Chapter XI, as this applies within the federal government and intergovernmentally, to test Hypothesis No. 6.

In Chapter XII, conclusions are summarized and recommendations are proposed for changes in policy and public administration, and for further research.

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**THE CONSTITUTIONAL NATURE
OF FEDERAL PARTICIPATION
IN CANADIAN EDUCATION**

by

Robert Charles Stewart

**A thesis submitted to the Department
of Political Science in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy**

**Carleton University
Department of Political Science
Ottawa, Ontario**

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The undersigned hereby recommend to
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IN CANADIAN EDUCATION"

submitted by
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in partial fulfilment of the requirements
for the degree of Doctor of Philosophy

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November 9, 1990

ABSTRACT

In democratic states, education does not lend itself to full governance or, in federalism, to a watertight compartmentalization in jurisdiction or practice. In Canada, entrenchment of both group and individual rights in education limits legislative and executive powers, as does related judge-made constitutional law. Each province's discretionary and prescriptive use of its Section 93 legislative power invites federal initiatives. In Canada, in the English law which applies to Section 93 and its variants, freedom of action is presumed where no law prohibits it. This creates a strong basis for academic freedom - especially in post-secondary and post-school education.

Constitutional bases for federal participation in education include: full Section 93 jurisdiction in the territories; external responsibility; remedial and supervisory powers concerning group minority religious rights in education; residual power in and for education extraterritorial to provincial jurisdictions. Prima facie grounds for concurrence in post-secondary education include plenary federal jurisdiction over communications and concurrent jurisdiction in research and culture. Section 91 anomalies which give the federal order of government full jurisdiction in education apply to defence; Indians (and Inuit) and Indian lands; federal penitentiaries. Aspects of education in all federal heads of powers permit ancillary action. Federal powers of general application include residual power to legislate for "peace, order and good government"; disallowance and reserve; a declaratory power to expropriate works; incorporation. Federal taxing power permits extensive expenditures via the federal spending and lending power.

The Constitution Act, 1982 expands federal participation in education with its entrenched, national official languages minority rights in education and its amendment procedure to permit selective transfer of provincial jurisdiction in education to federal

jurisdiction. Potential for additional national rights in education exists via judicial rulings on the Act's Charter of Rights and Freedoms. Self government in education for aboriginal peoples is open to entrenchment by constitutional amendment, if not via existing treaties.

Federal participation which has come to encompass all dimensions of education and related matters has not, as a rule, resulted from federal interventions. Generally, federal participation in education lacks public visibility - especially its substantial support of educational reform in Quebec since its "quiet revolution". The nature and reach of Section 93's jurisdiction has not been a focus of constitutional study by the federal and provincial governments.

All federal participation in education is constitutional, or is so presumed. Two clear exceptions noted are: collective activities of the provinces' Council of Ministers of Education, Canada, which exceed their separate Section 93 jurisdictions; and executive practices within provinces which are outside the grant of legislative power only which Section 93 or its variants make to each Legislature. The Meech Lake Accord would have constitutionalized such "executive federalism".

Awareness of federal officials of the applicable legal rules of the Constitution is generally unsatisfactory. This finding conforms with previous federal study and is observed to apply also in the case of non-legal rules of the Constitution. Deficiencies in co-ordination which hinder federal participation in education, starting with policy-making, both within federal jurisdiction and intergovernmentally, are correctable without constitutional change.

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To my parents, Charles and Kathleen Stewart of Mervin, Saskatchewan, whose generous financial support made the research for this lengthy study possible, I dedicate this thesis report.

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CHAPTER I

INTRODUCTION

In every country, education is a primary responsibility in governance and a major requirement for national survival. It is a principal means of cultural transmission and elaboration, of orientation for work, and of political socialization for citizenship. To this end, educational curriculum must ensure common national as well particular essentials, to accommodate particular minority group and individual interests. A constitutional arrangement is required to assure achievement of both requirements, especially when language and/or culture are variables. Consequently, the constitutional limits of the state's legislative power over education, and the allocation of that power, are of crucial importance. In a federal state, the determination of these legislative limits, powers, and rights, can be both complex and controversial. This applies culturally, politically, and above all, constitutionally - in particular where, between the two orders of government, there is doubt or disagreement about the allocation of legislative powers over education. Canada's federal union is no exception.

Such doubts and disagreements exist in the perennial question of whether, constitutionally, Canada's federal distribution of legislative powers and related jurisprudence precludes federal participation in education. Uncertainty about the nature and distribution of these powers has invited varied interpretations. Section 93, in some political interpretations, has been treated as a mutually exclusive set of words, cut off from the rest of the Constitution. This ignores the federal residual created by the terms of Section 93, and that residual's capacity for accommodating unforeseen contingencies of national interest. On the other hand, legal interpretations of Section 93 tend to include its full constitutional context. This permits consideration of the flexibility which Section 93's vagueness and omissions create, and of the additional and comple-

mentary federal powers which relate to education broadly defined. This study follows the latter course. Its main purpose is to ascertain the constitutional nature and extent of federal participation in Canadian education.

The only express legislative provision for education in the Constitution Act, 1867,¹ was Section 93 which, along with its variants in subsequent constitutional acts for the admission of the fourth to tenth provinces to Confederation,² grants to each province power to make laws "in relation to education". Each province "may" exclusively make such laws, but only "in and for" that province. Thus the provinces have no legislative power in relation to education nationally or intergovernmentally. At Confederation, this jurisdictional gap created an implicit federal power which assured that there could be federal participation in Canadian education nationally and intergovernmentally.

In a federal distribution of powers, silence does not mean that there has been an omission of legislative power. Research, a jurisdictional concern nationally as well as provincially, was not mentioned in 1867, or since - even though dissemination of knowledge through education presupposes its creation. The Act of 1867 was also silent on culture, education's principal *raison d'être*, and on language, its means of expression.

In Section 93 of the 1867 Act, provisions were made to entrench particular group religious rights and privileges in education, and the power of the federal Cabinet and Parliament to act correctively in these matters. This asserted the principle that minority rights in education require federal protection. To add to this jurisdictional complexity, the meaning and reach of the controversial term "education" was not defined then. Indeed, no Confederation record - contemporary or retrospective - shows that it was seriously discussed at all. (The protection of particular group religious rights in, or via education was another matter, and this was provided for in schooling only.) The Courts have not defined it since.

While the term was still not clarified in the Constitution Act, 1982, official language minority rights in education were entrenched on a uniform basis nationally,

and in addition to Section 93 jurisdiction. This reasserted the principle of protection of minority rights in education on a federal, or national, basis. A precedent was thus set for the possible creation of future national Charter rights in relation to education, apart from Section 93 jurisdiction. A new amendment provision was also made to allow transfers of provincial legislative powers, relating "to education or other cultural matters", from provincial legislatures to Parliament. These changes go against the established trend to fragmentation via Section 93, which has produced ten separate and different provincial systems of public education, in addition to two different territorial systems, both under federal Section 93 authority, and a federal system under various constitutional authorities.

In spite of this diversity, there has been a general perception that provincial legislative power in relation to education is both exclusive and exhaustive, and that any constitutional limits to it are restrictive only. Notwithstanding such a belief, provincial exercise of legislative (and executive) power in education has tended to be delimited, in definitions and operations, to particular matters of formal schooling or education. The foremost example of this would be statutory obligations and rights in public education in particular programs for specified age and grade levels. In addition, there are disagreements about the limits of provincial jurisdiction in education. For instance, should provincial jurisdiction be extended more fully to pre-school programs of an educational nature? What jurisdiction should apply to post-school education on a lifelong basis? How certain or complete is provincial jurisdiction for college and university education? (Through federal research and grants, contracts, support facilities and services for research, there is a critical involvement by the central government in post secondary curriculum, instruction and human resource development in all fields of science and technology.) Where and how does jurisdiction in education apply to developments in learning and communications technology which have impacts in and beyond educational institutions and their control? Most provincial educational systems have not been able

to keep pace with the open and evolving nature of education - especially as it applies to varied learning needs and to different populations. The provinces have never had the necessary resources and resourcing powers to meet this challenge.

In an attempt to account for this situation, the Rowell-Sirois Commission noted that, since 1867, the expansion of the concept of education had been "as unexpected as the expansion of social services generally".³ Moreover, since this observation was made, the history of Canadian education shows that this concept and its manifestations have grown steadily. At the same time, there has been a parallel and growing concern for expanding rights in public education on a national basis.

The federal government has played a real and varied role in Canadian education for some time, touching on all aspects and levels of matters in relation to education. This involvement is still to be determined in terms of purposes, programs and activities, expenditure, and co-ordination. The constitutional law which applies to these matters also remains to be determined. Given these two sets of related data, it is important to know how they fit. This will make it possible to assess whether federal participation in education in each case is constitutional, or unconstitutional, or extra-constitutional.

These terms are defined and analyzed subsequently in relation to judicial review. It need only be noted here that in Canadian law at this time, legislation is constitutional to the extent that it is *intra vires* and is unconstitutional to the extent that it is *ultra vires*. Judges make these decisions. In the British tradition, they do so by using doctrines and procedures of review which, over time, judges have built into our system of legal and constitutional decision-making. The Court does not initiate constitutional cases, appeals, or references. It responds to them, when they are originated elsewhere.

This gives the federal and provincial governments a choice when they are faced with jurisdictional and legislative disputes in educational matters. They can initiate judicial review including references, or they can use political and/or executive alternatives to this - to settle out of court, so to speak. This is characteristic of con-

temporary executive federalism in Canada, with its preference for the certainties of political and executive arrangements over the uncertainties of judicial adjudication.

The term "extra-constitutional" (which is not used in legal literature) is used in this study to describe these political and executive measures. The term is also used to embrace the development of non-legal rules, or conventions, which such institutional practices create. It also applies to gray areas of constitutionality which federal and provincial governments have declined to put to judicial review, in particular, the federal spending power.

Knowledge of such basic matters is of particular significance in politics and public administration in, and between, both orders of government in Canada. This is because all players in government must know and observe the constitutional rules. They must also be able to distinguish between the legal rules of the Constitution, which the Court will enforce, and its conventions, which the Court will not enforce. The legal rules allocate the distribution of government powers and define the entrenched rights and provisions which governments cannot change without constitutional amendment. The conventions, or non-legal rules, are dependent for their use and survival on the knowledge and observance of elected politicians and their appointed public servants. Thus, in a study of the constitutional nature of federal participation in education, it is important to know, at least, the extent to which federal officials involved are aware of the constitutional dimension in their work in relation to education. Such awareness is the minimum essential requirement for competent and loyal service in public administration.

The need for such awareness is stressed in a special intergovernmental study related to the Constitution carried out by the Federal-Provincial Relations Office (FPRO). This study is referred to later in order to compare its conclusions with the findings of this study. Co-ordination of federal participation in education is also a

concern, because of the effects caused by overlapping in administration and expenditure on the size and nature of such participation.

Problems and Hypotheses. Based on these considerations, research was directed to a sequence of six main problems, as follows:

- 1) What are the constitutional bases for federal participation in Canadian education?
- 2) How do recent Constitution Act, 1982 amendments, including the new terms for amending the Constitution, provide additional scope for federal participation in education?
- 3) How great has federal participation in education become?
- 4) What is the fit between federal participation in education and the constitutional bases for it?
- 5) Are federal officials aware of the constitutional basis of their work in relation to education?
- 6) How is federal participation in education co-ordinated?

Findings in answer to these problems are used as referents for clarifying and evaluating a series of six hypotheses which are related to these problems and which are derived from them and from the literature on education, federalism, and the Canadian Constitution. Each hypothesis is stated as a proposition which tentatively assumes a relationship between phenomena, so that its logical or empirical consequences may be drawn out. The hypotheses are as follows:

- No.1 Despite provincial jurisdiction for education in Section 93 of the Constitution Act, 1867, and its subsequent variants, there are also constitutional bases for federal participation in education.
- No.2 Constitution Act, 1982 amendments, including the terms for amending the Constitution, increase the scope and flexibility of federal participation in education in relation to antecedent jurisprudence.

- No.3 Despite provincial jurisdiction for education in Section 93 of the Constitution Act, 1867 and its subsequent variants, federal participation in education, broadly defined, has now become extensive and complex.
- No.4 Most federal participation in education has a constitutional basis.
- No.5 Federal officials concerned have a limited awareness of the constitutional bases of their work in education.
- No.6 Deficiencies in the co-ordination of federal participation in education have increased the extent of such participation.

Definition of Education. In order to gain a full appreciation of federal participation in education, training and research are included in the definition of education in this study. This broadly-based approach to the study of federal participation in education has been used by Statistics Canada in its reports since 1919.

Training has been distinguished from education by the federal government, to rationalize federal responsibility and action in programs for youth and adults who have left regular schooling. The Government of Ontario has accepted this interpretation officially;⁴ other provinces have condoned it. There is virtually no support for such semantics in professional education literature, where the two terms are taken as synonymous, or different only in degree. All scientists interviewed declined to distinguish research from education, because of the integral relationship they perceive between the creation of knowledge and its dissemination.

Culture is included in this study because of its fundamental linkage with values, aims and programs in education. Communications and telecommunications are included, because they are considered as matters of substance and method in the theory and practice of modern education for the Information Age. Moreover, in Canada, these two matters are subject to exclusive and plenary federal jurisdiction.

Need for Study

The politics of Canadian education make it necessary to know the role the federal government can play constitutionally. This information is needed to establish both the legitimacy of federal actions in policy, law, administration, and financing which are related to Canadian education. This information is needed first of all to determine whether Canada's federal union is, or was meant to be, one in which its federal order of government can assume responsibility for education, and if so, how. Given the fundamental law which applies to the distribution of powers in Canadian federalism and the related jurisprudence, it is possible to determine all the relevant powers which may, or do, apply to federal participation in education, and not focus just on Section 93 as is often the case.

Section 93 interpretations have often been more ideological than legal, as the result of an *a priori* assumption of exclusive provincial jurisdiction. Since everyone "knows" that the provinces are responsible for education, it has been easy to foster the idea that, somehow, federal participation in education involves some sort of unconstitutional intervention. This discourages the public from initiating national issues in Canadian education. The same blockage can apply to policy-making in the national political parties. Worst of all, public and party uncertainty can give federal governments an option for backing out of national obligations in education which have constitutional foundation. Research is needed to determine all the constitutional law which can apply to federal participation in Canadian education: that which relates to Section 93 and that which is additional.

Federal expenditure on education - about 10 per cent of the federal budget - makes the constitutionality of this action a significant matter. Efforts to achieve value for money, and visibility for national participation in education, depend on certainty about the constitutional bases for such participation. Governments of Canada need this knowledge for setting policy priorities and for budgeting related to education. It is

needed also for setting the duty requirements of federal officials who are involved in work related to education - within the federal government itself, and intergovernmentally. This is a minimum essential in public administration.

Yet, within the federal government, the constitutional law which applies to federal participation in education has never been a focus for full and continuing legal study.⁵ Consequently, there has been no identification of the constitutional law which applies to all the present forms and aspects of federal participation in education. Moreover, management training in the federal public service has been deficient in the study of such matters.⁶ There is, therefore, a need for such basic knowledge in both training and practice.

In summary, research is needed in response to the six problems which are the basis of this study - for the practical reasons described and as baselines for further research. This need is indicated in the literature related to federal participation in education as defined. Such literature includes Royal Commission studies and reports, federal statistics and reports, international studies on education, academic research and commentary, interest group proposals and the writer's referrals to federal departments and agencies in search of related, unpublished studies and reports.

Of those sources of information relevant to the problems for study, two are of interest for their breadth of coverage. Both of these sources define education to include training and research. The first reference is Professor James C. Miller's historical study, National Government and Education in Federated Democracies: Dominion of Canada. This study was motivated, as the author states, by his conviction that, as of 1939, the time had come for national leadership in education in democracies of the federal type, including Canada. The status of federal involvement in education at this time, and background information which includes some commentary on constitutional law, is referred to, as required, in this study. The second and brief source is OECD's 1976 Reviews of National Policies for Education: Canada which observes that, as of this

time, there was no overt federal presence in educational policy. This deficiency was answered, in part, by subsequent federal initiatives aimed at establishing a national forum for educational policy-making in post-secondary education, with the federal government as a participant. These objectives for federal participation were expressed in speeches by successive Secretaries of State for Canada, and by Prime Minister Trudeau. These matters were clarified in the writer's interview with the Hon. Gordon Robertson, President of the Institute for Research on Public Policy Issues, and former Secretary of the Cabinet and of the Federal Provincial Relations Office ⁷.

The longstanding and expanding interest of federal politicians of all parties in education nationally and, sometimes, federally, is described in a 1960 Ph.D. thesis by W.N. Toombs, "An Analysis of Parliamentary Debates on Federal Financial Participation in Education in Canada, 1867-1960". These findings applied up to the transition from co-operative to executive federalism.

Finance, and its linkage with the federal spending power, is also a theme in other studies relating to federal participation in education, but mainly at the post-secondary level. Among these are reports by various commissions, academics and consultants, all of which call for federal contribution - some with little or no federal control and some with optimal federal control. Other separate themes of study related to federal involvement in education include vocational education, manpower policy and planning, research support, language rights in education, communications, and cultural policy. These studies do not, however, produce a complete and current picture of the federal government's participation in education.

There is no complete picture in policy, programs and administration at the federal order of government because, as the United Nations' Organization for Economic Cooperation and Development (OECD) pointed out, there is no administrative focus for federal participation in education. Consequently, there is "a kind of vacuum in educational policy" at the higher decision-making level - an "empty space" which is

invaded by federal agencies responsible for related policy areas who "tend to view education as an instrument for their particular missions, and not as a field of policy in its own right".⁸ Hence the need to learn how federal participation is co-ordinated and how, in turn, this affects the size and nature of such participation.

Overall, the most important need for a study of this kind is the facts and proposals it could produce for promoting the optimal uses of relevant law, expenditures, and public administration. This could lead to the more effective development of new knowledge, human resources for work and for citizenship, and the growth and protection of Canadian culture.

Limitations on Research

This study, like the programs and activities it investigates, is subject to significant limitations on both the extent of relevant information and its availability. To begin with, to the present, the management of the federal government has not decided on an operational definition of education. There is no particular monitoring of educational expenditures by the Comptroller General before they are made. There is no system-wide audit of these expenditures by the Auditor General afterwards, or procedure for doing so. There is no management or information locus to identify or monitor all federal educational programs and activities and expenditures in a system fashion. As noted by the OECD, there is no national education policy. Moreover, to date there is no forum for making such policy with federal participation. As stated, the constitutional law which applies to all forms and aspects of federal participation in education has not been identified. In short, there is no total picture of such participation, or of its constitutional bases.

Because the Public Archives of Canada has never made education a theme for longitudinal data collection and analysis, there has never been such a total picture, or all the identifiable parts for putting such a picture together. Any research done within the

federal government has been limited to particular topics. The Department of Justice has no on-going arrangement for monitoring or review of the legal and constitutional bases of federal participation in education. However, it has always had the capability to respond to requests from government clients for reviews and opinions on issues in law.

Statistics Canada, in co-operation with government departments and agencies, has, since its inception, made provision for educational statistics in the broad scope defined. The Secretary of State Department has collaborated in such work by means of research and funding for research. To date, however, the gathering of data, micro-analysis, and reporting, have been limited, because so few of the federal statistics on education have been disaggregated.

Exclusion of federal representatives from most of the affairs of the Council of Ministers of Education of Canada and the ongoing work of its secretariat in Toronto has inhibited research on education in national terms, including that carried out or supported by the federal government. Such a lack in co-operation and co-ordination hinders research which is national in scope.

Organizationally, potential for federal co-ordination of matters under the rubric of education - including research and training - exists in Cabinet, its committees and secretariat services. In practice there is no one locus. The Ministry of State for Science and Technology, which was established in 1971, is low in Cabinet rank. The Secretary of State, which has had a co-ordinative role for an increasing part of federal participation in education - mainly in areas of post-secondary education, official languages and culture - has had similar low Cabinet status. The two bodies have not had a regular, on-going integrative relationship. The same applies to the various other federal departments and agencies whose mandates include education programs and/or services as an aspect or part. The Ministry of State for Social Development, which was established in 1980 and terminated in 1984, had taken steps to fill co-ordinative gaps in matters of education. Consequently, fragmentation in federal policy-making and

implementation continues. The same limitation applies to research on the federal role in education.

Finally, the federal Education Services (classification) Group (EDS), which was established in 1967 to deal with matters in the field of education programs, services and communications, has declined in both status and potential for service. There is still no EDS human resource planning on a system-wide basis. The Group's unique requirements for knowledge of public administration, in both its classification and selection standards, are routinely set aside in delegated and sub-delegated staffing. Its classification standards - the starting point for all personnel administration - were last updated in 1970. The Group's capabilities for research and for service have been weakened accordingly.

Collection and Treatment of Data

As the foregoing discussion indicates, the main focus of data gathering for this thesis is the constitutional law on which rests the validity of federal participation in education. This information was obtained from all the relevant constitutional law sources, including constitutional statutes, relevant case law and references, and constitutional conventions. These basic matters were clarified further in the next phase of data gathering, in order to identify and describe federal programs and activities in education in terms of their respective authorities, purposes, content, coverage, expenditure and coordination. Interviews and referrals were made to gather and to confirm information and opinion derived from questions on these variables prepared by the writer. Related documentation was referred to, where available. Additional referrals were made for specific and cross reference information and opinion as required. In this phase, data collection began at the responsibility centre for the management of each program and/or activity. Information on programs and law obtained at this level was clarified up the chain of command, to the deputy head and/or past or present Minister, if possible.

Additional matters of significance were noted, for further clarification. Final referrals were made to central agencies and, as required, to legal counsel.

The first part of the work was carried out from June 1984 to October 1985, with follow-ups for corrections and completions, as required. This work involved coping with the organizational and staff effects of changes in government from Prime Ministers Trudeau, to Turner, to Mulroney. It was concentrated on collection of federal participation data up to, and including separately, the fiscal year 1983/84. There was still a need for final referrals to sources in the provinces and the Council of Ministers of Education of Canada (CMEC) on relevant matters of law and executive federalism, and to legal sources. These referrals had to be delayed until relevant and unfinished matters in constitutional law pending at 1984 were resolved.

These matters flowed directly from the Constitution Act, 1982. Included in the Act was an explicit provision for subsequent constitutional conferences on matters directly affecting Canada's aboriginal peoples. Among the matters involved was native self government in education. Judicial review was initiated, or pending, on issues in Section 23's provisions for national minority language rights in education. Some cases were appealed to the Supreme Court of Canada for landmark rulings. Other disputes did not result in litigation as anticipated.

It is significant that, politically, Quebec was the only province which did not endorse the 1982 Act and its Charter, even though this law applies to all of Canada - as Quebec has shown by use of the Act's Section 33 notwithstanding clause. Quebec also obtained an exemption in the Act from minority official language rights provisions in Section 23(1)(a). To gain Quebec's political acceptance, the federal and provincial governments negotiated the Meech Lake Accord in 1987. Its proposals were considered in this study for the following main reasons. The Accord would have constitutionalized executive federalism. It had significant potential, not contemplated in 1984, for

affecting jurisdiction in culture, official languages, and education based on the 1982 Act. This included constitutional amendment procedure related to these matters. The Accord's provisions would also have had limiting effects on achievement of native self government in education via constitutional amendment. The Accord's proposals represent a reaction against the potential for increased judicial policy-making made possible by the 1982 Act. As a result, references are made in this study to the Accord, to sharpen and clarify the content, issues, and trends in relation to education which were created by the 1982 Act.

Final collection of data was made in 1989, by which time interview contacts were attempted and made with Ministers, senior officers, and legal advisors for eight provinces and the Council of Ministers of Education. In total there were 6 interviews of former federal cabinet members, 115 of federal managers (up to Deputy Minister rank), and 31 of federal specialists, including legal counsel (up to Assistant Deputy Minister rank). All of these interviews were conducted in person - as required by the sequence for data gathering, and as permitted by access to interviewees. (One ministerial interview had to be postponed nine times.) There were 101 additional personnel sources of basic and cross reference information: 56 federal; 2 territorial; 19 provincial, including the Canadian Council of Ministers of Education of Canada; 14 external legal counsel and 10 university representatives. (Travel was required for provincial data gathering. All but two senior interviews were conducted in person - the remaining two granted phone interviews.)

Overview of Chapters

The six problems set out in this study are addressed in three parts. In Part I, Background and Baselines for Federal Participation in Education, Chapter II defines and compares education in democratic federalism. In Chapter III, Canadian education is examined in relation to the Constitution and judicial review, with particular reference to

the Constitution Act, 1867, Section 93 and its subsequent variants. Allowance is made for observed deficiencies in Section 93 implementation which may elicit federal action. Consideration is also given to judicial review and to the political and executive means in Canadian federalism by which it can be avoided. Hypotheses are used to guide the gathering of information and opinion, and to draw conclusions.

