policy for his province in respect to grants-in-aid.¹⁸ The traditional viewpoint of Quebec governments had been opposition to conditional grants on dogmatic constitutional grounds, although the Duplessis government and its predecessors had participated in several shared-cost programmes.¹⁹ Premier Lesage announced that his government was taking the steps necessary to accept all the conditional grants it was not then receiving, in particular those relating to hospital insurance and the Trans-Canada Highway, "on a temporary basis and without prejudice to its full sovereignty."²⁰ He coupled this announcement with the request that the federal government cease its participation in well established programmes with fiscal compensation to the provinces. It is significant that the Quebec leader's opposition to conditional grants was not on ideological or constitutional grounds but rather that they did not sufficiently take local conditions into account and that they "raise administrative difficulties that are the cause of a loss of efficiency or duplication of effort and increased costs."

In the period since 1960 the major issue in the field of conditional grants has been the contracting out option which is discussed in the next chapter. Two other developments have occurred, both of which make the grant-in-aid device more palatable to the provinces.

First, there are some indications that in the future conditional grants will be made for broader and less specific purposes than in the past. The composite forestry agreements which were in effect from 1962-64 and renewed in modified form at their expiration are a step in this direction. Under the 1962 arrangements, former

agreements on forest inventories, reforestation, forest fire protection and forest access roads were consolidated, and a new programme of stand improvement added. The new agreements had the provision that a province must spend at least 40 per cent of its total federal allotment on forest access roads.²¹ Discussions have been taking place between the federal government and the provinces concerning the integration of the three grant-in-aid programmes of categorical public assistance with the agreements related to general public assistance. Such an integration of public assistance programmes would mean that, with the exception of certain groups of unemployed employables, the federal authorities would contribute to welfare costs without regard to the causes of the recipients' needs for such help. The Royal Commission on Health Services whose report has been under discussion by the federal and provincial authorities since the summer of 1964 recommended that:

. . . provision be made for terminating the present pattern of health grants to provinces for specific disease categories and client groups as each province begins to receive its Medical Services Grant. . . . The one exception should be the grant for Medical Rehabilitation and Crippled Children, which should be extended as an interim measure in order to implement our Recommendation . . . that services to crippled children be given priority.²²

There have been sporadic discussions in federal-provincial circles of the bloc grant alternative under which the provinces would receive subsidies on the sole condition that the federal funds be spent on broadly defined public functions such as vocational training, public health or the development of natural resources.²³ The forestry agreements and the projected arrangements related to public assistance adhere to this general pattern. Thus there are strong influences at work to make federal financial assistance available for more comprehensive provincial purposes than in the past.

Second, progress has been made in rationalizing the procedures by which the provinces are reimbursed by the federal government for expenditures on aided functions.²⁴ These procedures have in the past given rise to frictions between the two levels. Under the leadership of the Continuing Committee on Fiscal and Economic Matters several of these difficulties have been eliminated.

The contracting-out procedure which is discussed in the next chapter casts some doubts over the long-term future of conditional grants in the Canadian federal system. As we shall see, provincial administrations, excepting Quebec, have shown no disposition to accept this alternative. On the other hand, it will undoubtedly require a very high degree of ingenuity on the part of federal officials to devise financial terms so that Quebec is satisfied that it is not being financially penalized for contracting out and so that the other provinces see no financial disadvantage in maintaining their participation in shared-cost arrangements.

The Tax Structure Committee established in the fall of 1964 has been given explicit responsibility for considering shared-cost programmes for the period 1967-72 in the broad contexts of expenditure-priorities for all governments and of comprehensive fiscal arrangements between the two levels. In the past grant-in-aid programmes have been established to meet the needs of provinces for particular functions with relatively little regard for the over-all distribution of tax sources and public revenues between the federal and provincial administrations. This phase appears to be ending.

D. The Medicare Proposal: Alternative to Conditional Grants?

The proposal for federal support of provincial medical care plans made by Prime Minister Pearson at the Federal-Provincial Conference of July 1965²⁵ contains a radically new departure by which the federal government may both pay part of the costs of a provincial service and influence certain standards of performance in respect to that service. The federal offer was to make a "fiscal contribution of pre-determined size" to provincial medicare programmes if they met the following four conditions.

First, "the scope of benefits should be, broadly speaking, all the services provided by physicians, both general practitioners and specialists."

Second, "... the plan should be universal. That is to say, it should cover all residents of the province on uniform terms and conditions."

Third, "... a federal contribution can properly be made available only to a plan which is publicly administered, either directly by the provincial government or by a provincial government agency."

Fourth, "... each provincial plan should ... provide full transferability of benefits when people are absent from the Province or when they move their homes to another Province."

If a province would enter into a general agreement with the federal authorities to establish a plan according to these conditions and if provincial legislation were enacted to implement this agreement the federal contribution would be paid so long as these circumstances were in effect. Although the Prime Minister did not specify the federal scale of contributions in his preliminary speech, newspaper reports have spoken of a tentative federal contribution of \$14 per capita per year to participating provinces. This was about half the current costs of the Saskatchewan plan then in operation.

The federal proposal differs in several significant respects from existing grant-in-aid programmes. There is no provision for contracting-out and Mr. Lesage indicated at the conference that Quebec would establish a plan conforming in general to the federal conditions.²⁶ The projected arrangement would be simple to implement once

an agreement on general principles was reached and would involve none of the complexities in respect to the definition of shareable costs, reimbursement procedures and so on inherent in conditional grant programmes. Within the broad conditions of eligibility set by the federal authorities, the participating provinces would have complete freedom of action in determining the kinds and levels of services provided in their plans, the way in which provincial contributions would be raised and other matters.

Although I have not come across any serious discussion of the application of the principles in federal medical care proposals to other provincial services, it seems likely that the successful implementation of this procedure would result in it being regarded in some quarters as an alternative to the traditional grant-in-aid device.

One of the distinctive features of the Canadian constitutional system is the differentiated pattern of relations between the individual provinces and groups of provinces and the federal government. An analysis of this differentiation was made in the last chapter. More important as a device of adjustment is the contracting-out procedure. This device gives a new dimension to the resources of the federal system to adapt to the demands made upon it and, so far as I am aware, is unique to Canada.

Contracting-out has been used to describe two kinds of arrangements.

First, there is the situation where a province assumes the exclusive responsibility for financing and administering a programme which in some or all of the other provinces is carried on by the federal government and where there are compensating financial adjustments between the contracting-out province and the federal authorities to ensure that neither this province nor its residents are financially penalized because of this decision.

Second, there is the procedure by which a province receives some form of fiscal compensation in lieu of the federal contributions to a programme through a conditional grant arrangement.

A. The 1959 University Finance Agreement

The original contracting-out arrangement was concluded between the federal and Quebec governments in 1959 and related to university finance.¹

In its report to the Government of Canada in 1951 the Royal Commission on National Development in the Arts, Letters and Sciences recommended that the federal government provide annual and unconditional contributions to those institutions that were members of the National Conference of Canadian Universities. According to this proposal the

total sum available would be divided among the provinces in proportion to their respective populations, and within a province the allocation to individual universities would be in the proportion of their enrolments to the total provincial enrolment. The federal government responded promptly to this recommendation and in the 1951-52 fiscal year grants were provided at the rate of 50 cents per capita of total provincial population.

While the Quebec universities accepted the federal grants in 1951-52, Premier Duplessis in effect ordered them to refuse the second and subsequent annual payments on the grounds that these subventions were a federal encroachment on the exclusive responsibilities of the provinces for education. Mr. Duplessis soon thereafter announced that beginning in 1954 a provincial income tax would be levied at about 15 per cent of the federal rates. This tax was defended partly in terms of the financial needs of the Quebec universities which the Premier had insisted should not receive federal grants. This move by the Quebec government related university finance to the broader pattern of federal-provincial fiscal arrangements. Under these arrangements as they had existed since 1947 the residents of a province which levied a personal income tax were allowed a tax credit up to 5 per cent of the federal tax. Until the Quebec decision this provision had not been operative as no province had levied such a tax. Mr. Duplessis demanded that the federal abatement be increased to 15 per cent which would have of course absorbed the total increased burden of the Quebec tax so far as the residents of the province were concerned. The result of the ensuing controversy between the federal and Quebec governments was an increase of the federal tax abatement to 10 per cent.

In the period immediately after the increased federal abatement was established the 10 per cent tax credit more than compensated for the refusal of the Quebec universities to accept federal grants. The federal-provincial fiscal arrangements which came into effect in 1957, however, added new complications to the situation. These arrangements provided for stabilization and equalization payments to the provinces whether or not they levied individual and corporate income taxes and succession duties. Although this aspect of course favoured Quebec, which had remained out of the 1947-52 and 1952-57 tax agreements, that province could still complain that the new procedures did not in any way compensate for the burdens it had assumed in university finance and that the federal per capita grants had been increased to \$1.00 in 1957 and \$1.50 in 1958 without corresponding adjustments in the rates of abatement for residents of provinces levying provincial income taxes.

In 1957 the federal government made two moves which it was hoped would induce the Quebec administration to change its policies on federal subsidies to universities. The first designated the National Conference of Canadian Universities as an intermediate disbursing agent for the per capita grants. The second measure provided that those moneys not distributed by the conference, in effect the grants

refused by Quebec universities because of the province's policy, would be held in trust for these institutions until claimed. The Quebec government did not in any way modify its position in response to these overtures.

The "thaw" in federal-Quebec relations after the death of Mr. Duplessis, and perhaps the increasing impatience of the Quebec universities under the ban on the acceptance of federal subventions, led to an agreement with the federal authorities which took effect in 1960. According to this agreement, the federal government would withdraw from the corporate income tax field to the extent of one additional percentage point in Quebec and that province would continue to assume the entire public responsibility for the financial support of its universities. It was provided that if the amount of federal grants that would otherwise have been paid in any year exceeded the proceeds of the one per cent abatement the federal government would add this sum to the equalization grant to the province. Conversely, if the proceeds from the abatement exceeded the per capita calculation this amount would be deducted from the equalization grant. A provision of the agreement also released to the Quebec universities the moneys which had been accumulated in trust for them. This contracting-out option was in 1960 enacted in an amendment to the Federal-Provincial Tax Sharing Arrangements Act and continued in 1964 legislation. Under federal law all the provinces have the same option to contract out in respect to federal support of universities but none other than Quebec has shown any disposition to do so.

The 1959 agreement was an important precedent in Canadian federalism. For the first time the shares of an important tax field occupied by both the federal and provincial governments were related explicitly to their respective responsibilities for financing a particular activity. For the first time also, a province had gained the opportunity to refrain from participation in a particular federal initiative without being subjected to financial disabilities as a consequence of this choice. Most significantly perhaps, the agreement was a clear recognition that Quebec had a special position in the Canadian federation, a position which would lead her to resist federal encroachment in matters where such action was not perceived by the other provinces to affect their interests.

Despite the significance of the general principle established in 1959, the arrangements in respect to university finance were not directly applicable to later uses of the contracting-out device. From the time it was established in 1951 the federal per capita grant scheme was in the form of unconditional subventions to eligible institutions and the payment of these moneys was not related to the costs incurred by the universities, the maintenance of particular levels of provincial support or prescribed standards of university facilities. Thus the financial arrangements evolved for contracting-out could be made simple and their workings almost automatic. Also, too, the situation was such that the agreement with Quebec could be made in relative isolation from the other provinces. This was

impractical in later applications of the contracting-out device in respect of the Canada Pension Plan and the conditional grant programmes.²

B. Contracting-out of Conditional Grant Programmes

Up until this decade it has been taken for granted in Canada as in other federations that when a regional government chose not to participate in a federal shared-cost arrangement it would suffer the full financial penalties of this choice. The traditional Quebec position of hostility in principle to conditional grants as unwarranted federal encroachments on provincial jurisdiction did not challenge this circumstance directly. The Quebec attack on this device was of the root-and-branch variety. The Tremblay report³ regarded conditional grants as an inherent element of what it called "the new federalism," an aspect rooted in what the report argued was the unwarranted assumption by the federal government of the power to tax and to spend as it chose. The implications of such a position were that unless the conditional grant system was completely dismantled the Quebec government had the unsatisfactory alternatives either of accepting the grants with the attached conditions and thus acceding in what were regarded as unconstitutional intrusions of the federal authorities or of foregoing the subventions which were available to the other provinces which had no such principled objections to accepting them.

Despite its ideological position, the Quebec administration in office from 1944 to 1960 participated with the federal authorities in several conditional grant programmes. In the 1959-60 fiscal year the province received \$46,339,000 in such grants and accepted payments in respect to public health activities (including hospital construction) and categorical and general public assistance, but refused grants related to the Trans-Canada Highway, hospital insurance, vocational training, forestry activities and civil defence.⁴ It is impossible to calculate precisely the amount that Quebec would have received if it had chosen to participate fully in the available grants. If the grants-in-aid to Quebec, however, had borne the same ratio to those received by Ontario in 1959-60 as Quebec grants did to Ontario grants in 1961-62 (when both provinces were participating in all major shared-cost programmes) then Quebec would have received in 1959-60 a further \$82,031,000 or \$15.60 per capita on the 1961 population.⁵

In 1961 the federal Liberal party committed itself to the contracting-out option in certain established conditional grant programmes. The party's policy was thus enunciated in its 1963 election manifesto:

If some provinces wish, they should be able to withdraw without financial loss from joint programs which involve regular expenditures by the federal government and which are well established. In such cases, Ottawa will compensate provinces for the federal

share of the cost by lowering its own direct taxes and increasing equalization payments. This will be done also if some provinces do not want to take part in new joint programs that may be desirable for the federal government to initiate with the provinces.⁶

Contracting-out was a major topic of discussion at the Federal-Provincial Conference held in Quebec City from March 31 to April 2, 1964. The communique issued at the end of the meeting stated "It was agreed that the federal government should immediately enter into detailed discussions with provincial governments concerning contracting-out arrangements for shared-cost programmes. Such negotiations would apply to programmes which are of a permanent nature and which involve fairly regular annual expenditures." In accord with this agreement and at the initiative of the government of Quebec, representatives of the federal and provincial administrations met in Ottawa early in June to discuss the proposed arrangements. Prime Minister Pearson in a letter to the provincial premiers on August 15, 1964⁷ outlined the understandings concluded at the June and subsequent meetings and a resolution to embody these into legislation was introduced in the House of Commons by the Minister of Finance on December 18, 1964. The major features of the Established Programs (Interim Arrangements) Act as enacted by Parliament in April 1965 can be summarized briefly.

1. Applicability

The bill divides the arrangements to which contracting-out is to apply into "standing programs" and "special programs." The first category includes:

- hospital insurance
- old age assistance, blind persons' allowances, disabled persons' allowances and the welfare portion of general public assistance
- health grants (excluding those for hospital construction)
- non-capital expenditures on vocational training.

"Special programs" include:

- agricultural lime assistance
- the composite forestry agreements concluded with all provinces and special forestry agreements with Nova Scotia and New Brunswick
- the hospital construction programme
- the camp grounds and picnic areas programme
- the roads-to-resources programme.

Excluded from contracting-out are:

- capital grants for vocational training
- certain "research and demonstration" projects
- the "unemployed portion" of general public assistance
- Centennial of Confederation projects
- municipal winter works
- emergency measures
- projects under the Agricultural Rehabilitation and Development Act.

2. *The fiscal equivalent*

Provinces which contract out of "standing programs" receive an extra abatement on the federal personal income tax. The Act assigns each of these arrangements a unit value corresponding presumably to the estimated percentage yields of these abatements in Quebec. The actual fiscal equivalent received by a contracting-out province and consisting of abatements with cash adjustments paid by the federal authorities will, in the interim period, equal the actual audited expenditures made by the province on the service.

The fiscal equivalents for "standing programs" are to be cash payments by the federal government to the non-participating provinces. The amount of these payments is based on the amount that the relevant federal minister thinks the provinces would otherwise have received as conditional grants.

3. *The interim arrangements*

According to the Act, an agreement between the federal government and a province to terminate a standing programme had to be concluded on or before October 31, 1965. Contracting-out of special programmes had no time limitation and could be done at the beginning of any fiscal year within the period of 1965-68 for hospital construction, 1965 to the end of existing agreements for roads to resources, and 1965 to 1967 for other such programmes.

The agreements concluded between the federal and provincial governments in 1964 provided that during an interim period, specified for each arrangement to which contracting-out applied, the non-participating province would "maintain its present obligations" in respect to the functions or services and furnish the federal authorities with audited accounts of its expenditures on these matters. It was also agreed that "a contracting-out province would, during the interim period and subsequently, continue to participate in federal-provincial bodies and meetings established for the purposes of consultation and co-ordination in fields of activity where contracting-out would apply."⁸ For several programmes the interim period is to March 31, 1967, the date when the existing federal-provincial fiscal arrangements expire; the interim period extends for a longer period for other programmes, because of the exigencies of these particular programmes.

C. *Contracting-out of Exclusively Federal Programmes*

In three circumstances apart from university finance the contracting-out principle is applied to activities which are carried out by the federal authorities in participating provinces, without direct financial or administrative involvement of the provincial governments. All three such arrangements are based on initiatives to which the federal Liberal party committed itself before the 1963 general election.

1. The youth allowances programme

The federal Liberal programme of 1963 pledged the party to "extend family allowances beyond the age of sixteen for boys and girls who remain students." The new government moved soon after its election to provide for the paying of allowances at \$10 per month on behalf of 16- and 17-year-olds still in school or university. The Quebec government alone of the provinces had a similar programme and Premier Lesage soon made it clear that this would be continued, that his administration would find the simultaneous operation of the two arrangements unacceptable and that a fiscal equivalent should thus be paid.

The Youth Allowances Act enacted by Parliament in the summer of 1964 provides that \$10 monthly allowances be paid on behalf of dependent 16- and 17-year-olds continuing their education and of dependent youths in the same age group who because of "physical or mental infirmity" are precluded from doing so. The Act stated that such payments were not to be made on behalf of persons residing in a province which had enacted legislation providing for similar allowances prior to the coming into effect of the federal legislation. The Fiscal Revision Act 1964 enacted at the same time made available an extra 3 per cent abatement on the personal income tax for those provinces which had youth allowance programmes similar to the federal one. The usual provisions were made for cash adjustments between the federal government and the contracting-out provinces of discrepancies between the yield of the abatement and the amounts paid by the provinces for this. In the period prior to the federal enactment the Quebec administration proved willing to adjust its own programme in order to relate it to the period of the year in which the allowances would be paid and to include disabled youths so that the terms of the provincial and federal arrangements would be almost identical.

2. Student loans

The federal Liberal programme of 1963 stated that "All qualified university students will be able to borrow if necessary for genuine educational needs. The fund will be independently administered. Loans will be interest-free during the period of study and for the first year afterwards, and will then be repayable, plus interest, within a reasonable time." At the Federal-Provincial Conference held in Quebec City in the spring of 1964 Premier Lesage attacked the proposed plan as a federal intrusion on the exclusive jurisdiction of the provinces over education and demanded that if it were implemented his province should receive a fiscal equivalent. As in the case of youth allowances, Quebec had its own system of university loans. The Canada Student Loans Act later enacted by Parliament provided that up to \$40 million in the first year be loaned to Canadian university students by the chartered banks, with the federal government guaranteeing the loans and paying the interest charges while the students were in university and for six months thereafter. The Act also provided that when any province which had a student loan plan of its own

informed the federal government of its desire to contract out, the federal authorities would pay to that province a cash equivalent. This cash equivalent would be related to federal contributions to banks in the participating provinces and to the proportion of persons in the 18-25-year-old population in that province as compared with the population in the same age group in the participating provinces. Only Quebec has used this option.

3. Contributory old age pensions and supplementary benefits

In its 1963 election manifesto the federal Liberal party committed itself to a national contributory plan of retirement pensions and supplementary benefits. The plan was to be financed from compulsory contributions on earnings up to \$5,000 per year with employers and employees contributing equally and self-employed persons participating if they wished. The proposed plan would also provide pensions for contributors who were disabled before age 65 and for the widows and orphans of contributors. The party pledged that if elected it would seek agreement with the provinces to make this constitutionally possible. The plan was not to be funded, *i.e.* it was to be so devised as not to accumulate funds for investment purposes during the period of coming to maturity.

The newly-elected federal government early in July 1963 introduced into the House of Commons a resolution for a national pension plan in general harmony with that promised in its election programme. Shortly thereafter, the Quebec government demanded that the proposed federal plan should not apply to residents of that province. Premier Jean Lesage enunciated his administration's policy at the Federal-Provincial Conference held in November of that year: "... we have elected to stick to the spirit of the contracting-out formula and we shall institute in Quebec a system which will be provincial, public, universal and based on actuarial hypotheses."

It is neither possible nor necessary to trace the federal-provincial negotiations about contributory pensions which went on during and after the summer of 1963. From the first, Quebec was determined to have a plan of its own which would not only provide cash benefits to those eligible but which would result in the accumulation of a large investment fund available to the province. On the other hand, in the subsequent negotiations the Quebec administration showed some willingness to modify the details of its own plan so that the provincial and federal schemes did not impose significant restrictions on the movement of people between Quebec and other parts of Canada. Also, the Quebec government was willing to give its approval to a proposed constitutional amendment enacted in 1964 making it possible for the federal plan to provide survivors' benefits and pensions to contributors disabled before retirement age. Because of the pressure from Quebec and the other provinces the federal government was persuaded to put its scheme on a partially funded basis so that a substantial fund would be accumulated for the purchase of provincial securities.

