A CAP ON CAP

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The tension between maintaining Parliamentary sovereignty in the face of cooperative federalism was manifested in the recent case of the *Reference Re Canada Assistance Plan (B.C.)*.[1] It can be argued that the Supreme Court of Canada, in taking a classical approach to sovereignty, did not effectively deal with the reality of cooperative federalism.

The *Canada Assistance Plan* (the "Plan") is one of a number of shared-cost programs in existence between Canada and the provinces. First enacted in 1966, this program provides for 50:50 cost-sharing with respect to social assistance and welfare. The magnitude of this program can be determined from an examination of expenditures under the Plan. Payments by the Federal Government to the provinces climbed from $151 million in 1967-68 to approximately $5.5 billion in 1989-90. A feature of this Plan is that it authorized the Government of Canada to enter into agreements with the provinces.[2] The Plan was open-ended in that the Government of Canada would pay approximately half of a province's expenditures with respect to social assistance and welfare regardless of its size.[3] In addition, the Plan stipulated that agreements would remain in force so long as a provincial enabling law remained in force.[4] The agreements could be terminated by consent on one year's notice from either party[5] and could be amended by mutual consent.[6]

The Government of Canada entered into an Agreement with British Columbia on March 23, 1967. The Agreement provided that it was to remain in force as long as the provincial enabling law was in operation.[7] Further, the Agreement provided that it could be amended or terminated at any time by mutual consent of the Minister and the province.[8] It could also be terminated by either party on one year's notice.[9] The Agreement between Canada and Alberta was the same, *mutatis mutandis*, as that between Canada and British Columbia.

In his Budget Speech of February 20, 1990, The Honourable Michael H. Wilson, Minister of Finance, Canada, advised that his government would be introducing an expenditure control plan. In the Budget,[10] the Minister provided details of his plan:

> For the next two years, growth in CAP transfers will be limited to 5 percent a year in fiscally stronger provinces; Ontario, British Columbia and Alberta. Other provinces — those receiving federal equalization payments — will be exempt from this ceiling on growth. They will continue to have open-ended access to federal dollars to meet any growth in expenditures eligible for cost sharing under CAP.[11]

The proposed changes to the Budget were embodied in Bill C-69, *An Act to amend certain statutes to enable restraint of government expenditures*, which was introduced in Parliament on March 15, 1990. It received Royal Assent on February 1, 1991.[12]

Events moved along quickly as, on February 27, 1990, the Government of British Columbia referred the following questions to the British Columbia Court of Appeal under the *Constitutional Questions Act*, R.S.B.C. 1979, c.63:

1. Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the Canada Assistance Plan [sic], R.S.C. 1970, c.C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 percent of the cost to British Columbia of assistance and welfare services?

2. Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Canada Assistance Plan Act [sic], R.S.C. 1970, c.C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the Act without the consent of British Columbia?

Ultimately Ontario, all the western provinces, as well as the Native Council of Canada and the United Native Nations of British Columbia intervened in the cause.

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1. *Reference Re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
2. R.S.C., 1985, c.C-1, s.4
3. Ibid. s.5.
4. Ibid. s.8(1).
5. Ibid. s.8(2).
6. Ibid. s.8(2).
7. Agreement of March 23, 1967, s.6(2).
8. Ibid. s.6(3)(9).
9. Ibid., s.6(3)(6).
10. The Budget, February 20, 1990, at 11-12.
11. Ibid. at 76.
12. *Government Expenditures Restraint Act*, S.C. 1991, c.9.

At the British Columbia Court of Appeal,[13] Canada did not seriously contend that the federal government could limit its obligations under the Plan and the Agreement except by legislation. Virtually all the argument of British Columbia, supported by Alberta, centered on the application of the doctrine of legitimate expectations. British Columbia argued that it had a legitimate expectation that the Government of Canada would not introduce a bill into Parliament altering the terms of the Plan or the Agreement without the consent of British Columbia. This position was based on the Plan, the nature of the Agreement, and the course of dealings over the time between the parties to the Agreement.

It was argued that Parliamentary sovereignty had been preserved as the attack was directed against the Government of Canada in introducing the bill into Parliament, and not against Parliament itself. Indeed, it was admitted that Parliament could pass the law if it wanted. It was to be seen whether the bill would become law in the face of a judicial finding that British Columbia had a legitimate expectation that no such law would be introduced. Further, the importance of cooperative federalism to the fabric of the nation was urged. It was argued that shared-cost agreements have added stability and certainty to the provision of provincial social services. Intergovernmental agreements facilitated the daily business of intergovernmental operations. Governments, it was submitted, enter into these agreements to know their boundaries of action, to know what is expected of them and the government they are contracting with. They add permanence, stability and predictability. It was argued that, if this law could be introduced into Parliament by the Government of Canada, the basis for cooperative federalism would collapse.

On June 15, 1990 the British Columbia Court of Appeal held, in a 4:1 decision, in favour of British Columbia and the Intervenors in holding that the answers to the questions posed were (1) No and (2) Yes. Toy J.A. (concurred in by Hinkson and Legg J.J.A.) accepted British Columbia's submission that it had such a legitimate expectation. Further, Toy J.A. held that Parliamentary sovereignty was ensured as only the conduct of the Government of Canada was impugned rather than Parliament itself. Lambert J.A., concurring in the result, decided the case on interpretation issues. Southin J.A. dissented.