In Chapter IV, all constitutional powers applicable to federal participation in education are identified, and related to Hypothesis No.1. In Chapter V, the development of rights in Canadian education is described, with particular reference to a derivation of such rights from the Constitution Act, 1982, including the Act's new provision for constitutional amendment in matters of education or other cultural matters. To test Hypothesis No. 2, the scope and flexibility of federal participation as the result of the 1982 Act are identified and compared with antecedent jurisprudence under Section 93.

In Part II, Development of Federal Participation in Education, such participation, broadly defined, is identified and analyzed. Developments and milestones in federal participation in education are identified and categorized in Chapter VI. This procedure is also used in Chapters VII, VIII, and IX for federal participation as it was in the fiscal year 1983/84. Information is used in total to consider the size and complexity of federal participation in education, and to draw conclusions in relation to Hypothesis No.3.

In Part III, Results of Federal Participation in Education, this participation is examined in two ways: first to determine and analyze its fit with constitutional law and, second, to determine and analyze its co-ordination. Allowance is made in both cases for effects of executive federalism as an alternative to judicial review and constitutional requirements. Chapter X describes the fit between federal participation in education and relevant constitutional law, as required by Hypothesis No. 4. It describes the awareness which federal officials interviewed have of such law in their educational work, to test Hypothesis No. 5. Co-ordination of federal participation in education is described in

Chapter XI, as this applies within the federal government and intergovernmentally, to test Hypothesis No. 6.

In Chapter XII, conclusions are summarized and recommendations are proposed for changes in policy and public administration, and for further research.

END NOTES

1. The Constitution Act, 1982 included a provision for modernizing the Constitution by means of repeal and/or renaming of acts and orders-in-council listed in Schedule I of the Act, which is incorporated in this study as Appendix A. Hence the British North America Act, 1867, 30-31 Vict., c.3(U.K.) became the Constitution Act, 1867.

The B.N.A. Act of 1867 was commonly and incorrectly referred to as the Constitution of Canada. In fact, as described in Chapter III, the Constitution of Canada includes not only this Act as renamed and its formal amendments, but also certain Imperial statutes, such as the Statute of Westminster, 1931, certain Imperial orders-in-council, certain federal and provincial statutes of a constitutional character, certain letters patent, and a number of constitutional customs and conventions. In addition, the aforesaid have been supplemented by judicial interpretation and decision.

Of particular significance in this study are the provisions which the Constitution Act, 1867 makes for the distribution of powers between the federal and provincial orders of government, including the terms of Section 93 related to education. See Appendix B.

2. The variants of Section 93 of the Constitution Act, 1867 are cited in full in Appendix C. They apply to Manitoba, Saskatchewan, Alberta and Newfoundland. Ordinances approved by the federal government extend a variance of Section 93 to the territories.
3. Canada, Royal Commission on Dominion-Provincial Relations, Book II, Recommendations, p.50.
4. Hon. William Davis, "Economic Transformation: A New Priority for Employment and Human Resources." An address to the 25th Annual Premiers' Conference, Charlottetown, P.E.I. August, 1984, p.2.
5. Interviews with senior officers of: the Departments of Justice, Finance, and the Secretary of State; the Privy Council Office; the Privy Council Office; the Federal Provincial Relations Office; the Law Reform Commission; the Public Archives of Canada.
6. Management training policies and programs for the Public Service of Canada to 1983/84: documentation and interviews, Treasury Board and the Public Service Commission.
7. Interviews with former Secretaries of State, the Hon. Gerald Regan and the Hon. Serge Joyal; interviews with the Deputy Minister and senior officials, Secretary of State Department; Ministerial Speech File, Secretary of State Library. Interview with the Hon. Gordon Robertson, Institute for Public Policy.
8. Organization for Economic Co-operation, Reviews of National Policies for Education: Canada. Paris:OECD, 1976, p.93.

CHAPTER II

EDUCATION IN DEMOCRATIC FEDERATIONS

To clarify the nature and scope of federal participation in Canadian education, this chapter examines the following basic and related concerns in practice and in the literature. It begins by considering what is meant by education in a modern, democratic society. It goes on to identify characteristics of federalism which relate to education and, in particular, in federal states having British origins in constitutional law. The means for federal participation in education are noted. Of concern also are the provisions required and made for minority rights in education - whether such rights are derived explicitly from constitutional enactment or from its interpretation by the court. This leads to concern for the crucial role of the judiciary in federations in judicial review respecting related to the distribution of powers and entrenched rights in education. Finally, because of the responsibility and resourcing concerns which arise in federalism, there is need to be aware of the issues in educational finance and co-ordination.

The Nature of Education

Education is a difficult term to define because of what it connotes. It depends for its meaning to a considerable extent on the culture in which it occurs. As King states

Societies preserve their existence by the transmission of their culture from one generation to the next. The process of cultural transmission is what is meant essentially by the term education. Education refers to the cluster of values, beliefs, skills, knowledge and techniques used in this process. Education is at the same time a social system for transmitting culture and also a part of the culture it transmits.¹

In such a broad sense, education is synonymous with socialization. Education is also synonymous with learning - not merely as schooling based on prescribed curricula, but in all categories or fields of knowledge and skill. The more modern a society is or aspires to be, the greater its quest for learning in all fields. Thus in 1967 Senator Robert Stanbury was moved to say of Canadian education that "now, like some benign growth, it seems to have so expanded as to fill society". Consequently, he thought it was "futile to fancy that our federal government could be excluded from the dynamic and all-pervasive institution" which education had become in Canada.²

To rationalize federal participation in education, various federal politicians and officials have tried to make distinctions between "education", as a constitutional term reserved to provincial jurisdiction, and what are said to be related matters. So far, apart from regular schooling in Canada, these have included such matters as research, adult training and retraining, culture, and communications. In Canada, this has not promoted the sort of clarity of definition and purpose required for effective educational policy-making, planning, financing or co-ordination.

But constitutions in other democratic federations do not provide much definition help either. In the United States Constitution, for example, education was not mentioned and hence not defined, even vaguely. As a head of legislative power it was first assumed to be a responsibility reserved to the states, but with due regard for parental rights. The constitutional amendments of 1789 recognized the rights retained by citizens. Article 9 refers to such rights not enumerated in the Constitution. Article 10 refers to powers not delegated to the national order of government, or prohibited by it to the states as being reserved to the states, or to the people. (Canadian Fathers of Confederation were aware of such early American law.) Later, for reasons of equity and the national interest, the American federal administration assumed extensive obligations in education law and practice. The Australian constitution, which did not mention education either, had the same initial presumption about residual state juris-

diction over "education". However, Australia has long had its Office of the Commonwealth Director of Education and its national university. The same lack of definition of the term also applies in countries which Wheare has classified as quasi-federal. For instance, the constitution of the Federal German Republic states in Article 7 (1) that "the entire educational system is under the supervision of the state" (meaning the *länder*). Yet subsequently, a federal ministry of education and science was established.

It is possible that the lack of full and clear definition of the term education as a legislative head of power may reflect a general uncertainty about how, in a federal state, such jurisdiction can be placed effectively at one order of government exclusively, given the mix of both societal and individual needs and the varied local and national concerns which education must satisfy. Hence until the Constitution Act, 1982, the Canadian constitution had little to say about education. Moreover, the record of the education compromise in Section 93 of the Constitution (B.N.A.) Act, 1867 is (as Chapter III describes) both brief and controversial. Suffice to say that, as limited in practice as public education was at the times of the American, Canadian and Australian constitutional beginnings, there was less than unanimous support for making it a plenary legislative power at the state or provincial order of government. Sir John A. Macdonald suggests this in Canada's case in a letter to Dr. Egerton Ryerson of March 25th, 1872 in which, while upholding the Constitution as it was, he referred to "the subject of Education" as having been "withdrawn, unwisely as I always thought, from the control and supervision of the General Government".³

Aside from the problem definition poses in law and politics for constitution-makers and interpreters, semantics has not been an issue amongst educators and scientists. This is reflected in most dictionaries and in the professional literature on the subject of education which is shared closely by Canada, the United States and Australia. For example, the terms education and training are treated as synonymous,⁴ as in the French language. Nonetheless, "training" is sometimes given the connotation of being

oriented to the development of vocational or practical skills - in contrast to a more general, or liberal, and non-vocational "education". In addition, it should be noted that most discussion on education in the professional literature refers to learning which is linked to, or aided by, teaching to disseminate knowledge in formal, systematic ways - in kindergarten, in secondary schools, in colleges, and so on.

Education in such circumstances lends itself to regulation of one kind or another and, therefore, to arbitrary controls on what, for particular formal purposes, constitutes "education" and who is qualified to provide it. Nevertheless, if place (locus) and techniques (modus) are used as defining variables for acquiring the knowledges and skills called "education", it is then possible to make broader distinctions. Economist F. Machlup makes eight preliminary distinctions this way.⁵ These are: (1) education in the home - which includes the complex task of learning a language (or languages) in cultural context; (2) education in school - at the various levels; (3) training on the job; (4) instruction in church; (5) training in the armed forces; (6) education over television; (7) self-education; (8) learning from experience. Other categories could be added. but in Machlup's view, as in the social sciences, such distinctions will be "'sharp' only in abstract reasoning, while no sharp lines can be drawn in reality".⁶

Education is indeed a complicated phenomenon. No matter how it is defined for legal or other purposes, it involves, as Professor Burton Clark and others⁷ note, an intimate connection with culture, social class, politics and the economy, and to language, religion, minorities, government and the family. The most striking examples of the importance of education apply to the poor, whether they live in developing or affluent societies. In the latter case, it was the view of Canada's Special Senate Committee on Poverty that

The essence of poverty is deprivation, and for the children of poverty the effects become distressingly apparent when they encounter the educational system.⁸

In this regard, there is consensus among experts on child development that the early childhood years are of critical importance to potential physical, emotional and mental development and, thereby to the quality of individual and group life, work and citizenship to follow. For example, as Professor T. Ryan reported to the Committee, in terms of intelligence measured at age seventeen, about 50 per cent occurs between conception and age four; about 30 per cent between ages four and eight and the remaining 20 per cent between ages eight and seventeen.⁹ This makes the consequences of early deprivation cumulative and possibly irreversible.

In affluent societies, socio-economic deprivation results in a separate culture of poverty and, consequently, a separation from the goals and content of public education. There seems to be no doubt that exclusions from the core of the main culture occur, especially when illiteracy is also involved. The result then is sub-cultures and the involuntary exclusions from the mainstream of society, which the Vanier Institute of the Family and others have observed in Canada's case.¹⁰ In such circumstances the indices of alienation are many, including school drop out, chronic unemployment, and non-participation in civic affairs. Much of this is unnoticed by the majority. As the Economic Council of Canada noted earlier,

One reason for poverty's partial invisibility (i.e., in Canada) is that the poor tend to be collectively inarticulate. Many of them lack the education and the organization to make themselves heard.¹¹

In contrast, the poor in the developing world are, and have long been, most visible. The number of persons without formal schooling benefits in the countries concerned is staggering. In his research for the World Bank, in 1980, Abdeen Noor estimated that there were three people without education and in need of it for every one of the 315 million persons enrolled in school programs.¹² This situation has led to efforts to use basic education at all age levels to improve health, production, communication and so on. Canada's aid programs, as reported at the Canadian

Development Agency (CIDA), almost invariably involve some aspect of education to assure intended benefit.

In affluent countries, problems associated with domestic poverty have inspired various education-related experiments or reforms which, often, require funding which is only available at the national level of government. In the cases of Canada and the United States for example, this has created special national responsibilities and participation in educational matters of various kinds for the poor, including the indigenous peoples who in both countries are predominantly poor. This has occurred in both countries because, as elsewhere throughout the world, education is perceived as an avenue to social and occupational mobility and an escape from poverty.

Such escape is difficult anywhere, because, as research has shown, there is a strong, multi-dimensional relationship between lack of education and poverty. In the vicious cycle which develops, basic means, role models and motivation are lacking in the home environment. Nevertheless, as shown by some educational interventions, this cycle can be broken. Sylvia Ostry and Zaidi state that while the educational system may tend to maintain the status quo in the hierarchy of socio-economic privileges,

Education is the channel through which there takes place an upward flow of the poor but meritorious and a downward flow of the rich but dull. This is the redistributive function of education.¹³

Obviously, to give impetus to this redistributive and democratic function, there must be appropriate home and family economic security. Moreover, to encourage the disadvantaged to accept schooling, there must also be programs which lead to meaningful job and citizenship opportunities. This calls for the right mix of economic and educational policy and means, on national as well as local planes.

Modern education is a dynamic phenomenon. This is because its ends, means and content are subject to challenge and to change - in no circumstances more than in a modern, democratic society where change is fostered on a broad front. Thus as a philo-

sophy or system, education is fundamentally social and societal in nature, tending to fit, or reflect, the society it serves. It does this, as historians and other researchers have found, because it responds to the transmission requirements of a culture, and to change.

Therefore, education has two broad roles to play: the traditional role as cultural agent and the modern role as agent of change. Consequently, as educational historian W.F. Connell¹⁴ and others have observed, in most of the twentieth century world education now represents more than a static aggregate of processes for imparting knowledge and for developing attitudes, skills, and behaviours which are socially desirable in the society or culture that education serves and of which it is a part. Education - formal and informal - flows from culture and varies from one society to the next, and within societies from one period to the next. In short, as Bernard Ostry writes,

Culture, however we define it, is central to everything we do and think. It is what we do and the reason why we do it, what we wish and why we imagine it, what we perceive and how we express it, how we live and in what manner we approach death. It is our environment and the patterns of our adaptation to it. It is the world we have created and are still creating; it is the way we see that world and the motives that urge us to change it. It is the way we know ourselves and each other; it is our web of personal relationships; it is the images and abstractions that allow us to live together in communities and nations. It is the element in which we live.¹⁵

When governments prescribe school curricula, there is an unavoidable link between culture, education, and politics. Moreover, political awareness of culture is reflected when this occurs.

In a federal state where primary or exclusive jurisdiction in education is provincial, the results can vary greatly - even to the point where historic and civic essentials required for maintaining the country as a whole are ignored or downgraded. Apart from this, the public education content prescribed by government can reflect only a part of the given cultural source. To add to this, in the many countries where there is more than one culture - different ensembles of ways of valuing, feeling and thinking -

the distinctive groups concerned want accommodations in public education. Consequently, in federal states where religious, linguistic and ethnic minorities fear being discriminated against by national majorities - as in India, Malaysia, Nigeria, Switzerland or Canada - there is demand for provincial autonomy in defence of cultural identity and survival, by constitutional means. Yet such accommodation may not satisfy the further problem of provincial minorities who also have particular cultural, linguistic and educational needs and claims.

Constitutional law in education which treats federal theory as absolute may run counter to demographic and political realities and to common legal principles in a democracy. Quebec is such a complex case in point. Its first peoples, the Indians and Inuit, have substantial land claims within the Province's present boundaries which they seek to use to achieve limited self government within Canada. In the meantime, they do not seek to give up the protection which federal jurisdiction affords in respect to their lands and affairs. The anglophone minority, which dates from 1763, expects English to have equal status with French, as the national constitution requires. The increasing proportion of immigrants of neither background want choice in this matter. In democratic federal states the constitutional issue in public education seems to become not whether the provincial order of government should have jurisdiction in education, but to what extent and under what conditions this can apply in relation to individual rights, group rights and the national interest.

State involvement in education, fully or in part, creates a symbiotic relationship between education, however defined, and politics - as the exercise of power to influence thought and behaviour. Such a relationship is a concern of long standing in Western philosophical thought and in practice. In his treatises, Plato attaches much importance to education. In the Republic, he ranks it with the conducting of military campaigns and the administering of states as amongst the grandest and most beautiful subjects.¹⁶ In the Laws (written in later life), when he declared,

Then let us not leave the meaning of education ambiguous or ill-defined,¹⁷

he was obviously not thinking about the complexities of modern federalism applied to jurisdiction and tasks in public education. Moreover, his emphasis was on education

which makes a man eagerly pursue the ideal perfection of citizenship, and teaches him how rightly to rule and how to obey.¹⁸

Hence also the importance to him of knowing the state's constitution so that its purposes might be observed and safeguarded.

He perceived education to be of crucial importance in early childhood; as universal (and co-educational); as compulsory, and as a lifelong requirement. In contrast to his earlier view in the Republic, education is not to be confined to the ruling class.¹⁹ In the later work, he proposed that this responsibility be delegated to a director of education.²⁰ In Crito he states that "no man should bring children into the world who is unwilling to preserve to the end in their nurture and education" - an idea which suggests a shared responsibility by parent and state.²¹ In the Republic, education is described as being for the good of the individual and the safety, or security, of the state.

The approach of the ancient Greeks to education was rational; and it was based on the conviction that the welfare of the society rests on the education of its members. As subsequent history and philosophical writings show, this conviction persisted in thought, if not in deed, from this early time to the advent of public education in the modern state, of both democratic and non-democratic forms. Once again there were periodic debates about what kind of education is required to produce the ideal person, or citizen, and the content and methods which are best suited to achieve both this and the needs of the society and/or state. In 1959, the Hon. Woodrow S. Lloyd, former Saskatchewan Minister of Education and Premier, wrote about the links between education, politics and the rights of the individuals. He stated that

The concept of education as a legitimate activity for governments developed in part from an increasing acceptance of the importance of individuals as human beings and of their consequent basic right to certain opportunities. It was undoubtedly speeded by a realization of the necessity of some education for the sake of the state and for the sake of enterprises desirable and useful to those controlling the activities of the state. Undoubtedly, too, it resulted from growing respect for and confidence in the process of government...²²

In all modern states today, whether unitary or federal in form, democratic or otherwise, state control applies both over the aims and curricula of public schooling and the regulatory and fiscal control of all public education. While the classical theory described makes the promotion of "virtue" the ultimate goal of education, the resulting and enduring issue in all states having a public education system is not only what such virtue should constitute, but who should decide this and how. Consequently, the nature of education in a state is a function both of the culture or cultures which it enfolds and the constitutional form of government it adopts and observes. This governing framework will also set out the rights which individuals and groups have in education and its governance.

Wherever it occurs, education involves teaching and learning. It begins in the home and family, where the child is taught the mother tongue and something of the cultural, or sub-cultural, context within which this language has meaning. As a rule, the modern state does not interfere. In Canada, Section 93 has not been used for such a purpose. On the contrary, in Saskatchewan for example, parents of school aged children may request and obtain the Province's permission to teach their children themselves, at home - provided that they can satisfy the standards which apply, and provided they agree to follow the prescribed curriculum.

J.S. Bruner thinks that "education seeks to develop the power and sensibility of mind". Moreover, in addition to a transmission of some part of the culture - because no one can master it in whole - he holds that

Education must also seek to develop the processes of intelligence so that the individual is capable of going beyond the cultural ways of his social world, so that he can create an interior culture of his own.²³

This is not a view which fits, or tolerates, rigid state or political control of education - certainly not in a democracy. The authors of the Massey-Levesque Royal Commission on the Arts, Letters and Science in Canada elaborate further stating that

Education is the progressive development of the individual in all his faculties, physical and intellectual, aesthetic and moral. As a result of the disciplined growth of the entire personality, the educated man shows a balanced development of all his powers; he has fully realized his human possibilities.²⁴

These authors go on to suggest that there are two means of accomplishing this end; formal education in schools and universities (subject to constitutional law), and general non-academic education available through a variety of extracurricular "instruments of education", such as books, broadcasting, films, museums, and art galleries.²⁵

The question such views raise for comparative study is in what circumstances - in law, politics and educational governance - are they best realized? In institutionalized and regulated public education, each jurisdiction determines its version of what is best and attempts to deliver it. It also facilitates the advancement of new knowledge through research. Moreover, a country's degree of support for research and development is variously taken as an index of the stature of its educational system, of its modernity, and of the protection of its cultural, political and economic sovereignty.

Notwithstanding this, R.M. Thomas for one, observes that "educational institutions and their functions are often used by political bodies to maintain or augment political power".²⁶ In this regard, comparative study identifies a variety of such situations - ranging from as much state regulatory and administrative control as possible to as little as possible. The political settings range from one party states, where power over education can be concentrated and maintained, to multi party states where such

power is alternated, delegated and broadly accountable. For example, in the People's Republic of China, where about six per cent of the population is made up of some fifty-six distinct ethnic groups, education has been, as J.N. Hawkins describes, one of the more "highly charged political environments" among world nations.²⁷ Thus, for instance, during the so-called cultural revolution now past, social class was made a more important factor than ethnicity. Education was to promote "proletarian culture and customs", while traditional ethnic culture was relegated to historical study.²⁸ During this period of Chinese history, the emphasis was on the "political" aspect of China's development and this was reflected "in every aspect of China's minority educational affairs".²⁹ In another one-party but quasi-federal state, the U.S.S.R., each republic administers its own educational services after some central policy review and control has been applied. In both cases, minority cultural-linguistic groups are placed in a somewhat colonial relationship with the central and culturally-dominant power. Thus minority group input to the definition and control of what education is to mean for its members may be limited. Ironically, until recent years and notwithstanding democratic ideals, public education for the indigenous peoples in the United States, Canada and Australia was handled in such a colonial way, but without the benefit of the use of native languages as the first language of instruction as in the U.S.S.R.³⁰

Clearly, who controls whatever is defined as public education - its goals, content, training and selection of personnel, financing and so on - has considerable power, actually and potentially. This is why, everywhere, such matters are a prime focus of state interest and control, in legislation, regulation, financing and administration. This also explains why early educational thought and research concentrated on the state's formal institutions of teaching and learning, and on their curricula. For example, in Durkheim's conception of education, the child is socialized through schooling which aims to reflect the values and needs of the society it serves, and to produce adults with the necessary capabilities for life in that society.³¹

Such a view of education is reflected in more modern terms by the authors of Quebec's Royal Commission of Enquiry on Education - the Parent Commission - of 1961 who stated that

Naturally the school exists within a given society and at a given time in history, and is influenced by them; in addition, it serves as a factor in their own evolution. It is inspired by a certain human ideal; it is devoted to the development of certain definite qualities: it finds fulfillment in its own special vision of the future. Hence education must at once have its roots in tradition and look ahead toward what is to come - a dual role especially difficult during a period of quickening change in every department of human life.³²

Concern is expressed here for continuity and discontinuity - for both old and new values. However, in older, vertically-oriented systems of education, such as that to be replaced in Quebec at the time, an orderly teaching-and-learning continuum was suited to development in circumstances where the purposes of education served a stable, slowly changing culture. This was the condition when the Constitution Act, 1867 was enacted, including its unique constitutional provisions for education.

Such circumstances have long since stopped applying in most developed and developing countries, including Canada. Consequently, for some time, there has been a need, as anthropologist Margaret Mead explained, for a re-definition of education, to better relate it to change and to the lateral impacts of change. In 1959 she described the need for

another whole dimension of learning: the lateral transmission, to every sentient member of society, of what has just been discovered, invented, created, manufactured, or marketed.³³

She went on to observe that this need for lateral transmission in education "exists no less in the classroom and laboratory than it does on the assembly line".³⁴ Later, when writing on the coming post industrial society, sociologist Daniel Bell noted that when

we lived in an information-poor society, the school was "the central organizer of experience and the codifier of values".³⁵ But now, he writes,

Education takes place outside the school, in the multifarious influence of media and peer group, while schools, because of their gatekeeper roles, have become more vocational and specialized.³⁶

Illich, Toffler and others express similar views about the impacts of change on traditional means of institutionalized education.³⁷ Of the future, philosopher Marshall McLuhan has predicted that work will be characterized by learning a living.³⁸ That is, the usefulness of any skill or behaviour will be of short duration generally, because of the continuing need to keep abreast of technological invention and application. In his view, lifelong learning will be an operational requirement.

Writing on high technology for industry and education, Judith Tobin takes the view that the location of learning is "no longer restricted to institutions, but is shifting to the home and the workplace".³⁹ She then describes the computer literacy and cognitive skills now required for a more interdisciplinary curriculum - wherever it is developed and put into practice. When programmed learning in various forms and subject fields is combined with such technology, the scope for self-education is expanded greatly. There is an inherent danger here to our national culture when such material is imported into Canada without the kinds of governmental course control and supervision common to the administration of Canada's various school systems.

A modern technological society, in combination with a political system which permits and encourages freedom of speech, creates conditions in which there are many environments for learning. Work in such a society generates demands for increasingly higher standards of worker competence. Leisure and a high standard of living promote demands, with responses to match, for various kinds of education. There is no let up on new knowledge supply and demand. The lines between scientific discovery of knowledge (research) and its transmission (education) become blurred as subjects of

jurisdiction.. Moreover, as self-education increases, the same lack of clarity applies, between formal and informal learning experience and between "education" and "information". Furthermore, for a growing number of children and youth, what is prescribed in provincial, or state, courses of study forms a decreasing part of their total learning, or education. Developments in telecommunications and computer learning are extending this condition on a mass basis.

