

A FRAMEWORK FOR CONFLICT MANAGEMENT

Barbara Cameron

The Social Union Framework Agreement¹ outlines the rules that First Ministers (minus Québec) have pledged to follow in dealing, mainly, with each other. It is not being submitted to any legislature for approval, so it has less legal status than the *Calgary Declaration*. It is an executive federalist statement of good intentions, common understandings and shared commitments. Its significance is political and it needs to be assessed from that perspective.

Within the context of the constitutional division of powers and the political traditions surrounding the exercise of the federal spending power, the Agreement offers the federal government room to manoeuvre in dealing with the demands of the provinces and citizens concerning social programs. With respect to Québec, it signals little flexibility on the principle of the federal role in social programs but offers some possibilities for case-by-case crisis management in the form of bureaucratic, bilateral side agreements. There is plenty of space in the Agreement for federal government initiative — provided a government wishes to act. However, there are also opportunities for a federal government intent on delay to bury issues in processes of consultation and expert evaluation. The Agreement is not so much a framework for a social union as a framework for the political management of disputes between Québec and English Canada, and between elites and non-elites around social programs.

FEDERAL SPENDING POWER

Despite concerns voiced during the social union negotiations about the erosion of the federal role, the

provisions in the Agreement regarding the federal spending power, “opting in,” and Canada-wide objectives do not seriously restrict and, in some cases, may even strengthen the federal capacity to act.

Section 5 of the Social Union Framework Agreement dealing with federal spending power would not have been out of place in the 1960s, the expansionary period of the Canadian welfare state. It affirms the legitimacy of the federal spending power in the promotion of equality of opportunity and mobility for all Canadians and in the pursuit of Canada-wide objectives. It recognizes that conditional social transfers are useful in encouraging new and innovative social programs for social services, as well as income support programs. It also reaffirms the virtually unrestricted right of the federal government to transfer funds directly to individuals and organizations. At the same time, it acknowledges what has never been in doubt: provinces have jurisdiction over program design and delivery. This strong, positive affirmation of federal spending power goes far beyond what any Québec government could accept.

Provincial Consent

Constitutionally, there is no requirement for the Government of Canada to obtain provincial support before exercising its spending power. In the Agreement, the federal government pledges to obtain the support of a majority of the provinces before proceeding with a new Canada-wide initiative.² Formally, this appears to be a significant limitation. The political reality, however, is quite different. The threshold for provincial support in the Agreement is set at six provinces, with no stipulation about the proportion of the total Canadian population represented. When placed in the context of the political traditions surrounding spending power, this formula emerges as a weak limitation.

The federal government has always assumed, with the notable exception of one instance, that some support from

¹ A Framework to Improve the Social Union for Canadians — An Agreement between the Government of Canada and the Governments of the Provinces and Territories (February 4, 1999). Online: Government of Canada, Publications and Forms, Resource Centre Publications and Links <http://socialunion.gc.ca/news/020499_e.html> (accessed 1 December 1999). The text of the Agreement is reproduced in this issue at page 133.

² *Ibid.* at s. 5.

provincial governments is necessary to demonstrate a "national consensus" in the case of shared-cost programs. While flexibly interpreted, the operating assumption for federal-provincial negotiations has generally been that a "national consensus" was needed: the threshold for this was support by the Parliament of Canada and a majority of the provinces representing a majority of the Canadian population. The notion of a double provincial majority — a majority of provinces and a majority of the population — was first articulated in the 1950s by Prime Minister Louis St. Laurent and the requirement of six provinces with a majority of the population was built into the Hospital Insurance Act. John Diefenbaker removed the so-called "six provinces clause" when his government assumed office, but retained the majority-of-the-population criteria. By that time the five provinces that had signed on to the cost-shared program represented 56.3 per cent of the population.³