The federal legislation providing for the Canada Pension Plan was enacted early in 1965. The Act makes provision for its non-applicability, with minor exceptions, to residents of a province which within 30 days of the coming into force of the enactment had given the federal government notice that it intended to bring its own comparable plan into effect with contributions to begin in 1966. Only Quebec accepted this option.

D. A Partial Application of Contracting-out: The Federal-Municipal Loan Fund

The election manifesto of the federal Liberal party in the 1963 election promised the establishment of a "Municipal Development and Loan Fund . . . to provide capital for sound municipal improvements which provincial governments approve but for which financing is at present inadequate." A resolution to implement this pledge by providing a \$400 million fund was introduced in the House of Commons in June 1963. The reaction of the provinces to this federal initiative was for the most part hostile.⁹ Undoubtedly the federal government regarded the measure primarily as one to stimulate employment and to relieve municipalities of the high interest rates that some were forced to pay for funds to undertake necessary capital projects. Although there had been provisions in federal legislation for capital loans to municipalities from 1938 onward, the provinces were sensitive because, without prior consultation, the federal government was involving itself on a much more extensive scale than before in an area of direct provincial responsibility. Although the unfavourable provincial reactions were not confined to Quebec, that province understandably resisted the federal initiative with more vigour than did the others and on June 26, 1963 the legislative assembly unanimously passed a resolution declaring the federal bill to be "a serious infringement upon the exclusive jurisdiction and the autonomy of the province of Quebec." Mr. Lesage in transmitting this resolution to Prime Minister Pearson wrote, "I must add that I am sure I am expressing the unanimous feeling of the members of the Quebec Legislative Assembly when I say that they consider as a breach of your promise fully to respect provincial rights . . . the fact of proceeding unilaterally to establish a municipal loan fund, which, according to your program was to be instituted solely in co-operation with the provinces."¹⁰ A federal-provincial conference was convened on July 26-27¹¹ as a result of provincial opposition to the federal initiatives in respect to the municipal loan fund and to the contributory old age pension plan. At this meeting the federal government proved willing to modify its original scheme to enlarge the scope of projects for which money might be borrowed and to divide the total amount available for loans among the provinces according to their respective populations. It was also agreed that the provinces might enter into agreements with the federal government to administer themselves their portions of the fund rather than have this function

carried out by the federal agency created for the purpose. The provinces of Quebec, Ontario, Manitoba and Saskatchewan have accepted the contracting-out alternative.¹² The agreements resulting from the July meetings were enacted by Parliament in the Municipal Development and Loan Act which came into effect in September 1963.

E. The Significance of the Contracting-out Device

The various contracting-out arrangements are, taken together, a response by the federal authorities to the circumstance that Quebec demands a wider range of fiscal and administrative autonomy than the other provinces wish for themselves. These arrangements tend to create a situation where federal activity in Quebec is, with some exceptions, confined to matters within the legislative jurisdiction of Parliament, while in the rest of Canada the central government is involved in a great many matters which are the constitutional responsibility of the provinces. This situation, it can reasonably be argued, is an institutional recognition of the differences between the majority in Quebec and the majorities in the other provinces as to the appropriate role of the federal government.

Critics of the contracting-out procedure have charged that it makes less likely than otherwise the establishment and maintenance of minimum country-wide standards in certain basic public services. This argument is not compelling under the procedure as it has evolved up until the present. In every circumstance to which contracting-out is applied, Quebec is carrying on the function very much as is done elsewhere with federal involvement. In the negotiations surrounding the contributory pensions and youth allowance schemes the Quebec government proved itself willing to modify its own plans in detail at least to bring them into harmony with those projected for the rest of Canada. Further, as Stefan Dupré has pointed out, "... provincial electorates themselves can be depended upon to enforce a degree of program conformity, especially where services and payments to persons are involved,"¹³ and most of the matters to which contracting-out applies are of this nature. Also, it is reasonable to expect that Quebec will continue to participate in various federal-provincial and interprovincial consultative organizations concerned with grant-in-aid programmes and this participation helps maintain country-wide standards.

It has also been argued that the contracting-out device weakens the central government power to implement effective counter-cyclical fiscal policies in two ways—by reducing the federal share of income taxes, and by attenuating federal power to induce certain kinds of public expenditure. This appears not to be so, with the possible exception of the provisions relating to municipal loans. The various "standing programs" that make up most of the total fiscal equivalents concern the kinds of federal expenditures which would not be altered for counter-cyclical reasons except under the most unusual

circumstances. Under the various "special programs" non-participating provinces will apparently have to carry out the functions for which fiscal equivalents are claimed very much as is done in the other provinces. The contracting-out alternative is unavailable for most programmes where the levels of federal contributions can feasibly be varied for counter-cyclical reasons. Most of the capital assistance programmes are excluded — municipal winter works, the Trans-Canada Highway, assistance for the construction of hospitals and vocational training facilities and projects under the Agricultural Rehabilitation and Development Act. Neither is contracting-out applied to the "unemployment portions" of general public assistance where the levels of federal contributions can be expected to vary inversely with the prosperity of the respective provinces and municipalities. It is reasonable to argue, however, that the existing circumstances governing the Municipal Development and Loan Fund make this a less effective instrument of fiscal policy than was originally contemplated by the incumbent federal government. The federal power to influence income and employment may be somewhat attenuated by dividing the total fund available among the provinces according to their respective populations and by allowing the provinces to administer their own portions of the fund. It would, however, be almost impossible to estimate the degree of attenuation caused by the population rule and contracting-out, that is the extent to which each of these factors results in different loans being made or withheld than would have been the case under the original federal plan.

It seems unlikely that the provinces other than Quebec will avail themselves of the contracting-out option. In a speech to the National Industrial Conference Board on October 22, 1964 the Premier of Ontario expressed apprehension about the effect of this device on "national standards."¹⁴ Premier Duff Roblin of Manitoba in his budget speech to the legislature on March 4, 1965 said of contracting-out:

Manitoba views this new proposal with mixed feelings. We recognize particularly its threat to the continuing idea of a national standard of services and note its administrative difficulties. We shall probably not contract out ourselves and do not recommend it as a general proposition to the people of this Province. But it may, perhaps, be one practical way of easing areas of current federal-provincial friction and of reconciling the conflicting views on areas of concurrent interest and jurisdiction between the government at the center and the provinces. Through this idea of contracting-out, we may find ourselves able to meet the rather special requirements of a province like Quebec, through options open to all, even though most may have no wish or interest in invoking them. For this reason, I judge the experiment worth the very considerable risks that are attached to it and hope that it may perhaps be the seeds that will strengthen rather than weaken the bonds of Confederation.¹⁵

British Columbia has pressed for increased conditional grants on behalf of highways and natural resource development and for federal assistance for a programme of comprehensive health services.¹⁶ It thus seems probable that while federal legislation extends the contracting-out option to all the provinces, only Quebec will find it appropriate to accept. This circumstance, of course, makes less difficult than otherwise the negotiations surrounding the application of contracting-out to particular programmes and functions and in particular the calculation of the formulas by which fiscal equivalents are to be given. The availability in law of this option may of course strengthen the position of the provinces other than Quebec in their relations with the federal government concerning the functions to which it applies, although it is likely that it will become a convention of the Canadian constitution that contracting-out is a procedure which in fact if not in law applies only to the particular requirements of Quebec.

The term "cooperative federalism" has come to be used very frequently in Canadian political debate. Some persons employ the phrase in a very broad sense to emphasize the increasing importance of federal-provincial collaboration in contrast with the older "classical federalism" in which the two levels carried out their respective responsibilities as assigned by the constitution in relative isolation from one another.¹ Within the context of political debate in Quebec, cooperative federalism is defended, or attacked, as an alternative to separatism, the "associate states" alternative and other proposals for more radical and explicit changes in the political and constitutional relations between Quebec and the rest of Canada.² In yet another context, cooperative federalism is regarded as the successor to the centralized version of federalism which developed during and after the Second World War, to what the Honourable Maurice Lamontagne has called "tutelary federalism."³ Although there are significant differences in emphases among those who now use the term, most would probably agree that cooperative federalism embodies the following features.

First, the chief devices by which continuous redistribution of powers, responsibilities and resources between the two levels is effected are procedures of continuous interaction between the federal and provincial governments rather than constitutional amendment or changing patterns of judicial review. Some of the reasons for the relatively minor role that formal processes of constitutional change have come to play were suggested in Chapter IV. The Honourable Guy Favreau described the new circumstances thus: "Gone are the days when constant recourse to the courts was hurriedly made to obtain an interpretation that would finally resolve jurisdictional conflicts between the federal and provincial governments."⁴ Most of the basic conflicts between the two levels, particularly as these relate to the crucial matters of fiscal sharing, do not lend themselves to judicial determination. Formal constitutional change is almost always sporadic and such change usually works in the direction of delineating the

respective powers and privileges of the federal and provincial legislatures rather than articulating their activities. Under the prevailing attitudes it would be regarded as inappropriate by the governments concerned to submit a dispute of fundamental importance for judicial determination unless intergovernmental negotiations over a protracted period had failed to result in agreement. As the conflict between the federal and some of the provincial authorities about the ownership of offshore mineral rights demonstrates, even under such circumstances as these the judicial settlement of disputes may not be seen by all as legitimate.⁵

Second, cooperative federalism embodies consultations between the provinces and the federal government prior to the latter committing itself to policies directly affecting provincial interests. Unilateral federal actions in such matters were common in the decade after the Second World War. At the height of federal dominance in 1950 Premier T. C. Douglas of Saskatchewan presented the following list of complaints to the Federal-Provincial Constitutional Conference:

In the matter of marketing, the latest dominion legislation represents an abandonment by the federal government of its responsibilities with regard to international trade. Having failed to protect the Canadian producer in foreign markets, it has now thrust upon the provinces, without consultation, the responsibilities which it has failed to discharge.

Without consultation with the provinces, it is vacating the field of rental control, after permitting substantial rent increases, and thus thrusting upon the provinces the responsibility of meeting a social crisis.

Without consultation with the provinces, it has announced a comprehensive irrigation scheme, which we now learn must be supported by substantial provincial contributions.

Without consultation with the provinces, it has announced the construction of a trans-Canada highway, and it is later found that the provinces will not only have to stand fifty per cent of the cost of construction, but also the entire cost of the right of way.

Without consultation with the provinces, it has decided upon a housing program for which every province must contribute twenty-five per cent of the cost, without regard to its ability to pay.

By these unilateral decisions, the federal government has embarrassed the provinces in respect to their capital programs and has virtually dictated policies to which their consent has not been obtained.⁶

During the period of the dominance of the federal government, federal announcements of new grants-in-aid were sometimes made without prior provincial consultation. Such actions understandably disturbed the provinces which were often forced, by influences both inside and outside their own administrations, to alter their programmes and, usually more important, to undertake new financial commitments to take advantage of the federal largesse. The traditions of cooperative federalism as these are now evolving preclude such unilateral federal

initiatives. There is, however, no agreement about either the range of matters in respect to which consultation should take place or the circumstances of these discussions. Without altering the traditions of Canadian politics in a very fundamental way, cooperative federalism could not forestall a federal political party from committing itself to initiatives in matters directly affecting the provinces. But there is as yet no clear tradition as to whether it is more appropriate for a federal government to introduce into Parliament bills providing for activities in which the provinces are directly concerned, with the assumption of course that provincial consultation will occur before the final parliamentary enactment, or whether it is more appropriate for the government to ask Parliament to ratify agreements previously reached with the provinces. There is also no agreement as yet about the range of matters on which federal-provincial consultations are appropriate. As we shall see later in this chapter, the strategy which the Quebec government, elected in 1960, pursued with some success was to extend this range to include every important aspect of federal economic policies, including those which are constitutionally within the exclusive legislative jurisdiction of the federal Parliament. Despite these unresolved differences, federal-provincial collaboration is now regarded as appropriate not only in such matters as the marketing of agricultural products and industrial standards, where under the constitution both levels have responsibilities, but also in respect to other policies where no such obvious sharing exists but where the actions of one government clearly affect the others. Premier Lesage of Quebec stated the new assumptions concisely at his opening statement to the Federal-Provincial Conference of July 1965:

Sound practice of federalism requires that each government respect the jurisdiction of the other legislative authorities.

In an era when interdependence is as pronounced as it is today, however, respect of mutual (legislative) competence is not the only condition for harmony between governments. Thus, even when legislating in fields within its own jurisdiction, each government should be concerned with the repercussions of its decisions on the others' plans and on the orderly conduct of the country's affairs in general. In our opinion, a government may not do exactly as it pleases simply because it has legal authority in a given field. Instead, in the interest of administrative efficiency and the search for genuine solutions, it must see that its actions are compatible with those of the other legislative authorities, and do not infringe on their rights and privileges.

In short, the legality of an act should not be the only criterion, it is also important to weigh its timeliness and repercussions.⁷

Under present circumstances consultation has seemed sometimes to be a one-way street. Although unilateral provincial initiatives can and do complicate federal responsibilities in certain situations, the federal government has not effectively asserted its right to be consulted by the provinces. However, in his opening statement to the July conference in 1965 Prime Minister Pearson did make such a claim:

We cannot work together if the federal government attempts to encroach on provincial rights. Equally we cannot work together if provincial policies are directed to the erosion of federal jurisdiction and power. We have to proceed by the methods of cooperative federalism, by consultation and cooperation in all matters of mutual concern. Cooperative federalism is not a doctrine that puts all the restraints on the federal government. It does not mean that the federal government should move only after consulting the Provinces while the Provinces accept no similar obligation on their side. Cooperative federalism does not mean that the burden of agreement rests only on the federal government while the Provinces make demands for the withdrawal of the federal government from established lines of action and responsibility.⁸

Third, cooperative federalism has come to involve interactions between the two levels in respect to the most fundamental aspects of public policy. Cooperative federalism as the term is commonly used in the United States refers to the interactions between the national and state governments through grants-in-aid. In Canada, however, both the norms and procedures of federal-provincial relations include not only collaboration in specialized public functions but also the attempted articulation of policies in fiscal matters and in policies for economic stability and growth.

Fourth, cooperative federalism envisages increasingly more institutionalized structures and processes of intergovernmental relations. Observers of Canadian federalism agree that until this decade federal and provincial governments were slow in developing effective procedures for articulating their respective activities. As we shall see in this chapter, there are fundamental differences among the governments concerned about appropriate institutions for effective federal-provincial relations and in particular about the necessity for radically new institutional machinery designed specifically for these purposes. However, there is basic agreement that such relations should provide for more continuous high-level interaction than in the past, particularly where basic fiscal and economic policies are involved.

A. Cooperative Federalism Prior to 1945

Because almost nothing has been written about the institutions and procedures of federal-provincial collaboration prior to the 1930s, it is tempting to suggest that widespread cooperation between the two levels of government is of relatively recent origin. Recent research in the United States has, however, revealed a very large amount of federal-state coordination in respect to particular matters from the earliest days of the union.⁹ It is possible that such investigations in Canada would show that in the earlier decades we developed a much more diluted variant of classical federalism than is commonly

supposed.¹⁰ The thought and practice of the 1930s, however, seem to indicate that prior to the Second World War the norms of Canadian federalism consisted of the federal and provincial governments carrying out their respective roles as delineated by the constitution in relative isolation from one another, with changes in these roles being effected either by constitutional amendment or changing patterns of judicial review. We have not been able to discover any serious consideration during the decade of the great Depression of the cooperative federalism alternative, the alternative of attempting, in J. A. Corry's words, "to turn the flank of constitutional obstacles" by devices of intergovernmental collaboration.

As the Depression wore on it became apparent that the institutions of Canadian federalism were inadequate to meet the demands facing the country. Almost unanimously, those who wished change saw the formal constitution as the "villain of the piece" and more particularly the tradition of judicial interpretation of the Judicial Committee of the Privy Council. There was a very great amount of debate about a procedure for constitutional amendment and, unlike the situation after 1945, those who supported a new procedure were clearly bent on important substantive changes in the B.N.A. Act to enhance the power of the federal government. The judgment of the judiciary that the Bennett "New Deal" legislation of 1935 was *ultra vires* convinced most reformers, if they needed convincing, that the traditional interpretation of the constitution failed to give the federal government power to deal effectively with the desperate circumstances of the times. The most elaborately formulated statement of this view was made by a report to the Senate by its parliamentary counsel in March 1939 with the conclusion that the B.N.A. Act had in 1896 been "repealed by judicial legislation" and the recommendation that a constitutional amendment be enacted which would in effect direct the Judicial Committee and the Canadian courts to construe the Act in future according to the accepted canons of Anglo-Saxon judicial interpretation.¹¹

The report of the Royal Commission on Dominion-Provincial Relations presented to the Government of Canada in 1940 differed markedly from most of the other schemes for reform made during the previous decade in that it contemplated a solution within the existing division of legislative powers between the Dominion and the provinces. The Rowell-Sirois Commission was, however, critical of existing patterns of federal-provincial collaboration and made three major suggestions for avoiding collaborative activities between the two levels.

1. The federal government should assume exclusive responsibility for the relief of unemployed employables. It was in the field of public assistance more than any other that federal-provincial interactions had during the Depression been frequent, haphazard and unsatisfactory for all concerned.

2. There should be a redistribution of revenue sources, revenues and functions which would permit each province to provide services at average Canadian standards without subjecting its residents to

taxation above the Canadian average. This was the master solution of the report and its adoption was expected to forestall federal-provincial collaboration on provincial matters because some or all of the provinces lacked the financial resources to discharge their constitutional responsibilities.

3. There would be a procedure "by constitutional amendment if necessary" for the mutual inter-delegation of legislative powers between the Dominion and the provinces. This would permit the exclusive responsibility for particular functions to be discharged by one level or the other as an alternative to joint arrangements.

In its general distaste for cooperative federalism the Rowell-Sirois Commission appears to have been very much influenced by J. A. Corry's study "Difficulties of Divided Jurisdiction" undertaken at its direction.¹² Corry studied several kinds of activity in which both the Dominion and the provinces were involved and came to the following conclusion: "... Canadian experience so far seems to indicate that administrative performance in these joint activities ... falls short of the standards of reasonably good administration."¹³ In the light of subsequent developments in the theory and practice of cooperative federalism, it is significant to see why he judged, on the basis of the efficiency criterion alone, that federal-provincial collaborative arrangements were almost inherently deficient:

1. Officials of different bureaucracies find both their desires to express themselves through their work and their career prospects frustrated by entering into constructive intergovernmental relations. The capable and ambitious official will try to "master the uncertainties which interfere with his control of the situation." These uncertainties include the actions of the officials of the other jurisdiction and the official will thus strive to extend his control to all aspects of the joint activity. Further, if the official shows himself to be relatively passive in his relations with the other government he may convey to his superiors, who control his career prospects, that he has lost his originality. Conflicts in joint activities cannot thus be attributed to the "perversity of civil servants" but rather to inherent factors in such situations. Such conflicts are more likely than otherwise to occur when able and zealous officials are involved.

2. It is characteristic of most joint activities that federal and provincial officials will disagree on the objectives of particular public policies and the appropriate means by which these may be pursued. In his analysis of conditional grants Corry asserted, "Hope for harmonious and efficient cooperation depends largely on the discovery of clear-cut objective criteria for measuring the activity — criteria which command agreement by their clarity. Such criteria are almost impossible to find."

3. When conflict between members of two independent bureaucracies occurs there is no hierarchical superior by whom the dispute can be expeditiously resolved. "The real advantage of unified administration

is that it provides a single authority which can break a deadlock and whose very existence is a deterrent to prolonged bickering."

Thus in the period prior to the Second World War there was little disposition to try systematically to overcome the disabilities of the Canadian constitutional structure by federal-provincial collaboration. The prevailing tradition of thought visualized what were regarded as desirable changes in the roles of the two levels being effected necessarily by amendment or changing patterns of judicial review or both. In harmony with its terms of reference, the Rowell-Sirois Commission was somewhat outside this framework of analysis but the Commission rejected cooperative federalism on the grounds that joint activities were almost inherently inefficient. The Green Book proposals presented by the federal government to the provinces at the Conference on Reconstruction in 1945 were the first coordinated set of recommendations for change in Canadian federalism which gave a central role to federal-provincial collaboration.

B. Postwar Canadian Federalism: The Dominance of Programme Collaboration

An exhaustive account of federal-provincial relations in contemporary Canada would include a description of the very large number of formal and informal collaborative arrangements dealing with specific policies and programmes and involving, on either a sporadic or continuous basis, officials from both levels of government and often representatives of local authorities and private specialists as well. At the more general level of policy, one might examine the activities of the Dominion Council of Health established by statute in 1919. This council consists of the most senior appointed health officials of the eleven governments. Over the years it has concerned itself with the most fundamental health matters. At the other end of the spectrum one could observe highly technical discussions between federal and provincial officials concerning the reporting of statistics of agricultural production or the control of forest fires. Many of these interactions take place within the framework of conditional grant arrangements which make almost inevitable the continuous collaboration of officials involved in particular functions.¹⁴ Most specialists in government and outside believe that much is to be gained by sharing knowledge and experiences with others in the same occupational group, quite apart from those with whom one works. Contemporary federal-provincial relations include a very great amount of this informal sharing.