Spillovers from the compulsory and other regionally-controlled school programs raise problems of jurisdiction in democratic federations. In this regard the list of conflicts is growing and includes issues of ownership, control and content of school publishing; licensing authority over educational broadcasting; and the wide range of post secondary adult training programs under federal auspices of one kind or another. As noted in interviews conducted for this study at the Canada Employment and Immigration Council and the Science Council of Canada, jurisdictional problems between the two orders of government are anticipated on the issue of the reach of Section 93, given the anticipated demands of lifelong learning for employment. What should post-secondary education involve and what should its reach be? How can these matters be defined workably in a federal state?

The ambit of constitutional jurisdiction in education anywhere is neither clear nor broad enough to be all-inclusive. In large part, this is because the complex, broad and changing nature of education is too difficult to circumscribe at one point in time, let alone on a continuing basis. More important, such a characteristic of education suggests that for the learning individual everywhere, there is a measure of academic freedom implicit in the nature of education. Hence the special significance of literacy itself in the politics of any regime.

McCurdy's comparative study of law for teachers in Canada indicates that academic freedom has not been a characteristic quality in elementary and secondary education in Canada, for students or teachers.⁴⁰ However, as in other democratic feder-

ations, academic freedom is an element in both university teaching and governance. At the same time, with the exception of apprenticeship and vocational certificate training, it is safe to assume that a large part of adult, or continuing, education is unregulated.

This is because just about every sector of the community - writ large or small - is somehow involved in such activity. Obviously, to talk about education in a modern, free society and state is to consider matters which are, and should be in some respects, ungovernable. Freedom - as a benefit we may derive from the absence of legal duty imposed on us - makes such an open, unregulated experience possible. It is also characteristic of much of the lifelong learning which occurs in a democratic society.

In the common law countries - the United Kingdom, the United States, Australia, Canada in part, et al. - the liberty of speech which is a critical element in education as opposed to propaganda, derives from the absence of positive law. In these countries one can say, read, write and publish what positive law does not prohibit. What is left unprohibited in law constitutes the liberty of speech. In such democratic countries this does not give jurisdictions having legislative power for education a higher power to censure this liberty of speech. Education authorities may set objectives, select and order courses of study for instructional purposes, authorize learning materials, and licence teachers. They may not deny liberty of speech - to teachers, pupils or anyone else associated with school governance or curricula. In democracies, legislative jurisdiction over education does not include power over the liberty of speech. This is discussed further in Chapters IV and V in relation to the constitutional convention in the Preamble to the Constitution Act, 1867 which upholds free speech, the Criminal Code of Canada which provides defences for it and the not-so-entrenched freedom of speech in the Constitution Act, 1982 which is subject to a notwithstanding clause that Parliament and each provincial legislature can use to limit the Charter with respect to freedom of thought, belief, opinion, and expression.

In summary, the aforesaid clarifications are necessary (although they might be regarded as extraneous in legal adjudication) to make it clear that education as a system refers to a society's or state's total set of institutions, agencies and organizations - formal and informal - that create and transmit knowledge and the cultural heritage, and that adapt to change. Moreover, such an overview suggests why it is difficult to define education, to allocate jurisdiction over it, or to settle a dispute by legal adjudication.

Federalism in Relation to Education

Federalism has become a widespread principle of government. It is also a complicated form of government, as the problem of jurisdiction over education magnifies. As the preceding discussion indicates, it is difficult if not impossible to assign and apply an arbitrary boundary in law to a phenomenon which, of its nature, is open-ended, of broad concern, and subject to continuous change.

Public education is a basic responsibility and function in every modern state. In every state therefore, it is a matter of constitutional concern and as such a head of legislative power to be defined somehow. In unitary states, primary responsibility in law may rest with the unitary government, regardless of the cultural and linguistic differences in the provinces. This applies to the Irish, Scots, Welsh, Cornish and English in the United Kingdom, and to Breton, Basque and the several languages other than French in France. In federations, however, primary jurisdiction may be allocated to the state or provincial order of government, to satisfy certain cultural, linguistic, economic and other needs, or such jurisdiction may be shared - in law and/or practice. In all these circumstances of governance, the problem of minority rights in local education may require national protection, as it does in Canada's case.

In multicultural states, education can become a topic of considerable legal and political conflict, especially if there are problems of regional economic disparity as well. In study of stresses leading to breaks in federal states, Watts found that language, race,

religion, social structure and cultural tradition - elements related to education - have been among the "sharpest divisive forces".⁴¹ More recently in Canada, the Report of the Royal Commission on the Economic Union and Prospects for Canada states that education is an issue which is broadly seen as "fundamental to addressing virtually every major challenge we face: economic, social, political, cultural and ethical".⁴²

Such wide scope also explains why education has come to be regarded as an "aspect" of virtually every subject of legislation, whether provincial or federal. This also explains why in Canada's case, although education may be a primary head of provincial legislative power, it will involve federal responsibilities too. Thus federal participation in education - in a law, policy, political or administrative arrangement - might be rationalized in some cases by its "double aspect". That is, "education" might be considered as being ancillary to a particular head of federal or concurrent power.

Such circumstances explain why Sir K.C. Wheare held that the starting point in studies of federations is constitutional law: to ascertain how the legislative and executive powers of government have been organized and divided and to determine the political results of such law.⁴³ To clarify, W.R. Lederman defines the characteristic first principle of a federal constitution as "an original distribution of subjects of primary legislative powers" between the central and regional orders of government.⁴⁴ Such a constitution is also the means for the territorial sub-division of the country and, as such, calls for an original distribution of legislative powers between the central government in respect of the whole territory and the sub, or regional, orders of governments in respect of their fractions of the national territory. Naturally, such a division will produce interdependence and what Simeon describes for modern federal systems as the "co-existence" of governments which are at the same time "interdependent and relatively autonomous".⁴⁵

Federalism thus unites sovereign and co-ordinate polities. It does this within an overarching political system by means of a constitutional allocation of powers of

government in writing, to avoid misunderstandings. Such definition must apply to assure that, in principle, the constitution in the federal state is supreme and, therefore, binding on each order of government. Moreover, to preserve a co-ordinate relationship between the two orders of government, it is essential that such constitutional enactment be unalterable, unless by amendment procedure which is also part of the written constitution.⁴⁶

All such characteristics are in evidence in the democratic federations of the United States (1787), Canada (1867) and Australia (1901), where British origins in constitutional law are shared. In all three cases, federal participation occurs in spite of the initial allocation or assumption of primary jurisdiction at the regional order of government. It is invited by absence of a clear definition of education as a head of power legislatively - in Canada's case, or of any definition in the American case.

There are other reasons for federal participation in education. For example, in the three federations, because the central and regional orders of government have joint responsibility for the same territories and populations, each individual is subject to their respective authorities and is obliged by the laws of each to pay taxes. In turn, each jurisdiction is limited by constitutional law to its own list of heads of legislative power (except for whatever concurrent powers there may be, which are in turn subject to the particular paramountcy rule which is to apply when disputes arise). Ideally, in classical federalism, these powers would be mutually exclusive. This is not always so - particularly in the case of education, as Wheare recognized, because of its nature as described and because, in all modern federations with written constitutions, it is a broad and general head of power.

This is why it is essential in democratic federal states to have a judiciary which can interpret the constitution when disputes arise over jurisdictional issues in education, or in respect to entrenched rights in education. In these circumstances in common law countries, judges will be obliged to look to the actual terms of the law or laws in

question, as they are written and as they have been modified by case law. They will not be obliged to take extraneous information into account, such as the historical and contemporary considerations already described, to clarify the nature of education. They will, however, have to take account of any quasi-federal features in constitutional law which apply, as they do in Canada's case.

There are six such features which affect the nature and limitations of judicial adjudication in Canada - all of which have or could have some bearing on the exercise of provincial power in education.⁴⁷ All are sections of the Constitution Act 1867 and, briefly, are as follows: the federal power of disallowance, Section 90; the federal appointment of the Lieutenant Governor, Section 58; the province's power to amend its constitution, except for the office of the Lieutenant Governor, Section 92 (1); the federal appointment of judges, Section 96; the federal government power to determine appeals from provincial decisions affecting minority rights in education, Section 93; the federal power unilaterally to bring local works within federal jurisdiction, Section 91(29) and Section 92 (10c). Recent provisions in the Constitution Act, 1982, which are discussed in Chapter V add to this complexity.

Apart from such limitations to a pure form of federalism in theory - which J.A. Corry considers to have ended in practice in the Great Depression years in both Canada and the United States - there is no common approach to dealing with jurisdiction for education in federations. Responsibility for it could be shared between central and regional orders of government, as it is on a *de facto* basis to some extent in most federal states; or, as in Canada's case, it could be ostensibly allocated to one order of government. Education as a head of provincial power could also be excluded from the written part of the constitution, as in the United States where, initially, the states assumed legislative responsibility for it. Whatever the case, as Wheare observed, the role of the central government in education has not been confined to so-called interventions.⁴⁸ In all federal states, it makes some educational contribution itself. For

example, the national government of Switzerland established the Swiss Polytechnic at Zurich; the Australian National University was founded at Canberra. India's federal union has a national granting council which provides the bulk of university funding, for both its provincial and national universities and colleges of agriculture. Canada, Australia and the United States all have national libraries, museums and scientific laboratories of national significance and use. Such institutions and services are referred to as educational. In these and other federations, the practice of national grants in support of education, training and research is common, usually with conditional terms.

Invariably, national governments are themselves extensively involved in scientific and technological research of divers kinds. They are responsible nationally for the gathering of statistics. They are involved in the publication and dissemination of information on all aspects of research and government interest.

Patents and copyrights of educational and other equipment and materials fall under exclusive federal jurisdiction. The same applies to the regulation of imports for educational and other uses. Broadcasting everywhere, in all its forms, is subject to national regulation and, almost invariably, involves some public ownership too. Culture in all its manifestations is subject to national support in some forms. Sports are usually treated the same way.

In federal countries, it is common to find the central government directly responsible for education in territorial regions, for education and related programs and service to native peoples, for education and training of military and of police personnel and the inmates of federal prisons. Citizenship preparation for immigrants is a national responsibility. Management, occupational and language in-service of public servants is a common government responsibility.

Common and minority rights are national concerns and responsibilities, including individual and group rights in education. In democratic federations, initial cultural reasons for making education a primary responsibility at the regional order of govern-

ment constitutionally - such as minority language and cultural interests - need not erase national grounds for participation. In Canada's case, this is recognized constitutionally in Section 93 of the 1867 Act which, for example, provides for both federal executive and legislative means of protecting particular group religious rights in education. This is affirmed again constitutionally in respect to creation of official language rights in education, but on an individual basis, apart from Section 93, in Section 23 of the Constitution Act, 1982.⁴⁹

National governments in federations can become involved in education and related matters as the result of social and economic forces which originate in the regions. This might involve the inability of regional governments to fund the necessary facilities, programs, and services. Besides this, disadvantaged groups and individuals will need economic assistance to assure access to educational and training programs - in adherence to democratic ideology. The same applies to the disabled. Consequently, equity requirements in democratic federalism and the development of such rights will tend to be national in scope and thus national in response. National employment needs and problems will foster national concern and action.

Emergency circumstance can, and have, accelerated federal participation in education and training in wartime, when Constitutions can be suspended by the national parliament - as in Canada's case in two world wars. Supreme Court rulings may make peacetime emergency a reason for extraordinary federal action in any field. Supreme Court rulings in rights cases may evoke legislative remedy as in civil rights in the United States.

In summary, legislative jurisdiction for education adds to the complexity of the federal form of government - no matter how this power is defined and allocated constitutionally. Education is not a matter which is mutually exclusive, least of all on the variable of geography in the form of jurisdictional areas decided for various reasons, including expedient ones. For example, unique native cultures may extend over two or

more such jurisdictions. Is it morally or democratically right that they receive very different educational treatment in relation to their culture because of arbitrary divisions of jurisdiction? They do. How can an aspect of education be avoided in virtually every head of power, no matter where it is allocated? It cannot be.

Means of Federal Participation

Legitimacy of federal participation in education policies and actions may be described on *de jure* or *de facto* terms in relation to the Constitution. In Canada's case, for example, this may involve constitutional law which is based on either legal or non-legal rules of the Constitution. Where statutory terms are vague and case law is scarce, assumptions of constitutionality might be made and acted on - until judicial review is evoked. Alternatives to judicial review might evolve, into co-operative federalism, or executive federalism. The issue of residual power will also arise where allocation of education power in the provincial order of government is not clear or complete.

Omissions in the initial constitutional arrangements in Canada, Australia and the United States all opened the way for such national expressions of interest and action in matters of education. In Canada's case, the silence of the Constitution Act, 1867 on language in education, culture and research has paved the way not only to federal participation in all three instances, but to recent provisions for constitutional amendment in the first two instances as well. All such federal initiatives are held to be in the national interest, thereby filling not only contemporary national needs but also perceived national gaps in jurisdiction. The same sort of reaction has taken place in the United States - in particular in reaction to the Sputnik achievements of the U.S.S.R. in the 1950's. The result was federal legislation and conditional funding across the spectrum of American public education and related matters - all in the declared national interests of defence, education, and science. Another result was policy development in all aspects of American education on a national scale which was enlarged by national legislation related to education - all without constitutional amendment.

In theory, constitutional amendment seems to be the decisive means of making changes in the governing relations between the two orders of government in federations. However, it is almost invariably a complicated and time-consuming way to achieve fundamental change in the distribution and use of powers.⁵⁰

Judicial review is a related avenue to such change in favour of a national exercise of powers. In Canada there has been a lengthy history of avoidance of legal confrontations which might result in changes to arrangements in support of education, such as the federal spending power, which is a main means of federal participation in education. This situation has not prevented a series of constitutional cases from originating at the local school board level of educational governance - mainly over disputes concerning religious and language rights in education. Even so, the highest court has yet to give a clear definition of either the meaning or limits of Canadian "education" under Section 93. Consequently, what operational definitions there are seem to be largely matters of expediency, or policy, as the various government players choose.

Educational policy and implementation agreements may be made variously in federations, at the political, executive and administrative levels, sometimes without need of enabling legislation. First Ministers may meet, as they do in Canada's case, to seek to create and carry out policies and programs which may or may not fit the allocation of constitutional powers. That is, they may agree politically and/or executively to avoid constitutional confrontation rather than seeking judicial review or constitutional amendment.

Related to such politics is the assigned work of special committees and secretariats. Another support measure for such endeavours is a shared research and information service for all players in the policy-making and implementation necessary to achieve desired national goals and programs in education - in spite of constitutional constraints. As noted, it is virtually the rule in democratic federal countries to have some sort of national means of communicating and co-ordinating information needed for

policy-making and implementation. It may be a ministry, a bureau, or the function of a cabinet committee or secretariat.

Whether or not this is done, national parliaments may provide a continuing and constitutionally acceptable means of assuring federal participation in education by such means as Senate investigating committees in the United States and Canada; royal commissions, committee studies for the Executive, House of Commons committees in Commonwealth federations, including Canada's recent innovation of all-party task forces. Resultant publications and recommendations are disseminated widely as public information and as inputs to policy discussion. In addition, the legislative debates themselves may also provide support to national interests and concerns in education. For instance, W.N. Toombs' analysis of Canada's Parliamentary debates in relation to educational finance from 1867 showed a sustained interest in education on a predominantly non-partisan basis.⁵¹

In some respects the interests expressed reflect what T.H. Bell describes, in the American case, as a need for a federal role in education which allows for a "capacity-building strategy" based on the recognition that education is, as he claims, "a federal concern" but "a local, state, and institutional responsibility".⁵² In Canada, Australia and the United States, this sort of strategy seems to be implicit in various fiscal arrangements made for supporting education and related matters, changeable as such measures can be.

Friedrich theorizes that "federal relations are fluctuating relations in the very nature of things".⁵³ He also holds that federalism is possible only when a set of political communities "coexist and interact as autonomous entities".⁵⁴ The recurrent constitutional changes required to make the necessary adaptations for this are obviously not easy to achieve in any federation. Education as a head of legislative power is a prime example of such difficulty, given its critical variables of culture and economics, and the mobility of population in all federal states. In these circumstances, perhaps

W.S. Livingstone's thesis best accounts for the problems in legal definition of education if, as he holds,

the essence of federalism lies not in the constitutional or institutional structure but in the society itself.⁵⁵

Minority Rights in Education

In a democratic society educational rights are a basic concern, whether they are cultural or economic, or both, especially in the case of minorities. Yet there can be no minority rights in education without first a clear, established right to education. This is implicit in principle in the international commitment of 1948 to Article 26 of the Universal Declaration of Human Rights which proclaimed that

Everyone has a right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be made equally accessible to all on the basis of merit.⁵⁶

Moreover, because of the minority status children may have in law, this declaration held that parents have "a prior right to choose the kind of education that shall be given to their children".⁵⁷ Subsequently, the same rights were amplified in the Declaration of Rights of the Child in which, in Article 7 it is stated that

The child is entitled to receive education which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.⁵⁸

More recently, such rights in principle were broadened further in the Covenant on Economic, Social and Cultural Rights, which states in Article 13 the parties to this agreement recognize the right of everyone to education and, accordingly,

(a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.⁵⁹

Such international declarations *per se* have no force in member state law. Their terms or intent may be translated into such law, but in federal states, national government agreement to comply must be matched with jurisdiction to enact and to implement. If this is lacking, as it will be in full or part in the field of education, the national government's support will be limited accordingly. On the other hand, within a federation, regional responsibility, or jurisdiction, may not match regional resource capability. This situation applies to some extent in all federations, and in Canada's case in particular. Consequently, realization of rights to education and in education to a common standard will depend to some extent on national taxation and spending measures.

Regional governments may lack the will to act in education, apart from lacking the resources and resourcing powers to match their constitutional responsibilities. This has tended to occur in matters of minority rights in education. Thus, paradoxically, a national minority accommodated by provincial government, may not, in turn, adequately accommodate its own minority.⁶⁰ Consequently, there is need, on a national basis, for guarantee and protection of all minority rights in education, if relevant democratic values are to be satisfied. This may be achieved by constitutional enactments, as in Canada's case. It may be initiated by judicial review, as in rulings in constitutional cases in the United States. Provision may be made by statutory law of less permanence, as occurs in many states. Accommodation may also be reached by political accord, executive arrangements and by the force of tolerance.

J.S. Mill thought that governments should not interfere with individuals "for their own good", but education was an exception - in the mutual interest of society, the

state and the individual.⁶¹ As Morris Ginsberg holds, the right to education "is part of the right to conditions of mental and physical development".⁶² The consequences of ignorance affect everyone. Therefore, in a democracy, whether federal or unitary in form, everyone should have the benefits of education. Yet, as Alexander Brady observed, free education with universal access provided by the modern state has not been motivated by the ideals of democracy and desire for equality alone, but by nationalism and industrialism as well.⁶³ Nonetheless, in the case of the British Dominions, free public education

...is peculiarly shaped by the egalitarian drives implicit in modern democracy, and politicians have been prompt to recognize its powerful and growing electoral appeal as a major equalizing agency, promising wider opportunity for the population, and easing social distempers.⁶⁴

The campaign by American blacks for civil rights bears witness to these thoughts, for registry to vote was one of two key measures for winning reform. The other measure was court challenge. In the 1896 case Plessy v. Ferguson, the principle of "separate but equal" which emerged was also applied to public education in the United States.⁶⁵ But in the school segregation cases on racial lines of the 1950's this formula was finally struck down. In the landmark case, Brown v. Board of Education of Topeka, Chief Justice Warren asked

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities?⁶⁶

The conclusion was that it did, because

...the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.⁶⁷

While the court in this case had considered it as its prime duty to rule on the constitutionality of segregation in American public education, it also recognized that the implementation of such reform would be difficult. It was. But there were spillovers too, Kravitz notes, because the way was cleared by this landmark case for further racial equality - for the benefit of Hispanics and others.⁶⁸ Reform included the federal Civil Rights Act of 1964 and the Bilingual Education Act of 1968. Finally, there was the 1974 landmark case, Lau versus Nicholson, which gave a legitimacy to minority language rights in American public education beyond those in recent Canadian constitutional change.⁶⁹ The resulting Lau remedies, as they are called, are directed at assuring that compulsory schooling should begin in the child's mother tongue. The result, in fact, is that there has been a dramatic shift away from the melting pot orientation of traditional American public education, towards multicultural accommodation, beyond that which has been recognized in principle in Canada's recent Constitution Act, 1982 amendments. Yet in Canada's case, it remains to be seen how the Supreme Court of Canada will respond to the potential for liberal interpretation which seems to exist. In contrast, Australia achieved its belated accommodation of indigenous people's languages in the first years of schooling by policy means, following political embarrassment in the matter in the United Nations.

The content of rights in education in democratic federations has expanded steadily and is still elaborating. Free public education at the elementary level has been extended to the same at the secondary level and, in some places, to tuition for higher education. At the same time, there has been a steady diversification of programs and services in vocational areas and to accommodate various aspects of learning differences and disabilities. However, not all of this change is based on explicit constitutional guarantees. A notable exception is direct help of educational benefit to the culturally disadvantaged - including the illiterate - and the poor. Federal programs of this kind in the United States include Operation Headstart in the 1960's for pre-school children of

the urban and rural poor and, more recently, use of public and private television for instructional help to adults who are illiterate. The federal government of Canada has provided for the school aged children of the poor, as described in Chapter VIII. However, federal funding support for correcting Canada's serious adult literacy problems were virtually eliminated, as also described. The point is that assistance based on statutory provision or executive policy can be ended by legislative amendment or a change in policy - for austerity or any other reasons. This would not be so when education rights in education are written into constitutional law.

"Rights" is clearly not a neutral term. Nor is it an absolute term or guarantee. To have force in law, a right to, or in, education must be recognized in constitutional or statutory law, or by the courts.⁷⁰ When a right so applies, a corresponding public duty applies -either across the board on an individual basis, or on a group basis. Moreover, as in Canada's case, it is possible for a federal state to have both kinds of rights in play in education.

Indigenous people may not be accorded language rights in education in the written constitution, as in Canada's case. Persons of language origins other than the official language, or languages, may not be accorded such rights either, yet they may acquire these rights by judicial review, as occurred in the United States. Thus, in Canada's case, the recognition of multi-cultural policy in constitutional rhetoric could, through judicial review, be transformed into new rights in education.

In the meantime, economic rights in or through education are more indirect or inferential, unless they are specified in the written part of the constitution. There is no explicit provision for these rights in Canada's case although, in effect, they have been established in some instances - access to higher education which student loans ensure for one. Such "rights" might be thought of in extra-constitutional terms, in that they can be taken away legislatively, or by executive action, without recourse to the Constitution. Meanwhile, there may be assumed "rights" in such fields as health, welfare,

justice, employment, and of course, education, which at best are emerging non-legal constitutional rules which the court may or may not enforce. In Canada, the court has not done so.

In summary it may be noted that, while modern democratic federations may show a preference for rights in public education, there are limitations. In some respects, everywhere, public education is also a privilege. When, in a democratic federation, the central order of government uses its spending power for purposes of equalization in education and related matters, it is acting in the national interest. Where basic rights matters in education are at stake - both constitutional and otherwise - the central government must facilitate their attainment. Finally, when the highest national court makes rulings on the definition and protection of rights in education, it is contributing to the same end.

Role of the Judiciary

In federal states it is essential that there be legal machinery for the settling of disputes which involve the jurisdiction to legislate and the legal meaning of legislation. This is an essential characteristic of federalism.⁷¹ However, in both the United States and Canada, there are no express provisions in the written parts of the respective constitutions for doing this. In both cases, the role of the court in constitutional cases has come about as the result of conventions, or non-legal rules, which, while they may be constitutional, do not have the force of law. Moreover, unlike the constitution of Australia, the Canadian Constitution did not mention appeals to the Judicial Committee of the Privy Council. Nor did the Constitution Act, 1867 give constitutional status to the existence and jurisdiction of the Supreme Court of Canada. Section 101 of this Act authorizes Parliament to "provide for the constitution, maintenance and organization of a general court of appeal for Canada". Therefore, this court became and remains, a statutory body. Consequently, the federal legislation governing it can, as Laskin stated, limit

appeals, impose conditions on bringing appeals and, as upheld in Crown Grain v. Day (1908), entitle the Supreme Court of Canada to review appeals from provincial courts on matters within provincial legislative power.⁷²

In comparison, the Supreme Court of the United States and the High Court of Australia both have constitutional status. However, the Supreme Court of Canada is more than a federal court in the American style. Since Canada's system of courts is unitary (that is, one national system with federally appointed judges) instead of dual (with state and federal courts and appointments), it is a national court. Thus, like the High Court of Australia, it may hear both federal and provincial appeals. Nonetheless, Canada did not achieve its judicial sovereignty until 1949, when appeals to the Judicial Committee of the Privy Council were abolished. Until then, there were three orders of sovereignty: the provincial, the federal and the Imperial. (The last vestige of Imperial sovereignty ended in 1982 when the Canadian Constitution was patriated at the request of Parliament and the provinces.)