The one notable, and highly influential, exception was medicare. Here, the federal government adopted the strategy of announcing that funds would be available to any province that established a medicare plan that met four principles: universality of benefits, comprehensiveness of services covered, portability of benefits and public administration. There was no stipulation that a certain number — or even any — of the provinces had to be onside. Prime Minister Lester Pearson announced the federal conditions to the provinces, without prior negotiation, at a 1965 federal-provincial conference, the same time they were announced publicly. Provincial opposition to medicare from Québec, Ontario and Alberta was bitter. The strategy angered the provinces and damaged federal-provincial relations to the extent that Prime Minister Pierre Elliott Trudeau promised "there will be no more medicares."⁴ At a constitutional conference a year after the inaugural date of medicare, Trudeau's government proposed a formula for establishing a national consensus that implicitly acknowledged a "double provincial majority" as the threshold required for federally funded, cost-shared initiatives.⁵ Since 1982, the constitutional amending formula of seven provinces with

fifty per cent of the population has frequently surfaced as the appropriate one for shared-cost programs.⁶

Neither the Meech Lake Accord nor the Charlottetown Agreement contained a requirement for provincial approval and so, formally at least, the Social Union Framework Agreement places a greater limitation on the federal capacity to act. In theory, the federal government could have acted under the proposed constitutional amendment, as it did with medicare. However, the political costs of doing so would be much higher today than in the mid-1960s, before the consolidation of a strong Québec sovereignty movement and before the abandonment of the welfare state by Canada's economic elites. In the absence of both a strong positive affirmation of the federal spending power and a specific formula for determining a national consensus, the traditions surrounding provincial consent would likely have shaped the provinces' expectations.

In the light of the history of federal-provincial negotiations around cost-shared programs, specifying the level of provincial consent at the low threshold contained in the Framework Agreement can be seen as strengthening the real capacity of the federal government to spend in areas of exclusive provincial jurisdiction. The formula of six provinces with no population minimum legitimizes federal action with the support only of "have not" provinces in English Canada and without the participation of Québec and the three "have" provinces of Ontario, Alberta and British Columbia. This rule potentially gives the "have not" provinces additional influence in the design of Canada-wide programs. Provided that new initiatives attract the support of six provinces, a federal government with the will to do so could proceed with a Canada-wide initiative, inviting the other provinces to join in if they choose.

"Opting In"

Under the Framework Agreement, a province cannot "opt out" of a program and still receive money. It must demonstrate, through an unspecified accountability framework, that its existing programming completely or partially fulfills the objectives of the Canada-wide initiative and only then will it receive its share of the federal transfer to use for another, related purpose.⁷ Whatever is left over after the province brings programs

³ Malcolm G. Taylor, *Health Insurance and Canadian Public Policy: The Seven Decisions that Created the Canadian Health Insurance System and Their Outcomes*, 2nd ed. (Kingston/Montreal: McGill-Queen's University Press, 1987) 182, 231 and 227.

⁴ Accounts of this strategy are found in works by two participants in the events. See A.W. Johnson, *Social Policy in Canada: the Past as it Conditions the Present* (Ottawa: Institute for Research on Public Policy, 1987) at 15-16 and Tom Kent, *A Public Purpose: An Experience of Liberal Opposition and Canadian Government* (Kingston and Montreal: McGill-Queen's University Press, 1988) at 364-369.

⁵ Canada, *Federal-Provincial Grants and the Spending Power of Parliament. Working Paper on the Constitution* (Ottawa: 1969).

⁶ The initial proposals of the government of Brian Mulroney in the Charlottetown constitutional round proposed to entrench the formula of seven provinces with fifty per cent of the population. This formula was widely opposed in English Canada and did not make it into the final *Charlottetown Agreement. Shaping Canada's Future Together* (24 September 1991) 59.