The period immediately after the Second World War was particularly propitious for the development of widespread federal-provincial collaboration in respect to particular programmes and projects. For a variety of reasons, the federal government was more responsive than the provincial administrations to pressures for the extension of particular public activities within provincial legislative jurisdiction.

The distribution of tax sources and public revenues between the two levels and the relative prosperity of the times made it appear prudent to the federal authorities that they should assume heavy and continuing responsibilities for provincial matters. It had become a "given" fact that there was little prospect of constitutional adaptation through amendment or changing patterns of judicial review. The failure of the Dominion-Provincial Conferences of 1941 and 1945-46 seemed to demonstrate the impossibility of effecting a comprehensive redistribution of powers, functions and fiscal resources through agreement between the federal government and the provinces. There was little development of effective institutions and procedures for the coordination of basic federal and provincial policies either at the ministerial level or at the level of these appointed officials where concerns were broader than that of particular programmes. In such circumstances, the federal system could adjust to the demands made upon it only by piecemeal collaboration on specific and relatively narrowly-defined functions where cooperation was possible.

The growth of specialization and professionalism in the federal and provincial bureaucracies was an important element in both projecting the federal government into provincial matters and in providing a base for constructive intergovernmental collaboration. The federal civil service which emerged from the Second World War was both more competent and more activist than anything the country had seen before and its orientations were very much the same as those of the incumbent political leadership.¹⁵ Involvement in a particular public function not only puts officials in possession of a common body of techniques and knowledge but characteristically commits them to common policy preferences—the preferences of correctional officials for rehabilitative methods, of foresters for sustained-yield management, of social workers for general rather than categorical public assistance programmes, of professional economists for measures to maximize the gross national product. Such commitments are of course strengthened when all or most of the officials involved have a common pre-entry training and participate in common professional activities. Thus, within the limits set by the Canadian constitution and the policies of their respective governments, various communities of purpose developed concerning particular public activities. These groupings in health, public assistance, resource development, and so on have been of the greatest significance in aiding the federal system to adjust to the demands made upon it. What Seymour M. Lipset has said of bureaucracies generally is relevant to this kind of piecemeal adaptation, "Inherent in bureaucratic structures is a tendency to reduce conflicts to administrative decisions by experts, and thus over time bureaucratization facilitates the removing of objects from the political arena. Constant emphasis on the need for objective criteria as a basis for the settlement of conflicts enables bureaucracies to play a major mediating role."¹⁶ In its discussion of joint activities the Rowell-Sirois Commission, on the basis of previous Canadian experience, seriously underestimated the future possibilities of constructive federal-provincial collaboration. The commission argued that

except in a few circumstances, like those involving specialized health functions, it was unlikely that federal and provincial officials directly concerned could agree on criteria for action in such matters, and that because of this disagreement, the efficient administration of joint activities would be inhibited by conflicts which could be resolved only at the political level, if at all. This analysis almost completely disregarded the possibility of developing relatively autonomous communities of officials across jurisdictional lines, groups which would find it possible to agree and to collaborate effectively on matters involving broader considerations than purely technical ones. In the administration of conditional grant programmes particularly, the number of programme officials at the federal level concerned with the substantive aspects of jointly financed activities increased after the Second World War, and the attitudes and interests of these civil servants corresponded closely with those of their provincial collaborators directly responsible for the administration of these functions.

Although the week-to-week collaboration of federal and provincial officials concerned with relatively narrowly-defined activities remains an important element of the Canadian federal system, the trend in the past five years has been towards a structure of control which subsumes these activities under broader considerations. In some cases this development relates to specific policy areas. The discussions surrounding the Report of the Royal Commission on Health Services presented to the federal government in 1964 and the proposed Canada Assistance Act have given an impetus to overall coordination in these matters. Federal and provincial ministers of such functional departments as Labour, Welfare, Health and Agriculture now meet at fairly regular intervals where formerly collaboration took place mainly at the middle levels of the civil services. The contracting-out alternative has caused the grant-in-aid procedure to be considered in terms of more fundamental considerations than those directly related to individual aided activities. Conferences of the premiers and prime ministers and of groups of ministers have come increasingly to direct particular committees of officials to carry out specialized studies and to report their findings. Finally, the increasing importance of federal-provincial institutions in the field of fiscal collaboration makes it unlikely that in the foreseeable future federal-provincial relations in regard to specific functions will be as insulated from broad policy considerations as was the case in the previous decade.

It is impossible to make any accurate statistical statement of the increasing frequency and importance of federal-provincial and inter-provincial interactions. Edgar Gallant, director of the Federal-Provincial Relations Branch of the federal Department of Finance, in 1965 made an analysis of conferences and committees in seven categories.¹⁷

1. *Federal-provincial committees as such.* According to Gallant's classification there are about 100 of these committees and sub-

committees, with about 30 of them regional in nature and the others with members from the federal and all the provincial governments. In terms of hierarchical levels the following meetings were held in 1965:

Prime ministers and premiers	2
Ministers	13
Deputy ministers	14
Directors	27
Professional and technical	65

2. *Federal advisory councils.* These are committees constituted under federal statute or order-in-council to advise federal ministers. Such groups (e.g. the Dominion Council of Health and the National Council of Welfare) include representatives from the provincial administrations and sometimes from outside government.

3. *Quasi-independent associations.* These are bodies made up wholly or largely of ministers and civil servants and are supported by governments but are not federal-provincial bodies in the strict sense of the word (e.g. the Canadian Council of Resource Ministers and the Association of Canadian Fire Marshals).

4. *Interprovincial conferences.* Gallant reports that one compilation lists some 60 formally constituted interprovincial committees. In some cases federal observers attend these conferences.

5. *Provincial advisory committees.* In some provinces provincial committees have been set up with federal representation to advise on federal-provincial programmes in such fields as Indian Affairs and projects of ARDA (Agricultural and Rural Development Agency).

6. *Sub-committees.* These sub-committees, usually dealing with technical matters, have a direct reporting relation to some other committees. The Dominion Council of Health, for example, has set up several such groups.

7. *Non-governmental associations.* These organizations, such as the Institute of Public Administration of Canada and the Canadian Good Roads Association, are formally independent of government but are composed largely or wholly of public officials and are concerned with public policy matters.

C. The New Directions of Cooperative Federalism: Collaboration in General Policies

Federal-provincial collaboration in respect to specific programmes and projects can be distinguished from interactions related to more comprehensive public policies. The dominant participants in the former processes are members of programme agencies whose work is concerned with activities in such fields as public assistance, health and hospital insurance, vocational training and resource development. The latter kind of activity involves officials whose responsibilities are less particularistic—prime ministers and premiers and their

staff agencies, the federal and provincial Departments of Finance and Treasuries and public organizations concerned directly with economic planning and development. As we have seen, the period between the end of the Second World War and about 1960 was characterized by the dominance of programme collaboration in federal-provincial relations. The devising and implementing of these joint ventures were for the most part unrelated to each other, to broader federal and provincial objectives or to the division of tax sources and public revenues between the two levels. The working of the grant-in-aid device contributed to this particularism. The periodic negotiation of the tax agreements, it is true, was a procedure by which the more general directions of public policies could be resolved in what J. A. Corry has called "tolerable compromises."¹⁸ These interactions, however, at the non-technical levels of government at least, were of a somewhat sporadic nature and there was neither the will nor the institutional machinery to relate basic federal and provincial policies to each other on a continuing basis.

The development in the 1960s of new agencies and procedures for federal-provincial collaboration at the level of fundamental policy-making has been a response by the governments concerned to the following circumstances.

First, the fiscal problem has become more acute for both levels. These new urgencies will be dealt with later in this chapter.

Second, the interventionist policies in economic matters of both the federal and provincial governments have resulted in an increasing number of situations where the absence of collaboration can result in serious frustrations of the objectives of all the governments concerned. Cooperative federalism as it is evolving is a series of responses to this kind of basic interdependence.

Third, there has been a deepening awareness that the Canadian federal system is in crisis. So long as responsible elected and senior appointed officials could reasonably take the continuing existence of the federation for granted, it was possible for them to regard federal-provincial relations as a relatively technical field which did not merit their sustained concern. This circumstance has now passed.

The last six months of 1963 could be described as a watershed in the development of federal-provincial policy collaboration. The situation as it evolved was essentially this. The programme of the federal Liberal party in the 1963 general election included several promises about matters related directly or indirectly to provincial responsibilities—promises of a contributory old age pension plan, a municipal development and loan fund, a federal-provincial medical care programme, tax concessions for industries in depressed areas, and the establishment of an Economic Council, a Department of Industry and an Area Development Authority. It can reasonably be claimed that the Liberal programme was an extension of the New National Policy which emerged from the Second World War. Resolutions to implement several of the new government's election commitments were

introduced into the House of Commons at the session which began in May 1963. The subsequent objections of some of the provinces to federal initiatives in respect to the proposed contributory pensions and municipal loan fund plans were so vigorous that the federal and provincial governments met at Ottawa on July 26-27. At this meeting the federal authorities quickly agreed under provincial pressure to basic changes in the municipal loan scheme. The communiqué issued at the end of the conference expressed the agreement of the participants that meetings of the prime ministers and premiers should be held more regularly than in the past and that it was desirable "to establish more adequate machinery for maintaining federal-provincial contacts between such meetings." The actions of the federal authorities during and after the conference indicate that they had been convinced in a somewhat dramatic way that the former practice of unilateral initiatives in matters about which the provinces felt a vital concern should be replaced by prior federal-provincial consultations and that more effective procedures of continuing intergovernmental consultation were urgently needed.

At the Federal-Provincial Conference on November 26-29, 1963 the topic of "continuing federal-provincial liaison arrangements" was on the agenda. Unlike the practice at previous such meetings, it was agreed that this conference was to be the first of a series of gatherings and it was decided to reconvene early in the next year. The conference also agreed that the following joint investigations should be undertaken:

1. A joint study at the official level was to be made of fiscal arrangements and shared-cost programmes and the relations between the two.
2. The federal and provincial Ministers of Agriculture were to examine "proposals to permit the Canada-wide operation of agricultural marketing boards."
3. Discussions on contributory old age pensions were to continue.
4. There was to be an early meeting of the Ministers of Health to discuss hospital costs and other health matters.
5. A federal-provincial working group was to examine the joint operation of welfare programmes prior to further discussions by the relevant ministers.
6. There was to be a conference at the ministerial level to discuss Indian affairs in May 1964.

The two conferences of 1963 thus were a reflection of the new circumstances of cooperative federalism in which the prime ministers and premiers were more deeply and continuously involved in federal-provincial relations than before, and in which these leaders would meet at relatively short intervals to review matters of mutual concern and to charge more specialized groups at the ministerial and official levels with inquiring into and reporting on particular policies and

programmes. It had become apparent at the highest political levels in Ottawa and in most if not all of the provincial capitals that such relations were of crucial importance to the effective governing of these jurisdictions and even to the continued existence of the Canadian federation itself.

The policies of the federal government in the period after the crucial events of the latter months of 1963 illustrate the directions in which cooperative federalism had moved.

1. After some initial disputes, the federal government has consulted with the provinces in designating areas of low employment where new industries are given tax concessions and grants.

2. The federal statute of 1963 establishing the Economic Council of Canada required that body in carrying out its responsibilities to "seek full and regular consultations with appropriate agencies of the governments of the several Provinces."

3. In respect to a matter where there had been several unilateral federal initiatives in the past, Prime Minister Pearson offered at the conference of November 1963 to increase the maximum payments in which the federal authorities would share in the three categorical public assistance programmes and the maximum incomes of pensioners, if the provinces would agree to these measures.

4. The federal contributory retirement pension programme was under continuous discussion with the provinces until its provisions were enacted by Parliament in March 1965.

5. The federal government sponsored a meeting at the ministerial level with the provinces a month after the Royal Commission on Health Services presented its report in the summer of 1964.

6. Early in 1964 the federal Minister of Trade and Commerce convened a meeting of provincial ministers to invite them to give their views on trade policies and to discuss measures for the coordination of federal and provincial policies in these matters.

7. Detailed discussions regarding contracting-out took place in the spring and summer of 1964 and led to an agreement on this procedure.

8. In the summer of 1965 the provinces were consulted in advance on the Prime Minister's appeal for a slow-down in construction because of inflationary pressures.

9. In January 1966 the federal government accepted the principle that it should to a greater extent than in the past consult the provinces prior to signing conventions of the International Labour Organization.

The Speech from the Throne read to Parliament on April 5, 1965 contained several references to new federal initiatives in economic and social policy to be undertaken in collaboration with the provinces.¹⁹ After further consultations with the provinces a Canada assistance plan was to be implemented. It would provide for federal sharing in

the costs of comprehensive provincial programmes based on needs, regardless of the circumstances which occasioned such needs. The government committed itself to a programme "for the full utilization of our human resources and the elimination of poverty among our people" and announced its intention to convene a federal-provincial conference in this connection. The federal area development programme was to be expanded after consultation with the provinces. There were to be more aggressive federal policies to assist workers displaced by automation, measures to be taken in collaboration with labour and management and "where appropriate in conjunction with the provinces." Further federal-provincial meetings were to be held for the purpose of evolving measures so that all Canadians would receive the health services they needed regardless of their individual ability to pay. The Speech from the Throne also suggested new federal policies concerning major agricultural products to be evolved in cooperation with the provinces. The general direction of federal action in social and economic policies was thus towards a more precise definition of objectives than in the past, a definition which would assist those individuals, areas and groups that had been to a greater or lesser degree bypassed in the general circumstances of prosperity which prevailed since the Second World War. This more selective approach inevitably involved a very high degree of federal-provincial collaboration if the federal objectives were to be successfully pursued.

D. Procedures and Institutions of Federal-Provincial Collaboration

During the past few years the federal government and several provincial governments have developed new agencies for dealing with federal-provincial relations at the level of basic policy. These changes are a manifestation of the increasingly important roles of the prime ministers and premiers and their staff agencies and of the elected and senior appointed financial officials in interaction between federal and provincial administrations. Although ever since the 1930s students of Canadian federalism have recommended more institutionalized machinery for federal-provincial relations, the governments concerned showed little disposition to move in this direction until the 1960s. As we have seen, these relations were for the most part dominated by isolated patterns of collaboration in particular programmes and functions and by the periodic renegotiation of the five-year fiscal agreements. The new developments represent the prevailing conviction in government circles that federal-provincial relations are too important to be left to technicians. A brief account of the development of institutional machinery in the federal and the Quebec and Ontario governments demonstrates the organizational response to the new circumstances.

1. Federal government

A small Federal-Provincial Relations Division was established in the Department of Finance in 1954. The division became responsible

for the implementation of the fiscal agreements with the provinces, acted as a secretariat for the Federal-Provincial Continuing Committee on Fiscal and Economic Matters after the latter body was established in 1955 and was given several other operating responsibilities in the same field.

In the past three years much more elaborate institutional machinery has been developed. Early in 1964 a small Federal-Provincial Secretariat was established in the Privy Council office under the direct supervision of the Clerk of the Privy Council. This agency provides secretariat services for federal-provincial conferences of prime ministers and premiers, for cabinet, and for other interdepartmental committees dealing with such matters. It is also directed to "keep in touch with, review and bring to the attention of the Prime Minister, ministers or departments any aspects or implications of present or proposed government policies which would be of interest or concern to the governments of the provinces."²⁰ The secretariat is also charged with providing for the provinces "a central point of contact with the federal government at the official level."

In the summer of 1964 the Deputy Provincial Treasurer of Saskatchewan resigned to become Assistant Deputy Minister of Finance with his major responsibilities in the field of federal-provincial fiscal relations and a strategic role as the secretary of the Tax Structure Committee. The federal "war on poverty" secretariat under the direct supervision of the Prime Minister has had important coordinating responsibilities in a great many fields of public activities where the provinces have legislative jurisdiction. The federal machinery is in process of rapid evolution. There is now a Cabinet Committee on Federal-Provincial Relations. At the official level there is a committee of senior appointed officials with representatives from the offices of the Prime Minister and the Privy Council, the Department of Finance and from other departments when matters concerning them are under discussion.

Two other federally-appointed groups concerned with basic fiscal and economic policies have also engaged in consultative relations with counterpart provincial agencies—the Economic Council of Canada has under its statutory terms of reference consulted with corresponding bodies responsible for advising provincial administrations in the field of economic planning and development; the federal Royal Commission on Taxation has been in close touch with counterpart fiscal commissions established by most of the provinces.

2. *Quebec*

A Department of Federal-Provincial Affairs was established in 1961. Premier Jean Lesage was Minister of the Department from its creation until he left office in 1966 when Premier Daniel Johnson assumed the portfolio. Lesage's deputy, Claude Morin, has played a strategic role in policy relations with the federal government and in inter-governmental groups dealing with various aspects of federal-provincial matters.

3. Ontario

A small research group, the Intergovernmental Relations Branch, was a part of the Department of Economics and Development established by statute in 1956. In 1956 this branch was transferred to the Treasury Department and came to be known as the Research and Statistics Branch with responsibilities in respect to federal-provincial and provincial-municipal financial relations and the preparation of the government's annual budget statement. A major change was made in 1965 with the appointment of Ian Macdonald as chief economist of the Department of Economics and Development with major responsibilities for coordinating research in federal-provincial relations and as a senior policy adviser to the government of Ontario in this field.

E. Institutions and Procedures for Coordinating Federal and Provincial Fiscal Policies

The fiscal problem in Canadian federalism has had several interrelated elements:

1. The sharing of tax fields between the federal and provincial governments;
2. The rates of federal and provincial taxation in tax fields which both occupy;
3. The distribution of federal revenues beyond those needed for functions with the legislative jurisdiction of Parliament among the provinces and local government authorities;
4. The coordination of the taxation and expenditure policies of all governments in the interests of economic stability and growth.

Besides these elements the current efforts in federal-provincial fiscal relations are directed toward attempts to secure agreement on priorities for major expenditures for the period 1967-72.

In this decade the fiscal relations of governments in Canada have become more crucial than ever before for the continuing stability, if not the existence, of Canadian federalism. The constantly increasing proportion of public expenditures made and of the public debt held by provincial and local governments has made federal fiscal and monetary policies less effective than before in ensuring economic stability and growth, unless the other levels pursue complementary policies. The reforms undertaken by the government of Quebec are very expensive and its demands for fiscal autonomy are insistent. The demands for higher public expenditures on such matters as education, medical services, welfare, roads, urban renewal and resources development are of such dimensions that even in a prosperous economy they cannot be met without increases in the rates of taxation. In such circumstances pressures on one level are almost immediately transmitted to demands on one or both of the others. Because of these forces at work, it is reasonable to suppose that the country will pay a very heavy price in

terms of economic growth and stability and that conflicts among governments will become intolerably severe unless more effective means are found to ensure at least minimum measures of intergovernmental fiscal collaboration.

Little progress was made in establishing effective machinery for federal-provincial fiscal collaboration in the decade after the Second World War. At the Federal-Provincial Conference on Reconstruction, Premier Drew of Ontario pressed for a continuing "Dominion-Provincial Economic Board" of technical advisers appointed by both levels with major responsibilities in the fiscal field.²¹ In succeeding years both the Ontario government and those of some other provinces made similar proposals. The federal government remained cool to such suggestions and may have been under the kind of apprehension about a "super-cabinet" voiced by Prime Minister King in 1935. The continuing prosperity of the nation and the sporadic nature of the renegotiation of the tax agreements every few years made the need for federal-provincial coordination in fiscal matters less urgent than it later became.

The Continuing Committee on Fiscal and Economic Matters was established by action of the Federal-Provincial Conference of 1955. There appear to have been two influences working towards the creation of such a body. The disadvantages of inadequate preparatory staff work for the intermittent meetings of ministers had become recognized. Furthermore, there was need for more institutionalized channels for transmitting opinions and information between the two levels. The press communiqué issued by the conference described the continuing committee's role in the following terms:

By general agreement the Conference established a committee of federal and provincial officials to meet from time to time to exchange information and examine technical problems in the field of federal-provincial fiscal and economic relations. Representation on this committee will be designated by the Prime Minister or Premier of each government respectively and the chairman will be designated by the Prime Minister of Canada. The Committee will not take collective action but each of its members will report to his own government on the subjects discussed.²²

The committee has generally met twice a year. It is usually chaired by the federal Deputy Minister of Finance and the provincial representatives are the Deputy Provincial Treasurers or their counterparts. Secretariat services are provided by the Federal-Provincial Relations Division of the federal Department of Finance. A former member of the latter agency has thus described the committee:

Much of the Committee's work is concentrated in the areas of concurrent or overlapping jurisdiction and administration. Since the members are at the deputy minister level they are concerned with "top level administration, which is sometimes almost indistinguishable from policy questions. . . ." The committee members agree on facts, clarify problems, discuss memoranda submitted by members, but make no independent decisions, take no votes, exercise

no executive powers as a committee, do not lobby as a body and do not bind their principals in any way. They do however pursue a consensus of views, and a collective judgement, indulge in co-operative studies, and participate in the fiscal discussions that constitute the bulk of their daily responsibilities.²³

On at least two occasions the committee has been charged with special studies—in 1959 it was asked to report on the rationalization of the accounting and reimbursement procedures related to shared-cost programmes; and in 1964 it was charged with working out the general directions of studies to be undertaken by the newly-created Tax Structure Committee and the methods and assumptions governing the preparation of these studies. As well as its responsibilities in the field of fiscal relations, the Continuing Committee has been a useful channel for sharing information and opinions about economic circumstances and economic policies and at each meeting members report on the economic situations in their respective jurisdictions. Most important of all, the activities of the committee have brought the senior appointed financial officials to the point where they know each other and appreciate each other's problems.