In Corry's view, this Imperial body, and the Supreme Court of Canada, had tended to treat the Constitution (BNA) Act, 1867 as a statute rather than as a constitution.⁷³ This court, like the Commonwealth courts in general, followed a practice of focussing on the terms and construction of the law or laws in question. Apart from such conservative practice in adjudication, the British influence across the Commonwealth also included a tradition of flexibility, or pragmatism, in the handling of constitutional issues. In addition to adjudication of cases in statute and constitutional law, these courts may also accept a reference from those bodies having standing, i.e., those sovereign central or regional governments concerned. In these circumstances, the object is to obtain the court's advisory opinion on a constitutional question or issue that may be related to a law, or be part of a law, or even be a proposed law.

West Germany has such a provision for advisory opinion by the court, provided the dispute over the constitutional validity of a law is deemed genuine. Moreover, in

this federal state, standing for seeking a reference from the court is wider than permitted in the English-speaking federal states. Thus besides governments, a wide range of governmental and political bodies may be disputants - including extra-parliamentary political parties. In the United States, however, hypothetical or moot issues in a case are frowned on. Instead, there is preference for actual cases with specific questions to be decided. In Australia, although an early attempt to use an advisory procedure was ruled unconstitutional, it is still possible for the attorneys general of the central and regional governments to sue each other, in order to get declarations from the court on the validity of laws and, like the West Germans to some extent, to undertake such action at the request of third party interests - whether individual or group.⁷⁴

In federalism the court must decide the validity of laws in dispute before it. This involves determining what is meant by the constitution. Such decision-making also involves the precedence of constitutional law over statute law. For instance in Canada, from 1867, the courts held that if a statute was inconsistent with the Constitution Act 1867, the latter had to prevail, because it was an imperial statute. This argument was similar to that used in an American landmark case in 1803, Marbury v. Madison.⁷⁵ In the judgment of the Supreme Court as stated by Chief Justice Marshall, an Act of Congress was declared invalid because it was unconstitutional. This set the precedent in the United States that a legislature in a federal state could not be the interpreter of its own constitutional powers. Subsequently in the United States, it became accepted that the court had a vital role to play in settling disputes over the distribution of powers as written constitutionally. Thus such a constitutional convention has come to apply for many years in the United States, Canada and Australia.

In these and other federal states, the role of the supreme court is of one of ultimate power in cases which require interpretation of entrenched provisions in the constitution. This is most evident in cases involving entrenched rights, as American jurisprudence has shown for some time, and as Canadian jurisprudence is beginning to

show since the advent of the Constitution Act, 1982 with its Canadian Charter of Rights and Freedoms. In a federal state, entrenched parts of a written constitution may not be changed by the unilateral amendment of one of the orders of government. Invariably, amendments call for the agreement of the central order of government and the prescribed minimum number of regional governments, unless there is also a veto provision to protect particular regional interests.

The judiciary reaches a decision by means of the doctrines and procedures of interpretation which it has developed about what the constitution means. This occurs notwithstanding the criticisms of what is thought to amount to a policy-making role - without the accountability to the electorate and the government which such quasi legislative action would seem to require in a democracy. Thus, in reference to democratic federalism, Hogg notes that

The judges upon whom the large task of judicial review rests are not well suited to the policy-making which is inevitably involved. Their mandate to make decisions differs from that of other public officials in that judges are not accountable to any electorate or to any government for their decisions; on the contrary, they occupy a uniquely protected place in the system of government, which is designed to guarantee their independence from political or other influences.⁷⁶

To offset such concerns, some alternatives to judicial review have developed. These are discussed in detail later in this study. They include aspects of co-operative federalism with its peer relationships between intergovernmental experts; executive federalism with its higher level intergovernmental decision-making; and provisions for special committees and secretariats in particular fields, to assure on-going study and action. Intergovernmental conferences are another means for developing political and administrative solutions to otherwise legal and constitutional problems. These conferences are also a major device for working out fiscal arrangements to make federalism work more equitably, in particular in major social fields such as health and education.

Notwithstanding the pragmatic and practical benefits of such forms of direct political and administrative negotiation, there still exists in federal states the essential requirement of protecting those regional and cultural interests, minority rights and civil liberties which are a *raison d'être* for federalism. In democratic federalism, there are different views on the course to follow in complex and sensitive fields like education. The traditional view is that all such matters are best protected by an independent judiciary rather than by political majorities. This is evident to a considerable degree in the United States, where the adaptability of the Supreme Court to changing conditions has been demonstrated often. An alternative view expressed by lawyer and political scientist, J.A. Corry, was that

Perhaps the adjustment of federal relations is now too delicate, too complex, as well as too serious a matter to be entrusted in any extensive way to judges, because of the inflexibility of the techniques they apply.⁷⁷

This view is not surprising, for in spite of myths to the contrary, judicial review is not scientific. As Corry, Laskin, and Hogg among other legal scholars have made clear, it does not yield reproducible or predictable results. It is important to note that Corry's opinion was stated before the advent of executive federalism, and before its possible constitutionalization via the Meech Lake Accord.

When choosing a course to follow in adjudicating disputes, or adjusting to change in a field of jurisdiction, it is still necessary for all concerned to be able to distinguish between law and policy. Corry defines law as "the body of rules for regulating human conduct that are enforced by the courts".⁷⁸ In contrast

Policy is largely uncertain and unpredictable because it is a formulation of what it is thought advantageous and expedient to try to do in the light of all the circumstances, or perhaps more correctly, of such of the circumstances as it seems expedient at the moment to attend to.⁷⁹

Ideally, law is the sphere of the judiciary, while policy is the sphere of statesmen and politicians. Thus while judges should be sensitive to policy issues and substance in the fields in which they adjudicate, it does not seem to be their role to make such policy. Furthermore, the bureaucracy must know and observe the requirements of law and government policy. Given the special nature of education and its governance in a democracy, it is self-evident that appointed bureaucratic officials, like appointed judges, should not be the final authors of education policy. However, when a constitution has entrenched provisions, including rights in education, the Court may be pushed into what amounts to policy-making, especially when politicians and/or legislators won't take action in matters requiring correction.

Educational Finance

In all democratic federations, the financing of education is a very influential means of policy-making and implementation. The federal spending power has been, as Smiley states, "a device making both for stability and change in the Canadian constitutional system".⁸⁰ Education is a prime example. As the Canadian Teachers' Federation maintains in its brief to the Macdonald Royal Commission

Policies of the federal government can and do have real impact on the quality of education offered by the schools. Federal-provincial fiscal arrangements, in particular, have a decisive influence on the ability of the provinces and territories to provide comparable standards of education with comparable tax burdens on their taxpayers. While each province has complete authority to provide comparable standard of service within its own borders, only the federal government has the moral responsibility, the fiscal power and the administrative capacity to reduce disparities among provinces.⁸¹

Implementation of federal financing in education has usually been linked directly to particular programs and services. The arrangements may be unilateral on the federal side, or bilateral with participating regional governments. In either case, bureaucrats on the federal side can be placed in positions of considerable discretionary authority.

depending on the terms of agreement - especially in matters where federal education policy is lacking, unclear, or unco-ordinated.

To obviate relevant dilemmas in theory, Wheare described financial self-sufficiency as an essential feature of federation.⁸² Birch, among others, holds that in practice finance is "the fundamental problem" in federalism.⁸³ This explains the importance of a distribution of constitutional powers with due regard for a match between legislative responsibility and necessary revenue sources and means. To complicate such an equation, Birch observes that "the constitution gives one authority legislative power over subjects which can only be controlled effectively by the other".⁸⁴ Hence the federal "spending power" comes into play, when the central government decides to meet or underwrite needs in education which, for whatever reasons, cannot be met at minimal or national standards otherwise. In the United States, Article 1 (8) of the constitution declares that "The Congress shall have the power to levy and collect taxes...and provide for...general welfare of the United States". In Australia, Section 96 of the Constitution contains a similar broad federal power, stating that Parliament "may grant financial assistance to any State on such terms and conditions as Parliament thinks fit". Moreover unlike other democratic federations studied, Australia levies a national education tax from which payments are allocated to the regional governments by the national government. In Switzerland and in the Federal Republic of Germany, the terms of the national spending power are more limited. The Swiss constitution gives the national government power to spend "for the welfare of the people and the economic security of the citizens", but calls for consultations with the cantons and the introduction of national authority in law subject to referendum. West Germany's spending power is differentiated in three ways (in Article 72 (2)) of its constitution. It recognizes matters of concurrent federal-state powers, where the *länder* cannot act effectively without federal participation; it allows for compensation when federal law imposes expenditure on the *länder*; it also allows for equalization with supplementary grants from federal

funds if required. Canada's inferred constitutional basis for the considerable exercise of its federal spending power - in education as defined and many other fields - is discussed in Chapter IV.

Since education is a comprehensive category with many and varied formal and informal aspects, expenditures on education are sure to have complex and far-reaching effects. Results include contributions to culture, citizenship and the creation of human capital. Education helps an individual to acquire a durable consumer good for use and enjoyment through life. It also increases the ability of labour to contribute to production.⁸⁵ Thus, a country's most valuable renewable resource is its people, provided they have the kind of education needed for the modern and changing society in which they live and inter-relate.

These matters help to explain the interest of national governments in the human resource planning requirements for all their people. In federations, rigid separations of jurisdiction and action in matters of education can impede achievement of these requirements, unless constitutional and/or extra-constitutional means are applied. This explains the tendency of national governments to subsume matters of education under national economic concerns.⁸⁶

Such an orientation, however, poses a dilemma for multicultural federations.⁸⁷ On one hand, as Professor Ronald Watts has noted, a certain measure of constitutional inflexibility is required to allay fears and give minorities confidence in their federal structure. But, as he observed, if federal institutions are too inflexible they fail to reflect changes in social and economic conditions. The opposite of too much flexibility in federalism can cause problems too, as Professor Alan Cairns writes.⁸⁸ In any case, Watts' studies led him to conclude that in most multicultural federations, such as Canada, regional and cultural groups have developed what he describes as

...a deep-rooted anxiety that centralized fiscal and economic policies aimed at rapid development of an integral economy would undermine

their cultural distinctiveness and opportunities for employment in culturally congenial conditions.⁸⁹

Hence in Canada for example, the acceptability of regional development programs, many of them with educational provisions. Hence also concerns about the possible loss of such programs and related cultural support and survival, as the result of "free trade" with the United States, whose influence on all aspects of Canadian culture and education is already most apparent. Such cause for anxiety is all the more understandable since so much Canadian education policy is, as the OECD has noted, undefined nationally and un-co-ordinated federally and intergovernmentally.

Co-ordination of Education

Co-ordination is a crucial element in administrative theory and practice. According to Gardner, its meaning - "the harmonious combination of individuals, groups or functions towards the achievement of an objective" - seems clear enough in abstract terms.⁹⁰ However, he notes, the concept becomes somewhat elusive when we try to define it in government administration, since the need for co-ordination runs throughout the machinery of government - from policy-making to first line operations. It is, as Follet and others have said, a continuous process, or task, in administration. It doesn't just happen, as Gulick observed. "It must be won by intelligent, vigorous, persistent and organized effort".⁹¹ First of all, co-ordination must be required by, and legitimized by, law.

Education in modern states is not easy to co-ordinate in the best of circumstances. Given its complex and changing nature, especially in an Information Age, administrative co-ordination is difficult in any jurisdiction - whether local, provincial or national. Intergovernmental relations increase co-ordination difficulties.

To overcome such problems, most countries have some national means of directing and co-ordinating matters of national concern in education on a regular basis. In

the United States, since 1867, this function has been served in various ways by the federal Bureau of Education. In other countries, there are national ministries of education and/or science. Canada and Switzerland are the only two Western industrial countries which do not have either a national bureau, or office, or a national ministry of education. Yet, since 1891 Switzerland has had a standing conference of the heads of cantonal departments of education which acts in informational clearing and liaison capacities.⁹² While Canada has no national education policy forum at the Ministerial level, education has been a topic of meetings of first ministers.

The constitutional responsibility of regional governments for education in democratic federations produces diversity more easily than unity, unless there is a determination to compensate with co-ordinative efforts in research, dissemination of information, policy development and evaluation.

In Canada's case, the deficiencies mentioned are partly a result of what Cairns describes as the unique circumstances of powers and resources at the regional order of government. He states that

The provinces in Canadian federalism, especially those which combine wealth and resources with impressive jurisdictional capacity, are more powerful than the states or provinces of any existing federal system. They are more powerful than most of the member states of the United Nations.⁹³

This situation emphasizes the need for comparative education research on a national basis. It also makes the nature and extent of federal participation in Canadian education even more remarkable than it appears to be, given the power of the provincial players and, as mentioned, lacks in co-ordination.

Gardner states that the achievement of co-ordination is "an underlying purpose of all administrative practices and procedures".⁹⁴ Before this can happen, however, it is necessary for the policy players to appreciate that effectiveness in co-ordination - and the benefits this produces - depends on their acceptance of the goals or objectives to be

met. In federations this means acceptance within each order of government and, most difficult of all, nationally. In multicultural federations where diversities in culture, religion, and language apply, agreement on basic educational goals may be lacking. Hence the need to foresee this problem and to provide co-operation and compromise by both constitutional and extra-constitutional means.

In the United States such capacity for harmony is being infused into American public education by constitutional rulings in the courts. In Canada so far, reliance has been more on a combination of the constitutional and extra-constitutional means identified and analyzed in this study.

END NOTES

The Nature of Education

1. Richard King, Education. London: Longmans, Green and Co. Ltd., 1969, p.2
2. Robert Stanbury, "The Federal Role in Education", Queen's Quarterly, Vol.74, Autumn. 1967, p.364
3. Sir John A. Macdonald, Letter to Dr. Egerton Ryerson of March 25th, 1872. P.A.C. No. MG 24.K15
4. E.D. Hodgson, "A Politician Me?" in The Organization and Administration of Education in Canada: A Collection of Readings, edited by E.D. Hodgson, et.al. Edmonton: University of Alberta, 1976, p.377.
5. Fritz Machlup, The Production and Distribution of Knowledge in the United States. Princeton, New Jersey: Princeton University Press, 1962, pp.51-77.
6. Ibid., p.51
7. Burton R. Clark, Educating the Expert Society. San Francisco: Chandler Publishing Co., 1962, pp.11-40.
8. Senate of Canada, Poverty in Canada: A Report of the Special Senate Committee. Ottawa: Ministry of Supply and Services, Canada, 1976, p.117. For a description and analysis of the current situation in Canada, see also the National Welfare Council's submission to the Royal Commission on Economic Union and Development Prospects for Canada, Poverty and Public Policy, December, 1983.
9. Ibid., pp.117-118
10. The Vanier Institute of the Family, Brief submitted to the Special Senate Committee on Poverty, October, 1970, pp.44-45. See also Poverty in the Affluent Society, Hanna Meisner, ed. New York: Harper and Row Publishers, 1966. See also Schooling in Capitalist America: Educational Reform and Contradictions of Economic Life, by Samuel Bowles and Herbert Gintis, New York: Basic Books, Inc. Publishers, 1976.
11. Economic Council of Canada, Fifth Annual Review: The Challenge and Change, September, 1968, p.103. See also subsequent E.C.C.annual reviews.
12. Abdeen Noor, Education and Basic Human Needs. World Bank Staff Working Papers, No. 450. Washington, D.C.: The World Bank, 1981.
13. Sylvia Ostry and Mahmood A. Zaidi, Labour Economics in Canada, 2nd ed. Toronto: Macmillan of Canada, 1975. p.253. See Senate of Canada, op.cit., pp.1-48; 111-113; 149-159.
14. W.F. Connell, A History of Education in the Twentieth Century World. New York: Teachers College Press, Columbia University, 1980, p.2ff.
15. Bernard Ostry, The Cultural Connection: An Essay on Culture and Government Policy in Canada. Toronto: McClelland and Stewart, 1978, p.1.
16. See R.C. Lodge, Plato's Theory of Education, London: Routledge and Kegan Paul, 1947.
17. The Laws Book I, 644ff. Revised edition, translated by B. Jowett, London: Oxford University Press, 1953, pp.209-210.

18. Loc.cit.
19. Robert R. Rusk, The Doctrines of the Great Educators. New York: Macmillan and Company, 1962, p.6.
20. Ibid., p.36.
21. Ibid., p.6.
22. Woodrow S. Lloyd, The Role of Education in Canadian Education, Toronto: W.J.Gage Ltd., 1959, p.15.
23. Jerome S. Bruner, "After John Dewey, What?" Selected Educational Heresies; Some Unorthodox Views Concerning the Nature and Purpose of Contemporary Education. William F. O'Neill, editor, Glenview, Illinois: Scott Foresman and Co., p.348. See also J.S. Bruner, The Relevance of Education. Anita Gil, editor, New York: W.W. Norton and Co. Inc., 1973.
24. Royal Commission on National Development in the Arts, Letters, and Sciences, Ottawa: King's Printer, 1951, p.6.
25. Ibid., pp.6-8.
26. R. Murray Thomas, "Strategies for Using Education to Achieve Political Ends" in Politics and Education: Cases from Eleven Nations, R. Murray Thomas, ed. New York: Pergamon Press, 1983, p.31.
27. John N. Hawkins, "The People's Republic of China: Educational Policy and National Minorities: The Politics of Intergroup Relations," in R. Murray Thomas, op.cit., p.138
28. Loc.cit.
29. Ibid., p.146.
30. Interviews with officials of U.N.E.S.C.O.; Indian and Northern Affairs Department; Inuit Taparistat of Canada; Assembly of First Nations.
31. See a discussion of Emile Durkheim's conception of education in Mark W. Novak's Living in the Free School, Carleton Library No. 88. Toronto: McClelland and Stewart, 1975, pp.5-6.
32. Quebec, Report of the Royal Commission of Inquiry on Education in the Province of Quebec, Vol.2. The Rt. Rev. Alphonse Marie Parent, Chairman. Quebec: Pierre Des Marais, Printer, 1963, p.2.
33. Margaret Mead, "A Redefinition of Education," in Education for Public Responsibility. Edited by C. Scott Fletcher, New York: W.W. Norton and Co., 1961, p.52.
34. Loc.cit. See also Margaret Mead, Continuities in Cultural Evolution. New Haven: Yale University Press, 1964, Chapters 3 and 6.
35. Daniel Bell, The Coming of Post-Industrial Society: A Venture in Social Forecasting. New York: Basic Books Inc., Publishers, p.421.
36. Loc.cit.
37. Ivan Illich, Deschooling Society, New York: Harper and Row Publishers, 1971. See also Learning for Tomorrow: The Role of the Future in Education, Alvin Toffler, ed. New York: Vintage Books, 1974. Note also, James L. Coleman, "The Children Have Outgrown the Schools," Psychology Today, Vol. 3, No. 9, pp.72-75;82.

38. Canadian Association for Adult Education, A Submission to the Royal Commission on the Economic Union and Development Prospects for Canada, 1983, pp.1-2.
39. Judith Tobin, "The Canadian High Technology Industry and Education." TV Ontario: Office of Development Research. Mimeographed. Ottawa, 1983, p.23.
40. Shelbourne G. McCurdy, The Legal Status of the Canadian Teacher, Toronto:Emond-Montgomery Publications Ltd., 1984, pp.279-281.

Federalism in Relation to Education

41. R.L. Watts, "Survival or Disintegration," in Must Canada Fail?, Richard Simeon, ed. Montreal: McGill-Queens University Press, 1977, p.93.
42. Royal Commission on the Economic Union and Development Prospects for Canada, Challenges and Choices. Ottawa: Ministry of Supply and Services Canada, 1984, p.17.
43. K.C. Wheare, Modern Constitutions. London: Oxford University Press, 1964 edition, p.28. See also A.H. Birch, "Approaches to the Study of Federalism," Political Studies, Vol. 14, No. 1, 1966, pp.15-16.
44. W.R. Lederman, op.cit.
45. Richard Simeon, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada. Toronto: University of Toronto Press, 1972, p.3.
46. K.C. Wheare, Federal Government, 4th edition. London: Oxford University Press, 1963, p.55.
47. Peter Hogg, Constitutional Law of Canada. Toronto: The Carswell Company of Canada Limited, 1977, pp.37-41.
48. Wheare, op.cit., pp.155-156.
49. See also the Council of National Ethno-Cultural Organizations of Canada, "Submission to the Royal Commission on the Economic Union and Development Prospects for Canada," October, 1983, p.14. (This organization, which represents over forty national groups, proposes in Recommendation No. 5:
 that all levels of government maintain and increase the following program areas which are vital to realizing a truly multicultural Canada:
 - heritage language teaching
 - improvement of race relations
 - multicultural ethic in education
 - ethnic studies

Means of Federal Participation

50. See Wheare, op.cit., pp.235-236, for his comparative and summary comments on effective ways in which federations can have "a high degree of adaptability" in wartime without constitutional amendment.
51. W.N. Toombs, "An Analysis of Parliamentary Debates on Federal Participation in Education, 1867-1960," Edmonton: University of Alberta, Unpublished Ph.D. thesis, 1963.
52. T.H. Bell, "The Federal Role in Education," Harvard Educational Review, Vol.52, 1982, p.378.

53. Carl J. Friedrich, Trends of Federalism Theory and Practice. New York: Frederick A. Praeger, 1968, p.7.
54. Loc.cit.
55. W.L. Livingstone, "A Note on Federalism: Federalism as a Judicial Concept," Political Science Quarterly, Vol. 67, No. 1, 1957, p.84.

Minority Rights in Education

56. United Nations Document A/811, 1948.
57. Loc.cit.
58. UN G/A Res. 1386XIV), 14th GA, 1959.
59. UN, Human Rights: A Compilation of International Instruments. New York: United Nations Publications, 1978, pp.114-115.
60. See Wheare, op.cit. p.153, who comments that "It is, of course, true that a national minority which is a provincial majority may not respect in its turn the rights of the minority within its own province." In several interviews for this study, such difficulty was mentioned in respect to Canada's native peoples in particular.
61. See J.S. Mill in On Justice in Society, by Morris Ginsberg, Penguin Books, 1971, p.118. See also Wheare, op.cit., pp.151, for a quotation of J.S. Mill's statement in Representative Government, (Everyman edition), p.357, that "The principal business of the central authority should be to give instruction, of the local authority to apply it."
62. Morris Ginsberg, op.cit., p.118.
63. Alexander Brady, Democracy in the Dominions, 3rd ed., Toronto: University of Toronto Press, 1966, p.476.
64. Loc.cit.
65. Quoted and analyzed in Edward Mc Whinney, Comparative Federalism: States' Rights and National Power, 2nd ed. Toronto: University of Toronto Press, 1965, p.69. See also Plessy versus Ferguson, 163, U.S. 537(1896).
66. Brown vs. Board of Education of Topeka et.al., 347 U.S., 983(1954). This case established the principle in American law that racial segregation *per se* in education is unconstitutional.
67. Loc.cit.
68. Nathan Kravitz, "The United States of America: The Languages of Education: New Ethnicity and the Drive to Power" pp. 104-121 in Politics and Education. R. Murray Thomas, ed. Toronto: Pergamon Press, 1983.
69. Lau vs. Nicholson, 414 U.S. 563(1973).
See also Kravitz, op.cit.
70. See Hogg, op.cit., p.299.

Role of the Judiciary

71. Quebec, Report of the Royal Commission of Inquiry on Constitutional Problems (Tremblay Report): The General Theory of Federalism. In Canadian Constitutional Law: Cases, Notes and Materials, 2nd ed., J.D. Whyte and W.R. Lederman, editors., Toronto: Butterworth's, 1977, pp.1-31 and 32. See also Bora Laskin, The British Tradition in Canadian Law, London: Stevens and Sons, 1969, p.109.
72. Crown Grain vs. Day (1908) A.C. 504. See also Bora Laskin, op.cit., pp.109-110.
73. J.A. Corry, Law and Policy. W.M. Martin Lectures, 1957, University of Saskatchewan. Toronto: Clarke, Irwin & Co. Ltd., 1959, p.60.
74. Geoffrey Sawer, Modern Federalism. London: C.A. Watts and Co. Ltd., 1969, pp.160-161.
75. Marbury v. Madison (1803), 6 U.S. (1 Cranch) 137.
76. Hogg, op.cit. p.46.
77. Corry, op.cit. p.62
78. Ibid., p.3
79. Ibid., p.4
80. See D.V. Smiley, Conditional Grants and Canadian Federalism, Toronto, Canadian Tax Foundation 1963, Chapter II, "The Constitutional Aspects", pp.17-27.
81. Canadian Teachers' Federation Submission to the Royal Commission on the Economic Union and Development Prospects for Canada, Ottawa: CTF, October 31, 1983, p.24.
82. Wheare, op.cit., pp.51-52.
83. A.H. Birch, Federalism, Finance and Social Legislation in Canada, Australia, and the United States. London: Oxford University Press, 1957.
84. Op.cit., p.3.
85. Eric Hanson and Peter J. Atherton. Some Economic and Social Effects of Education, mimeographed, A research report for the Commission on Educational Planning. Edmonton, 1970, p.2.
86. Interviews: senior officials of C.I.D.A., U.N.E.S.C.O.
87. Watts, op.cit.
88. Allan C. Cairns, "The Other Crisis of Canadian Federalism," Canadian Public Administration, Vol.22, Summer, 1979, pp.186-187.
89. Watts, op.cit.
90. A.J.A. Gardner, "Co-ordination of the Government - A Summing Up", Public Administration Australia, Vol. 26, 1967, p.58.
91. Luther Gulick, "The Division and Co-ordination of Work," D.C. Rowat, editor, Basic Issues in Public Administration, New York: Macmillan, 1961, p.53.