⁷ *Supra* note 1 at s. 5.

up to the objectives may be used to achieve “objectives in the same or a related priority area.”⁸ This requirement makes receiving compensation dependent on meeting (or agreeing to meet) objectives and rewards any province that already has such programs in place. Provided a province meets the “agreed objectives” and agrees to an accountability procedure, it is entitled to its share of the funds.⁹

In contrast, Meech Lake and Charlottetown allowed a province to opt out with compensation, provided it carried on a “program or initiative that is compatible with the national objective.” There was no provision for an accountability process and the word “compatible” was open to very broad interpretation. Whether the language “fulfill the agreed objectives” will be different in practice from “compatible with” depends very much on the nature of both the objectives and the accountability procedure.

Objectives

The Framework Agreement is most ambiguous on the crucial question of “objectives.” The document uses a variety of terms to describe what might fall into this category. In the section on the federal spending power, it speaks of Canada-wide objectives in a way consistent with the English Canadian notion of “national standards.” The criteria for medicare are described as “principles.”¹⁰ In other places, it uses “Canada-wide priorities and objectives,”¹¹ “agreed objectives,”¹² “social priorities”¹³ and even “outcomes.”¹⁴ It refers to “outcome measures” and “comparable indicators to measure progress on agreed objectives.”¹⁵

The procedure for establishing the agreed objectives is also a bit unclear. In section 5, which deals with the spending power, the federal government commits itself to “work collaboratively with all provincial and territorial governments to identify Canada-wide priorities and objectives.”¹⁶ Yet the Agreement does not specifically assign the task of establishing Canada-wide objectives to a federal-provincial body. Significantly, this is not listed as a responsibility of the Ministerial Council which will monitor the implementation of the Agreement. While the federal government does agree to subject the interpretation of the *Canada Health Act* to a non-bidding dispute

resolution process, nowhere does it give up its power to enforce “Canada-wide objectives.”¹⁷

The consultation commitments may not result in any significant departure from existing practice. The federal government has usually negotiated with the provinces around the conditions attached to its cost-shared transfers both collectively and bilaterally and will continue to do so under the Framework Agreement. In negotiations over criteria, the federal government’s power will lie, as it has in the past, in its financial resources. If it cannot reach agreement with at least six provinces on conditions it considers acceptable, it can withdraw its offer of funding. Yet, in exchange for a commitment to “proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities,”¹⁸ the federal government gained from the provinces an explicit endorsement of the principles of the *Canada Health Act* — something sought by federal Liberal governments since at least 1981.¹⁹

ACCOUNTABILITY PROVISIONS

The Framework Agreement holds out the promise of greater public accountability of governments and even of democratic participation around social policy. Governments commit themselves to “ensure appropriate opportunities for Canadians to have meaningful input into social programs.”²⁰ Indeed, Canadians are told that “Canada’s Social Union can be strengthened by enhancing each government’s accountability to its constituents.”²¹ The review of the Framework Agreement after three years will “ensure significant opportunities for input and feedback from Canadians and all interested parties, including social policy experts, private sector and voluntary organizations.”²² But no mechanisms or institutions are identified to facilitate public accountability and participation. In a parliamentary democracy, the Parliament of Canada and the provincial legislatures are the obvious institutions to be assigned the task of holding executives accountable. Yet, the Agreement calls for governments to report regularly to constituents — not legislatures — on the performance of programs. It is

⁸ *Ibid.*

⁹ *Ibid.* at s. 3.

¹⁰ *Ibid.* at s. 1.

¹¹ *Ibid.* at s. 5.

¹² *Ibid.* at s. 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.* at s. 5.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Allan J. MacEachen, *Federal-Provincial Fiscal Arrangements in the Eighties. A Submission to the Parliamentary Task Force on the Federal-Provincial Fiscal Arrangements by the Honourable Allan J. MacEachen Deputy Prime Minister and Minister of Finance*, April 23, 1981 (Ottawa: Supply and Services Canada, 1981) 18.

²⁰ *Supra* note 1 at s. 1.

²¹ *Ibid.* at s. 3.