A Committee of Provincial Treasurers and Ministers of Finance was constituted in 1959. This group met twice in that year but not again until the fall of 1963. On the latter occasion it was constituted as a sub-committee of the Federal-Provincial Conference to discuss the fiscal and economic outlook for the coming year. It was similarly convened in the next two years. Apparently in the last meeting the ministers discussed the perspectives and policies of their respective governments with a greater degree of frankness than ever before.

The establishment of the Tax Structure Committee at the Federal-Provincial Conference of October 1964 was a new departure in the evolution of fiscal coordination. The committee was to be chaired by the federal Minister of Finance and was to include two other federal ministers and the provincial treasurers or ministers of finance. The committee was charged with reporting early in 1966 to the conference which established it on the following matters.

1. Trends to be expected during 1967-72 by the federal government, the provinces and the municipalities, taking into account the broad priorities likely to be accorded by governments to expenditures on major programmes that will compete for available funds;
2. The problems involved in financing these expenditures and their relationship to the economic circumstances to be expected, the probable levels of costs of public services and facilities, and the prospective levels of government debt;
3. The general policy to be followed in respect of shared-cost programmes during the period 1967-72;
4. The tax fields that should be used exclusively by the federal government and by the provinces and municipalities, and the fields in which joint occupancy is desirable;
5. The arrangements to be made in respect of jointly occupied tax fields;

6. The relation of equalization grants to the fiscal requirements and fiscal capacities of the provinces, and the best equalization arrangements for the period 1967-72;
7. Future intergovernmental liaison on fiscal and economic matters;
8. Other related matters.

The Tax Structure Committee is unique in the development of federal-provincial fiscal relations in several ways.

First, it has been given collective responsibility for recommending policies of crucial importance to the federal-provincial conferences. It was explicitly asserted in the terms of reference of the Continuing Committee on Fiscal and Economic Matters that this body would have no such corporate role and that the individual members would report to their respective governments.

Second, the committee is charged with the task of devising a fiscal and economic settlement much broader in scope than previous fiscal agreements concluded since 1942. These agreements related only to a limited field of tax sources and did not explicitly take into account shared-cost programmes or the expenditure priorities of the various governments.

Third, the committee has proceeded by much more sophisticated staff work than has accompanied federal-provincial relations in the past. Each government has made expenditure and revenue projections until 1972 according to common techniques so that these figures for all jurisdictions will be comparable. The committee, as opposed to previous such bodies, has a working instead of a recording secretary and has a small technical secretariat working in Ottawa under its direction.

It is impossible to make any evaluation of how the Tax Structure Committee will discharge the responsibilities assigned to it. Those involved in its work hope that the agreements already reached on basic economic assumptions and the availability of comparable revenue and expenditure projections will tend to limit conflicts between the federal and provincial governments. All the governments are aware of the serious consequences of failure to agree on some very fundamental matters. The senior appointed officials are involved in a process of sustained collaboration and have come to know each other and each other's problems very well. On the other hand, the terms of reference of the committee charge it with finding agreement on matters of the most basic political choice for all 11 governments, particularly as these relate to expenditure priorities. It can be expected that the objectives of the governments about such matters will not be easy to reconcile. It can be expected also that these governments will be somewhat reluctant to surrender their freedom of action.

F. Policy Conflicts in Federal-Provincial Relations

The federal system, if it is to survive, must evolve procedures for bringing about tolerable compromises in matters where there are conflicts of interest between the federal authorities and those of one or more of the provinces. The most intractable of these conflicts are *real* in the sense that they are usually imposed by the differing responsibilities that federal and provincial officials have assumed and cannot be wished away by incantations against the alleged irrationalities or perversities of individuals. More than at any time since Confederation, the federal government and the provinces now confront each other in areas of public activity where each has explicitly formulated policies. Each is now able to frustrate the other more than at any time in the past. On the basis of past events and current developments federal-provincial disagreement may be expected in respect to such matters as those listed below.

1. Policies of the federal government and the provinces may differ about the appropriate degree of the mobility of labour and capital within Canada and about public policies encouraging or limiting such mobility.
2. In some cases provinces may desire closer integration with contiguous areas of the United States than is compatible with the economic objectives of the federal government.
3. Some of the provinces and the federal government may put different priorities on economic development as against price stability.
4. With respect to certain kinds of capital expenditures the primary concern of the federal government may be the impact on employment and income, while the provinces are chiefly concerned with the need for roads, schools, hospitals and other amenities and, in some cases, with the continuing financial stability of the local authorities that borrow to make such expenditures.
5. Some of the provinces may work toward the development of more autonomous provincial or regional economies than are deemed consistent with federal objectives.
6. The federal government and the provinces may differ about the degree of interprovincial or interregional equalization that it is possible or desirable to effect and about appropriate federal measures to be implemented to this end.
7. The federal government and the provinces may differ about particular federal measures which benefit some areas but which either do not help other areas or adversely affect them.
8. Provinces may wish to enter into patterns of trade, investment and other relations with foreign nations inconsistent with economic or non-economic objectives of the federal government.
9. Federal policies for economic development in areas where income and employment are low may conflict with provincial regional development plans.

G. Interprovincial Cooperation

There has been little systematic study of interprovincial relations in Canada.²⁴ There are it seems many instances of interprovincial cooperation for limited purposes and undoubtedly the increasingly frequent interactions of provincial officials in the federal-provincial context facilitate such collaboration. It is only since the beginning of the annual premiers' conferences in 1960, however, that the provincial leaders have had a forum in which to discuss problems of common interest.

In his opening statement to the 1960 Federal-Provincial Conference, Premier Lesage asserted that "the provinces share with one another an increasing number of common problems that they could profitably study together and also, we hope, solve together."²⁵ Because of this, the Quebec government would extend an early invitation to the premiers to convene to study these problems and to decide whether it would be appropriate to "establish inter-provincial relations on a permanent basis." The Quebec hope was that this invitation would be accepted and that in the future "the provinces will be able to prepare, at first in collaboration with one another and then in collaboration with the Federal Government, long term solutions which, while effectively settling problems, will also maintain the balance in our federation."²⁶ The first interprovincial conference in recent years met on December 1-2, 1960, and in succeeding years meetings have been held at the invitation of different provinces each August. Prime Minister Diefenbaker was invited to attend the first conference but declined to do so and the communiqué at the end of the meeting expressed the hope that in the future a federal cabinet minister might come. This has not happened but the federal government has sent appointed officials as observers. Until 1963 it sent the head of the Federal-Provincial Relations Division of the Department of Finance, and in 1964 and 1965 the Assistant Deputy Minister of Finance whose chief responsibilities are with fiscal relations and the head of the Federal-Provincial Secretariat in the Privy Council Office.

The premiers' conferences are held in private and it is possible to discover the topics under discussion only through newspaper reports and the brief communiqués issued at the end of each meeting. Some of the matters under review have been the financing of schools and hospitals, the coordination of retail sales tax collections, projects for the Centennial of Canada celebration, provincial policies of giving preferences to provincial firms in bidding for government contracts, Indian affairs, off-shore mineral rights, uniform regulations for motor vehicle insurance and the reciprocal recognition of truck licences, and the coordination of educational standards and curricula. Two collaborative projects of considerable significance have resulted from the premiers' conferences.

First, at the 1963 meeting in Halifax the provincial leaders approved in principle a proposal for the interprovincial exchange of civil servants. This proposal originated with the Institute of

Public Administration of Canada and is to be implemented in cooperation with that organization.

Second, in January 1965 representatives of all the provinces except Newfoundland, Prince Edward Island and New Brunswick met with federal officials in Toronto to discuss the possibilities of uniform and reciprocal legislation relating to private pensions plans. The communiqué issued at the end of the meeting stated that "general technical agreement" had been reached among the provinces in attendance in respect to their future pensions legislation. These matters related to the solvency of private pensions funds, provisions for vesting and locking-in employer contributions, and reciprocal agreements so that the registration, inspection and audit of each private plan need be carried on by only one province.

The premiers' meetings are very informal. In contrast with the federal-provincial conferences of heads of government, the provincial leaders generally attend with not more than two advisers each.²⁷ Despite what seems to have been the original hopes of the government of Quebec, most if not all of the other provinces have been most reluctant to try to agree on matters of federal-provincial concern before discussion of these matters with federal authorities. There has not been any support either for the establishment of more formal inter-provincial machinery. The premiers' meetings have undoubtedly provided a useful forum for the discussion of common problems and to a limited degree have been a vehicle for reaching agreement on specific matters of mutual concern. It is unlikely, however, that in the foreseeable future the major decisions facing Canadian federalism will be removed from the context of federal-provincial relations.

In both the Atlantic and Prairie provinces progress has been made towards interprovincial cooperation in dealing with regional problems.

First, there is a well-established tradition of collaboration in the Atlantic region at the official level and also through private associations that work in close collaboration with the governments involved.²⁸ The Atlantic Provinces Economic Council, a private body, prepares research studies, makes representations to the federal government on behalf of the region, organizes trade fairs and trade missions and publishes the *Atlantic Provinces Statistical Review*. The premiers of the four provinces have met annually since 1956 and have made progress towards finding agreement on a common regional viewpoint in their dealings with the federal authorities. The economic difficulties of the region and the small size of each of its provinces have resulted in a more extensive pattern of interprovincial cooperation both in governmental institutions and other organizations than prevails elsewhere in Canada.

Second, in October 1965 the Prairie Economic Council was established by the premiers of Alberta, Saskatchewan and Manitoba. The council is to meet at least every six months and is to consist of the premiers assisted in each case by another cabinet minister. Among the matters dealt with at the first meeting were the following:

1. An agreement to abolish provincial preferences on public purchases and contracts;
2. Certain studies of the Saskatchewan-Nelson Basin;
3. Measures towards the expansion and greater utilization of the Port of Churchill;
4. Agreements toward coordination in higher education, particularly as this bore on "newly developing fields and disciplines";
5. Measures toward eliminating discriminatory practices affecting interprovincial trucking;
6. Measures relating to regional tourist development; an inventory of provincial policies in the industrial and natural resource fields; and the wider use of certain specialized health facilities in Winnipeg.

It thus seems that in its initial aspects at least interprovincial cooperation on the prairies will be less oriented towards presenting a common regional front to the federal government than has been the case in the Atlantic provinces.²⁹

H. Cooperative Federalism and the Lesage Administration

The directions taken by the Lesage administration which came to power in Quebec in 1960 were of crucial importance in developing federal institutions in Canada. In order to understand the objectives and strategies in federal-provincial relations of this political leadership it is useful to say something about the previous Quebec administration.

The Duplessis government waged a stubborn battle for provincial autonomy. It opposed the centralized plan for domestic reform presented to the Federal-Provincial Conference on Reconstruction; it refused to cooperate in several federal grant-in-aid programmes; it forbade Quebec universities to accept federal per capita grants from 1952 onward; it opposed unilateral amendments to the constitution such as those effected by the federal authorities in 1943, 1946 and 1949; and it consistently challenged the appropriateness in peacetime at least of federal income taxes and succession duties. Provincial autonomy was one of the most influential elements in the electoral appeal of the Union Nationale.³⁰ On the other hand, this strategy did not produce the result of restricting the growth of federal influence, apart from the partial victory of Mr. Duplessis in 1954 when after a prolonged struggle with the federal authorities the permissible rebate on the federal personal income tax for residents of a province with its own tax was raised from 5 to 10 per cent. The reasons for this failure are complex. Fundamentally, however, the defect in the provincial strategy was that the government of Quebec opposed centralization on dogmatic constitutional grounds and failed to use the effective range of provincial autonomy for positive purposes. The

extension of federal power was not effectively challenged precisely because in this period the federal government was more responsive than the province in meeting urgently-felt social and economic needs.

In contrast, the Lesage administration was more aggressively interventionist than any provincial government has ever been in Canadian history. It proceeded on the assumption that the French Canadian community could thrive only by coordinated and sophisticated provincial activity concerning a wide range of social and economic matters. This circumstance imposed demands on Canadian federal institutions to which they had never before been subjected and raised a new set of issues in the political relations between the two cultural communities.³¹ The defence of provincial autonomy has very different consequences in Quebec or elsewhere when a province pursues interventionist policies over a broad range of social, cultural and economic matters than when the scope of provincial action is narrower.

There were pressures for provincial autonomy in four directions supported by the Lesage administration.

First, there was the demand that the federal authorities cease their involvement in matters within the legislative jurisdiction of the provinces as defined by the constitution. Mr. Lesage gave this rationale at the Federal-Provincial Conference of November 1963:

. . . we must exercise constant vigilance. Nobody in Quebec believes that a given measure — aid to municipalities, the contributory pensions programme, or federal assistance to technical education, for example — can, in itself, lead French-Canada to assimilation by the English-speaking majority. Nor does anyone believe that any of these measures, taken simply, is of a nature to threaten our entire cultural heritage. However, we must be systematically opposed to any federal move, whatever it may be, that reduces, in fact, or attacks the field of provincial jurisdiction. We absolutely cannot, even if it concerns a question which appears to be only a secondary one, remain passive in the face of federal initiatives which we judge to be detrimental to the exercise of powers entrusted to the provinces. In fact, it is the whole of these measures that must be considered, and it is against each of the items comprising the whole that we must be opposed, because each item is a threat to the autonomy of the provinces, a threat which constitutes a precedent which is later on invoked to justify further threats of increasingly detrimental effect.³²

The contracting-out procedure which was analyzed in Chapter V went some distance in meeting this dimension of Quebec's demands for autonomy. In the six months before it left office the Lesage government had adopted the position that it had the right to contract out of any future federal initiatives in matters within provincial jurisdiction without incurring any obligation to expend the proceeds of the fiscal equivalent of the service in question or to conform to country-wide standards in providing it.

Second, Quebec pressed both for an increased share of the direct tax fields and for higher unconditional grants. The programme of reform to which the province was committed was very expensive. Between 1955 and 1965 Quebec expenditures increased by 270 per cent, more than those of any other province, and between 1954 and 1963 the direct provincial debt increased by 120 per cent.³³ The argument often used by the Quebec government was that the centralized system of access to tax sources which still prevailed was a legacy from the war and immediate postwar period when the most important public needs were met by the federal authorities. It argued further that under the existing circumstances those matters dealt with by the provinces were of higher social priority than federal activities.

Third, the Quebec government demanded that it be consulted in respect to important federal economic policies. At the Federal-Provincial Conference of November 1963 Mr. Lesage asserted:

. . . the provinces should always be consulted by the federal government each time the latter wishes to effect policies which could have a repercussion on the economy of the provinces. Actually, there are few economic problems which are exclusively federal in their bearing. Economic policy measures almost always influence the provinces. Consequently, the provinces can no longer be satisfied with a passive role in such matters, nor can they resign themselves to suffer the consequences of unexpected, arbitrary federal decisions in which they have had no voice.³⁴

Mr. Lesage more specifically demanded that the provinces "should have their voice in determining tariff structures, transportation and even the monetary policies of Canada" and this should come through participation in "permanent Federal-Provincial organisms instituted for this purpose." The increasing involvement of the Quebec government in economic direction and control brought about many situations in which provincial objectives could be frustrated by inappropriate policies or actions of the federal government. Out of this circumstance came the Quebec demand to be consulted by the federal authorities about a very broad range of matters.

Fourth, the Quebec government asserted the right to participate directly and without federal control in international relations where these relations concerned matters within the legislative jurisdiction of the provinces. Under the Canadian constitution as judicially interpreted the power to enact legislation implementing treaties or other international agreements follows the normal lines of delineation contained in Sections 91, 92, 93 and 95 of the British North America Act, *i.e.* Parliament cannot extend its jurisdiction to include what would otherwise be provincial matters on the basis of a claim that the projected legislation relates to some international arrangement. The position of the Lesage government respecting this aspect of the constitution was articulated by the Honourable Paul Gérin-Lajoie in April 1965 " . . . there is no reason why the right to implement an international agreement should be dissociated from the right to conclude this agreement. This is a case of two essential

steps in the one, single operation."³⁵ The practical consequences of this point of view were that the federal authorities should cease to "exert a kind of supervision and adventitious control over Quebec's international relations" and that Quebec should participate directly in international bodies — presumably like UNESCO and WHO — dealing with matters under the legislative jurisdiction of the provinces. The justification for the assertion of the "personnalité internationale" of Quebec was given succinctly by Mr. Gérin-Lajoie in an interview with *Le Devoir* printed in the edition of May 1, 1965:

. . . le gouvernement fédéral du Canada s'est montré incapable d'établir un contact étroit entre l'étranger et la communauté canadienne-française. Pour des raisons démographiques et historiques, le gouvernement fédéral représente une entité plus anglophone que francophone. La situation géographique de notre pays, les liens économiques étroits qui l'unissent à son puissant voisin du sud, sa participation soutenue aux activités du Commonwealth contribuent à orienter son action plus naturellement en fonction des préoccupations du monde anglo-saxon. Aussi est-ce surtout par le seul gouvernement francophone d'Amérique continentale, celui du Québec, que l'on peut établir un contact réel et fécond avec la collectivité qu'il représente.

J'ajouterai que le gouvernement fédéral, dans sa politique extérieure, s'est montré moins respectueux de la dualité canadienne que dans sa politique intérieure, ce qui n'est pas peu dire.

The Quebec government elected in 1960 pursued its substantive objectives in federal-provincial relations with sophistication and a very high degree of success. The essential strategy of the government was to attempt to extend its range of effective discretion by political and administrative means rather than to oppose the federal authorities on dogmatic constitutional grounds. In a revealing speech in the Legislative Assembly of Quebec on February 11, 1966 Premier Lesage spoke in these terms of the alternative strategies:

. . . le réalisme est une condition de succès dans les relations fédérales-provinciales. Mais d'abord quelles sont les attitudes en présence. À ce sujet, on peut chez nous distinguer en gros deux attitudes. L'attitude formaliste qui met l'accent sur les cadres juridiques qui doivent déterminer les relations entre le Québec et le reste du Canada.

L'attitude pratique, ou si l'on veut fonctionnelle, qui met l'accent sur les moyens de tout genre grâce auxquels le Québec pourra s'affirmer pleinement.

En vertu de la première attitude, on oriente exclusivement ses efforts vers l'action constitutionnelle et on accorde une importance exagérée à des questions juridiques. Ainsi, on décide a priori que pour s'épanouir vraiment, le Québec doit ou bien être séparé du reste du pays, ou bien être un État associé, ou bien jouir d'un statut particulier par rapport aux autres provinces. Et cela décidé, a priori, on utilise la plus grande partie de son énergie à définir des mots et à discuter de concepts théoriques.

C'est là, à mon sens, une attitude idéaliste qui satisfait ou qui peut satisfaire l'esprit, mais qui ne peut pas être efficace, car elle risque constamment de perdre de vue la réalité.

L'attitude pratique de son côté est fondée sur le point de vue que le Québec peut s'affirmer par une action économique, sociale, politique, administrative et constitutionnelle. Selon les circonstances, l'accent est mis sur l'un ou l'autre type d'action. Aucune n'exclut les autres ou ne leur est a priori supérieure. La vie en société est trop complexe pour qu'il existe une seule solution à tous les problèmes. Ceux qui ne pensent qu'à un type d'action (constitutionnelle, sociale, économique, administrative) peuvent être amenés à négliger les autres. De cette façon alors, ils rendent plus aléatoire le succès de leurs efforts. Il faut donc toucher à tous les aspects et ne pas s'attacher théoriquement à des concepts dans un cadre ou dans un champ donné. . . .

le gouvernement actuel du Québec a choisi l'attitude pratique.³⁶

The decision of the Government of Quebec that the Fulton-Favreau formula for constitutional amendment should not be submitted to the legislature of the province for approval could reasonably be interpreted as a conviction on the part of the administration that for the immediate future at least Quebec could advance its interests effectively within the existing constitutional framework. The previous Quebec defence of the formula had been partly on the grounds that it would facilitate substantive amendments to the constitution desired by the province. If it is assumed that the absence of a new amending procedure will make such amendments less likely than otherwise, the Quebec position could be viewed as one which did not regard explicit constitutional changes as being urgent.

The Lesage government acted on the assumption that its objectives in its relations with the federal authorities and those of the other provinces could best be pursued through the development of new institutions of intergovernmental collaboration. Three kinds of organization were at one time or another proposed by the Quebec government.

First, at the Federal-Provincial Conference of 1960 and subsequently the government suggested that there be established a federal-provincial secretariat financed and controlled by the participating governments.

Second, the Lesage administration at the 1960 conference recommended regular meetings of provincial leaders and in general more permanent and institutionalized machinery for interprovincial cooperation.