92. A. Chaiton, "Attempts to Establish a National Bureau of Education, 1892-1926", in Canadian Schools and Canadian Identity, A. Chaiton, ed. Toronto: Gage Educational Publishing Ltd., 1977, p.117.
93. Alan C. Cairns, op.cit., p.194.

CHAPTER III

EDUCATION IN THE CANADIAN CONSTITUTIONAL CONTEXT

This Chapter describes the Canadian constitutional framework within which education is both a significant head of legislative power and a focus for policy-making and implementation. To clarify what jurisdiction in Canadian education involves and how federal participation in it relates to constitutional law, six main elements in the linkage between law and practice are examined. The first concerns the legal and non-legal rules which make up the Constitution, and which serve to explain the constitutionality or otherwise of federal participation in education. The second focusses on Section 93 of the Constitution Act, 1867 and its later variants, including its terms and constructions, and the pre-Confederation situation in education and its governance. The third assesses Section 93 terms and the provincial terms at union as they apply to post-secondary jurisdiction. The fourth considers deficiencies in provincial implementation of Section 93 as potential or actual causes for federal participation in education. The fifth describes the nature and effects of judicial review, including its doctrines of interpretation which may be applied to constitutional issues in Canadian education. The sixth distinguishes between function and aspect in Canada's educational practice and constitutional law.

The Constitution

In countries ruled by law, the fundamental part of the law is identified as constitutional. It forms the constitution. As J.A. Corry explains

The constitution constitutes the organs of government: the head of state, legislature, executive and judiciary, and defines and limits of their powers and duties. Conversely, it outlines the rights and duties of individual persons vis-à-vis the different organs of government.¹

The constitution of a state is, therefore, the basis of its political and legal order. It is, as Corry says, "the frame or chassis in which the working engine of government is set".²

The term "constitution" is interpreted in the literature and in practice in either of two ways. In the restricted sense, it refers to the contents of a basic constitutional document. In Canada's case, the constitution would comprise the Constitution Act, 1867 and its amendments, together with the judge-made, or case, law which has come to apply. In the wider sense, which must apply in Canada's case, a constitution includes what Professor P.W. Hogg describes as

...all the important rules, whatever their source, which allocate power within a nation; in other words, all of the important rules which establish, empower and regulate the principal institutions of government.³

These rules, as Wheare described them, are of two kinds. They are either legal and, as such, will be recognized and applied by the court; or they are non-legal and will prescribe how legal rules are to be observed. He also noted that in most countries these latter usages, understandings, customs or conventions will form a part of the collection of rules referred to as "the Constitution".⁴

For Canada, a distinction between legal and non-legal rules was made in the Constitution Reference to the Supreme Court of Canada in 1981, in Reference Re Amendment of the Constitution of Canada.⁵ Of particular interest are the questions initiated by Manitoba, Newfoundland, and Quebec, respectively to determine whether "the federal principle" had become a constitutional convention and, if so, a justification for requiring the consent of the provinces to the then-pending amendment of the B.N.A. (Constitution) Act, 1867. In its decision, by a 6:3 majority, the Court held that the agreement of the provinces was required for the joint Address (of the House of Commons and the Senate) to Her Majesty respecting the Constitution of Canada and that "the passing of the Resolution without such agreement would be unconstitutional in

the conventional sense".⁶ In other words, the federal government could still act unilaterally to repatriate the 1867 Act within the legal rules of the Constitution, but at the expense of an important non-legal convention of the Constitution.

This dichotomy explains the judges' equation: "constitutional conventions plus constitutional law equal the total Constitution of the country".⁷ It also explains their reasoning that because of conflict between convention and law, the courts cannot enforce conventions; nor can conventions crystallize into laws "unless it be by statutory adoption".⁸

It is at this point, however, that the minority 3:6 opinion is of interest in relation to education. The dissenting opinion takes into account a fear that a judicial decision could have the effect "of transforming a conventional rule into a legal rule",⁹ as could the enactment of a convention in statutory form - if Professor Hogg's analysis is accepted in the matter. To be on the safe side, these judges took the view that "it is not for the Courts to raise a convention to the status of a legal principle"¹⁰ - that is, by a judge-made rule. How such a transformation might affect education jurisdiction and practice in Canada is suggested by an example given in the majority opinion, to explain how usage and practice could lead to a convention. The example is the holding of federal-provincial conferences (which on occasion deal with educational programs and financing).¹¹

The law which the courts will enforce is made up chiefly of statutory rules made by legislatures, and common law rules made by judges. Constitutional statutes and judge-made rules related to them will take precedence. Entrenched provisions in the constitutional statutes will also take precedence over ordinary statute law and judge-made rules related to it. Thus, when a dispute is before the Court on a matter of education, it must first determine what the law is and then how it applies constitutionally. The Court will enforce the legal rule that applies. But, so far in Canada, it will not enforce a non-legal constitutional rule, or convention whether they are written or not. It

may still be argued that there are certain conventions involving federal participation in education. The federal government's fiscal support for education and related matters in Canada's unequal federal union is one longstanding example. Other examples are described in this study. In all such cases, whether conventions have come to apply or not, federal participation could be ended without recourse, unless there are legal rules of the Constitution to require it. A change in federal policy, an amendment of a federal statute or regulation, or an expired agreement would suffice.

Nevertheless, a federal constitution which provides for the distribution of the powers of government may also, as the Supreme Court judges in the majority opinion stated, "constitute a fertile ground for the growth of constitutional conventions" between the various legislatures and governments¹² - on the political and/or the executive level. In Canada, education is just such a fertile ground by virtue of its nature and the matrix of local and national needs it is expected to meet. In part this explains both the tendency and the fact of federal participation in education by constitutional and other means. Potential for the development of conventions related to such federal action is there because, while conventions are not legal rules, neither are they judge-made rules. They are, instead, institutional rules. As such, they are based on the precedents set by government institutions (and the players in these institutions), unilaterally, bilaterally, or multi-laterally. These rules are not, therefore, based on judicial precedents. They are not what the Supreme Court described as statutory commands "which it is the function and duty of the courts to obey and enforce".

In Canada's federalism, Section 93 of the Constitution Act, 1867 and its variants produce legal rules as legislation which vary from one provincial jurisdiction to the next. As a result, in the governance of Canadian education, there is a striking lack of harmony in some of this legislation. This makes meeting various common, national needs in education very difficult, time-consuming, and costly. Mobile individuals and their families can bear the brunt of diversity. Yet judge-made rulings in education cases

and references can produce some common ground in law and practice across Canada. Until the Constitution Act, 1982 this was a slow process and one of limited content in respect to federal participation in Canadian education.

In contrast to these matters, non-legal rules which involve the federal order of government, or relations with it, may be variously developed. They may be bilateral, as in the case of agreements to support the official languages in education. They may be multi-lateral, as in the cases of the EPF arrangements for post-secondary education. Or they may be of a unilateral nature on the part of the federal government and, thus, be universal in application over matters in which exclusive federal jurisdiction is claimed, accepted, or is of *de facto* status because it is simply not challenged. Of course, in matters where the federal order of government lacks jurisdiction for its participation in education, these non-legal rules, or conventions, may be overridden by the legal rules which apply but only if judicial review is sought. As a result, in a continuing situation where adjudication of jurisdictional conflicts in matters of education is avoided by the federal and provincial governments, development and use of non-legal rule-making and the conventions in support of federal participation in education, is of significance constitutionally and should be taken into account. Federal funding of the official languages in education has been an example in point.

It is therefore strategically important for the governments, institutions and players in Canadian public education to know what, in constitutional terms, a convention is. A definition which all members of the Supreme Court of Canada accepted in the Constitutional Reference of 1981 is that given by Chief Justice Freedman in the Manitoba Reference, who stated that

...a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than usage or custom.¹³

This continuum gives fuller meaning to the workings and results of, first, "co-operative" and, then, "executive" federalism in Canadian educational affairs. An emphasis on operational agreements and precedents is characteristic of both approaches to federal-provincial relations.

When trying to account for that part of federal participation in education which cannot be explained by relation to Section 93 of the Constitution Act, 1867, or by other particular legal rules of the Canadian constitution, it is necessary to understand the function and purpose of a convention. To clarify the matter of function, Professor Hogg states that

What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all.¹⁴

The purpose of these non-legal rules of the Constitution is clarified in the majority opinion of the Supreme Court on conventions, stating that

The main purpose of constitutional conventions is to ensure that the legal framework of the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period.¹⁵

Of course the doctrine of parliamentary sovereignty remains a key value, or principle, in constitutional law of British origin. However, the limitations imposed on this doctrine by the Canadian system of federalism and by the allocation of responsibility for education - explicitly and implicitly - must also be made clear. In the Preamble to the Act of 1867, this constitutional value is supported by a set of conventions which had been won in Britain and in the British North American colonies before Confederation - notably responsible government, with its capacity for integrating policy making and implementation. In constitutional theory, and in fact, in a system of responsible government the cabinet (the executive) must at all times enjoy the support

(the "confidence") of a majority in the elected assembly. This makes the executive responsible to the legislature for the complementary and integrative tasks of developing and implementing policy.

Unlike Britain, where Parliament has supreme legislative authority - to create new rights and freedoms without restriction - Canada's legislative power is distributed between two orders of government. Consequently, when a right is entrenched in the Constitution as a legal rule, it may not be changed by either order of government unless by constitutional amendment. A right which is evolving as a non-legal rule could become observable by convention. It could also be made enforceable by legislation or by judicial ruling. Rights of both kinds are referred to in Chapter V.

It is evident that the Fathers of Confederation rejected the American example of a bill of rights as a distinctive part of the constitution. Professor F.R. Scott noted that if the Constitution Act, 1867 is examined from the perspective of civil liberties and human rights, more will be found than some would suppose. The conventions described apply. Moreover,

The preamble of a constitution does not bind Parliament as strict rules of law do, and is thus not a substitute for a bill of rights, but it states an ideal or aim which we should pursue in our constitutional development and it tells judges to interpret the law in a manner favourable to fundamental freedoms.¹⁶

Furthermore, as an exception to making an exhaustive distribution of the legislative powers of Canada, the Fathers of Confederation did include a small, initial bill of rights.¹⁷ Provisions were made for: guarantees of the rights and privileges of denominational schools in Section 93; guarantee of tenure for superior court judges in Section 99; and the guarantee in Section 133 of the French and English languages in the legislative and judicial proceedings in both the federal and Quebec jurisdictions.

In summary, it is necessary to note that in Canada, from 1867, rights as they apply to education and other matters are of two origins: they are either entrenched pro-

visions in the Act of 1867 and its amendments, or they are provisions on the continuum for development of conventions. That is, such rights are either legal rules in constitutional law, which the Court will recognize and enforce, or they are non-legal rules which the Court may recognize but has not yet transformed by judge-made ruling.

Given such an ultimate result, one last consideration of conventions is required in regard to the history and future of Canadian public education. This is a knowledge of how a convention can be created. In succinct terms, Sir Ivor Jennings describes the process as follows:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.¹⁸

As subsequent description and analysis of federal participation in Canadian education show, precedents are important. Moreover, they appear across a wide spectrum: before, at, and after, Confederation.

Section 93 and Its Variants

Section 93 of the Constitution Act, 1867 remains the benchmark for clarifying all endeavours in Canadian education, whether they are based on legal rules or non-legal rules. An understanding of its terms and constructions, and those of its several variants, is essential. This cannot be made clear without an appreciation of the historical forces and circumstances which led up to the important constitutional compromise that Section 93 still represents, as shown in the Constitution Act, 1982, Section 29 of the "Canadian Charter of Rights and Freedoms":

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissident schools or as regards the use of the English or the French language.¹⁹

Section 29 does not reaffirm Section 93 in total. It reaffirms group religious rights where these are entrenched under Section 93 and its variants. The Charter of 1982 includes entrenched, national language rights in education, and it contains the potential for other such rights in education - all apart from Section 93 and its variants. It is also possible that amendment to Section 93's broad, vague description of jurisdiction in relation to education was avoided in the 1982 Act for pragmatic reasons. The array of constitutional bases for federal participation in education, which are identified and analyzed in Chapter IV, is part of the explanation.

History explains too. The 1867 Act ensured that the federal government would have educational obligations in addition to those which apply to the provinces in Section 93.²⁰ Constitutional use of "education" as an undefined term in Section 93, and constitutional silence on vitally related matters, have helped to create this situation. Various Section 91 and other powers, and a residual responsibility for education and related matters nationally and intergovernmentally, have made federal participation necessary and unavoidable. Early rulings of the Judicial Committee of the Privy Council up to 1925 limited federal residual power, except for times of emergency. The limitations in respect to jurisdiction for federal participation in education have been more redirective than restrictive. Thus, as described in Chapter IV, some Section 91 anomalies permit full federal jurisdiction for education. The potential for federal participation in education through the avoidance of judicial review has increased since "co-operative" federalism (within responsible government) was replaced by "executive" federalism (with its emphasis on senior, political-level transactions which do not always clear the legislature, the governing party, or the public). The Court's reluctance to define "education" is another factor.

Clearly, Section 93 and its variants do not represent a unified constitutional statement. This is manifest in the separate allocations of legislative power involved, and in the flexibility their respective terms permit, and even encourage. In any case,

agreement on the general terms of Section 93 at 1867, imperfect as they are, constituted one of the most controversial and difficult compromises in the framing of the Constitution Act, 1867. This experiment in educational governance had begun long before other controversial matters in education were to emerge as the result of changes in Canada's demography, economics, technology, sociology, politics and culture. No consideration was given to the means by which modern communications would cross the jurisdictional, and artificial, boundaries which Section 93 and its variants apply, geographically and culturally, to the conduct of education in Canada. From the beginning of modern communications technology in Canada, its national application has been very clear in the public's mind - as reflected still in the CBC's mandate to advance national interests in culture, education, and citizenship. In particular this viewpoint has been shown in the attitude of the Court when, respectively, the Judicial Committee of the Privy Council and the Supreme Court of Canada gave Parliament legislative jurisdiction over, first, broadcasting and, then, telecommunications.

The compromise at 1867 dealt with religion. Confederation historians have noted that there was considerable disagreement between the English (who wanted state-controlled schools), and the French (who wanted church-controlled schools) on the issue of school governance.²¹ This made Section 93 - via provision for separate school continuity or creation - a major accommodation of a history of religion rooted deeply in the early educational endeavours of both New France and the British North American colonies. For the French it was an example of "notre maitre, le passe". The results of this arrangement in public education were not a definitive success. Far from it. "It is doubtful", Professor C.E. Phillips wrote in his book, The Development of Education in Canada, "whether any law or pact in later Canadian history has evoked controversy, bitterness, litigation and frustration in comparable measure".²²

This might have been avoided had original intent prevailed. In the beginning of Section 93's development, its protective features were general in their intent and

application and, therefore, applied to the protection of any minority which had had religious freedom in education before 1867. That is, such generous intent applied to denominational rights in education then in existence (*in esse*) and to those which may yet be (*in posse*).

The same intentions are reflected in comments made in the House of Lords on Section 93 by Lord Carnarvon who declared that

The object of that clause is to guard against the possibility of the members of the minority suffering undue pressure by the majority. It has been framed to place all the minorities, of whatever religion, precisely the same footing, and that whether the minorities were *in esse* or *in posse*. Thus the Roman Catholic minority in Upper Canada, the Protestant minority in Lower Canada, and the Roman Catholic minority again in the Maritime provinces, would all be placed on a footing of precise equality.²³

However, as the final terms and construction of the 93rd clause show, limitation was placed on the classes of persons who may claim denominational rights in public education. This was reaffirmed in 1982 as described. It had previously been reaffirmed in Section 91(1) of the Constitution (B.N.A.) Act, (No. 2), 1949 which exempted from Parliament the power to amend the Constitution

...as regards rights and privileges by this or any other constitutional Act granted or secured...to any class of persons with respect to schools....²⁴

Section 93 was not framed to create a common system of schooling in Canada. The variable of group religious rights in education could only have been accommodated by provincial jurisdiction, given the varied religious circumstances which applied in the colonies at Confederation - or, inevitably, would come to apply when the territories were added to the new Dominion. In turn, the need to protect these entrenched minority rights called for the further entrenchment of provisions to make both the federal Cabinet and Parliament the final sources of recourse and redress in disputes over the constitutional minority in question.

The provinces were not obliged to act on Section 93's denominational rights in education unless they were in law - practice was added later - at the Union, or were legislated into law and practice afterwards. Hence, British Columbia, which entered Confederation without a provision for religion in education, in law or in practice, was not obliged to provide for such schooling. If, however, the Province should ever use its Section 93 enabling legislation to enact a provision for separate schools, the result of this legislation would be the entrenchment in the Constitution of the minority religious rights in education concerned.

It should also be noted that Section 93's means for creating diversity in education provincially includes the statutory capacity to make education compulsory, and to make it a statutory right. This is because of the absence in common law alone of a compulsion to oblige and enforce education, and no natural right to an education.²⁵ As a result, pre- and post-Confederation statute law is a basic consideration in the educational practice and jurisprudence of each respective jurisdiction.

Terms and Construction. The terms and construction of Section 93 in the Constitution Act, 1867 are as follows:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:-

- (1) Nothing in any such Law shall prejudicially affect any right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;
- (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or

Roman Catholic Minority of the Queen's Subjects in relation to Education;

- (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this section.

There are two constitutional dimensions in Section 93. The first relates to legislative authorities and the second to particular minority religious rights in education. This applies in the 1867 clause and in variations in four later entries into Confederation - by Manitoba in 1870, Alberta and Saskatchewan in 1905 and Newfoundland in 1949. In order to deal with the two dimensions as required, it is necessary to distinguish between that which entails legislative authority over education and that which limits such authority. Therefore, in those jurisdictions in which Section 93 or a variant applies - with the exception of the former Dominion of Newfoundland in part, as explained subsequently - we find qualified provincial authority over education. However, such authority is subject to certain supervisory remedial powers which, first, the Governor General in Council (the Cabinet) and then Parliament may exercise. This is exclusive of other federal powers re: education legislation, provincially, inter-governmentally and nationally.

First and foremost, Section 93 and its variants are grants of power to each province's Legislature only - not to its Executive except in a subordinate way via legislation in relation to education, which the Legislature "may" make only "in and for" that province. Hence, in public education in Canada there has been a constitutional check on "executive federalism" in any form - from the Constitution Act, 1867 and without change in the Constitution Act, 1982.

Section 93, and later variations of it, give each province a primary, but not plenary, power to make laws in relation to education within its territory in s.s.(1). Such power is subject to entrenched protection of minority rights and privileges in religion held by law by any class of persons in the three colonies entering the union of 1867. S.s.(2) extends to Ontario and Quebec equal minority education rights for Protestants and Roman Catholics. S.s.(3) extends to future provinces in Confederation the protection of minority education rights for Protestants and Roman Catholics existing in law at the union or legislated thereafter. This subsection also grants to the minorities concerned the right to appeal to the federal Cabinet for redress concerning "any act or decision" of "any provincial authority" affecting "any right or privilege" in relation to education. Finally, s.s. (4) creates federal supervisory power to ensure "due execution" of (all) the provisions of Section 93. This potentially significant sub-section also creates a federal duty, with power to match, to seek remedial federal legislation: (a) for due execution of Section provisions; and (b) for enforcement of any remedial Cabinet decision "in every such case".

Potentially, federal powers in Section 93 are considerable with respect to remedial measures to protect minority rights in education. Hence Section 93 implies a unitary principle insofar as the federal government and Parliament are given ultimate authority in respect of remedial law in relation to education, albeit under defined circumstances. This principle, or quasi-unitary characteristic, is magnified because, until 1982, Parliament was empowered to set the constitutional terms in full for each new province's entry to Confederation, including the initial provision for provincial jurisdiction in education. The Territories, which were never a part of the original three colonies, came under Parliament's full Section 93 power from the time of their transfer from the Imperial Crown after 1867.²⁶

The entry of Newfoundland to Confederation gave cause for special constitutional arrangements, in order to accommodate its status and history as both a former sister

colony and, for a time, sister Dominion (with unitary government in education). Hence the provisions in Term 17 of the Terms of Union in lieu of Section 93, in order to assure continuity of the new province's unique system of public denominational education. As a result, denominational rights in education were entrenched as in Section 93, but for five denominational groups instead of two. Under Term 17, cases of infringement of such rights by Newfoundland as a provincial authority, were left to the courts, as would have applied when Newfoundland still had Dominion status. (27)

Section 93 gave to each province, as a broad, undefined head of power, its own primary jurisdiction. This permitted each entrant to Confederation to continue along established lines with the development of whatever school system it had started. Unique systems were thus encouraged and inevitable - but not to the extent that they would ignore national cultural, historic and civic matters in their courses of study. This national task in school curriculum was not dictated by the central government, as it would have been had Sir John A. Macdonald's preference for national jurisdiction in "education" been possible at Confederation. The compromise to accommodate particular group religious rights in education, by means of separate public schools, made it necessary to allocate primary jurisdiction for schooling to each province separately. The terms of Section 93, and its later variants, permitted each province to prescribe its curricula for schooling. In Ontario's case, for example, the Empire received more attention than the Dominion in its early provincial history courses. In Quebec's dual system of public schooling, very different Quebecois and "English" versions of Canadian history were taught to the separate francophone and anglophone groups. Debate on this dichotomy has grown since the Province consolidated control of public education under a department of education and prescribed one program of studies, with the exception of the religion course for dissentient schools.

The federal government did not intervene in matters of national concern and content in the provincial courses of study - such was the political sanctity of Section

93. But, as revealed in educational research in the 1960's on knowledge and perceptions of Canadian school students of the country's history and constitutional institutions, there was serious cause for national concern about the future of Canadian identity and unity. Nevertheless, the initial federal reaction to these vital matters in schooling for Canadian citizenship was to trust the provinces to act correctively in the national interest, using their respective Section 93 jurisdictions to do so.

Problems with matters of national concern in education occur because Section 93 leaves gaps in practice and in law which both the nature of education and the nature of constitutional law seek to fill. The federal residual power allows for this. Therefore, the 1867 allocation of legislative power over education did not have to recognize the continuing participation of the central government in matters of education which had existed before and at Confederation. It was not necessary to make provision in Section 93 to recognize federal participation in education which would have to occur inter-governmentally and nationally from then, and internationally in future.

For some time, education beyond the most basic level had been a prerogative of the wealthy - a private good to be purchased by those rich enough and respectable enough to afford it. In the colonies-then-provinces, public education had been emerging, begrudgingly in some places, as a common entitlement. In spite of efforts to promote school building and school attendance, much remained to be done in public education at Confederation. With few exceptions, such education was at the basic level, without compulsory attendance, and only if public facilities and funding would permit it.

The Fathers of Confederation made action under Section 93 discretionary, except for the continuation of public separate schools, where they had been provided for in law (and, later, in practice too) at the union. This gave the provinces time, as well as discretion, in matters relating to implementation of education which was to be "in and for" that province. Presumably, this laissez-faire situation was the provinces' model for

the future. After all, Confederation had coincided with the peak of laissez-faire influence.²⁸

Coincidentally, at 1867, the provinces had a constitutional capacity for financing public education not much beyond the basic level of schooling then evolving. Therefore, depending on how laissez-faire philosophy was applied to government in Canada's nation-building circumstances, there was a potential for federal participation in future developments in Canadian education. Under laissez-faire such matters could be left largely to private fee-paying and charity, and to some discretionary support by provincial governments - as was the case in Quebec at the secondary and college levels until the 1960's. If the educational system provided for in Section 93 was to remain frozen in time, responses to contingencies unforeseen at 1867 would require private and/or federal initiatives.

To clarify this situation, it is necessary to determine whether Section 93 is an exhaustive grant of education power, or whether an exhaustive grant of such power was made in 1867. This in turn evokes the need to look to other parts of the constitutional law of Canada, as is done in Chapter IV, to identify whatever bases there may be for federal participation in education which the province-bound terms of Section 93 cannot meet. Next, review is required to identify what, if any, federal participation in education is not constitutional. Beyond this, it is necessary to consider what use each province makes of its Section 93 power, for if in a basic matter it does not, or cannot act, the way may be open - as in several post-secondary education matters - for remedial and/or residual federal action. Section 93 is not a constitutional licence for provincial inaction.