²² *Ibid.* at s. 7.

almost wholly silent on the principle of responsible government.²³

The main emphasis in the Agreement is on technocratic, administrative accountability rather than democratic accountability. Great importance is given to monitoring and measuring outcomes. It seems that reports drafted by experts will be the major instrument of public accountability, although not all reports will be made public as a matter of course. Fact-finding or mediation reports produced during dispute resolution processes will be made public only if one of the governments involved in the dispute so requests. The Ministerial Council will receive expert reports prepared for federal, provincial and territorial governments on progress on meeting commitments under the Agreement.²⁴ One gets the impression that the drafters of the Agreement hoped to depoliticize the fundamentally political conflicts surrounding social programs by recasting them as technical or administrative issues. Debates around social policy will be framed by reports of experts issued directly to citizens; elected legislatures will be bypassed by executive agreements. The conflicts between the federal and provincial governments will be channelled into sector negotiations and dispute resolution processes, where expert advice will again play a role.

A FRAMEWORK FOR MANAGING CONFLICT

The Framework Agreement provides some openings for English Canadian social policy groups to put their demands for Canada-wide social programs back on the federal political agenda. The strong affirmation of the federal spending power removes the jurisdictional excuse for inaction that federal governments have used since the mid-1980s. Specifying a low threshold for provincial consent clarifies the rules and makes it easier for social policy advocates to target their lobbying efforts. The passages in the Agreement about transparency and public accountability can be used as a wedge to force open some of the administrative and political secrecy surrounding federal-provincial negotiations. Social policy activists can also attempt to influence the criteria used to measure the performance of social programs. The "opting in" formula might neutralize Québec's opposition to new Canada-wide social programs in areas where it already has in place

advanced programs of its own. In child care, for example, the compensation formula would mean that Québec could receive funds to use in the same general area because its existing programs would almost certainly meet the "agreed objectives." The catch, of course, for Québec is the requirement of an accountability process. Nonetheless, the absence of Québec from the Agreement and the institutions it proposes does open up possibilities for an asymmetrical approach to the Canadian social union, which is essential if Canada is to move beyond the Québec/English Canada impasse.

The Framework Agreement, especially in the language used in relation to the spending power, reflects a distinctly English Canadian perspective on the role of the federal government in social programs. It takes a very tough stand with respect to Québec's traditional demands concerning the federal spending power. Any subsequent federal government that wishes to step back from the strong affirmation of federal spending power and the low threshold for provincial consent will run into difficulty in English Canada. At the same time, however, the Agreement does contain provisions that will make accommodation with Québec at a practical level possible; for example, through bilateral federal-provincial agreements around particular programs. Provided there is enough money on the table and the accountability procedures are not too stringent, an arrangement with even a Parti Québécois government could be concluded. In the event a federalist Québec government is elected, certain provisions of the Agreement, such as those on consultation and accountability, could be interpreted to give the provinces an enlarged role.

A federal government that sought to take the initiative on social programs would find plenty of space within the Framework Agreement to do so. A government that did not wish to act, however, would find opportunities for delay. The consultation requirements around "objectives" could be extended, with expert studies being commissioned. Discussions could be bogged down in sector negotiations for long periods of time. The amount of money being put on the table for the "have not" provinces could be insufficient to bring them onside. The success of a government in diffusing demands by burying proposed new initiatives in administrative procedures will depend very much on the ability of social policy advocates to mobilize. In the absence of sustained mobilization around focused demands, the Agreement will serve as an administrative arrangement for regularizing inter-governmental relations and a flexible instrument to manage conflicts around social programs as they arise.

Barbara Cameron

Department of Political Science, Atkinson College, York University.

²³ There are two nods in the direction of executive accountability to legislatures in the Agreement, one in connection with prior notice for changes to a social program that may affect another government and the other in connection with the use of third-party experts in dispute resolution processes. Both have more to do with preserving the room to manoeuvre of governments, especially the federal government, than public accountability.

²⁴ *Ibid.* at s. 6.