Third, at the Federal-Provincial Conference of 1963 Premier Lesage requested that there be established machinery by which the provinces might participate in the framing of federal transportation, tariff and "even" monetary policies. The Quebec government had a pronounced predilection in intergovernmental relations for "cooperation at the summit." There appeared to be a pronounced suspicion of functional relations between the two levels outside a framework of articulation

on basic policy matters. In speaking of economic coordination at the 1963 conference Mr. Lesage asserted, "The present policy of making decisions behind hermetically closed doors in the different sectors of the government is no longer at all acceptable."³⁷ Professor F.-A. Angers in his comments on the establishment of the Quebec Department of Federal-Provincial Relations in 1961 asserted what appeared to have been the view of the government of the province in respect to functional interactions between the two levels:

The coming into being of such a Department will, without doubt, give an altogether new character to relations between the Quebec Government and the government at Ottawa and of the other provinces. Up to now, it was on the technical level, that cooperation was established out of necessity between the different provinces and the central government. Within the limits of a more or less clearly defined policy according to each case, the superior officers and expert technicians of the various departments concerned correspond among themselves and meet in conference to determine standards or establish rules to coordinate efforts, whenever such steps are deemed necessary. In many instances, when a well-defined policy is not dictated by the governments themselves, it is these officers and technicians who, for all practical purposes, frame policy. In these circumstances there is always the risk of the policy being drawn up to meet urgent needs or to satisfy purely administrative or technical requirements. Lacking more precise ideas, the Minister automatically ratifies the decisions taken by his officers.

From now on, a Minister and a qualified staff will examine the policy-making aspects of intergovernment relations in Canada. . . . They will have to see that problems are faced as a consequence of principles or rules of policy. They will have technicians implementing provincial policy rather than abandoning policy to technical exigencies.³⁸

The department of which Professor Angers was speaking was an institutional recognition of the Quebec distrust of piecemeal functional relations between governments outside a basic policy framework and a predilection for conducting intergovernmental affairs in a quasi-diplomatic fashion. Premier Lesage was Minister of Federal-Provincial Relations after the establishment of the department, as well as being Minister of Finance. His Deputy, Claude Morin, and the small but highly-trained staff of officials in the department have no precise counterparts in the federal or the other provincial administrations. The "style" of federal-provincial relations as carried on by the Lesage government was thus significantly different from that between the other provinces and Ottawa. In both the federal and the other provincial governments there is a tradition, never so firmly established in Quebec, that federal-provincial relations at the level of basic policy are mainly the concern of treasury and finance departments. Functional relationships between specialized Quebec agencies and their provincial counterparts have in many cases been less close than is the case in the other provinces and some further attenuation

of these relations may come as new contracting-out arrangements are implemented. Most important perhaps, the government of Quebec, alone of the provincial administrations, pursued provincial autonomy for cultural and ideological reasons.

The institutions and procedures we described in the last chapter are evolving rapidly. Cooperative federalism is in essence a series of pragmatic and piecemeal responses by the federal and provincial governments to the circumstances of their mutual interdependence. We will try in this chapter to evaluate this evolving system of relations in answer to three kinds of general questions.

First, what are the general preconditions of success in cooperative federalism?

Second, what are the relative possibilities of cooperative federalism and explicit constitutional reform in meeting the demands for change in the Canadian federal system?

Third, what are the possibilities of the ongoing procedures of cooperative federalism in meeting the demands of English and French Canadians and of securing the survival of the Canadian federal union?

A. Circumstances of Success

1. Public policy effectiveness

There can be little disagreement with the general proposition that if liberal-democratic institutions are to survive they must somehow find ways of dealing with the very great number of varied and often contradictory demands made upon them, and that only by demonstrating such effectiveness can enough support be generated among the politically influential elements of democratic communities to ensure the long-run continuance of these institutions. In federal systems the individual jurisdictions must not only learn to respond effectively to demands upon them but must also evolve adequate means of central-regional articulation to cope with the circumstances of the interdependence of the two levels. Such articulation can take two forms, coordination and consultation.

Coordination is the process by which a complex of public activities is ordered according to some set of goals or priorities. Coordination relates both to the ranking itself and the subsequent actions to implement these decisions.

Consultation is the process by which officials and public agencies, with some significant degree of both independent discretion and mutual interdependence, communicate to each other their respective perceptions of situations and their judgements of the appropriate way of dealing with these situations. Coordination will be facilitated by effective procedures of consultation but does not always result from them.

Coordination and consultation in respect to public policy are of course easier to achieve when only one jurisdiction is involved and when, in principle at least, activities can be ordered through one hierarchical structure of authority than when, as in a federal system, the participants have legal and political safeguards for their independent positions. Within a hierarchical system authorized channels of communication are usually provided, although other patterns grow up through deliberate design or otherwise. Hierarchy also provides formal procedures by which solutions may be imposed in the absence of agreement and, as J. A. Corry pointed out many years ago, the very existence of these procedures may inhibit "bickering."¹ The relations between the federal and provincial governments cannot of course proceed within a pattern of hierarchical authority. On the surface, it would seem that the processes of joint decision-making which characterize cooperative federalism must lead almost inevitably to delays and frustrations in the framing and implementation of public policy.

Despite the inherent difficulties in working the institutions of cooperative federalism, it is significant that in the past two years a very large volume of public policy has resulted from the collaborative procedures. Agreements of fundamental importance have been reached in respect to contracting-out, public contributory pension plans and important aspects of economic direction and control. Important changes appear to be coming in the fields of medical insurance and public assistance. The agreement to set up the Tax Structure Committee was a major achievement in this direction and one can be reasonably optimistic that this committee will have some measure of success in attaining the ambitious objectives set out in its terms of reference. I am not here stating that these actual and anticipated policies resulting from the processes of cooperative federalism were the appropriate responses of the governments concerned to the demands upon them. Rather, I would argue that the record indicates that these procedures of joint decision-making have not in the recent past imposed insuperable barriers to the formulation and implementation of public policies of fundamental importance.

Consultative procedures leading to federal-provincial policy coordination are extraordinarily subtle and one cannot predict with any

assurance the form which the most effective of these procedures will take. What seems reasonably certain, however, is that the establishment of administrative machinery, even though ingenious, will not of itself bring about constructive relations. The following general points can be made:

1. Consultation leading to effective coordination will be facilitated when the participants can speak authoritatively for their respective governments. This does not mean that the officials involved have received explicit "instructions" from their governments on every matter under discussion; such a formal requirement would inhibit effective consultation. What is necessary is that the participants perceive each other as persons closely in touch with the perspectives of their respective administrations and with some degree of influence in determining these perspectives. There is also the requirement, that is probably not completely fulfilled in any of the governments, that effective procedures of cabinet and treasury control be maintained so that programme agencies and programme goals are subordinated to more comprehensive goals. As we saw in Chapter VII, a complex pattern of functional relations has developed between counterpart agencies of the two levels and in some circumstances those involved in these relations may resist attempts to subsume their activities under less particularistic goals. Although the effective articulation of federal and provincial objectives involves these functional interactions being sustained and in some cases strengthened, effective relations concerning more comprehensive kinds of public policies require greater measures of overhead control than have been developed in some jurisdictions.

2. Consultation and coordination will be facilitated when the participants come to share as much of a common frame of reference as is compatible with their continuing loyalty to their respective governments. Federal-provincial collaboration in respect to a very large number of specific programmes and projects has been possible largely because those involved were members of the same professions or sub-professions. Such membership characteristically means not only the common possession of specialized knowledge and techniques but also commitment to certain public-policy preferences. When matters of more fundamental political and economic choice are at issue it is unreasonable to expect that federal-provincial agreement can be reached in terms of such professional criteria, although agreement on matters of economic policy is more likely than otherwise if the elected and appointed officials involved are relatively sophisticated in the ways of contemporary economic analysis. However, a prolonged period of constructive relationships between the elected and appointed officials of the federal and provincial governments can be expected to result in a kind of community being developed, a community with its own characteristic perspectives and procedures and with its own subtle ways of distributing status and influence among its members. This development will of course be encouraged if the membership in such a group becomes relatively stable and if there is some movement of

personnel among the governments involved. It is obvious that the growth of community is dependent upon the politicians of the federal and provincial governments continuing to support such kinds of collaborative behaviour.

3. Consultation and minimum levels of coordination will be facilitated if the participants are more committed to the substantive results of particular policies than to enhancing the influence of their respective governments. Cooperative federalism requires a high degree of pragmatism, even opportunism, among those officials involved in federal-provincial relations as to what functions each level should perform. Thus any assumption by federal officials that decisions by the central government are somehow inherently "better" or more legitimate than those of the provinces is clearly incompatible with effective federal-provincial collaboration. Conversely, if some or all of the provinces carry out a persistent policy of attempting to extend their range of discretion at the expense of the federal authorities, the prerequisites of cooperative federalism are challenged in the most fundamental way. Any effective system of federal-provincial relations must of course deal with circumstances in which there are conflicts between the interests of the governments involved. It is only realistic to recognize that these differences characteristically arise from the divergent responsibilities these jurisdictions have assumed rather than from the perversity of the authorities of one level or the other. However, no government can be a constructive collaborator in the enterprise if its overriding objective is to decrease its dependence on the others regardless of the consequences of such actions for the substantive results of public policy.

4. Effective consultation leading to at least limited measures of coordination will be facilitated if the participating governments are predisposed to include the objectives of the others within their own priorities. Let us take a simple example. Assume federal-provincial discussions about a proposed measure where the result would be to increase municipal borrowing for capital purposes. Assume further that the primary objectives of the federal authorities relate to the income and employment aspects of these expenditures and that the first aim of the provinces is to safeguard the financial solvency of the municipalities. If each government presses its primary aim to the exclusion of the concerns of the other it is likely that these will prove incompatible, to a greater or lesser degree. But let us make more optimistic assumptions that either before or as a result of intergovernmental consultations (a) the provinces recognize both that the increase in aggregate demand expected to result from the measure is desirable and that the federal authorities have a legitimate interest in ensuring full employment, (b) the federal government shows a genuine interest in the continuing financial stability of the municipalities and a sympathetic appreciation of provincial concern for this objective. Under such circumstances effective consultation can lead to a solution which includes both federal and provincial aims,

a solution agreed upon against a background of mutual respect among the governments concerned for the constitutional responsibilities of each other.

5. Consultation will be facilitated when for the most part it takes place within a framework of confidentiality and when both formally and informally the governments come to share with each other information about situations and their appreciation of these situations which are not available to the public. It does not seem necessary to argue that the processes of federal-provincial collaboration and consultation about fundamentals cannot be successful unless to some considerable degree they can take place without publicity until agreements are reached. The sharing of information and views among the officials must be continuous and it is impossible to defend the situation which existed in the past where the federal authorities were prepared to share these more freely with friendly foreign governments than with provincial administrations. In the present context of federal-provincial relations, however, the federal government appears more sensitive to provincial responsibilities which may have significant implications for federal policies than at least some of the provinces.

In general, the relative success of cooperative federalism in recent years in harmonizing to some tolerable degree the objectives of the federal and provincial governments has depended much more on the attitudes of the officials involved and on the restraints they have placed on their own behaviour than on the development of more institutionalized procedures of intergovernmental collaboration. The existing structures are extraordinarily complex and work as well as they do largely because the individuals involved, including both elected and appointed officials, have come to know and respect each other in their increasingly frequent contacts. Whether or not this somewhat personalized fabric of cooperation could survive the dislocation of a rapid displacement of the present personnel is a matter of conjecture.

2. Political competition and articulation

The preceding chapters of this study have analyzed cooperative federalism exclusively as it relates to interactions between the federal and provincial executives. It would, however, be unrealistic in such an evaluation to ignore completely the political context within which these relations take place, to ignore the fact that the overriding decisions in federal-provincial relations are made by successful politicians who must periodically fight campaigns for re-election and who must continually defend their public conduct both in their respective legislatures and outside. There are two difficulties of a broadly political nature in the contemporary variant of cooperative federalism.

First, federal-provincial relations have dealt increasingly with policy matters of the most fundamental kind, matters which a

democratic community has a disposition to settle by the processes of free and open debate and political competition. Yet the success of the governments concerned in reaching tolerable settlements requires a considerable degree of insulation from publicity and from certain varieties of partisan political pressures.

Second, the interdependence of federal and provincial officials in their policy-making and policy-executing roles exercises strong influences towards collaborative behaviour. There are, however, fewer such influences on elected officials in their partisan political capacities.

The situation involving the so-called Fulton-Favreau formula illustrates one of the kinds of political difficulties which cooperative federalism may face. From the time that federal-provincial discussions on an amending procedure were reactivated by the Minister of Justice in 1961, until the publication of the draft formula upon which all the governments had agreed in the summer of 1964, there was little public debate on the issue even among specialists in constitutional matters and it was impossible for those outside government to know, except in a general way, what was going on.² Between the time the draft formula was agreed upon and the spring of 1965 the projected amendment was approved by the legislatures of all the provinces except Quebec without causing the incumbent provincial administrations significant political difficulties. By this time, however, considerable opposition to the Fulton-Favreau formula had been aroused—opposition from members of the Progressive Conservative and New Democratic parties in the House of Commons, from the Union Nationale and several influential private groups in Quebec and both from French- and English-speaking specialists in constitutional matters. The federal and Quebec governments thus faced a difficult situation. They had been precluded because of the relative confidentiality of the discussions preceding the agreement from cultivating public support for the new procedure. The matter at hand was a complex one and the draft formula was the result of a complicated compromise among the governments involved. Yet many of its critics put their arguments in terms of broad and easily understandable considerations quite unrelated to the acceptability of their proposals to the 11 governments. Despite these difficulties, the failure of either or both of the administrations to press the issue to legislative approval would place on them the onus for delaying the enactment of a Canadian amending procedure which had been under discussion for nearly 40 years. Such a failure might also complicate their relations with administrations which had secured the assent of their legislatures. It is likely that similar situations will arise in the future. Fundamental policy discussions will be carried on in confidence between the federal and provincial governments and will culminate in an agreement which becomes the subject of vigorous debate largely precluded until that time. Neither the members of the opposition parties nor the other members of politically influential publics have apparently fully accepted as legitimate the fact that high policy may

be made by federal-provincial agreement. Because of this, policies devised by these procedures may be subjected to more severe criticism than if they were made by a single jurisdiction, and criticism somewhat harder for their supporters to answer.

The relationships between federal and provincial political parties and the impact of these relations on the stands on public issues that these parties take are extraordinarily complex and have never been systematically examined.³ In some cases the electoral success of a federal or provincial party is significantly aided or frustrated by actions of the party of the same name at the other level; in other circumstances there may be little interdependence. Partisan political interactions between members of Parliament and members of the same parties in the provincial legislatures are conditioned by this kind of factor, by financial and other relationships between federal and provincial party organizations, by antagonisms and friendships growing out of previous political experience and by other influences. In most cases, however, it would appear that successful federal and provincial parties have resources of funds, organizations and popular support independent of party fortunes at the other level. It seems that usually only very weak parties are effectively subordinated to their electorally more successful federal or provincial counterparts. In circumstances where the federal government and that of a province bear the same party label there is thus no assurance that their relations will be harmonious, and Canadian political history has many contrary examples. On the other hand, where federal and provincial parties in power are of different complexions there are no overriding partisan political inhibitions imposed on collaboration in policy matters. In general, however, the influences on the federal and provincial administrations to collaborate because of their mutual interdependence in policy matters have little counterpart in the partisan political system.

3. The legitimation of cooperative federalism

If cooperative federalism is in the long run to survive, the politically influential publics in Canada must be persuaded that this is a legitimate way of making crucial public decisions. Such persuasion will be extraordinarily difficult in the face of alternative proposals for reforming our federal institutions, proposals which are on the surface simpler and more conceptually consistent. These difficulties inherent in the complexities of the existing procedures and institutions are compounded by the incompatibility between cooperative federalism and at least three influential systems of ideas about how government in Canada should be carried on.

First, cooperative federalism is difficult to defend in terms of British parliamentary traditions. The underlying assumption of this tradition is that the legislature is sovereign—in the United Kingdom over all matters and in federal countries over all those matters conferred on it by the constitution. This assumption is challenged when

the actual locus of decision-making is transferred from the cabinet, which is collectively responsible to the elected chamber, to inter-governmental bodies. Cooperative federalism has been called "government by diplomacy" by one student of the Canadian constitution. Contemporary democratic theory and practice, both where British parliamentary traditions prevail and elsewhere, have found it extraordinarily difficult to deal with situations involving the external relations of governments.

Second, cooperative federalism in its symbolic aspects gives Quebec no special status in the Canadian federal system. Daniel Johnson has said of this system:

Au lieu d'une véritable constitution, nous avons un régime mouvant, qui est constamment en mutation et qui est le produit des accords formels ou tacites entre Ottawa et la majorité des provinces. *L'autorité suprême du pays . . . c'est une institution qui n'est même pas mentionnée dans l'Acte de l'Amérique britannique du Nord.* C'est le forum des conférences fédérales-provinciales. Et là, le Québec n'a pas plus de droits que Terre-Neuve.⁴

The Honourable Jean-Luc Pepin in the most systematic defence of cooperative federalism that has ever been made⁵ has argued that this alternative recognizes both "cette réalité socio-politique du binationnalisme" and "un statut particulier" for Quebec in the Canadian federal system. However, in the formal aspects of federal-provincial relations and in the strict adherence to the rule that the various contracting-out options are available to all the provinces, the symbol, if not the substance, of the equality of the provinces is upheld.

Third, cooperative federalism to be successful requires a degree of secrecy in decision-making which is believed by many to be incompatible with the requirements of democracy. Members of the working press have become increasingly restive with the confidential nature of these processes and many have suggested that conferences of prime ministers and premiers be held in public. The necessity for secrecy until the results of federal-provincial negotiations are concluded can be expected to inhibit the legitimation of cooperative federalism.

B. Cooperative Federalism and Constitutional Change

Those who wish changes in the Canadian federal system can be divided into two groups—those who press for such reforms to come through the processes of federal-provincial collaboration and those bent on explicit alterations in the text of the existing constitution. The debate between them is not easily joined. Persons who are convinced that a substantial rewriting of the constitution is necessary often appear to place a high value on clarity and explicitness in our governmental arrangements and on the symbolic significance of a constitution as embodying the fundamental moral and political principles on which the regime is founded. By these tests, cooperative federalism

is of course deficient. On the other hand, supporters of a new constitution have not, so far as I am able to discover, made a careful study of the traditions and institutions of Canadian federalism as they have evolved in the past five years, or of the possibilities that some or most of the objectives they seek could be attained through the processes of federal-provincial interaction. But proponents of cooperative federalism have not investigated in any detail the incidence of formal constitutional arrangements on these institutions or the constraints that these arrangements impose on the attainment of particular substantive objectives.

Our evaluation of the relative appropriateness of the two broad alternatives as procedures of constitutional evolution will proceed in terms of answers to three questions.

First, if we assume that changes will require the agreement of the federal government and those of most if not all of the provinces, is it more likely that agreement will be secured for explicit constitutional change or for adaptation through federal collaboration on particular public policy matters?

Second, can the relations between the federal and provincial governments be more appropriately regulated through interactions between federal and provincial executives than through other procedures?

Third, is it appropriate to amend the constitution to provide explicitly for the institutions and procedures of federal-provincial relations?

1. The necessity for federal-provincial agreement

So far as I am able to discover, those who wish the Canadian constitution to be rewritten have never seriously considered whether or not it is likely that politically influential elements in the country could be brought to agreement on this matter. This applies to supporters in Quebec of the associated states solution, to Peter J. T. O'Hearn⁶ and to Marcel Faribault and Robert M. Fowler⁷ who have presented detailed draft constitutions and to those persons who have called for a new constitution without suggesting what they believe its nature should be. It appears unlikely that the required measure of agreement could be secured in the near future. The political relations between the "two founding races" are in a critical and fluid state. The institutions and procedures of federal-provincial relations are evolving rapidly. I would therefore agree with one scholar who remarked "to try to redraft the Canadian constitution now would be the same as trying to write a peace treaty while a war was still on." It is possible, however, to foresee limited changes in the constitution. One could imagine agreement to drop its obsolete sections and improve its literary qualities. Perhaps progress could be made toward a constitutional bill of rights binding on all governments and not subject to unilateral amendment by any. It may be possible to find agreement on more adequate protection for French-speaking and English-speaking cultural minorities. On the other

hand, any attempt to rewrite the constitution to change in a fundamental way the division of legislative powers between Parliament and the provinces would require simultaneous federal-provincial agreement on a very wide range of basic political issues. It seems to me unlikely that such an agreement will emerge in the immediate future.