Comparative practice indicates that coping with education in its broadest sense in a modern state - regardless of whether it is federal or unitary - calls for national involvement in some ways. In his essay, "Jurisdiction under the Constitution in Education in Canada", J.A. Corry wrote that

...whatever the dilemma about education in the Canadian federation is, it is not a constitutional one. Indeed Section 93 is a model of flexibility ...Whenever it becomes clear that special educational provision is needed to carry out responsibilities undertaken by Parliament in the exercise of its exclusive powers in Section 91, Parliament is entitled to make provision by whatever means and instrumentalities are required in the circumstances. As so often turns out in this country, obstacles that are declared to be formidable constitutional barriers turn out to be merely political ...That may not make the problem any easier to deal with, but at least one can make a start by removing the "no trespassing" signs and opening up Federal-Provincial consultation.²⁹

In an interview for this study, Dr. Corry reaffirmed these views in reply to a question concerning legal and extra-legal practices which were observed to occur in the governance of Canadian education. Professor D.V. Smiley, among others, concurs in the view that Section 93 is open to flexible treatment, notwithstanding the province's so-called exclusive jurisdiction. "Constitutional flexibility," he states, "manifests itself in its most fully developed form in respect to educational activities in Canada". Apart from denominational rights in education there has been, he notes, "almost no authoritative definition by the courts about what education means", and particularly, in what activities of a "broadly educational kind" the federal order of government may validly participate.³⁰

Legal and/or executive officials for eight provinces (Ontario, Quebec, Nova Scotia, New Brunswick, P.E.I., Manitoba, Saskatchewan and Alberta) were interviewed by the writer to ascertain whether there had ever been, or was to be, a provincial study of the possible constitutional limits of Section 93's jurisdiction. This question was directed to four Ministers from four different provinces whose portfolios represented the Premiership (2); Education (2); Finance(2); Intergovernmental Affairs (1); Attorney General (1). The same question was directed to the following Department of Education officials in six of the provinces: three deputy ministers, two assistant deputy ministers, one executive secretary to a deputy minister, and four legal counsel. The same question was directed to an executive secretary of the CMEC and to its immediate past President,

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the Hon. Roland Penner, former Minister of Education and Attorney General for Manitoba and Dean of Law, University of Manitoba. The answer from all these sources was that there had been no known study of this kind and none was contemplated. (Consideration of a possible reference case to the Supreme Court in Quebec's case, is described later.) Nor could any published record of such government study be found for any other provinces.

Earlier, in an interview the writer had with the senior Justice Department Counsel in Public and Constitutional Law, it was reported that no known study had been done by the Department. Moreover, no known request by any federal government to have such a study carried out was known. These matters are discussed further in Chapter IV, with particular reference to Section 91(24) concerning federal responsibility for the education of Indians (and the Inuit) in relation to Section 93, in the territories and in the rest of Canada.

Pre-Confederation Situation. One source for clarifying whatever residual scope and authority there might be for federal participation in education is the history of public education in the uniting colonies, at and before Confederation. Pre-confederation history shows that before the turning point to unity in 1867 was reached, much had been done in the colonies of British North America from the time of the American Revolution to build for eventual responsible government and an existence apart from republicanism. During this time, as the amount of education legislation bears witness, there was an increasing public and political interest in education at all levels. Consequently, in the uniting colonies at Confederation there were some 10,500 common elementary schools, including some "separate" schools, variously defined, which had been sanctioned in law in Nova Scotia and New Brunswick by custom or usage. Schools in Upper Canada were of three types: those for particular language groups (French, German, Gaelic and Algonkian); those for particular racial groups (Blacks and Indians); and those for either Roman Catholic or Protestant minorities in given

localities. In Nova Scotia in the 1840's common schooling was available in English, French, German and Micmac.³¹

P.B. Waite describes the times for children in matters of health and education, stating that

When children lived, they were educated in a rather ramshackle fashion, really at the instance of their parents. When education had to be paid for, even though from an early date subsidized by colonial governments, it was at best an uncertain quantity. But even when free education came, to Lower Canada and Upper Canada in the 1850's, Nova Scotia in 1864, and New Brunswick in 1871, there was no guarantee the children would go to school. Some parents believed that children should work, not study. Some did not know or care. In any case, there was no compulsory education. That came for the first time in Ontario in 1874, when it required only that parents of children between the ages of seven and twelve have their children at school four months a year. And the law could not be enforced. In 1890, even in Ontario, a quarter of the children of school age were not enrolled in school at all, and of those on the registers only half came. Compulsory attendance was still a dead letter.³²

Marcel Trudel writes that in francophone New France

as in France, the State left the task of education to private institutions, or to individuals. The State either made endowments for this purpose, or remunerated those concerned in one way or another.³³

This tradition didn't change significantly with the advent of Section 93 in 1867, for, as the Parent Commission Report stated in 1963:

The determination to make available to all pupils instruction in any field or at any level encounters one particularly serious obstacle in the French Roman Catholic schools of Quebec. The historical account of its development has shown how public and private education evolved along parallel lines, with only the latter leading to classical college and university. By tradition, the public school child was directed toward manual work, subordinate jobs in business and the service industries and toward the skilled trades. Seldom did he even consider - and the system did not encourage him - continuing his studies in the classical college and the university. By contrast, the child whose social background naturally suggested the liberal professions began in, or early transferred to, private institutions.³⁴

The circumstances of the times sheds some light on the context in which the Fathers of Confederation debated an education compromise and decided its final terms before enactment. For further clarification, it is helpful to consider parallel circumstances in the law on education in the mother country, where the idea that all children should have elementary education was not accepted until the Education Act of 1870 - three years after the Imperial statute of 1867 created the Dominion of Canada, with its continuing elements of colonial status. In this case, it is significant to note that prior to England's Education Act of 1889 and its Education Act of 1902, the only national system of education there was that which had been set up under the Elementary Act. In this regard the Encyclopaedia of the Laws of England states that prior to 1902, elementary education was "the only kind or 'grade' of education which had been systematically dealt with by the law as a whole".³⁵ However, as also explained, this did not preclude provision for education higher than the elementary level - for endowments and grants to secondary education, technical and agricultural instruction, and higher or university education.

In the new Dominion of Canada at 1867, there were 134 secondary schools of various types, whose development dated mainly from the 1850's. Significantly, enrolment at these schools was neither free nor compulsory. These schools were open only to those whose families could afford their high tuition and residence costs. Nonetheless, in spite of this dichotomy in institutional status and access, by 1867 measures had been proposed or taken to achieve regulatory control. This involved prescribed courses and texts, appointed boards, superintendents of instruction, and teacher qualification requirements. Total enrolment at both levels of schooling was 742,100 - including about 1700 Indian pupils enrolled in federal schools. The teacher-pupil ratio ranged from 1:78 in Upper Canada to 1:36 in New Brunswick. The average ratio was 1:55.³⁶

Institutions of higher education in the uniting colonies at 1867 included 8 colonial normal schools, 17 universities with degree-granting charters, and 17 non-degree-granting colleges. Charters were either Royal - granted by the Imperial government - or they were issued by the colonial legislatures. These institutions were all denominational, except for the Universities of Toronto, McGill, Dalhousie, and New Brunswick. Their programs were mainly for undergraduate studies, so the emphasis was on teaching. Research was not a regular part of university work. (Such work was conducted by or under senior government auspices, dating back to well before Confederation in the case of the exploration, mapping and geological research done by the Geological Survey of Canada.) All of these institutions were small, and only five of them (Toronto, McGill, Trinity, Victoria and Laval) had enrolments in 1867 of as many as one hundred.³⁷

When examining government-university relations at Confederation, Dr. N.A.M. Mackenzie notes that

...the few universities in British North America were small institutions operating under the auspices and control of religious denominations and other private groups and although some of these had received their charters and some grants of land from the Crown, there was no thought of looking to government for current or capital needs.³⁸

Former Queen's Dean of Law and President, J.A. Corry, went further to state that

...in 1867 none of the newly formed provinces regarded university and college education as being a matter for provincial jurisdiction. All the universities then existing (including my own) operated under royal charters or other non-provincial authority. Since then provincially supported institutions have developed but these were not considered to be the exclusive responsibility of the provinces.³⁹

Dr. Corry reiterated this information and his legal opinion in an interview the writer had with him. Earlier, in a study he and Professor Bonneau did for the Association of Uni-

versities and Colleges of Canada (AUCC), it was observed, in respect to Section 93's application "in and for" each province, that

In the days when education was limited to the common schools or parish schools (at most to the secondary schools) for children whose whole lives would be spent within the provinces of birth, the meaning of the clause was clear. There were universities then, under private or religious control, but no one had ever thought of making laws about them.⁴⁰

They went on to say that

Today, with high mobility in substantial sectors of the population, and with a range of highly specialized education being required for the purposes of the national government or for the governments of two or more provinces, not all the education actually within a province is really in and for the provinces.⁴¹

Historian C.B. Sisson's research on church and state in Canadian education before and at Confederation led him to conclude of the Fathers of Confederation that

In their drafting of the educational clauses of the British North America Act their thoughts were on elementary schools. They may possibly have strayed as far as secondary schools. But it would never have crossed their minds that a university could bear that name and be merely Provincial.⁴²

Section 93's emphasis on minority denominational rights in schooling suggests that it was meant to deal only with elementary and, perhaps, secondary schooling. This interpretation is supported by Lord Carnarvon's explanation of the clause's intent in the presentation of the British North America Act Bill to the House of Lords February 19th, 1867. He said that the provision was meant to secure

to the religious minority of one Province the same rights, privileges and protection, which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of Lower Canada, and the Roman Catholic minority of the Maritime Provinces, will thus stand on a footing of entire equality.⁴³

When he gave this explanation again in debate, the focus was still schooling. Had it been the intent of this clause, or, ultimately, of Section 93, to include university jurisdiction, surely this was the time to have made that clear. Did this leave the matter to the federal residual jurisdiction? Canadian delegates who drafted the final clause - including Macdonald, Langevin and, perhaps, Cartier - didn't make this clear. Is this because they couldn't agree? Is it because they didn't decide? What was made clear was that the provinces would have jurisdiction for schooling, including public separate schools, and that there would be federal power for supervision and remedy in these matters.

Post-secondary Jurisdiction

Does Section 93 in the Constitution Act, 1867 include provincial jurisdiction over post-secondary education? If so, is this to be an exclusive power in each province separately, or is it meant to be a concurrent power which would involve Parliament legislatively? What elements of post-secondary education are to be included? Research? Training? Culture? Communications? None of these are mentioned anywhere in the Act of 1867. In addition, what kinds of programs were to be included? Those of an academic nature only? Training for professions too? If so, how is profession to be defined? What populations were to be accommodated in post-secondary aims, plans, programs, opportunities? Would it be for all citizens of post-secondary standing, or only for particular elites? How were jurisdictional spillovers, in costs and benefits, to be handled constitutionally, given each province's territorial limitation in Section 93's terms? How were national concerns and needs related to post-secondary education to be accommodated constitutionally?

A reading of the terms of Section 93 does not produce a clear answer to any of these questions. Case law to date does not do so either, because so far, the Court has not decided, nor has it been asked by either order of government for decisions on

specific post-secondary questions in constitutional law. For some officials and lawyers interviewed, the matter seems to be a non-issue, because of federal jurisdiction in components of post-secondary education such as research, and its own jurisdiction for some post-secondary education. Thus *pro forma* rhetoric to the contrary, *de facto* federal-provincial concurrence has been taking place. This does not eliminate the fundamental constitutional issues which, perhaps, can best be resolved in judicial review, or by constitutional amendment.

Denise Michaud conducted archival research for the Association of Universities and Colleges of Canada (AUCC) to find an answer to the locus and nature of jurisdiction in Canadian post-secondary education. To do so, she used an historical approach and concentrated on the political and constitutional issues and circumstances surrounding the drafting and enacting of Section 93. Her conclusions and inferences were drawn from available evidence and indications, and from ambiguity, or critical omissions, in the terms of Section 93 at 1867 and, subsequently, in its variants. Her main conclusion was that, on the basis of this information, conclusive proof that the provinces were given exclusive jurisdiction in post-secondary education is lacking.⁴⁴ (That the provinces were not given plenary jurisdiction is obvious.)

This conclusion can be drawn from three sources. The first concerns the development of Section 93's terms in relation to post-secondary jurisdiction. The second relates to the Fourth Schedule of the Act. The third concerns the provisions made for post-secondary education at 1867 and thereafter, when constitutional arrangements were made for each new province's entry into Confederation.

Development of Section 93's Terms. The search for the development of Section 93's terms in relation to post-secondary education takes enquiry back to the discussions and legislative drafts in the colonies and England before the final Clause 93 approval was given by the Imperial Parliament, without amendment, with Royal assent on March

29th, 1867. This involves the preliminary conferences at Charlottetown, Quebec and London, from 1864, and related transactions.

From the records available, it is first noted that the original intent with respect to universities at the Charlottetown Conference (of September 1-7, 1864) seems to have been to exempt them from provincial jurisdiction. Among the sources of information available was P.E.I. delegate Whelan's report to the Charlottetown *Examiner* of September 5th which stated that there would be provision for federal "power to enforce uniformity in education".⁴⁵ Next, there is Waite's notice of lists of proposed local powers which appeared first in the Halifax *Morning Chronicle* and later in *Le Courier du Canada* - lists which included "education" without making it clear whether universities were included.⁴⁶ There is also an account of a confidential report from the Lieutenant Governor of New Brunswick, Arthur Gordon, to Colonial Secretary, the Rt. Hon. Edward Cardwell, of September 12th, 1864, which was reprinted in the *Journal of the House of Assembly* of New Brunswick in 1865. According to Gordon, at a meeting at his home of Brown, Cartier, and Galt, these delegates had agreed

That the Local Legislatures are to be entrusted with the care of Education with the exception of Universities.⁴⁷

There is no evidence on the record that, at the Quebec Conference of October 10-27, 1864, universities, or jurisdiction over them, was a topic of formal discussion, or subsequently, on October 28-29, when the conference resolutions were being revised.⁴⁸ However, the Canada delegates had gone to the meeting with a proposed resolution for making education a local power. This proposal, which applied to schooling only, was approved, together with D'Arcy McGee's amendment for protecting denominational rights and privileges of Protestant and Roman Catholic minorities in education.⁴⁹ Beyond this, there is no written record that universities were discussed before this adjournment.⁵⁰ This could be interpreted to imply that "education" meant schooling only.

The 72 resolutions which had been sent to Governor General Monck, November 1st, over the signature of Sir E.P. Tache, were returned November 7th without any change in the wording of Resolution 43(6) concerning "education". Governor General Monck's public statement, and the Imperial Colonial Office response, show that education was not mentioned - as might have been expected had there been a radical departure from Imperial practice at the time, or an elaboration of the reach of the term "education".⁵¹ The same would have been expected had private church charters - royal and papal - been affected. Granting exclusive jurisdiction over the few, small universities in existence at 1867, to former colonies - now provinces given Dominion status by the Imperial Parliament - does not ring true.

Yet, somehow, between the Quebec Conference and the time delegates journeyed to Montreal to sign the Resolution, the distinction between education as schooling and university may have been set aside in some quarters. How this happened, the reach, and validity of such a change, are not known. Certainly, the explicit terms were never to surface in constitutional law in Section 93 at 1867, or thereafter. Nevertheless, the idea is confirmed in some correspondence. For instance, Gordon wrote to Imperial Colonial Secretary Cardwell November 21st, 1864 that

I am fully aware of the great difficulties attending the subject of Education, but it is with extreme regret that I see it committed to the Local Legislatures. At all events, the Universities should have been placed under the guardianship of the Central Power. The local governments, needy, rapacious, and ignorant, with little money at their disposal, are pretty certain to appropriate the University funds to what they will call more useful objects, that is to say, objects which will enable them the (sic) scatter money among their political adherents. My government (that is, the New Brunswick government) quite admit this, and profess to lament it; but see no remedy unless means are taken to check the freedom of action of the local assembly as far as the University of New Brunswick is concerned.⁵²

Pre-legislative draft history shows that this wasn't a settled matter, or one which evoked any extensive or decisive comment or decision. Thus later still, in a letter of March 25,

1872 to Dr. Egerton Ryerson, Sir John A. Macdonald wrote of "education" - without indicating whether university, or post-secondary education was subsumed - that

Now the subject on Education has been withdrawn, unwisely as I always thought, from the control and supervision of the General Government.⁵³

The Quebec Conference Resolution 43(6) did not mention exclusive provincial education power, only that the central government was to have two significant powers. The first power (in Resolution 29(11)) was for legislating over works declared to be for the general advantage of Canada; the second was a residual, general power to legislate (for peace, order and good government) over matters not exclusively reserved to the provinces.⁵⁴

At the London Conference (of December 4-24, 1866), Resolution 41(7), which referred to education, did not make it an exclusive provincial power. When in Rough Draft Clause 42 such power was there, it was subsequently removed in the First Draft Bill in Clause 39. This time, Clause 37 made other heads of provincial power more exclusive, and Clause 38 retained central residual power. In the Third Draft exclusive provincial power in education was omitted (Clause 67) and other provincial powers were no longer exclusive (Clause 66). The central general residual power was to remain (Clause 52) and the central government was to have power to legislate on works and undertakings (Clause 80). The Fourth Draft again omitted exclusive provincial power in education (Clause 91) and for all other provincial powers (Clause 90). The central government residual power remained (Clause 48); the same applied to central government power to legislate on works and undertakings (Clause 126).⁵⁵

The Final Draft - which involved delegate control over the context of the education clause - resulted in provincial jurisdiction "in and for" education but without particular reference to universities (Clause 101). The central government was again given residual power to legislate for "peace, order and good government" (Clause 99)

and the works and undertakings power described (Clause 104).⁵⁶ All of these provisions were contained in the Constitution Act, 1867, including all the ambiguities about the meaning and scope of the "education" power, which still exist. Excluded was any provincial power whatever over "education" extra-territorially, as had also been the case in each colony before Confederation.

The dearth of delegate commentary and decision on university jurisdiction in the various official records of the time, and by its participants, may indicate that, in fact, there was little to report. This is not to say there was not some public interest, or that there was not an active interest in the university community. A petition of December 18, 1866 to Her Majesty from the Chancellor, Principal and Fellows of McGill College stated that

With regard to University education, it is much to be desired, that, as far as possible, there should be a uniform standard for degrees; and that the degrees of any university in British America should be recognized throughout the whole Confederation; and also, that the undue multiplication of Universities, which has become so great an evil in parts of these Provinces, should be arrested. These most desirable results can, in the opinion of Your Majesty's memorialists, be secured only by vesting in the General Government and Legislature an effective control over these interests.⁵⁷

University education, which was distinguished from education as basic schooling in discussion, might well have been left as a matter which could follow the Imperial model in law and practice in Great Britain at the time. While British universities were given royal charters by the government, they were treated as private, independent bodies. They were regarded as national and empire institutions. As such they were subject to little if any regulation, and received financial aid, when and as determined by government discretion, not obligation. Private endowments and fee-paying students were the main sources of funding. These universities and their independent *modus operandi* were a part of British history. In comparison, the educational focus in the

uniting North American colonies was basic (elementary) education and the controversial issue of religion in such education, as Section 93 at 1867 makes clear.

The Fourth Schedule. Requirements made in the Fourth Schedule of the Constitution Act, 1867 for the disposal of assets of Upper and Lower Canada between Ontario and Quebec, might be interpreted as an indication Section 93 was meant to include universities in the jurisdiction it gave to the provinces in education. This is because the conjoint properties to be reallocated included some educational real estate and some income funds. However, such matters were never cause for litigation and the clarification this might have evoked. Furthermore, given the distinction made in the Act between "works" (including physical properties *per se*, such as university lands and buildings) and "undertakings" (non-physical things, such as university activities *per se*), it seems doubtful that the arrangements concerned - which were completed by 1878 - prove this interpretation.

Provincial Terms at Union. The post-secondary education situation in each province at its union is a final indicator of the intended ambit of Section 93 and its variants. Section 93 at 1867 does not mention post-secondary education *per se*, and there is silence in the entire Act on critical elements in post-secondary education, such as research. This situation applied to Ontario, Quebec, Nova Scotia, and New Brunswick at Confederation. The creation of Manitoba, the next province to enter Confederation in 1870, was preceded by the establishment of two church-sponsored colleges: St. John's and St. Boniface. Section 22 of the Manitoba Act varied from Section 93, s.s.(1) in that any right or privilege in respect to denominational schools at the Union was to be protected "in practice" as well as "in law". Here was the first

opportunity after Confederation to clarify jurisdiction in post-secondary education.

Jurisdiction was not mentioned in spite of the two colleges which were obviously considered to be independent of government, as in Quebec. However, the federal government did take action itself in the matter of post-secondary education when it made a substantial land grant in right of Canada to help establish the University of Manitoba.⁵⁸

There were no institutions of higher learning in British Columbia at the Union in 1871. The Province made arrangements with McGill University to provide introductory university credit courses, in part through its secondary system (where, eventually, a Grade XIII was added as an equivalent to first year university).⁵⁹ This arrangement with McGill was a manifestation of a national outlook on university education in Canada. The same applied to other affiliate arrangements between early Western and established Eastern universities.⁶⁰

When Prince Edward Island joined Confederation in 1873, St. Dunston's, a non-degree college, was already established, yet nothing was added to that province's terms of union to extend provincial jurisdiction to this post-secondary institution. In the case of the Territories, however, the Parliament of Canada played an interesting role in the development of higher education. Dr. John McLean, Anglican Bishop of Saskatchewan, was the leader in establishing Emmanuel College at Prince Albert in 1879, an institution which enrolled Indian and Metis students.⁶¹ As in the early stage of development for other institutions of higher learning in Canada, the College included secondary-level studies as a preparation for university-level work. This beginning was soon expanded in scope, to realize an association of affiliated, denominational colleges which would serve all denominations within a larger institution. On February 20th, 1883, a bill was

introduced in Parliament to establish a university in the Diocese of Saskatchewan.⁶²

The result, after some debate, was the issuance of a federal charter to the Dominion University of Saskatchewan (making Emmanuel College a part of that new university, with the power to grant degrees in theology).⁶³ The constitutional question here was whether or not the federal order of government was merely exercising its Section 93 power because of the territories' subordinate status.

When Saskatchewan and Alberta became provinces in 1905 a variation was made in Section 93, s.s.(1) to protect rights and privileges of separate schools as defined in Chapters 29 and 30 of the North-west Territories Act, 1901, including a guarantee of grants to separate schools on a non-discriminatory basis. No mention of universities was made, but both provinces proceeded immediately to establish provincial universities, although neither Act mentioned post-secondary education *per se*. Was this because concurrent jurisdiction was assumed to have been gained by provincehood? In the writer's interview with him, former Saskatchewan Premier and Minister of Education, Allan Blakeney, expressed the opinion that concurrent jurisdiction applies for all provinces.⁶⁴ (Former Nova Scotia Premier and federal Secretary of State Gerald Regan expressed a similar opinion in the writer's interview with him.)⁶⁵ However, at a national education symposium in 1981, sponsored by Simon Fraser University, the Hon. David King, Alberta's Minister of Education at the time, stated that "education is and should remain within the exclusive jurisdiction of the provinces".⁶⁶

As in the case of the other provinces, Term 17 of the Newfoundland Act gives the Province the exclusive authority to make laws in relation to education "in and for the Province". And, as in all other cases, it prohibits the making of laws "prejudicially

affecting any rights or privileges with respect to denominational schools, common (amalgamated) schools or denominational colleges" existing at the union. Provision was also made for appeals to the Courts in disputes over denominational rights in education. Newfoundland's first university, Memorial, was established that same year. (Memorial College had been founded in 1925 as a "memorial" to fallen Newfoundlanders in World War I.)

In summary, with the exception of Newfoundland, no light is thrown by the constitutional terms for the entry of new provinces, on what the Imperial and, later, federal Parliaments intended, or expected, the ambit of Section 93 and its subsequent variants to be. What is emphasized in every case is schooling. The case for an unqualified provincial jurisdiction in post-secondary education is not evident.

Deficiencies in Provincial Implementation of Section 93

Deficiencies in provincial implementations of Section 93 are many and varied, according to views gleaned from texts and reports, and from interviews which were conducted for this study with federal, provincial, academic, and public sources. In study and practice, knowledge of these shortcomings has two-fold use. First, it helps to identify gaps and uncertainties in Section 93 jurisdiction, by province and collectively. Secondly, it serves to identify inadequacies in the implementation of Section 93, also by province and collectively. In turn, these findings clarify reasons and justifications that might be given - constitutional and otherwise - for federal participation in education.