13. (1990), 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, 46 B.C.L.R. (2d) 273 (B.C.C.A.).

The Supreme Court of Canada in an unanimous decision rendered on August 15, 1991, written by Sopinka J., reversed the decision of the British Columbia Court of Appeal. The Court held that Question 1 as set out in the Order in Council was of no assistance in resolving the dispute. In their view, the first question asked the Court to determine whether the Agreement obliged the Government of Canada to pay to British Columbia the contributions that were authorized when the agreement was signed or whether the obligation was to pay those contributions as authorized from time to time. Sopinka J. advised that if the former interpretation was correct, the Government of Canada acted contrary to the agreement in introducing Bill C-69 whereas, if the latter was correct, the action was in accordance with the Agreement. The Court held that if it was the intention to freeze the payment formula it would have been set out in the Agreement. Yet, the payment formula did not appear in the Agreement but only in the Act, where it was subject to amendment. Thus, the Court held that the Government of Canada, in tabling Bill C-69 in the House of Commons, acted in accordance with the Agreement and that the answer to question 1 was "Yes". The Court viewed Question 2 as dealing only with the legal doctrine of legitimate expectations. The Court repeated its position regarding the doctrine as stated in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, a decision released on December 20, 1990, eight days after that Court heard argument in the *Reference Re Canada Assistance Plan*, which held:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation. [at 1204].

The Court decided that Question 2 as posed by British Columbia claimed that the consent of British Columbia had to be obtained. It held, however, that the doctrine of legitimate expectations would require consultation, not consent. Further, Sopinka J. wrote that the rules governing procedural fairness do not apply to a body exercising purely legislative functions. The Court held that the "formulation and introduction of a bill are part of the legislative process with which the Courts will not meddle."[14]

14. *Supra*, note 1 at 25.

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inter-governmental, and not the constitutional, level.[41] Parliamentary and legislative committees should be commissioned to look into a code of conduct designed to address the specific barriers which act as socially indefensible impediments to trade. Redress for unjustifiable barriers should be had before bodies other than courts.

Although part of the "national unity" package, the constitutionalizing of the free market model marks another turn toward the kind of class conflict that characterized the free trade debate. The Business Council on National Issues, the Fraser and C.D. Howe Institutes, and the Canadian Manufacturing Association will be pitted against the labour movement, and those who are unable to participate freely in the market such as women and the poor.

The proposals may have another interesting effect. Much of the support for sovereignty within Québec has been led by the new economic elites, who gained financially by the upsurge in Québec economic activity in the 1970s and 1980s.[42] Coupled with the green light from Wall Street that Québec could go it alone economically, they, rather than the poets, musicians, and academics, have calmly been leading public opinion in Québec in the march towards sovereignty. The common market proposals are both a lure and a challenge to those elites. Either they will choose the federalist option, with its promise of economic prosperity in a common market, or they will choose to maintain "Québec Inc.", where the national assembly maintains its close ties to economic development in the province, unhampered by constitutional prohibitions against provincial intrusion into the marketplace. If they choose the former, the federal strategy may have succeeded in dismembering the sovereignist alliance. If they choose the latter, the bargaining power of Québec's nationalist movement will have been weakened.[43] Canadians outside of Québec may then be led, perhaps dangerously, to the brink where rhetoric and reality may not be readily distinguishable.

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41. The Manitoba Constitutional Task Force recently recommended that political action be taken to remove inter-provincial economic barriers. See *Report of the Manitoba Constitutional Task Force* (October 28, 1991) at 52-54.

42. See Charles Macli, "Duelling in the Dark" *Report on Business Magazine* (April 1991) 29.

43. Quebec's ability to negotiate a new free trade agreement with the United States may also be impaired. See T.J. Courchene, *In Praise of Renewed Federalism*, *supra*, note 1 at 30-31.

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Sopinka J. rejected the contention that there was no impediment to prevent Parliament from legislating but that the government was constrained by the doctrine from introducing the Bill before Parliament. Relying on W. Bagehot, *The English Constitution* (2nd ed. 1872) the Court held that a restraint on the executive in the introduction of a bill was a fetter on the sovereignty of Parliament.

The Court did not deal with an argument put forth by Ontario, supported by Alberta and Saskatchewan, that there was, with respect to federal-provincial cost-sharing agreements, a convention that neither Parliament nor the legislatures could use their legislative authority to alter their obligations unilaterally. Sopinka J. wrote that, since Question 2 did not relate to conventions, the issue would not be addressed.

The Supreme Court of Canada briefly dealt with a "manner and form" argument put forward by the Native Council of Canada and the United Native Nations of British Columbia. The Court held that there was no indication of an intention on the part of Parliament to have bound itself by the Plan and, further, that manner and form restrictions could only relate to non-substantive matters in statutes of a constitutional nature. The Court also briefly disposed of an argument by Manitoba that Parliament lacked legislative jurisdiction to make changes to the Plan.

In sum, the result in this case is the product of a conservative tradition with respect to Parliamentary sovereignty. It could be argued that Bagehot, relied upon by the Court, is of little relevance as he wrote about a 19th century unitary state without a history of cooperative federalism.

The Court has, however, left open a door. Although it held that the "formulation and introduction of a bill" would not be meddled with, it left aside:

> ... the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.[15]

Further, the issue regarding the existence of conventions in the realm of shared-cost agreements between Canada and the provinces is still unresolved.

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15. *Ibid.*