The processes of cooperative federalism allow politicians and civil servants to search for agreement where it can be found. I argued in the last chapter that the current circumstances of federal-provincial interdependence make necessary effective measures of intergovernmental collaboration in respect to fairly fundamental policy alternatives. On the other hand, a federal-provincial conference, unlike a constitutional convention, deals with specific proposals for action and does not have to strive for agreement on matters of abstract definition or on how to deal with hypothetical situations which may arise in the future. In the crucial area of the direction and control of the Canadian economy Jacques Parizeau has advanced a persuasive argument which is applicable to an even broader range of problems facing the Canadian federal system:

[can we] conclude . . . that changes in the constitution are likely to help the organization of adequate and co-ordinated economic policies? Personally, I doubt this very much. On the contrary, the constitution as it stands now has helped to narrow the areas of conflict. To attempt, in present circumstances, a full revision or redrafting of the constitution means really that the whole front will be ablaze; any rational solution to urgent problems of economic policies might have to be postponed for a long time. It would seem much more fruitful to find first an empirical equilibrium between the governments and then draft it into a legal text.⁸

2. *"Executive" federalism and other alternatives for regulating federal-provincial relations*

There are two alternatives to cooperative federalism in regulating the relations between the federal and provincial governments. The first is that the judiciary should assume a more active role in delineating the respective powers, privileges and responsibilities of the two levels. This appears to be unrealistic in the light of recent experience in Canada and in other developed federations. Judicial interpretation of the constitution is almost inevitably sporadic and the predilection of the courts is to emphasize the exclusive jurisdiction of central and regional governments rather than the articulation of their activities. Furthermore, in Canada at least, many of the more important problems of federal-provincial relations, particularly as these concern fiscal matters and the direction and control of the economy, do not seem appropriate for judicial determination. The second alternative is to vest in some group or groups other than the courts the tasks of making some of the most important decisions in Canadian federalism. Such a group or groups would require some degree of independence of both levels of government. The

Rowell-Sirois Report recommended "the establishment of a permanent and independent Commission to advise the federal government on the payment of National Adjustment Grants to the provinces and to reappraise each five years the criteria according to which such subsidies were paid." This recommendation received little support at the time it was made and has since been regarded as one of the commission's less constructive suggestions. In his recent book proposing a new Canadian constitution Peter J. T. O'Hearn suggests a "Federal Council" which, according to his draft constitution:

shall consist of Delegates of the Government in Canada. Each Provincial Government shall appoint one Delegate and the Government of Canada shall appoint Delegates not exceeding in number the Provincial Delegates. The Chairman shall be elected from the Delegates of the Government of Canada and the Council shall meet at the Call of the Chairman or any Five Delegates. The Council may make a binding Allocation between the Government of Canada, on the one Hand, and the Governments of the Provinces, on the other Hand, for any Period not exceeding Ten Years, of the Powers to tax and borrow, and may determine the limits of Rates or Amounts that shall apply to the Allocation; but to do so a Majority of the Delegates of the Provincial Governments representing a Majority of the Population of Canada, according to the latest general Census, must concur.⁹

It is significant that O'Hearn's proposal would permit such a "binding Allocation" of taxation and borrowing powers to be imposed on any or all of the provinces without their consent provided that the federal government and the requisite number of other provinces agreed. This condition alone would appear to make the proposal unrealistic. In general, the past history and present circumstances of Canadian federalism make it very unlikely that the federal government and the provinces will choose to have their relations regulated in fundamental ways either by the courts or by independent executive agencies explicitly charged with these responsibilities; nor, in my opinion would they gain any important advantages by doing so.

3. The constitutional recognition of cooperative federalism

Is it appropriate to redraft the constitution to provide for the institutions and procedures of cooperative federalism? The draft constitution suggested by Marcel Faribault and Robert M. Fowler provides for three federal-provincial agencies—an economic development bank, a fiscal commission and an economic and social council.¹⁰ Under the proposed constitution each of these bodies would be composed of four members appointed by the federal government and two each appointed by Quebec, Ontario, the four western provinces and the Atlantic provinces. The economic and social council would be an information-gathering agency to transmit to all jurisdictions materials on "the general trend of the Canadian economy, its medium and long-term prospects, its productivity, and the rate of growth, as well as on the comparative growth of the several Canadian provinces, the

improvement of the standard of living in their several regions and the general betterment of social relations in Canada." The economic development bank was to aid in the development of depressed regions, to remedy serious and unforeseen economic disturbances in particular provinces and to "aid in the execution" of important interprovincial projects. The major task assigned to the fiscal commission was to advise the governments concerned on their taxing and spending policies. The "statutes, regulations and by-laws" of the latter two groups were to be determined, according to the draft constitution, by "protocol between the federal government and the provinces by a three-fourth majority of the latter."

Faribault and Fowler nowhere demonstrate that the institutions and procedures they suggest would be preferable to the ones which are now in process of evolution. There is no evidence given, for example, that the proposed social and economic council would proceed more effectively than the present Economic Council of Canada in its rapidly developing pattern of relations with counterpart agencies in the provinces. Would the "fiscal commission" be more adequate in the devising or implementing of rational taxation and spending policies than the institutions which are now developing? Would the proposed federal-provincial bodies work under the direction of the increasingly frequent meetings of premiers and prime ministers? Such matters appear to have been ignored. Serious proposals for reform in federal-provincial relations must of necessity be based on a careful assessment of the adequacy of existing patterns of interaction. There is no evidence that Faribault and Fowler have done this.

It would seem prudent to try to rewrite the Canadian constitution only after the limits of adjustment possible through the procedures and institutions of cooperative federalism have clearly been reached. As we shall see in the last pages of this study there was some evidence early in 1966 that these limits were being approached.

C. Cooperative Federalism: The Limits of Adjustment

In its legal-constitutional, political and administrative dimensions Canadian federalism has since 1867 demonstrated great resources of adaptability. The major procedures of adaptation in the postwar period have become the processes of federal-provincial executive interaction rather than constitutional amendment or changing patterns of judicial review. In the past 10 years through these interactions the dominance of the federal government established during the Second World War has been attenuated by the effective reassertion of provincial vigour and purpose. Is there then the danger that the influence of the federal government in part or all of the country will be so weakened by piecemeal attrition that Canadian federalism in any recognizable form will cease to exist? For the reasons presented in the concluding pages of this study, I believe this danger to be "clear and present."

The first kind of danger to the Canadian federal system in cooperative federalism is that provincial pressures for autonomy will so weaken the federal government that it will be unable to discharge its responsibilities for the integration and development of the Canadian economy, for economic stabilization and growth and for interregional and interpersonal equalization. There are strong forces towards the enhanced power of the provinces. The proportion of total public expenditures made by the provinces and local authorities is likely to continue to increase, barring rapid increases in defence spending. The new and more specific kinds of social and economic policies which now seem to be necessary make less feasible than before certain kinds of federal control over these matters. The provinces are likely to continue to attract able and purposeful people to their public services. In the House of Commons elected in November 1965, the under-representation of certain provinces in the government party and cabinet may work to make the governments of these provinces the most effective outlet for their distinctive sentiments and interests. Despite these influences, there are strong countervailing forces at work to restrain the further weakening of federal power, at least in the governments of the provinces other than Quebec if not the general public in English Canada. Several premiers have expressed their anxiety about this trend very explicitly and the government of Ontario has been particularly sensitive to these considerations. None of the other provinces has shown any desire to take advantage of the contracting-out option and none has been willing to cooperate with Quebec on a permanent basis to weaken federal influence. It appears too that all of these provinces are actively seeking increased federal financial assistance for particular functions, specifically for higher education and health services. It seems likely that the support of other provincial administrations for federal power will increase as the pressures of the Quebec government for autonomy are pressed more aggressively and as the implications of the *statut particulier* alternative become more apparent.

The second kind of danger, and the one I believe more immediate, is that cooperative federalism will result in a situation in which the political and constitutional relationships between the people of Quebec and those of the other provinces will be so tenuous and so fragmentary—and so much mediated through the government of Quebec rather than being carried on within the institutions of the federal government—that a constitutional revolution destroying Canadian federalism will have been effected. The Lesage administration when it came to power and for some time afterward asserted the traditional Quebec position that it was demanding for itself only what under the constitution belonged equally to all the provinces; Mr. Lesage's defence of the Fulton-Favreau formula was largely on the grounds that any procedure for amendment acceptable to Quebec must provide for unanimous provincial consent in respect to changes in the most fundamental aspects of the constitution. The existing constitutional system, however, makes possible a very considerable amount of *de facto*

differentiation between the position of Quebec and that of the other provinces. The Lesage government exploited these possibilities in a sophisticated and successful way. In its last months in power the official position of the Lesage administration apparently reversed the traditional position of the equality of all the provinces and embraced the doctrine of the *statut particulier*. The Honourable Paul Gérin-Lajoie at his convocation address to Carleton University in April 1965, gave advance notice of the new position by questioning in somewhat hypothetical terms the traditional viewpoint that in a constitutional sense Quebec was a province "comme les autres."¹¹ In his speech to the Ste-Foy Chamber of Commerce on December 14, 1965, Premier Lesage committed his government to the *statut particulier* alternative in the most explicit way.¹²

The claims for a special status for Quebec made by the Lesage government in its last year in office were more than a *post hoc* justification of the contracting-out arrangements which had already been implemented. These arrangements, so far as Quebec was concerned, confined the federal authorities, with several important exceptions, to matters within federal legislative jurisdiction. The attainment of such an objective did not satisfy the requirements of the Lesage government for a wider range of provincial autonomy or for an enhanced provincial influence over federal policy-making. In his Labour Day address in 1965, the Premier asserted that as his administration came to formulate more far-reaching and explicit plans in respect to manpower and employment it would press for modifications of federal activities in these fields, particularly those of the National Employment Service.¹³ The new social security policy whose outlines were announced by the Honourable René Levesque in November 1965, included a system of family allowances based on very different principles than the federal scheme¹⁴ and the same kind of considerations would logically have justified an attempt to replace the federal Old Age Security programme with a provincial one. As Quebec plans for regional development became more explicitly formulated it became reasonable to expect more aggressive efforts to bring federal developmental policies through the Department of Industry, ARDA and other agencies into harmony with provincial requirements. The assertion of the "personnalité internationale" of Quebec was leading to increasingly insistent demands that, without federal supervision or control, the province should be able to enter into direct relations with foreign nations in regard to matters within provincial legislative jurisdiction. The objectives of the Lesage government in the projected steel complex, the newly-created public sector of the mining industry, new plans for rationalizing agriculture and so on could be expected to result in new pressures to influence federal policies closely connected with these objectives. In December 1965, Mr. Lesage announced the creation of a committee under the chairmanship of Jacques Parizeau to study and report by the end of 1966 on the activities of certain classes of financial institutions and appropriate provincial legislation which might be enacted to regulate them. Eric Kierans is reported to have informed the federal-

provincial conference the same month that Quebec would find contracting-out applied to new federal programmes unacceptable and would demand fiscal equivalents without undertaking any commitments about the service or facility in question.¹⁵ Thus the pressures of the Lesage government in respect to specific fields of policy-making were working steadily towards a situation in which Quebec had a significantly larger scope of *de facto* autonomy than that possessed by the other provinces.

The creation of a special status for Quebec has implications of the most fundamental kind for the workings of the institutions of the federal government. If the present trends continue, Parliament will deal increasingly with matters for which Quebec has assumed exclusive responsibility within that province. Increasingly, important federal agencies which deal with matters of crucial concern elsewhere in Canada will have only a tangential relationship to the people and government of Quebec. Increasingly, federal elections will revolve about matters which have a direct relevance only outside Quebec. Such a situation will likely create new tensions between Quebec and the rest of Canada, and it seems unlikely that English Canada will accede simultaneously to pressures for both a special status for Quebec and a more influential role for French-speaking citizens from Quebec in the institutions of the federal government.

One might argue that there are changes which might be made in the structure and workings of federal institutions to accommodate the situation of a *statut particulier*. Paul Sauriol, editorialist with *Le Devoir*, envisaged a group of reforms in which the normal traditions of parliamentary government would prevail concerning matters within the exclusive jurisdiction of the federal authorities, while in "les domaines mixtes" the responsibilities would be assumed either by a reconstituted Senate or some federal-provincial body to which each level would delegate its powers in these affairs.¹⁶ It seems unlikely, however, that such a solution could harmonize the differing conceptions of Quebec and the rest of the country on the appropriate role of the federal government.

The establishment of a *statut particulier* for Quebec within the Canadian constitutional system has important implications for the organizational relations between English- and French-speaking Canadians outside the governmental sphere. The theory and practice of the constitutional *statut particulier* mean that the most important political relations between the two cultural communities are conducted by their respective leaders "at the summit." This pattern of political relations would have to sustain and be sustained by corresponding kinds of interactions among private and quasi-public associations, particularly those primarily concerned with public policy matters. In general terms, a special status for Quebec makes less possible the establishment of effective bicultural organizations on a country-wide basis than does a situation in which all the provinces assume broadly the same responsibilities. During a period when the division of functions between the two levels of government is a

matter of controversy, organizations including important elements from the two cultural communities are subjected to severe internal strains when French Canadians from Quebec wish their province to have the exclusive powers to deal with affairs which other Canadians see as appropriate objectives of federal action. As particular aspects of the *statut particulier* are implemented, associations dealing with such vital concerns of public policy as higher education, welfare and health services, the exploitation and conservation of natural resources, municipal government, manpower and collective bargaining and so on can be expected to organize themselves into autonomous or semi-autonomous Quebec and non-Quebec elements. It is possible and even probable that the organizations will carry on some kind of formal relationships but these relations will be almost of necessity of a "fraternal" variety, precisely because their major focuses of attention are on different governments. It is to be expected also that these associations will be almost exclusively unicultural in both form and spirit. English-speaking Canadians from Quebec and French-speaking Canadians outside Quebec will find these associations inadequate vehicles for expressing their particular sentiments and interests.

The situation as it is evolving thus contains these elements.

First, so far as the provinces other than Quebec are concerned, the pressures towards autonomy which began in the late 1950s seem for the time being to have run their course. Among these administrations there is apprehension about the further weakening of federal power.

Second, the province of Quebec continues to press her demands both for a wider range of autonomy and for an enhanced degree of influence in matters within the legislative jurisdiction of the federal authorities.

Third, as the *de facto* differentiation between the position of Quebec and that of the other provinces increases, deep incompatibilities are revealed between federalism and the normal workings of federal parliamentary institutions, and between the *statut particulier* situation and the increased influence of French-speaking Canadians in the institutions of the federal government.

Can the continuing procedures of federal-provincial interaction enable the Canadian constitutional system to adapt to the new and contradictory demands now being made upon it? This seems unlikely. The directions in which the system is now being taken involve a constitutional revolution. There is nothing in the Confederation settlement as it was planned in 1864-67 or as it subsequently evolved which provides for a *statut particulier* in the form and dimensions clearly contemplated by the two successive governments of Quebec. It seems improbable that change of such a fundamental nature can be effected through piecemeal federal-provincial negotiation. Because Quebec has now charted its course in such explicit terms it is likely that in the future the federal government and the other provincial governments will evaluate Quebec demands within the framework of broader

considerations than they have done in the recent past. The institutions and procedures of cooperative federalism have shown some capacity to deal with questions of ever-increasing generality. Federal-provincial relations in the period after the Second World War were dominated by considerations relating to specific programmes and facilities. More recently progress has been made concerning broader functions of government. The Tax Structure Committee has been charged with questions related to the most fundamental aspects of federal and provincial policies and more particularly with attempting to find agreement on broad expenditure-priorities. There may be continued success in these directions. It seems improbable, however, that federal and provincial executives could by agreement effect a revolution that would change the constitutional ties between Quebec and the rest of Canada to a quasi-diplomatic rather than a federal variety.

In spite of the analysis given above, I believe that it would be imprudent to take a deterministic view of the current crisis in the Canadian federal system.

On the one hand, it is unreasonable to take comfort in the "pendulum theory of federal and provincial powers," which asserts that there are somehow inherent forces at work which will as in the past prevent the attenuation of the powers of one level or the other to the extent that federalism is destroyed. There are of course conceivable circumstances which would lead to the effective reassertion of federal power so far as the government and people of Quebec are concerned. The partial or complete mobilization of the country in response to a deteriorating international situation would bring this about. It is possible to imagine a situation where politically influential groups throughout Canada come to believe that decentralization of power was costing too much in terms of economic stability and growth. Some new federal political leadership might emerge which would successfully commit the country to a bold and popular programme of reform, even in the face of the opposition of the government of Quebec and perhaps the governments of some other provinces. It is impossible to predict the likelihood of these circumstances occurring. It is unreasonable, however, to believe that any or all of them are inevitable.

On the other hand, it seems that Canadian federalism has not yet passed the point of no return. It is possible that the Quebec leadership will press its demands towards the *statut particulier* less aggressively than a reading of recent official pronouncements would lead one to believe. Fortunately, viable political arrangements do not need to conform to standards of logical consistency. It is possible that Canadians may be able to agree on a set of devices which allow each of the contradictory demands on the Canadian constitutional system to be met in part. Perhaps some new distribution of revenues, revenue sources and functional responsibilities can be effected which would provide both for the dominance of the federal government in economic matters and exclusive provincial responsibility, without

the existing extent of federal involvement, in matters of provincial concern. Such a development would help to ensure the historic role of the federal government in economic matters and would also mitigate the difficulties inherent in a special status for Quebec within the Canadian federal system. Perhaps too the demands of the government of Quebec concerning particular matters will be discussed in the future within a framework which considers the cumulative impact of these demands on the survival of Canadian federalism. It is this last alternative rather than the piecemeal adjustments of cooperative federalism which gives best hope for the immediate future.

Two major changes between the spring of 1966 when the foregoing study was completed and the summer of 1967 have so altered the circumstances of Canadian federalism that at least a preliminary account and assessment of them is necessary. These developments are:

1. The new fiscal policies announced by the federal authorities in September and October 1966.
2. The evolving political relations between the federal and provincial authorities which appear to be leading to some sort of confrontation in which the fundamental nature of the Canadian constitutional system will be at issue.

A. The New Fiscal Regime

The policies concerning federal-provincial fiscal relations announced by the federal authorities in the fall of 1966 constitute very new departures. The essential features of these new directions announced by the government to the Tax Structure Committee in September 1966 and to a federal-provincial meeting called for the next month specifically to deal with the financing of higher education¹ were as follows:

1. *Equalization grants to the provinces on a new basis.* These were to be paid according to a radically new formula. This formula took into account the provincial yield from all tax sources rather than, as under the old formula, the yields from income taxes and succession duties and natural resources levies. Equalization was to be paid according to the national average yield from the new base. According to calculations of federal officials, the new method would have paid the provinces \$491.5 millions in unconditional equalization in the fiscal year 1966-67 compared with \$352.8 millions under the scheme then in effect.² The four Atlantic provinces and Quebec were to be the beneficiaries of the new plan. Ontario, Alberta and

British Columbia remained as "have" provinces not receiving equalization. Saskatchewan was redefined as a "have" province, with a transitional payment declining to zero during the next five-year period, and Manitoba was to receive a slight annual increase of \$1.6 millions.

2. *A gradual termination of the major shared-cost programmes in health and welfare.* The government announced its decision to terminate three major grant-in-aid programmes related to hospital insurance, grants for various health purposes and welfare payments when the agreements related to these respective schemes expired. Fiscal compensation to the provinces was to be on an equalized basis with certain fiscal incentives so that individuals and families would not be disadvantaged in receiving such services when they moved from one province to another. In general, the federal authorities proposed to end their participation in the major grant-in-aid schemes in which contracting-out had been permitted by the Established Programmes (Interim Arrangements) Act of 1964. The federal policy was based on a clear distinction between shared-cost programmes in respect to "social matters" and joint programmes in the field of economic development. The government asserted both its right and its intention to continue to participate in the latter, although three of these (forestry agreements, agricultural line assistance and roads-to-resources) were to be discontinued at the expiration of the agreements then in effect.

3. *Federal withdrawal from direct aid on behalf of institutions providing post-secondary education.* The federal government announced that it would end its \$5 per capita annual grants on behalf of universities and its programmes of aid both for capital and operating expenses of vocational training. Certain capital grants for vocational training would, however, continue in the transitional period. The provisions for compensation of the provinces would be (a) a reduction of federal income tax of 4 per cent and of corporate income tax of one per cent, with the yield from these taxes being equalized to the national average under the general equalization formula; (b) augmentation of (a) by unconditional grants to bring the total compensation in each province up to 50 per cent of the operating costs of its post-secondary institutions. Federal officials estimated that in 1967-68 the new arrangements would provide a fiscal transfer to the provinces of \$467.2 millions compared with \$270.0 millions in the previous fiscal year under the old provisions.³ The federal government offered to assume complete financial responsibility for adult retraining. At the same time, the Prime Minister asserted the right of the central authorities to participate in cultural activities, to sponsor any research they chose and to provide scholarships and bursaries for post-graduate and other specialized study.

The federal proposals taken together represent an attempt to reverse some of the trends in the Canadian federal system during the past two decades.

1. The government appears determined to liquidate the *de facto* special status that Quebec had assumed in the 1960s. The norm accepted by the central authorities is a relatively uniform scope of federal activity and of federal tax rates throughout Canada. This uniformity is to be attained by reducing federal involvement in all the provinces to roughly the same level as federal involvement in Quebec when the new policies were announced.

2. The proposals are an attempt to disentangle federal and provincial relations so that the provinces are able to finance their rapidly growing responsibilities by independent use of their taxing powers along with, in the case of the "have not" provinces, federal equalization grants at higher levels than ever before. Thus the central authorities hope to end the situation in which demands of the provincial and local electorates for increased expenditures are almost instantly translated into pressures on the federal government for financial concessions.