Shortcomings in Section 93 and its variants were described by some senior interviewees as being inherent in its terms. These persons included federal and provincial

politicians and executives, some federal legal officers, and some legal academics. One basic problem mentioned is the absence in the Constitution Act of an explicit federal residual responsibility for education - nationally and intergovernmentally. This is not to say that this residual power is not there, or that it cannot be duplicated by other federal powers. The absence of a clear national dimension in constitutional law for education tends to make the determination of national goals and priorities in education very difficult to achieve politically. It was said that confusion and inaction were invited by the absence of a clear constitutional definition of the meaning and reach of "education". Section 93's creation of separate provincial education jurisdictions and systems was held to have a balkanizing effect which works against common and national interests, in and through education.

This is most evident at the post-secondary level where there is a need to accommodate equal opportunity, national standards in education, training and research, population mobility in study and work, and national interests in economics, culture, and citizenship. Yet, as J.A. Corry advised, there are constitutional grounds for assuring such national needs:

If there is indeed a nation to be spoken for and protected, then the federal government must speak for the nation, take steps to ensure its survival, and nourish its growth.⁶⁷

It is difficult for the central government to act for the country as a whole when, for expedient reasons, the variable at issue - education - is perceived, or designated, to be a matter which can only be dealt with on a local basis. When Section 93 was drafted, and when it was legislated, it was not claimed that education itself could not be a

national responsibility - as it is and has always been in many countries. The accommodation of religion in public education was the issue.

The idea that education must be under the exclusive control of a local jurisdiction is not inherent in the nature of education. The related idea that the majority in a local jurisdiction will protect the educational rights of its minority has never been certain, nor has it been acceptable to the minorities concerned. The Fathers of Confederation recognized this when they made provision in Section 93 to protect minority religious rights in education.

From its inception, Section 93 has been a guarantor of majority interests in education. In every province, this has involved the priority accommodation of majority cultural and linguistic needs and wants. For example, from 1867 to 1982, Section 93 was a constitutional protection of majority Quebecois language and culture, in and through education. By custom only, this did not preclude accommodation of minority anglophone language in Quebec public education - as an adjunct to Protestant public separate school operation, and as an economic expedient because, until the quiet revolution, this anglophone population supplied most of the funding for the building and operation of its schools. Francophone minorities in the rest of Canada did not enjoy comparable benefit under Section 93. Hence when the B and B Commission proposed correction, including creation of a Section 93A to make the provinces responsible separately for official languages education, successive federal governments did not initiate the constitutional change to do this.⁶⁸

Silence in the Constitution on components of post-secondary education in particular - such as research and culture - has created openings and needs for federal activity in relation to education. The undefined term "education" invites euphemisms and efforts to distinguish between it and related matters, such as adult training. Major misuses of federal unconditional funding for post-secondary education have occurred for want of accepted constitutional bases for accountability. Federal funding for post-

secondary education has also been used directly and indirectly to support secondary level education - a clear provincial responsibility.

"Fed bashing", as some persons who were interviewed described it, has become a political sport in Canadian education. Provinces whose basic responsibilities under Section 93 have declined in some instances, have used the politics of "executive federalism" in education for this purpose. The principal voice has been the Council of Ministers of Education of Canada (CMEC) whose secretariat is located in Toronto. This body, which has no constitutional status whatever, has excluded federal representation with the zeal of a private fraternity. In a 1984 House of Commons debate on the renewal of the EPF agreement for federal post-secondary funding, the chief Progressive Conservative critic, Marcel Lambert, noted that, in spite of substantial federal funding in support of post-secondary education, the provincial Council of Ministers of Education "will not even let a Minister of the Government of Canada attend its conferences as an observer...".⁶⁹ Mr. Lambert then stated that

Consequently, we see the provincial authorities taking different approaches and adopting some rather odd standards. These policies stem from tradition or from the current fashion but there is no national goal in education.⁷⁰

He cited universities that use different qualification levels and professional bodies that "maintain the idea that the wheel was invented in their particular jurisdiction". He asked, too:

Has anyone ever tried to transfer a post-secondary student from one of the Western provinces into Quebec or Ontario?⁷¹

Some officials interviewed commented on this concern, but they included all levels of public education. "Education has not united us", Prime Minister Trudeau is quoted as having said in 1979, before he went on to make it clear that his government would not vacate the field of culture - a matter closely linked to education.⁷²

This connection was made in the terms of the Constitution Act 1982, but the provincial inability under Section 93 to cope with significant local as well as national concerns in education also persists. The litany of such deficiencies is embarrassing in some instances, dismaying in others. Some of these matters are cited here briefly, in each case with a reference to remedial federal action.

Literacy. The first concern is literacy - the most fundamental responsibility of any elementary-secondary school system. After 117 years of Section 93 responsibility for this basic requirement of schooling the results are poor - even after full consideration for problems posed by immigration and service to isolated areas. This situation, it is generally agreed, reflects on the goals and curriculum of all provincial school systems - both as this applies to public schooling and to adult education programs. Assuming an illiterate person to be someone with less than a Grade V attainment, about 4.5 million, or 24 per cent of Canadians 18 years of age and over, are illiterate. Estimates for 1984/85, by province, are as follows:

	Per cent of Population	Estimated No. of Illiterates
Newfoundland	44	180,000
Maritimes	25	320,000
Quebec	28	1,370,000
Ontario	24	1,600,000
Saskatchewan	19	290,000
Alberta	21	360,000
British Columbia	17	360,000
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Canada	24	4,500,000 ⁷³

These statistics apply to reading and writing only. They do not apply to the wider problem of functional illiteracy as it applies to the work force, which is assumed to require Grade IX completion, or better.

The Canadian literacy problem, as a provincial responsibility under Section 93, was first largely ignored and then masked for some time by a shift of the problem to unemployment and regional development programs involving substantial federal funding and direct program participation. Literacy training has also been a significant element in education for inmates in federal penitentiaries, where correlations are reported to be high between low literacy levels and both crime rates and recidivism.⁷⁴ The problem is large and costly to all concerned. Statistics on victim, family, and individual distress and losses are not available, but obviously, the tolls are significant in this partial spillover of Section 93 schooling failures.

Losses from under-education are incalculable. They impact negatively on culture, employment, citizenship, with family life, and on welfare costs. In circumstances where provincial resources and volunteerism are insufficient, federal support is required. The question is, under which of the ample constitutional grounds for federal participation which might apply should such help be given. In such circumstances, use of an emergency power in the national interest does not seem out of line.

Poverty. Public education in North America was intended to be a stepping stone out of poverty. To say that shared-cost programs which the federal government sponsors to remedy poverty have spillovers which support education is not disputed - as shown in Chapters VI and VIII. There was also agreement amongst those who made observations on the matter that poverty is a significant problem in education. Rates for poverty and cultural deprivation are significant across Canada. As of 1984, an estimated 1.2 million Canadian children fourteen and under were living below the poverty line.⁷⁵ However, as is apparent in reviews of provincial courses of study, and as commented on in interviews, Canadian elementary and secondary schools make minimal compensatory provisions in curriculum and instruction to remedy this situation.

In general, Canadian courses of study have been oriented to middle-class values, content, and methods of teaching and learning. In these circumstances, the poor and the culturally disadvantaged in particular may become objects for dead-end programs, including "special education" that actually penalizes them for their academic weaknesses - the effect, not cause, of their cultural deprivation. Their cultural and social status may thus be frozen rather than changed - as high drop-out and illiteracy statistics suggest. In vocational education, some federal officials interviewed for this study criticized the provinces for late starts, followed by lags in up-dating and development of training programs and services sufficient to meet Canadian industrial employment needs. Industrial Ontario, which, as a matter of policy has emphasized a federal responsibility in vocational training, had a hiatus of about 20 years in updating its secondary technical courses of study - a program many of its "general" students follow.

Education Based on Age. Expediency in provincial definition of Section 93 scope and responsibility was mentioned in interviews several times. Age was described as the main definer of Section 93 responsibilities in schooling. For example, in some provinces, pre-school day care - an educational matter in fact - is placed under various non-educational legislation, to avoid the responsibilities and costs involved, and to take advantage of federal programs and funding described in Chapters VI and VIII. The provincial school leaving age at 15 or 16, or graduation, separates Section 93's public schooling responsibility and costs from federal "adult" employment-related courses and costs. These federal programs have helped to salvage the drop-out population. The national average school drop-out rate is 30 per cent or more of the secondary enrolment. This age-based approach to minimal school retention was described in some interviews with federal officials as an expedient way of transferring provincial educational responsibilities to the federal government. In any case, the practice creates a distinction in practice between what may be defined as education under Section 93 and "re-edu-

cation" under federal auspices of some kind - usually under the rubric of "training". This situation invites constitutional interpretation.

Native Studies. The Constitution Act, 1867 made the federal government responsible for Indian (and Inuit) education. That does not mean these first peoples should be ignored in Section 93 schooling. Generally however, under Section 93, the provinces have developed their systems and courses of study without significant allowance for these peoples and their cultures. Until recently, course and text research revealed omissions, errors, and even slander in the treatment of this aspect of Canadian studies for all students, and in particular cultural study for students of native origins.⁷⁶ In the late 1960's, the Federal Department of Indian and Northern Development undertook to integrate the native school population en masse under provincial Section 93 curriculum and controls. This was rejected by most native peoples. Section 93 was not, and had not been, a means of accommodating their cultural, linguistic, educational, and socio-economic needs. And, according to the native representatives interviewed to 1988, this perception and grievance remains.

Cross Cultural Study. Multiculturalism was mentioned in some interviews with both federal and provincial officials in relation to education in general, and to Canadian studies in particular. Federal law, policy, and programs related to "multicultural education" are described in Chapter IX. With no disrespect intended to new Canadians, it was suggested by two senior educators in interviews for this study that multiculturalism, as a major school curriculum policy, could first trivialize Canadian culture and then inhibit its development in school and community. Native persons who were interviewed for this study drew attention to the exclusion of their indigenous cultures from the official federal definition and programs for promoting multiculturalism. None of the persons interviewed expressed an objection to it as a means of eliciting tolerance in

schools and elsewhere, but some cynicism was expressed about the vote-getting prospects of multiculturalism, in both federal and provincial politics. There is, obviously, some ambivalence about the value of multiculturalism in education and politics.

Canadian Studies. Content in all subject fields may fall under the rubric of Canadian studies. In public schooling, the emphasis in Canadian studies has been on history and its civics content, although, increasingly, Canadian literature seems to be becoming a significant element. In the late 1960's, all provinces came in for strong criticism for their handling of Canadian studies in elementary and secondary curricula. Professor A.B. Hodgetts conducted a notable study on civic education in Canada in which he studied 951 elementary and secondary classrooms in the ten provinces. His findings showed that the country's school children lacked interest in, and knowledge of, Canadian content. He concluded that

Most Canadian studies as currently prescribed and taught, do not nurture advanced intellectual skills, they do not transfer knowledge that is useful to the individual as a citizen and to his society, and they do not encourage an understanding of a great many aspects of our cultural heritage.⁷⁷

Several federal and provincial educational officials interviewed for this study expressed fears that this situation had not improved much, especially in matters of civics and the structure and dynamics of the Constitution. The writer's check of provincial courses of study indicated that this still seems to be the case, barring the compensatory teaching individual history teachers may do and contemporary comment in some texts. Diversities in history courses and content across Canada continue to be bewildering; the French and English differences in versions of Canadian history and civics seem to continue with the difference that Quebec anglophones are now compelled to follow the Quebecois version. Parochialism seems to prevail as before in most provincial courses. Civics

- a fifth wheel on the history courses in nine provinces seems to be as neglected as in the past, notwithstanding the continuing stresses in Canadian politics and constitutional law. This suggests that shortcomings in teacher training and strategies for teaching the social studies, which Hodgetts and his associates criticized in the 1960's, have not improved greatly.

At the same time a national survey directed by J.C. Johnstone focussed on youth perceptions of Canada in contemporary rather than historical terms. In an attempt to determine how Canadian young people perceived their homeland, a sample of 1365, ages 13 to 20, were asked for views on the nature of Canada, its peoples and problems; and for their expectations of living in Canada in the future. Collectively, these Canadians, (who would be in an age range of 30 to 40 years now) saw themselves as more similar to than different from Americans. There were also some sharp differences between anglophones and francophones - with the former being likely to see Canada in economic terms and as an open-class society; and with the latter tending to think of Canada in political terms and as less than an open-class society.⁷⁸ All such findings evoke concern for Canada's national identity, or consciousness - especially if such similar perceptions have continued to apply amongst Canadian youth.

Dr. Peter Regenstreif, who elaborated on this research, concluded that, as institutions, Canadian schools have reinforced "cleavages within the Canadian polity". They have not been instruments of social integration; moreover,

By leaving education in the hands of the provinces so exclusively, federalism has placed the most effective and quickest way to develop an economy and society beyond the reach of a national government. Education in exclusively provincial control is also another obstacle to the development of a Canadian as opposed to a regional or local identityThe evidence is that young Canadian begin school with many values in common. By the time they leave secondary school, they are markedly provincially as opposed to nationally oriented - and, most significantly, English and French young men and women are farther apart in attitude at the end of their education than at the beginning.⁷⁹

Such a situation would seem to make the building of a distinctive sense of Canadian consciousness or identity more accidental than deliberate.

In related commentary on political community survival, David Easton has written that

no system could endure for very long if it did not seek to build up a reservoir of support - frequently described as love of country, loyalty, and the like - upon which it could count regardless of the particular trials and tribulations or frustrations of desires that the members might experience at the moment.⁸⁰

Of course this admonition applies to all levels of a country's public education.

The A.U.C.C.'s Commission on Canadian Studies produced a four-volume report (the Symonds Report) in 1975, which covered a wide range of aspects in the field including university research, teaching, and curriculum. For example, recommendation No. 23 on curriculum describes a

remarkable lack of even basic knowledge about Canadian political institutions, processes and events among many Canadian university students and graduates.⁸¹

It recommended a substantial increase in Canadian content in university-level political science. Recommendation No. 25 elaborates on this situation, stating that

The Commission has noted with concern the extent to which the curriculum of Canadian universities is being shaped by the teaching interests and research priorities of the academic communities of other countries, particularly the United States. Because of this tendency, course content is often unduly limited or oriented to subject matter that is primarily of interest to the American academic community. Canadian questions and illustrations are almost completely ignored in some courses in which it would be natural for them to be examined, and subjects for study that do not appear to fit readily into the American framework of many disciplines are frequently overlooked or avoided with results that are often incongruous or even absurd. The Commission recommends that Canadian universities plan their curriculum and course content in the light of the particular academic needs, and the teaching and research needs, of this country.⁸²

Science Education. In Canadian elementary and secondary science education, there are serious concerns in all provinces about content relevance, materials, and teaching standards. This was verified in a national study and report conducted by the Science Council of Canada, related to the federal role in support of the sciences. This is described in Chapter VIII.

Educational sovereignty. Canada's sovereignty in education as a nation has never been a known focus for research, much less for concerted national protective action. This lack, in the opinion of some persons interviewed for this study, is attributed to the political aspect of Section 93 - especially as this relates to the claims and postures of Quebec for exclusive - meaning total - jurisdiction over education, to accommodate its majority Quebecois culture and language. A significant case in point is foreign control of Canadian cultural and educational materials, content, and production within Canada, or the business of importing foreign counterparts for Canadian school or out-of school use. Clearly, this touches Canadian sovereignty in a vital, basic way. Yet, as the Foreign Investment Review Agency's (FIRA's) senior legal counsel explained, by its terms of reference the Agency could not initiate action in any field without the federal government's policy directive to do so. In order to protect Canadian interests in the production of educational materials from foreign intervention and control, such a specific directive would be required. No such directive was issued.

In deference to provincial Section 93 jurisdiction and politics, the federal government had not called for F.I.R.A. action. To 1984, the provinces, singly or collectively, had not bothered to request protection, and, it seemed, the federal government had not been willing to test its Section 91 powers in such a matter. A Saskatchewan Deputy Minister of Education who was interviewed for this study, stated that control over authorization of books used in formal school studies should suffice. This seems to be Ontario's position also. Quebec is preoccupied with French language protection, so in

this case, American materials in English are not a threat to the province's francophone majority. None of the provincial officials concerned seem to appreciate the cultural power there is in choosing, designing, and producing Canadian learning resources for the information age. Nor do they seem to appreciate that much of what children and youth learn today is extra-curricular - outside the prescriptions laid down under Section 93 for the various provincial courses of study.

School Governance. Problems associated with cut backs in effective control and co-ordination of the governance of education provincially are described in Chapters X and XI. These declines have coincided with the rise of "executive federalism" practices within provinces, and among them collectively - to capture, or usurp, as claimed by some Canadian Teachers' Federation spokespersons and others, the federal residual power for education nationally, intergovernmentally, and even internationally.

Federal-Provincial Conference records and some interviews conducted for this study suggest that the strongest opposition to visible federal participation in education has come from Quebec, Ontario, and Alberta. Historically, Quebec stands apart from the other provinces in its concern for some fundamental matters of French language, culture, and education. At the elite level at least, and as mentioned in interviews with some federal and provincial politicians and senior officials, Quebec tends to see itself in education matters and status as more than a province and not much less than a sovereign state. This is evidenced in its claims for power over external affairs related to education affecting international francophonie, and in the discriminatory provisions of Bill 101.

Ontario has nearly 38 per cent of the Canadian population of elementary and secondary students. Given its considerable resources it is thus in a position to be a model for the best practices in all aspects of education - law, policy, administration, teacher education, staff relations, and curriculum. Its example could be of benefit to

anglophones, francophones, native Canadians, new Canadians, the poor and culturally disadvantaged, and the illiterate. Such is not the case, and markedly not so in a number of respects. This was the opinion of some school administrators in the other provinces and the federal government, some academics, and some interest group representatives - all of whom were interviewed for this study. The charge of parochialism, including perceived weaknesses in its Canadian Studies program and Civics, provincially and locally, is among the strongest criticisms of Ontario's use of its Section 93 power. Parochialism, in any province, is entrenched when, in effect, responsibility for provincial educational matters, instead of just authority to carry them out, is delegated to the local school boards and their bureaucracies. In Ontario's case, this results in curricula which are diversely elaborated. Mobility of students into, and within, the province's elementary and secondary schools was referred to as an often distressing encounter with varied learning content, instructional methods, standards, and quality of administrative facilitation.

Particular criticism was levelled at Ontario's unique system of dividing its secondary school population into widely different course streams with significant variations in their respective academic and cultural content, eligibility for future study, and preparation for citizenship and work. Students who choose and are accepted into the "advanced" academic program (which is the regular program in other provinces) can earn eligibility for entrance to university or college. The choice between the two program streams is left to students and their families. There is no qualifying ability or achievement test. Students who choose, or are assigned to, the "general" program are supposed to become eligible for non-degree vocational training. Lately, however, Community Colleges have shown a growing preference for advanced standing for entry to more and more of their programs because the "general" courses and standards are deemed to be inadequate. Those who need public education most - the poor, the culturally disadvantaged, the distressed, the disinterested - seem to be the main candidates

for this lesser, dead-end treatment. In provincial and national resourcing terms, the human and economic costs of this scheme for simplifying "teaching" and the "administering" of large enrolments may be very high - doubly so in an Information Age, where such minimal education is inadequate. Consequently, it may be criticized as class-oriented, as class-building and, as such, a dysfunctional and even detrimental influence on Canadian public education as a whole.

Such a scheme runs counter to egalitarianism in Western Canada's schools. It also contrasts with Quebec's reformed system of public education since a 1963 Parent Commission recommendation which held that

Education for all therefore presumes that a student will not encounter too many dead-ends as he moves vertically from the public schools to advanced studies. It likewise presumes that on the horizontal level he can pass without difficulty from one institution to an equivalent grade in any other, and that, without any loss of self-esteem, he may drop a classical or scientific secondary course to take up a vocational course at the same level. A re-arrangement of the educational structures, a better sequence of levels of study, a more rational distribution of programmes and institutions will eliminate losses of time which are injurious to students and wasteful to the country's general economy. This necessary co-ordination cannot be promptly achieved unless it is encouraged, and, if need be, imposed by a single authority with jurisdiction over the whole educational system.⁸³

(As Chapters VI to IX describe, Quebec has built and maintained this progressive system with substantial financial support from the federal order of government.) As of 1984, Ontario's three main political parties were not on record as advocates for reform of their class-oriented system of enculturation and acculturation - notwithstanding Quebec's example next door, or CCME affiliation.

Opposition from Alberta governments to federal "interventions" in education was described by one senior Alberta interviewee as an ideological reaction to things federal. A recent shift in attitude was attributed in some other Western interview comments to Alberta's growing need for federal funds to support its open, progressive system of public education which Albertans want to maintain.

Judicial Review

In 1867, Canada embarked on building a federal - albeit quasi-federal - system of government. It started this journey without its own clear and sufficient provisions for judicial review to settle jurisdictional disputes here within the context of place and time. Consequently before 1949, when Canada finally achieved judicial sovereignty, it was possible to appeal most Supreme Court of Canada decisions to the Judicial Committee of the Privy Council in London. In fact, appeals on provincial superior court rulings could be made to the Privy Council directly. Provincial reference cases could also be taken to the Privy Council. The significant price exacted on the status and effect of Canada's legal system was evident. The price to the federal order of government and its intended constitutional powers at 1867 was even greater. Smiley concludes that, until 1949, the Supreme Court of Canada was "very much subordinate to the Privy Council in jurisdiction of the Constitution".⁸⁴

There have been those who argue that this colonial arrangement constitutionally was a safety valve in the development of federalism, and an impartial protector of both "provincial rights" and "minority rights" against a too-powerful central government. Such a view was first put forth at a time when the national government lacked sovereignty in legal, military and external affairs. It was a time when vast expanses of Canada remained to be explored, mapped and settled; when new provinces and territories were to be created; when institutional infrastructures of all kinds - including thousands of schools - were still to be built and expanded; when enormous and costly transportation and communication linkages were to be built East to West in a race against American intervention.

A formidable test of provincial unwillingness to comply with the Constitution occurred in 1890, when Manitoba abolished at one stroke the constitutional guarantees in the Manitoba Act for separate schools, and the official status of the French language. Had federal protection of these minority rights prevailed then, as they should have, the

histories of French settlement and education in the West, and of Quebec relations with the rest of Canada, might have been much different.

The combined federal failures to implement the Manitoba and Dominion Lands Acts had the greater effect of denying the Metis (who spoke French and were Roman Catholic) their birthright in lands and benefits, including entitlements for education. From 1670 to 1870 these people had developed as a truly distinctive cultural group, and one aware of their collective rights, which they had protected successfully before 1867. In the void between the transfer of Hudson Bay Company lands to the Dominion of Canada, Louis Riel's Provisional Government appointed three representatives who met with Macdonald and Cartier before the Manitoba Act was drafted. One probable result of this action was the Act's provisions for the protection of French language and public separate schools. One certain result was Section 33 of the Manitoba Act, 1870 which read

And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

Had this Act, involving as it did prior consultations between representatives of the Metis and the federal government, been honoured, Metis rights would have been resolved long before the provisions of the Constitution Act, 1982 which remain to be implemented on their behalf.

Canada's inability to amend its Constitution in Canada ended in 1982. This was 51 years after the Statute of Westminster would have permitted and, indeed, invited

this final step to full nationhood. Provincial preference for final Imperial judicial review was felt to be too strong to risk the disunity (and loss of votes) which might ensue.

This delay in legal sovereignty has been compounded by a continuing provincial use of Section 93 to ignore or downplay Canadian studies, including civics, to the point that the majority of Canadian youth are not being prepared for knowledgeable citizenship - including a basic understanding of the Constitution. This has long been a problem in Ontario and, in particular, in Quebec, who together account for 61 per cent of Canada's elementary and secondary school enrollment, not counting Quebec's CEGEP enrollment.⁸⁵ The outcomes are ominous for national harmony and survival, unless these schooling deficiencies are corrected.

If the provinces will not correct this situation and the federal government cannot do so, perhaps the Supreme Court of Canada will clarify the constitutional law involved. A propos, in a 1983 judgement, Chief Justice Brian Dickson of the Supreme Court of Canada commented that a constitution should be drafted "with an eye to the future".⁸⁶ Such a document, he contended, is not, so to speak, a last will and testament - as inflexible as it is final. It is instead what various legal scholars describe as a living document and, as such, it is subject to, or should be adaptable to, forces of social and political change. Such an idea was reflected in a 1928 Privy Council Section 93 appeal case, Hirsch et al. v. Protestant Board School Commissioners of Montreal et al., by Viscount Cave who, in giving the Court's decision, gave an interpolation of this section which claimed that

while s.93 of the Act of 1867 protects every right or privilege with respect to denominational schools which any class of persons have had by law at the Union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorizes the provincial Legislature to make laws in regard to education subject only to the provisions of the section; and it is difficult to see how the legislature can effectively exercise the power so entrusted

to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise.⁸⁷

In spite of this belated eloquence on the subject of Section 93, the Privy Council was perceived in Canada, by Sir John A. Macdonald among others at the national level, as a judicial body which treated the Act of 1867 - which had been largely drafted by Canadians - as an ordinary statute, and as an Imperial one at that. In this view, the Act was not treated as a constitutional document for building a new and federal state.