3. There is to be a more discriminating exercise of the federal power to spend on matters generally considered to be within the legislative jurisdiction of the provinces. In the 1945-60 period the federal authorities were prepared to assist almost any activity that seemed in need of financial support, and there was little hesitation in imposing financial penalties on provincial and local governments, individuals or private groups that chose not to participate in such ventures. The federal spending power is now to be exercised in a more discriminating fashion.

It is significant that the new fiscal policies were evolved unilaterally by the federal authorities and were not the result of federal-provincial negotiation. Thus the high hopes that some observers of Canadian federalism had for the Tax Structure Committee when it was established have been proved unfounded.

The implementation of the federal fiscal policies will result in a partial return to "classical federalism" in which each level of government discharges its constitutional responsibilities in relative independence of the other. However, it would be unrealistic to believe that this variant of federalism will be attained. Although the federal government is to exercise its spending powers in a more discriminatory way than before, the federal authorities have asserted their right to be involved in several kinds of activities where the jurisdiction of Parliament is not clear.

1. There is declared to be a national interest in the "portability" of provincial social assistance and hospital insurance schemes and the federal government will make grants to the provinces to further this objective.

2. In its proposals on post-secondary education the federal government drew a sharp line between education and occupational retraining and, because of its interests in productivity and full employment, offered to assume complete financial responsibility for such retraining.

3. Because of its "over-riding responsibility for employment, economic stability and economic development in Canada" the federal government has declared its intention to participate with the provinces in shared-cost programmes concerning specific economic projects.

4. The federal authorities have asserted their right to involve themselves in cultural activities and research and to pay scholarships and bursaries to individuals.

5. The federal government has remained determined to make contributions to provincial medical insurance plans only if these schemes conformed to the four conditions outlined by Prime Minister Pearson in his proposal to the Federal-Provincial Conference of July 1965.

Apart from these specific exceptions, however, the new fiscal regime contemplates the federal authorities limiting their financial and administrative involvement for the most part to subjects within the explicit legislative jurisdiction of Parliament. On the other hand, the circumstances of the 1960s have led to the creation of several *zones grises* in relation to matters where formerly the federal authorities were regarded as having exclusive or at least overriding responsibilities. These new areas of divided responsibility are related to international affairs, the control of lending institutions, broadcasting, the promotion of scientific and cultural activities, immigration and fiscal policies toward economic stability and growth. The major fields of jurisdictional conflict have thus shifted rather dramatically in this decade to those formerly within federal control.

B. *Evolving Political Relations*

The directions that federal-provincial relations, and in particular Ottawa-Quebec relations have taken in the year since the accession of the Union Nationale to power in June 1966 can be analyzed usefully only against the background of interactions between the Pearson and Lesage governments in the preceding period. The strategy of the Lesage administration was to extend the range of Quebec discretion by initiatives related to particular spheres of public activity. The Pearson government was basically sympathetic to Quebec's redefinition of its role by such piecemeal and pragmatic initiatives and acceded to many of the province's requests. The Prime Minister and his cabinet colleagues from Quebec — in particular Guy Favreau, Maurice Lamontagne and Jean-Luc Pepin — evolved a rationale for the new circumstances of federal-provincial relations in the name of "cooperative federalism."

The Union Nationale administration, unlike the government it displaced, is committed both to the complete withdrawal of the federal authorities from the income tax and succession duty fields and to explicit constitutional reform towards some kind of bi-national union. Since it came to power in 1966 the Johnson government has posed direct challenges to Ottawa in respect to fiscal matters, the

international role of Quebec, the federal old age security and family allowance programmes and the insurance of deposits in certain lending institutions.

At the federal level, there has been since the general election of 1965 a stiffening in the attitudes of Quebec Liberals towards autonomist pressures coming from the province. At the Founding Convention of the Quebec Liberal Federation held in March 1966 there appears to have been a profound disposition to proceed in terms of federalist solutions in marked contrast to the autonomist directions then being taken by the Lesage government.⁴ Since the accession to power of the Union Nationale, leading Quebec Liberals in the House of Commons have opposed provincial pressures for an increased scope of Quebec autonomy and for constitutional change towards some form of *statut particulier*. Although the Honourable Jean Marchand has not, so far as I can discover, addressed himself directly to the constitutional issue since his accession to the cabinet the general tenor of his public speeches indicates that he believes concrete social and economic problems to be of more immediate importance than the national question. The Honourable Maurice Sauvé has outlined in more detail than any other prominent Quebec politician a series of measures to enhance the position of the French language and the French culture on a Canada-wide basis.⁵ The Honourable Jean Chrétien has opposed a *statut particulier* solution⁶ and has argued that the excesses of nationalism in Quebec have discouraged private investment in the province and contributed to its economic difficulties.⁷ In an article written for a supplement to *Le Devoir* published on June 30, 1967, Gérard Pelletier, Parliamentary Assistant to the Secretary of State for External Affairs, deplored the current Quebec preoccupation with constitutional matters — "la monomanie constitutionnelle" — and although he did not reject the *statut particulier* explicitly he was critical of the New Democratic Party which had accepted this alternative as official party policy. Perhaps the most significant single development in the stiffening resistance of the federal government to Quebec autonomism was the appointment of Pierre Elliott Trudeau as Minister of Justice in the spring of 1967. Trudeau has been for more than a decade a forthright conservative in constitutional matters in his defence of the distribution of legislative powers between Parliament and the provinces as contained in the British North America Act.⁸ In the 1950s his most severe strictures were against the federal authorities for involving themselves in provincial matters through the exercise of the spending power. During this decade many of Trudeau's constitutional polemics have been directed against what he regards as the excesses of Quebec nationalism and in the past 18 months against any form of *statut particulier*. As Minister of Justice he will obviously play a crucial role in future constitutional discussions with the provinces and it is reasonable to suppose that he would not have been appointed to that portfolio unless the Prime Minister was basically in sympathy with Trudeau's well known views on constitutional matters.

A critical element in Quebec-Ottawa relations in the near future may well be the directions taken by the provincial Liberal party. In an interview given to Gilles Gariépy of *Le Devoir* on June 26, 1967, Paul Gérin-Lajoie indicated that the party had opted for an autonomist rather than a federalist alternative, although the interview as published does not make clear whether the stand taken by the former Minister of Education had been adopted officially by the Quebec Liberals. Mr. Gérin-Lajoie asserted that the Lesage government had acted with "un certain empirisme" in constitutional matters and had chosen, in the fluid situation which then prevailed, to assert the rights of Quebec in particular matters rather than to work towards a comprehensive constitutional settlement with Ottawa. However, in his judgement, changes in federal policies in the past year had made such a piecemeal strategy inappropriate for Quebec. The new federal attitudes, it was asserted, had been made clear by the statements of several cabinet ministers opposing the *statut particulier*, in Ottawa's opposition to Quebec's demands for an international status and by the termination of contracting out. In these new circumstances it was thus necessary that Quebec should provoke "un affrontement constitutionnel" with Ottawa in which a new constitutional regime would be established within two years. Mr. Gérin-Lajoie explicitly asserted that the relatively weak political position of the Union Nationale government resulting from the June 1966 election should not be a handicap in such negotiations because "les deux grands partis québécois sont substantiellement d'accord quand il s'agit du réaménagement constitutionnel."

The resolution calling for a Confederation conference passed by the legislature of Ontario on May 23, 1967 indicates that yet another government now wishes some form of debate in which the problems of Canadian federalism will be discussed at a fundamental level. In speaking to the resolution recommending that such a conference be convened by Ontario, Premier Robarts outlined how "through federal initiative and federal-provincial conferences" Canada had moved from centralization to a set of circumstances where the individual provinces could define their relations with Ottawa differently to the present "general decentralization."⁹ He commented on this pattern of change:

I would suggest to you that these very fundamental questions of where our country was going were not in fact discussed. Those [changes] were the off-shoots of the various courses of action that come about in developing particular shared-cost programmes and in meeting the events of specific days and specific times as they occurred.

At no time were the real, fundamental questions debated per se. The questions of change came about almost as a byproduct. These questions have always been below the surface and have never been consciously rationalized. Until we do come to grips with some of these questions, I am convinced that we will continue to drift in this country, on what might be termed an uncharted course. . . .¹⁰

The dominant political forces in Ottawa and the two largest provinces thus appear to have lost their former confidence that the continuing processes of federal-provincial interaction in respect to particular issues are in themselves enough to enable the Canadian federal system to adapt to the changing circumstances that confront it. The events of the last year reinforce the general conclusion reached in Chapter VIII of this study that the devices of cooperative federalism had become inadequate to contain the conflicting forces at work in Canadian federalism.

In the past few years many recommendations for new institutions and procedures of federal-provincial articulation have been made. Some of these recommendations have been discussed in Chapter VII. This appendix summarizes the various proposals which have been brought forward.

A. Proposal for a Federal-Provincial Secretariat

At the 1960 Dominion-Provincial Conference the Premier of Quebec proposed that "a permanent Secretariat for federal-provincial conferences be established and that it be financed and administered jointly by the Federal and Provincial Governments." This request was reiterated by Mr. Lesage at the conference held in November 1963 and he said of this proposed agency and a "permanent Council of Provinces" that "Such institutions have become indispensable. They are probably the only concrete means of avoiding that the provinces be faced with 'faits accomplis' or with unilaterally dictated measures without previous consultation between and among themselves and with the central authority."

The Quebec leader went on to outline several unilateral initiatives which had been taken by the federal government in the previous few months, including the municipal loan fund, the projected contributory pension and the designation of depressed areas for federal economic assistance. According to Mr. Lesage's argument, such federal decisions had led to "immense confusion" and an understandable "spine-stiffening by the provinces." In such a situation there was the need for "concrete instruments of action" for permanent federal-provincial consultation and coordination. The government of Quebec pressed its request again at the conference held in July 1965 and reiterated that the proposed machinery "should not be limited to this or that aspect of federal-provincial relations, but should be concerned with overall policy." On this latter occasion, however, the government

expressed its willingness to wait on the findings of the Tax Structure Committee as this matter fell within the committee's terms of reference.

B. Proposals for New Federal-Provincial Agencies in Economic Policies

At the conference of November 1963 Premier Lesage recommended that there be provincial participation in "determining tariff structures, transportation and even the monetary policies of Canada" through "permanent Federal-Provincial organisms instituted for this purpose." Professor Jacques Parizeau has made more detailed suggestions along the same line:

1. The composition of the Board of Governors of the Bank of Canada be changed so that it would be "a group of official appointees of the federal government and the provinces." In Parizeau's terms this would make it easier for the Bank to "consult the two levels of government and to have monetary policies understood by the provincial authorities." He also suggested that such a device might aid in more effective debt management by the bank in the circumstances where an increasing proportion of the total public debt is held by the junior governments. Although the bank has the authority under this law to deal in provincial bonds it has refrained from doing so and although there have been pressures for it to change this policy the bank might under the existing structure "lose a good part of its moral authority if it decided unilaterally where help is most wanted and which province should be helped." A reconstituted Board of Governors would help to overcome this difficulty.

2. A federal-provincial committee on commercial policy might be constituted "possibly alongside the Tariff Board." This committee might "at least in the first stages" perform "a purely consultative role, but where clearing of federal intentions and regional constraints could proceed on an *ad hoc* basis." Parizeau pointed out that in his previous (1964) budget speech the federal Minister of Finance had stated that whenever international commercial negotiations adversely affected the interests of one region, Canadian officials would see to it that compensating advantages for the same region would also be negotiated. Parizeau argued, however, that this was a less effective way of providing an outlet for regional interests than federal-provincial machinery specially charged with responsibilities in commercial matters.

C. Saskatchewan's Proposals for Federal-Provincial Coordination in Fiscal Policy

The Saskatchewan government at the 1955, 1957 and 1960 Federal-Provincial conferences recommended more institutionalized intergovernmental machinery for research, consultation and planning in respect

to fiscal policy. In its brief to the Royal Commission on Banking and Finance in March 1962 the government recommended that "a permanent committee of Ministers of Finance and Provincial Treasurers be established, to meet at least once annually for the purpose of reviewing the needs of the economy and the financial policies suggested by economic trends." This body would gather early in December of each year at about the time when the governments were making their major budgetary decisions and would review the current economic situation and consider the impact on this situation of actual and projected public expenditures. Such meetings would not only influence the federal and provincial governments in their financial policies but would result in joint "federal-provincial counter-cyclical programs and projects" for which the federal authorities would provide financial assistance.

D. Professor Savourin's Proposal for a Federal-Provincial Agency in External Affairs

In a paper to the annual conference of the Canadian Bar Association in September 1965 Professor Louis Sabourin of the University of Ottawa proposed that "a permanent office" be set up to coordinate the policies of the federal and provincial governments in international affairs. This agency would have the following roles.

Firstly, it would be a clearing-house dealing with all sorts of international information useful to the provinces. It could facilitate the implementation in Canada of many multilateral conventions which Canada has not signed because these treaties were and are within the constitutional jurisdiction of the provinces. Secondly, it would coordinate the actions of both the federal and provincial governments, giving to both of them some sort of "droit de regard" on each others actions on the international scene, where it is a matter which is constitutionally given to the provinces. Naturally the provinces cannot pretend to any "droit de regard" on the federal government when Ottawa is operating within its own field of jurisdiction.

E. The Porter Commission's Proposal for Fiscal Coordination

The Royal Commission on Banking and Finance which reported to the Government of Canada in 1964 proposed reviving the continuing Committee of Ministers of Finance and Provincial Treasurers and an extension of the terms of reference of this group to include coordination of the fiscal policies of the federal, provincial and local governments. This recommendation was based on the following judgement of the commission: "In recent years, when credit conditions have altered significantly, the capital expenditures of provinces and municipalities have not been influenced enough to give us any confidence that monetary and debt policies provide an effective means of

adjusting the capital expenditure programs of the provinces and municipalities to the needs of economic stabilization. What is needed is a more direct and more effective method of coordination" (p. 520). The commission's viewpoint was that in such coordination federal influence would most appropriately be used to influence the timing and amount of provincial and municipal capital expenditure programmes rather than their direction.

F. The O'Hearn Proposal for a Fiscal Council

In his proposed draft constitution Peter J. T. O'Hearn proposed a body under the following terms:

5. The Federal Council shall consist of Delegates of the Governments in Canada. Each Provincial Government shall appoint one Delegate and the Government of Canada shall appoint Delegates not exceeding in Number the Provincial Delegates. The Chairman shall be elected from the Delegates of the Government of Canada and the Council shall meet at the Call of the Chairman or of any Five Delegates. The Council may make a binding Allocation between the Government of Canada on the one Hand, and the Governments of the Provinces, on the other Hand, for any period not exceeding Ten Years, of the Powers to tax and borrow and may determine the Limits of Rates or Amounts that shall apply to the Allocation; but to do so a Majority of the Delegates of the Government of Canada and a Majority of the Delegates of the Provincial Governments, representing a Majority of the Population of Canada according to the latest general Census, must concur.¹

G. The Faribault-Fowler Proposals

In their 1965 book *Ten to One: The Confederation Wager* Marcel Faribault and Robert M. Fowler proposed a draft constitution for Canada which called for three federal-provincial organizations each directed by a body of twelve persons — four appointed by the federal government and two each by the following provinces or groups of provinces: the four Atlantic provinces, Quebec, Ontario and the four western provinces.

1. The fiscal commission would have the following responsibilities (pp. 144-5):

- (a) To make recommendations to the federal and provincial governments regarding the best means of making taxation as equal as possible across Canada while allotting to each such government the proceeds of taxation more closely connected with its legislative authority and required for the discharge of its responsibility;
- (b) To promote efficiency and economy in the levying, collecting, and allotment of taxes across Canada, notably by the avoidance

of duplication, the simplification of taxpayer's returns and the improvement of accounting, remitting, and controlling procedures;

(c) To recommend all measures of reciprocity with other countries in fiscal matters;

(d) To act as an autonomous agency to the Canadian governments on such matters as they may entrust to it.

Further "the statute, regulations and by-laws of the commission are determined by protocol between the federal government and the provinces by a three-fourth majority of the latter."

2. The Economic Development Bank would have the following purposes (147):

(a) to aid in the economic development of such regions of Canada where the standard of living is abnormally low and where there exists serious underemployment;

(b) to remedy a serious disturbance of the economy of any one province, whether by reason of a natural calamity or other extraordinary and unforeseen events;

(c) to aid in the execution of important projects common to two or more provinces and which, by reason of their size, location, or nature, cannot be entirely or equitably financed by the various means available in the said provinces.

3. The Economic and Social Council would be responsible for (147-8):

the gathering, study, and transmission to all Canadian governments and other concerned bodies of the information available at any time on the general trend of the Canadian economy, its medium and long term prospects, its productivity, and the rate of its growth, as well as on the comparative growth of the several Canadian provinces, the improvement of the standard of living in their several regions and the general betterment of social relationships in Canada.

Faribault and Fowler also wrote into their draft constitution changes in the existing workings of the Bank of Canada. The bank would be charged with conducting "regular consultations with the competent services of both the federal government and the provinces." It would also be empowered to act as fiscal agent of provinces that so requested and to "grant provinces short-term advances or loans, discount or purchase their treasury bills, purchase and discount their bonds." The powers of the bank to "sustain the market of securities issued or guaranteed by such provinces" would be exercised with the assent of the federal Minister of Finance.

Chapter I

1. K. C. Wheare, *Federal Government* (4th ed., London, 1963), Chap. II.
2. *Ibid.*, 20.
3. C. J. Friedrich, *Man and His Government* (New York, 1963), 594-5.
4. M. J. C. Vile, *The Structure of American Federalism* (Oxford, 1961), 199.
5. Maurice Lamontagne, *Le fédéralisme canadien* (Québec, 1954), 245.
6. E. W. Weidner, "Decision-Making in a Federal System," in Arthur W. Macmahon (ed.), *Federalism, Mature and Emergent* (New York, 1955), 363.
7. D. V. Smiley, *Conditional Grants and Canadian Federalism* (Canadian Tax Foundation, Canadian Tax Paper no. 32, Toronto, 1963), 37-42.
8. One of the most distinguished efforts in this direction is the Little, Brown series in Comparative Politics under the editorship of Gabriel A. Almond, James S. Coleman and Lucien W. Pope. See particularly G. A. Almond and Sidney Verba, *The Civic Culture* (Princeton, 1963) and the abridgement under the same name in the Little, Brown series (Boston, 1965).
9. W. S. Livingston, *Federalism and Constitutional Change* (Oxford, 1956), 2.
10. W. S. Stokes, "The Centralized Federal Republics of Latin America," in G. C. S. Benson *et al.*, *Essays on Federalism* (Institute for Studies in Federalism, Claremont, California, 1961), 93.
11. Committee on Manitoba's Economic Future, *Report* (Winnipeg, 1963), III.

12. Professors Vincent Lemieux and John Meisel have undertaken a study of the bicultural aspects of certain non-governmental associations in Canada for the Royal Commission on Bilingualism and Biculturalism.
13. J. A. Corry, "Constitutional Trends and Federalism," in A. R. M. Lower *et al.*, *Evolving Canadian Federalism* (Durham, N.C., 1958), 141.
14. See, for example, Herbert Agar, *The Price of Union* (Boston, 1950) for a presentation of this hypothesis as it relates to the United States. In Canada, Frank Underhill has been the most persuasive apologist for the bi-national parties. See *In Search of Canadian Liberalism* (Toronto, 1960) and *The Image of Confederation: The Massey Lectures, 1963* (Canadian Broadcasting Corporation, Toronto, 1964).
15. W. H. Riker, *Federalism: Origin, Operation, Significance* (Boston, 1964), particularly 135-6.
16. *Ibid.*, 136.
17. *Ibid.*, 129.
18. For one of the few systematic efforts in this direction see E. R. Black, "Federal Strains within a Canadian Party," *Dalhousie Review*, XLV (1965), 306-23. More recently Khayyam Paltiel has made a provocative analysis of the relation between party finances and the maintenance of Canadian federalism, "Federalism and Party Finance: A Preliminary Sounding," in Committee on Election Expenses, *Studies in Canadian Party Finance* (Ottawa, 1966), 1-21.

Chapter II

1. For the best available account of the development of Canadian federalism up to the Second World War see Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Commission), *Report* (Ottawa, 1940), Bk. I. An abridgement of this analysis has appeared — D. V. Smiley (ed.), *The Rowell-Sirois Report, Book I* (The Carleton Library No. 5, Toronto, 1963).
2. Canada, House of Commons, *Debates*, I, 1944, 2.
3. *Ibid.*
4. Canada, Department of Reconstruction, *Employment and Income with Special Reference to the Initial Period of Reconstruction* (Ottawa, 1945).
5. *Ibid.*, 23.
6. *Dominion and Provincial Submissions and Plenary Conference Discussions, Dominion-Provincial Conference, 1945* (Ottawa, 1946).
7. *Ibid.*, 118.

8. *Ibid.*, 113.
9. *Ibid.*, 114.
10. *Ibid.*, 114.
11. *Ibid.*, 85.
12. *Ibid.*, 7.
13. Corry, "Constitutional Trends and Federalism," 113.
14. Royal Commission on National Development in the Arts, Letters and Sciences (Massey Commission), *Report* (Ottawa, 1951), 8.

Chapter III

1. Jacques Parizeau, "Federal-Provincial Fiscal Developments" in Canadian Tax Foundation, *Report of the 1964 Conference* (Toronto, 1965), 223.
2. Maurice Lamontagne, "Growth, Price Stability and the Problem of Unemployment" (paper presented to the Study Conference on National Problems, Kingston, 1960, mimeo.), 5.
3. Scott Gordon, "A Twenty-Year Perspective: Some Reflections on the Keynesian Revolution in Canada," in S. F. Kaluki (ed.), *Canadian Economic Policy since the War* (Canadian Trade Committee, Ottawa, 1966), 23-46.
4. *Ibid.*, 46.
5. Parizeau, "Federal-Provincial Fiscal Developments," 223-4.
6. Lamontagne, "Growth, Price Stability and the Problem of Unemployment," 6.
7. D. V. Smiley, "The Two Themes of Canadian Federalism," *Canadian Journal of Economics and Political Science*, XXI (1965), 80-97.
8. The Manifesto is reprinted in Herbert Quinn, *The Union Nationale: A Study in Quebec Nationalism* (Toronto, 1963), 225-35.
9. Reprinted in the Report of the Committee on Manitoba's Economic Future, *Manitoba 1926-1975* (Winnipeg, 1963), Appendix, Pt. IV, 3.
10. *Ibid.*
11. *Ibid.*, II, 16-17.
12. S. M. 1963, c. 23.
13. There is as yet little analytical material on these provincial agencies. See, however, two articles in *Canadian Public Administration*, VIII (1965): J. R. Mills, "Voluntary Economic Planning in Nova Scotia," 160-5, and Roland Parenteau, "The Quebec Economic Advisory Council," 166-71.

Chapter IV

1. Although this chapter deals with the formal constitution, I wish to reiterate the inextricable relation between this aspect of federalism and the ways in which the federal and provincial governments choose to wield their respective powers.
2. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec, 1865), 9.
3. *Ibid.*, 55.
4. *Ibid.*, 62.
5. *Ibid.*, 96.
6. The way in which Quebec's consent was obtained to the 1964 amendment giving Parliament concurrent jurisdiction with the provinces in respect to survivors' benefits under the proposed Canada Pension Plan is significant. This consent was secured as part of a complex agreement between the federal and Quebec administrations involving their respective proposals for contributory pensions programmes negotiated in the aftermath of the Federal-Provincial Conference of March 31 and April 1, 1964. See the account of these events in Peter Newman, "Pension Deal Saved Confederation," *Vancouver Sun*, Nov. 13, 1964.
7. See the standard text, Bora Laskin, *Canadian Constitutional Law* (4th ed., Toronto, 1966). For surveys of postwar trends of judicial review see Peter H. Russell, "The Court's Interpretation of the Constitution since 1949" in Paul Fox (ed.), *Politics: Canada* (Toronto, 1962), 64-80; V. C. Macdonald, *Legislative Power and the Supreme Court in the Fifties* (Toronto, 1961); and issues of the *Canadian Bar Review*.
8. For the most exhaustive analysis of the pattern of judicial interpretation along these lines see Canada, Senate, *Report Pursuant to the Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act* (Ottawa, 1939; reprinted 1961).
9. *University of Toronto Quarterly*, VII (1938), 144.
10. *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa, 1969), a study undertaken for the Royal Commission on Bilingualism and Biculturalism by Professor Peter Russell of the University of Toronto examines the nature and extent of judicial review of the constitution since 1949.
11. Corry, "Constitutional Trends and Federalism," 115.
12. R. S. C. 1952, c. 11.
13. S. C. 1958, 5-6 Eliz. II, c. 37.

14. For a comprehensive examination of these matters see G. V. La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa, 1955).
15. Canada, House of Commons, *Debates*, VII, 1960, 7934.
16. *Ibid.*, IV, 1960-61, 4397.
17. For an analysis of this incident see J. R. Mallory, "The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56," *Canadian Journal of Economics and Political Science*, XXVII (1961), 518-22.
18. For a discussion of the constitutional aspects of the spending power see Smiley, *Conditional Grants and Canadian Federalism*, Chap. II.
19. *Attorney-General for Canada v. Attorney-General for Ontario* [1937] A. C. 355 at 366.
20. *Angers v. Minister of National Revenue* (1957), Ex. Cr. 83.
21. Bora Laskin, *Canadian Constitutional Law* (2nd ed., Toronto, 1960), 655.
22. L. M. Gouin and Brooke Claxton, *Legislative Expedients and Devices Adopted by the Dominion and the Provinces: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa, 1939), 18.
23. F. R. Scott, "The Constitutional Background of the Taxation Agreements," *McGill Law Journal*, II (1955), 6.
24. Gouin and Claxton, *Legislative Expedients*, 22.
25. See Chapter VI.
26. Scott, "The Constitutional Background of the Taxation Agreements."
27. For a useful compilation of what one might reasonably call "constitutional statutes" see Maurice Ollivier (ed.), *British North America Acts and Selected Statutes 1867-1962* (Ottawa, n.d.).
28. S. C. 1873, 36 Vic., c. 26. At the 1960 Federal-Provincial Conference, Premier Walter B. Shaw of Prince Edward Island argued for a causeway connecting his province with the mainland on the basis of this pledge of 1873, *Proceedings*, 78.
29. For an account of this incident and its future ramifications see J. A. Maxwell, "A Flexible Portion of the British North America Act," *Canadian Bar Review*, XVI (1933), 148-57.
30. Royal Commission on Dominion-Provincial Relations, *Report* (Ottawa, 1940) Bk. I, 251.
31. *Ibid.*, 251-2.
32. *Ibid.*, 251.

33. *A.-G. N. S. v. A. G. Can. and Lord Nelson Hotel Company Limited* [1951] S. C. R. 31 and *P. E. I. Potato Marketing Board v. H. B. Willis Inc. and A. G. Can.* [1952] 4 D. L. R. 146.
34. S. C. 1953-54, 1-2 Eliz. II, c. 59.
35. *Winner v. S. M. T. (Eastern Ltd.) and A.-G. N. B.* [1951] 4 D. L. R. 529.
36. The draft bill is reprinted in Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa, 1965), App. 3.
37. *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.* [1923] A. C. 695.
38. National Emergency Powers Act, 1945, 9-10 George VI, c. 25.
39. Canada, House of Commons, *Debates* (2nd Session) 1950, 555.
40. *Ibid.*, I, 1951, 648-9.
41. Laskin, *Canadian Constitutional Law*, 242.
42. F. R. Scott, "Centralization and Decentralization in Canadian Federalism," *Canadian Bar Review*, XXIX (1951), 1124.
43. Corry, "Constitutional Trends and Federalism," 121-2.

Chapter V

1. For the period prior to the Second World War see Luella Gettys, *The Administration of Canadian Conditional Grants* (New York, 1938). For the later period see D. V. Smiley, *Conditional Grants and Canadian Federalism* (Canadian Tax Foundation, Canadian Tax Paper no. 32, Toronto, 1963) and Canada, Department of Finance, *Federal-Provincial Conditional Grant and Shared-Cost Programmes, 1962* (Ottawa, 1962). See also Canadian Council of Resource Ministers, *An Inventory of Joint Programs and Agreements Affecting Canada's Renewable Resources* (Montreal, 1964).
2. See the two studies prepared for the Royal Commission on Dominion-Provincial Relations — J. A. Corry, *Difficulties of Divided Jurisdiction* and A. E. Grauer, *Public Assistance and Social Insurance* (Ottawa, 1939).
3. Corry, "Constitutional Trends and Federalism," 109-14.
4. Smiley, *Conditional Grants and Canadian Federalism*, 37-42.
5. Federal grants for training and research in the welfare field came later but these were not directly related to federal contributions towards unemployment insurance.
6. In only a few circumstances, such as those relating to the Trans-Canada Highway, do federal officials actually inspect the facility or service for which federal funds are given. The characteristic procedure is for these moneys to be paid on the basis of provincial documentation.

7. For some of the factors working towards programme collaboration see D. V. Smiley, "Public Administration and Canadian Federalism," *Canadian Public Administration*, VII (1964), 378-9.
8. In this respect see the complaints of the premiers of New Brunswick and Prince Edward Island at the 1960 Federal-Provincial Conference (*Proceedings* (Ottawa, 1961), 49 and 75).
9. Institute of Public Administration of Canada, *Proceedings of the Fifth Annual Conference* (Toronto, 1963), 376.
10. Federal-Provincial Conference, 1960, *Proceedings*.
11. Figures from Canadian Tax Foundation and Canada, Department of Finance, *Federal-Provincial Conditional Grant and Shared-Cost Programmes, 1962*.
12. Federal-Provincial Conference, 1960, *Proceedings*, 91.
13. *Ibid.*, 49.
14. *Ibid.*, 75.
15. *Ibid.*, 54-5.
16. *Ibid.*, 85.
17. *Ibid.*, 74.
18. *Ibid.*, 129-30.
19. In 1959-60, the last fiscal year before the new policy came into effect, Quebec received grants-in-aid in respect of the major programmes of health grants (including hospital construction) and categorical and general public assistance but did not participate in schemes related to vocational training, roads-to-resources, hospital insurance, and the Trans-Canada Highway.
20. Federal-Provincial Conference, 1960, *Proceedings*, 130.
21. *Federal-Provincial Conditional Grant and Shared-Cost Programmes, 1962*, 45-6; and Canadian Council of Resource Ministers, *An Inventory of Joint Programs and Agreements Affecting Canada's Renewable Resources*, 161-6.
22. Royal Commission on Health Services, *Report* (Ottawa, 1964), 90.
23. The Government of Ontario has shown some interest in this alternative. See Mr. Robarts' statement to the Federal-Provincial Conference, November, 1963 (*Proceedings* (Ottawa, 1964) 26). For an analysis of this device see D. V. Smiley, "Federal Block Grants to the Provinces: A Realistic Alternative?" Canadian Tax Foundation, *Report of the 1964 Conference* (Toronto, 1965), 218-22.
24. See the statement of Prime Minister Diefenbaker to the 1960 Federal-Provincial Conference (*Proceedings*, 13).
25. Prime Minister Pearson, "Opening Statement to the Federal-Provincial Conference of July, 1965," 21-7 (mimeo.).

26. *Ibid.*, 22-5. Mr. Lesage spoke of the federal contributions to provincial plans being in the form of a "fiscal abatement," presumably in the personal income tax. Assuming that provincial plans conform to the four federal conditions, there seems no vital principle involved in having this compensation paid in this form or in cash subsidies or in a combination of the two.

Chapter VI

1. J. Stefan Dupré has made a detailed analysis of the 1959 agreement and the nature and significance of contracting-out generally, "Contracting-Out: A Funny Thing Happened on the Way to the Centennial," in the Canadian Tax Foundation, *Report of the 1964 Conference* (Toronto, 1965), 209-18.
2. The 1960 agreement provided for abatements in the corporate income tax, a tax with a variable and unpredictable yield. Future abatements were related to the personal income tax.
3. Royal Commission of Inquiry on Constitutional Problems, *Report* (Quebec, 1956), Book IV, Fourth Part, Chap. VI.
4. *Federal-Provincial Conditional Grant and Shared-Cost Programmes*, 1962.
5. Calculations made from figures in *ibid.*
6. Election Manifesto of the Liberal party (Ottawa, 1963), 7-8. The New Democratic Party at its founding convention in the summer of 1961 gave endorsement to contracting-out on a limited basis. The federal programme of the party stated, "Unconditional (equalization) grants must be used more frequently and should eventually replace conditional grants. . . . In areas affecting education, language and similar rights now in the British North America Act, where a province does not participate in a joint program it will not forego its right to equivalent funds."
7. Reprinted in Canada, House of Commons, *Debates*, XII 1964-65, 12500-3.
8. Prime Minister Pearson's letter to the premiers, *ibid.*, 12503.
9. J. T. Saywell, "Federal-Provincial Relations," in *Canadian Annual Review*, 1963 (Toronto, 1964), 65-6.
10. *Ibid.*, 66.
11. For an account of this conference see *ibid.*, 66-8.
12. Municipal Development and Loan Board, *First Annual Report* (Ottawa, 1964), 3.
13. *Ibid.*, 217.
14. John Robarts, Unpublished Address to the National Industrial Conference Board, October 22, 1964, Toronto, 6 (mimeo.).

15. Duff Roblin, *Budget Speech to the Legislature* (Winnipeg, 1965), 24-5.
16. Brief presented to the plenary session of the Federal-Provincial Conference, Ottawa, July 19, 1965, 2-5.

Chapter VII

1. Corry, "Constitutional Trends and Federalism," 92-125; and J. R. Mallory, "The Five Faces of Federalism" in P.-A. Cr  peau and C. B. Macpherson (eds.), *The Future of Canadian Federalism* (Toronto, Montreal, 1965), 3-15 and particularly 9-11.
2. The Hon. Jean-Luc Pepin has given the most systematic analysis from this point of view. See his speech "Le f  d  ralisme coop  ratif" in *Le Canada face    l'avenir* (Montreal, 1964), 113-24.
3. Various speeches delivered by the Hon. Maurice Lamontagne and the Hon. Guy Favreau emphasized this theme. Two former Progressive-Conservative ministers have claimed credit for their party in initiating these procedures with special reference to the Council of Resource Ministers. See the speech of the Hon. Walter Dinsdale in Canada, House of Commons, *Debates*, III, 1964, 2878-81 and the speech by the Hon. Alvin Hamilton at Provencher, Manitoba, October 21, 1963 (mimeo.).
4. Hon. Guy Favreau, "Rebirth through Reason: Cooperative Federalism," speech given on February 7, 1965, to the Chamber of Commerce, Matane, Quebec (mimeo. trans.), 8.
5. For the background of this dispute see E. R. Black, "Oil Offshore Troubles the Waters," *Queen's Quarterly*, LXXII (1966), 590-603.
6. T. C. Douglas, Constitutional Conference of Federal and Provincial Governments, 1950, *Proceedings* (Ottawa, 1950), 39.
7. Jean Lesage, Federal-Provincial Conference, 1965, Statement (mimeo.), 26.
8. Lester B. Pearson, Federal-Provincial Conference, 1965, Statement (mimeo.), 3.
9. Daniel J. Elazar, *The American Partnership: Intergovernmental Cooperation in the Nineteenth Century United States* (Chicago, 1962).
10. The Dominion Council of Health has been meeting regularly since it was established in 1919 and the Canadian Association of Administrators of Labour Legislation since 1938.
11. Canada, Senate, *Report Pursuant to the Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act* (Ottawa, 1939; repr. 1961), particularly 7-14.

12. J. A. Corry, *Difficulties of Divided Jurisdiction: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa, 1940).
13. *Ibid.*, 8.
14. See D. V. Smiley, *Conditional Grants and Canadian Federalism*, Canadian Tax Foundation, Canadian Tax Paper no. 32 (Toronto, 1963), Chap. III.
15. See J. G. Hodgetts, "Liberal and Bureaucrat," *Queen's Quarterly*, LXII (1955), 182, and also John Meisel, "The Formulation of Liberal and Conservative Programmes in the 1957 Canadian General Election," *Canadian Journal of Economics and Political Science*, XXVI (November, 1960).
16. Robert K. Merton *et al.* (eds.), *Sociology Today* (New York, 1959), 102.
17. Edgar Gallant, "The Machinery of Federal-Provincial Relations," *Canadian Public Administration*, VIII (1959), 515-26.
18. Corry, "Constitutional Trends and Federalism," 120.
19. Canada, House of Commons, *Debates*, I, 1965, 1-3.
20. Canada, House of Commons, *Debates*, III, 1964, 3205.
21. George Drew, 1945 Federal-Provincial Conference on Reconstruction, *Proceedings*, 239.
22. See A. R. Kear, "Cooperative Federalism: A Study of the Federal-Provincial Continuing Committee on Fiscal and Economic Matters," *Canadian Public Administration*, VI (1963), 48.
23. *Ibid.*, 50.
24. See, however, Richard Leach, "Inter-provincial Cooperation," *Canadian Public Administration*, II (1959), 83-91 and J. H. Aitchison, "Inter-provincial Cooperation" in J. H. Aitchison (ed.), *Political Process in Canada: Essays in Honour of R. Macgregor Dawson* (Toronto, 1963), 153-70.
25. Jean Lesage, Federal-Provincial Conference, 1960, *Proceedings* (Ottawa, 1961), 126.
26. *Ibid.*, 126-7.
27. Premier Smallwood of Newfoundland gave as his reason for not attending the 1965 Conference in Winnipeg that the meetings should be held by the government leaders without their advisers.
28. See Guy Henson, "Voluntary and Official Cooperation in the Atlantic Provinces," in *The Idea of Maritime Union* (Report of a Conference sponsored by the Canadian Institute on Public Affairs and Mount Allison University, February, 1965), 57-66.

29. *Ibid.*, 63. Henson suggests that the extent of interprovincial cooperation is significantly higher in the Atlantic region than in the Canadian prairie provinces.
30. See Herbert F. Quinn, *The Union Nationale: A Study in Quebec Nationalism* (Toronto, 1963).
31. See D. V. Smiley, "The Two Themes of Canadian Federalism," *Canadian Journal of Economics and Political Science*, XXXI (1965), 80-95.
32. Jean Lesage, Federal-Provincial Conference, 1963, *Proceedings* (Ottawa, 1964), 40.
33. Canadian Tax Foundation, *The Provincial Finances 1965* (Toronto, 1966), 178.
34. Jean Lesage, Federal-Provincial Conference, 1963, *Proceedings*, 45.
35. Address to members of the Montreal Consular Corps, April 12, 1965 (Quebec, Department of Education, Information Service), 9.
36. Québec, Législature, *Débats*, 1966, 586.
37. Federal-Provincial Conference, 1963, *Proceedings*, 45.
38. F.-A. Angers, *Quebec Statistical Yearbook, 1961* (Quebec, 1961), 62.

Chapter VIII

1. J. A. Corry, *Difficulties of Divided Jurisdiction: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa, 1940), 10.
2. Mr. Fulton did, however, submit the draft proposals to a selected group of university law teachers for their comments.
3. For one of the few systematic attempts in this direction see Edwin R. Black, "Federal Strains within a Canadian Party," *Dalhousie Review*, XLV (1965), 307-23.
4. Daniel Johnson, *Égalité ou indépendance* (Montréal, 1965), 73.
5. Hon. Jean-Luc Pepin, "Le fédéralisme coopératif" in Conférence annuelle de l'Institut canadien des affaires publiques, *Le Canada face à l'avenir* (Montréal, 1964), 113-24.
6. Peter J. T. O'Hearn, *Peace, Order and Good Government* (Toronto, 1964).
7. Marcel Faribault and Robert M. Fowler, *Ten to One: The Confederation Wager* (Toronto, 1965).
8. Jacques Parizeau, "Prospects for Economic Policy in a Federal Canada" in Crépeau and Macpherson (eds.), *The Future of Canadian Federalism*, 57.

9. *Ibid.*, 45.
10. *Ibid.*, 145-8.
11. Hon. Paul Gérin-Lajoie, "Convocation Address to Carleton University, April, 1965" (Quebec, Department of Education, Information Service, mimeo.). "Up to the present, Quebec has asked nothing for itself which it would be unwilling to recognize for the other provinces. But one may wonder if this is the correct attitude to take!" (p. 5) and "What objection or difficulty would there be if Canada were to adopt a constitutional regime which would take account of the existence of two 'nations' or 'societies' within one Canada?" (p. 7).
12. Reprinted in *Le Devoir*, 23 et 24 décembre, 1965.
13. *Le Devoir*, 3 septembre, 1965.
14. Interview in *ibid.*, 20 novembre, 1965.
15. *Ibid.*, 14 décembre, 1965.
16. Editorial, *ibid.*, 17 décembre, 1965.

Appendix A

1. Federal-Provincial Tax Structure Committee, *Proceedings, September 14-15, 1966* (Ottawa, 1966), 11-30; and Lester B. Pearson, "Statement to the Federal-Provincial Meeting, October 24, 1966" (Prime Minister's Office, mimeo.).
2. Federal-Provincial Tax Structure Committee, *Proceedings*, 17.
3. Canada, House of Commons, *Debates*, XIII, 1967, 13718-9.
4. Quebec Liberal Federation, *Proceedings of the Founding Convention* (Quebec, 1966), mimeo.
5. Maurice Sauvé, "Speech to the Montreal Chamber of Commerce," reproduced in part in *Le Devoir*, 3 novembre, 1966.
6. Jean Chrétien, "Speech to the Toronto Chapter of the American Marketing Assoc., May 30, 1967" (Mr. Chrétien's Office, mimeo.).
7. Chrétien, "Speech to the Chicoutimi Lions Club, December 6, 1966" (Mr. Chrétien's Office, mimeo.).
8. Mr. Trudeau has several times declared his support for a linguistic bill of rights which would secure the rights of French and English languages on a Canada-wide basis.
9. Legislature of Ontario, *Debates*, 1967, 3566-8.
10. *Ibid.*, 3568.

Appendix B

1. O'Hearn, *Peace, Order and Good Government: A New Constitution for Canada*, 45.