Professor W.R. Lederman describes two different ways to interpret laws. The first interpretation is "literal or grammatical" and, as such, focusses on words - the terms and their construction - in statutes and constitutional documents. The second interpretation is "sociological" and "insists that constitutional words and statutory words must be carefully linked by judicially noticed knowledge and by evidence to the on-going life of the society".⁸⁸ Section 93 puts both of these methods of interpretation to the test. In the first instance, the terms of Section 93 are ambiguous and incomplete - the signs of political expediency or compromise. In the second, Section 93 produces a fragmentation, or balkanization of provincial jurisdictions - with varied consequences in common matters of legislation, policy, and practice. National concerns, needs, and actions in education are not accommodated by either extreme.

Until 1949, such dysfunction nationally was compounded by the peculiarity of final appeals decided by judges unfamiliar with, and far removed from, the sociology and politics of Canadian public education. Possibly, their lordships were sensitive to these limitations and, perhaps, their early reluctance to define "education" in Canada in purpose or content was a result - one that has persisted. Exceptions to this would be the Privy Council's interpretations in the Manitoba and Ontario cases cited on minority religious and language rights in education under Section 93.

Historically, Section 93 cases in law have dealt mainly with controversial group rights in education. Federal responsibilities in such matters are subsisting - as Professor

Beaudoin and others hold. Moreover, the Constitution Act, 1982, Section 29 reaffirms this. Hence, in a recent Supreme Court of Canada judgment, AG Quebec and Greater Hull School Board, et.al. (1984) Chouinard, J. summarized - as stated by the trial judge - the conditions which evoke federal protection under Section 93 of the Constitution Act, 1867, namely

In order to claim the protection of this section, the following conditions must of necessity be met:

- (a) there must be a right or privilege affecting a denominational school;
- (b) enjoyed by a particular class of persons;
- (c) by law;
- (d) in effect at the time of the Union;
- (e) and which is prejudicially affected.⁸⁹

In this interpretation, the only denominational rights and privileges in education which Section 93 protects constitutionally are those which are in each province's terms of union. The result is variability in protection and jurisprudence.

This status has not meant that separate or dissident schools, where established, had been given a carte blanche to regulate their own schools. It has been established in case law that a province can legislate to "affect" such a school, provided it does not do so "prejudicially". Another issue has been the grade limit of separate school claim to provincial funding. In Ontario, this resulted in a 1928 ruling of the Judicial Committee of the Privy Council in Tiny v. The King in which it was held that the right of funding in Ontario's case did not extend in law beyond the elementary level.⁹⁰ However, this ruling did not prevent the Province from later making secondary separate school funding available as a matter of policy. When recently the provincial government decided to put this funding on a constitutional basis, a 1984 reference case to the Supreme Court of Canada was precipitated. The Province's Attorney General submitted that the Court

had been asked the wrong question in the Tiny case. In Reference to Bill 30, Wilson J. explains that in this case

All of the judgements concentrated on the question whether the separate schools had an unfettered discretion to operate their schools free from any regulatory interference. The Attorney General submits that the real question, unsatisfactorily addressed by the various courts in Tiny, was what level of instruction were separate schools *permitted in law* to provide in 1867. I would agree with this submission. When the correct question is asked it is seen that every judge who participated in the Tiny decisions, with the exception of Duff J. in this court, held that separate schools were permitted by law to offer any level of courses at the time of Confederation.⁹¹

Bill 30 was held to be a valid exercise of the Province's power to return constitutionally guaranteed rights to separate schools by Section 93(1) of this Act.

Nova Scotia and New Brunswick avoided the issue of separate public schools because, in each case, there was no existing guarantee in law of denominational rights in education at Confederation. However, when Manitoba joined Confederation in 1870, Section 22(1) of the Manitoba Act guaranteed denominational rights and privileges in education to those classes of persons having them "by law or practice" at the Union.

In Manitoba's case, constitutional rights in education which came into force at the Union in 1870 were subject, twenty years later, first to unconstitutional removal and, then, to extra-constitutional accommodation. In the litigation concerned, the ultimate question was how the federal government would intervene under Section 93.⁹² In the meantime, separate school funding was upheld by the Supreme Court of Canada in Barrett v. City of Winnipeg.⁹³ But, on appeal to the Judicial Committee of the Privy Council, this decision was reversed.⁹⁴ It was held that because the separate school supporters did not have a positive right to exemption from taxation for public schools at the Union, the loss of such funding did not "prejudicially affect" the rights and privileges referred to in Section 22(1) of the Manitoba Act. The next challenge came in Brophy v. AG Manitoba,⁹⁵ when Section 22(2) of this Act, which is the same as

Section 93(3) of the Constitution Act, 1867, was used to appeal to the federal Cabinet. The objective in this case was to obtain an order from the federal Cabinet to restore funding to the Province's Roman Catholic separate schools. Under this provision the province's failure to remedy could result in federal remedial legislation under Section 22(3) - the equivalent of Section 93 (4). Adhering to the doctrine of *stare decisis*, the Supreme Court of Canada followed the ruling and reasoning in Barrett as decided by the Privy Council. Then, in an extraordinary turnabout - to show how unscientific judicial review can be and how precedents may not always be followed - the Privy Council held that withdrawal of funds to separate schools in Manitoba did affect the rights and privileges of the Roman Catholic minority prior to 1890.

This meant that the federal government could be asked for a Remedial Order. One was drafted and served on the government of Manitoba. The Province was commanded to restore to the Roman Catholic minority the rights and privileges which the provincial statute of 1890 had taken from them. Included was a requirement that this minority was to receive any school grants due them and that they not be required to support any other schools. The Liberal Government of Manitoba did not comply. Instead, it asked for an enquiry into its education problems, to obtain more information. Bowell's Conservative Government upheld the Constitution. Laurier's Liberal Opposition, for political reasons, did not.

The federal government responded February 11, 1896, by introducing its Remedial Bill in Parliament, where its Executive Order had failed, to seek legislative support for making Manitoba comply with the Constitution.⁹⁶ The Bill's opponents made sure that it did not pass. The only opportunity since 1867 to test the full remedial power of Section 93 failed. Nevertheless, the affair was instructive. First, it showed the need for a Canadian final court of appeal. Second, it showed that the Constitution can be set aside, ignored, even betrayed, if the support of political parties' is lacking. Third, the Manitoba school crisis showed how explosive education can be as a political

issue. Fourth, and contrary to some glib conclusions, the incident did not show that Section 93's remedial power was passé. If anything, it showed that politicians, on whose awareness and respect rests the observance of the non-legal, institutional rules of the Constitution, have an equally important obligation to support the legal rules of the Constitution - as they are legislated and as they are ruled on by the Court. When they fail, the constitutional basis and function of government is brought into disrespect.

Prince Edward Island entered Confederation in 1873 under circumstances similar to British Columbia's entry. The Alberta and Saskatchewan Acts of 1905 recognized separate schools as public schools - as in the case of Ontario and Quebec. Section 17 of both Acts recognized education rights already legislated by the federal Parliament in the Ordinances of the Northwest Territories of 1901. As a result, there has never been any dispute about the elementary and secondary range of grade coverage which applies in these two provinces, or in the Northwest Territories and the Yukon. The circumstances which apply to Newfoundland have already been outlined.

Quebec has been the source of several disputes and cases related to rights in education, as described in Chapter V. These disputes have involved religious and language rights. In none of these cases was there direct federal corrective action. In one instance there was what amounts to a significant, voluntary federal support of Quebec's Section 93 responsibilities for choice and costs associated with the language, or languages, of public instruction. This occurred when the federal Official Languages Act was passed in 1970. From that time, Quebec was paid grants, as described in Chapter VIII, to cover English language costs in the public schools of the Province. Previously, from 1867 until 1970, under Section 93, French and English had been the languages of instruction in Quebec's public and public separate schools. A convention, or non-legal rule, could be said to have been established constitutionally but not legally. Such a non-legal rule would not be enforceable in the Courts but would depend on the tolerance of Quebec's francophone majority.

British Columbia entered Confederation in 1871 without any law protecting denominational schools. This did not mean that such rights could never be created by the Province. If the province's Legislature passed a bill to establish public separate schools, it would do so under its Section 93 power. In so doing, it would also activate the constitutional provisions in Section 93 for safeguarding the religious rights created, which would then become entrenched constitutionally. As a result, they could not in future be removed by provincial statute.

The Court has protected provincial jurisdiction to legislate on schooling "in and for" each province. In 1873, for example, the federal Cabinet passed an Order-in-Council which stated that

...the Mennonites will have the fullest privilege of exercising their religious principles, and educating their children in schools, as provided by law, without any kind of molestation or restriction whatever.⁹⁷

But subsequently, in R. v. Hildebrand, the Province's Court of Appeal held that federal action in the circumstances was *ultra vires*; that education was a provincial, not a federal, matter; that the parents of Mennonite children had to observe the Province's compulsory school attendance laws.⁹⁸

In a 1907 case, Brothers of the Christian Schools v. the Minister of Education for Ontario, the Privy Council ruled that Parliament could not legislate on qualifications for teaching where it lacked Section 93 jurisdiction to do so - in this instance in Ontario. Later still, in Angers v. Minister of National Revenue, the appellant claimed that the Federal Family Allowance Act which made payment conditional on school attendance had assumed a supervisory role and was making school attendance compulsory despite provincial Section 93 jurisdiction in such matters. Dumoulin J. of the Exchequer Court of Canada found no such interference; moreover, federal allowances were *intra vires* by virtue of the general Section 91 "peace, order and good government" clause. The judge distinguished between an obligatory, or mandatory law, and a

directory one - such as the federal Act in question - which just offered financial aid on conditions. The Court found no interference with the province's schools, but there would have been, it was stated, had the federal government's aid scheme been used to create its own school system.⁹⁹

While these protections of basic local matters under the province's Section 93 power seem reasonable, the early Privy Council limitations on intended national and intergovernmental potential of some federal Section 91 powers, and the residual power in particular, seem perverse in the eyes of nationally-oriented politicians and educators. The virtual elimination through such judicial review of the federal residual power under Section 91, except initially in times of emergency, was a blow to the flexibility which the Fathers of Confederation had incorporated in the 1867 Act, to allow, if necessary, for federal initiatives to remedy matters of national concern. As for the obvious residual in the terms of Section 93 for such federal power, no judicial review or reference was ever sought to clarify the matter. With provincial government emphasis on schooling and a very small proportion of the population attending university until after World War II, cause for such action did not seem to arise.

Given the political aspects and issues in Section 93's eleventh-hour creation, and its resulting capacity for flexible treatment, the Fathers of Confederation may have intended that the national government play a supervisory role in education - at least where educational matters of concern were not "in and for" just one province. Judicial review would not have been an obstacle in this scheme of things constitutionally, given the federal Section 91 residual power for national developmental action, and provision within Section 93 for federal remedial action.

In this regard, it is the opinion of education historian, Professor F. Henry Johnson that, in addition to the province's power in Section 93 to legislate separately in relation to education,

From its beginning the Canadian constitution ensured that the national government would have other educational obligations. In the first place, since the term "education" was undefined and as the residual powers of government (ie. all those not specifically allotted to the provinces) were to be in the hands of the Dominion, there existed considerable leeway for future developments of a cultural or educational character to be legally interpreted as matters of national concern.¹⁰⁰

Participants of a recent national symposium, "Education Canada", conducted under the auspices of the Ontario Institute for Studies in Education, concluded, as Dr. Bernard Shapiro describes, that

The central issue was the apparent contradiction between Section 93 of the British North America Act, which provides for provincial jurisdiction in the area of education, and the realities of twentieth-century Canadian life, which appear to acknowledge not only the presence of the federal government in education but also - even in the view of the most provincially oriented Spokesmen - some legitimate role and responsibility for the central government.¹⁰¹

Ironically, the provinces' early and lengthy support for Privy Council judicial review, and the kind of "province building" it helped to promote, produced resourcing problems which called for massive use of the federal spending power - a possible gray area constitutionally and, thus, a facilitation of modern "executive federalism" with its extra-constitutional alternatives to judicial review. To add to the irony, one of the principal objects of the use of the federal spending power is post-secondary education - an area where the Court might find, or confirm, concurrent jurisdiction.

In retrospect, events have shown that Privy Council rulings to limit the federal residual and other particular powers did not eliminate federal participation in education. It just made it more extra-constitutional in political and executive ways, as described in this study. Constitutionally, as identified and analyzed in Chapters IV and V, it made such participation more difficult - but not impossible.

In looking to trends for the future of Canadian education, as it is to be affected by both extra-constitutional actions and effects, it became necessary in 1982 to combine

jurisprudence based on Section 93 with that which flows from the Charter provisions related to education, and to allow for the resolution of the intersections in law which result. This has, of course, made judicial review more complex, and, because of the entrenched matters to be adjudicated, more significant. This is described further at the conclusion of Chapter V.

It is sufficient to note here that, on the premise that the Charter is likely to exert a significant impact on public policy outcomes, the role of the judiciary will become more powerful - in matters of public policy, law, values and perceptions. This, of course, will include impacts on pre-1982 jurisprudence. In turn, this will raise the issue of the Court's ways, or methods, of analyzing and interpreting the law, and in particular, constitutional law. In the case of "education" - in Section 93 and its variants extending from Confederation and in the Constitution Act, 1982 - description and analysis in Chapter V show that the scope for elaboration could be considerable. In the meantime, Professor Patrick Monahan argues that

As long as the Court clings to the mistaken idea that its role is simply to interpret the "text" of the constitution, its jurisprudence under the Charter will remain barren and haphazard.¹⁰²

Long before, when such narrow legal interpretation was just as much a concern to constitutional lawyers and politicians, Sir Robert Borden, who was both, observed that

The provisions of any constitutional Act are necessarily of so general a character that judicial interpretation is required.¹⁰³

Thus, notwithstanding the Court's reluctance so far to define "education" as a constitutional term and power for allocating jurisdiction in Canadian federalism, its repertoire of doctrines, or procedures, for judicial review has been developing. It is not necessary for it to focus narrowly, or conservatively, on textual terms and construction, something which the nature of education itself seems to preclude in any federal state.

Consequently, as a matter of common sense, it is not likely that the Court will adopt either of the extreme choices of text or theory when it makes a clear decision on the allocation of the education power in Canada's quasi federalism. If this happens, the leading questions will start with Section 93. Constitutionally and legally, what is education, as a power, to legislate? What are the limits, or reach, of this power? Where does its jurisdiction lie?

In either case, the Court will begin its adjudication (as it does in all cases) with a characterization of the law, or laws, at issue.¹⁰⁴ It will determine first of all what is the legislative matter at issue. Is it an education matter? Is it exclusively so, or is there a double aspect - ie., does it relate both to an education power and another power? If so, what is the paramount aspect? Can the matter at issue be distinguished from education - the way research, culture, language, and communications are and, perhaps, the way "re-education" might be?

In arriving at its characterization of the law or laws at issue, the Court will also consider such factors as the law's purpose, its effect, or its colourability. The Court may also consider the severance capacity in a law, or its reading down (narrowing) capacity, or its interjurisdictional immunity. It will consider the criteria of choice it adopts and it will, by convention, begin its analysis with a presumption of constitutionality - the parallel of the doctrine of being innocent until proven guilty.

After the law or laws at issue have been characterized, the Court will interpret them in relation to the Constitution. In doing this, the Court will look for relevance of the law in question to the heads of federal and provincial legislative power.

Exclusiveness of the head or heads of power concerned will be considered.

Exhaustiveness of the grant of power will be considered. Whether or not ancillary power is involved will be taken into account. The Court will then consider relevant precedents (in circumstances analagous with the case concerned). If concurrence is involved, the Court will look for paramountcy (of one jurisdiction over another) and

apply this. The Court may also consider the progressive interpretation which has been made of the constitutional content before it. It may take legislative history into account, to try to become aware of legislative intent - if indeed this is possible conclusively in law, or politics, or in education *per se*.

The Court will embark on none of these tasks of adjudication without external initiation. The federal and/or provincial governments may initiate a reference. Cases and appeals may come from governments. They may also come from groups or individuals via the standing for initiating litigation which Section 24 of the Constitution Act, 1982 permits relevant to rights in Part 1 of the Charter. In the latter cases where language, culture, and education are concerned in Sections 93 and 133, in the Constitution Act, 1867, and in the 1982 Charter, the initiation may be funded by the federal government, as described in Chapter VIII. Thus, where education is concerned, in relation to language in particular, since 1978 when the federal Court Challenges Program was initiated to fund cases related to language rights, the scope and pace of constitutional debate and adjudication has been accelerated - with resultant impacts on education policy and programs across Canada. This has broadened and intensified federal participation in education, as well as stimulating judicial review.

Education as a Function or Aspect

In the Section 93 description of the Constitution Act, 1867, education is categorized as a function which, in a federal state, can be assigned on a mutually exclusive basis - to one order of government, and, separately, to each territorial unit of jurisdiction concerned. (This was only for education "in and for" each province without defining the reach of the term.) This arrangement also fits the kind of "geographic" orientation which seems to be a part of English law thinking in matters of jurisdiction.¹⁰⁵ That is, it suits putting things, or responsibilities, in their place. Hence, in 1867, it seemed easy to satisfy Quebec's historic claims to protection of its majority

culture and religion by the simple expediency of an allocation of exclusive responsibility for the education function "in and for" the jurisdiction Quebec covered territorially in 1867 and still, when its territory was greatly enlarged in 1912. The anomaly of minority rights for the English-speaking Protestants within Quebec and the Roman Catholic minority in other provinces was then dealt with by means of entrenched group rights and privileges. This did not disturb the mutually exclusive treatment of education constitutionally - at least where only schooling was concerned, and where certain group religious rights in education were to apply.

From the beginning, however, colleges and universities were another matter - unless, of course, they were to be regarded as strictly provincial institutions in purpose and function. The issue did not arise in Quebec's case until the quiet revolution in education in the 1960's, because at that point all of its universities were still private bodies. The matter wasn't an issue in the rest of Canada because the proportion of Secondary School students attending universities was very low until after World War II. In any case, Canadian universities, including Quebec's, with their universal purposes, work, and reach, had established operational links among themselves, and with the national government. At first this may have been largely because of both federal research spillovers and federal research and its related support in universities. Federal/university efforts to meet national research and human resourcing needs during the two world wars were significant. After World War II, all these ties strengthened greatly as recommendations of the Massey-Levesque Commission were implemented. In short, this made post-secondary education as a matter for mutually exclusive function (and jurisdiction) too complicated to maintain, if indeed, constitutionally, this had ever existed, or was intended to exist.

Does this mean that it is necessary to distinguish between "education" as a provincial schooling function, and "post-secondary education" as something different? If the answer is yes, then post-secondary education would be a matter of concurrent

federal and provincial jurisdiction. Judges might decide this in judicial review. Legislators can do so by constitutional amendment. If neither action occurs, executive federalism can adapt to the situation, by political and executive means. Meanwhile, "education" in and for a modern democratic state, federal or not, does not lend itself to a watertight compartmentalizing as a function - in educational practice, and in constitutional law.

This problem is demonstrated in the reading of the terms of Section 93. Clearly, the terms cover the education function only as it applies "in and for" each province. This in turn poses questions in constitutional law and practice as to where the locus of residual power lies to cover matters of education which are of national concern - when more than one province is involved - and of international relations - where provincial sovereignty is lacking.

To make categorization more difficult, the vague term "education" in Section 93 blurs the dividing line between provincial and federal jurisdiction. This applies in particular in the case of post-secondary education which includes "research" - a matter not yet mentioned in the Constitution - and "culture" - a term added to it in 1982 - as a matter linked to education. Some Section 91 anomalies, which give the federal order of government responsibility for education, apply under certain heads of power, such as defence. Education is also an aspect of virtually all heads of power - federal and provincial - as recognized in practice, and in legal doctrine and rulings. There are also the provisions in Section 93 for federal corrective and supervisory powers, in addition to the federal power of disallowance which still apply. Finally, how could an exhaustive allocation of provincial jurisdiction in education in 1867 have been given, or intended, without matching constitutional resourcing capacities?

These questions, as well as their answers, suggest that from this time there were explicit and implicit expectations of federal participation in the development of Canadian education nationally, including the post-secondary level. Nevertheless, there

has been no common focus or forum for dealing with such matters. From a national point of view, the thirteen education systems are sub-systems. There is not yet a master system for meeting the functional requirements of Canadian education nationally. Thus Wittenberg's idea of "functional integrity of the whole system" is uncertain.¹⁰⁶ There is no clear picture of such a whole system yet, or even of what it should be. The same applies to consideration of how education can be a major reforming institution and function of the Canadian nation. It is also impossible to consider why or how there could be a national approach to education, or a reforming role for education within this context, unless there is provision for the federal government to have the legitimacy necessary to be a participant in the education policy-making and implementation required. Hence the importance of knowing first what federal participation in education has come to involve, and how this applies constitutionally.

In addition to the apparent requirement for federal action to fill gaps or vacuums in constitutional law and practice created by the terms and construction of Section 93, there is scope for identifying and justifying such action by use of the aspect theory which has become part of Canada's jurisprudence. Briefly, the issue of what in Canadian law is termed "double aspect" arises when a given law contains aspects or characteristics which are competent to both the federal and provincial orders of government to legislate on.¹⁰⁷ Thus in the 1883 case, Hodge versus the Queen, when the Judicial Committee of the Privy Council looked at the classes of subject in the Constitution Act, 1867, which the court said had been assigned "exclusively" to the federal order of government in Section 91, and to the provincial government in Section 92, the reasoning in the judgement created a "double aspect doctrine". It was observed that

...subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s. 91.¹⁰⁸

If so, it was held, the laws concerned were competent to both orders of government.

While Section 93 has not yet been put to such a test, the analogous situation applies. Moreover, constitutional lawyers, including F.R. Scott and J.A. Corry among others, have noted that the federal government could act in the field of education constitutionally by virtue of its exclusive Section 91 powers.¹⁰⁹ In some cases, this might involve the aspect (or as it is also described, the double) doctrine.

In the meantime, the courts have not yet explained when and how in education the double aspect doctrine is to apply. The best explanation seems to be one given by W.R. Lederman who suggests that the doctrine be applied when "the contrast between the relative importance of the two features is not so sharp".¹¹⁰ Professor Hogg clarifies the matter further by viewing the doctrine as the course of judicial restraint. As such, he suggests that

When the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that the laws of that kind may be enacted by either the Parliament or a Legislature.¹¹¹

Education is commonly regarded as an "aspect" of virtually every field of legislation. Moreover, in extra-constitutional affairs such theory is translated into actions with results which can include a broad range of *de facto* arrangements that may not be challenged legally. Hence the importance of the continuum for development of constitutional conventions, as non-legal rules and a part of the Constitution.

Such political developments are fostered by elements in the Canadian government and its constitutional history. The democratic values which underlie both phenomena have created, as history shows, the benchmarks and the momentum for development of rights, including those in education. Given the national context within which such rights emerge, it becomes necessary for them to apply nation-wide. This is recognized in the Constitution Act, 1982 Charter of Rights and Freedoms, which

includes new language rights in education throughout Canada and the potential for other such rights.

The development of conventions, or non-legal rules, is another normal part of Canadian constitutional development, as the Preamble to the Constitution Act, 1867 makes clear. It gives rise to exercises of responsible government at both orders of government, where the political process in Cabinet serves as a continuous focus for the integration of matters related to policy-making and policy implementation. The separation of powers is not a part of the British constitutional heritage transplanted and adapted in Canada, and sustained for so many years after Confederation in Imperial judicial review. Thus, via responsible government, there is scope for political, non-legal rule-making in a complex field such as education - federally, provincially, and inter-governmentally. The idea of an education "aspect" of various federal legislative powers encourages the development of conventions which, if challenged in law, might be upheld as legal rules by virtue of the double aspect doctrine.

Apart from the rational or logical basis of an aspect theory applied to education and other functions, the Constitution Act, 1867 did provide for a distribution of legislative powers and responsibilities - primarily in Sections 91, federal, and 92, provincial. The Section 93 compromise was exceptional by virtue of its quasi federal character in the form of particular federal roles and duties of both a supervisory and participatory nature. However, as described more fully in Chapter IV, much federal participation in education is based directly on certain Section 91 powers. This includes certain anomalies of function, and aspects which are more than merely ancillary - i.e., necessary incidentals. Hence there is scope for federal policy and law in relation to education, as a function and as an aspect. There is also need for judicial review to settle disputes when jurisdiction to act in these matters is called into question by one order of government or the other.

The classification of laws becomes a crucial task when a law is challenged. It becomes necessary, as Lederman notes, to make decisions on the relative federal and provincial features respectively, and then to determine exclusivity, or concurrence.¹¹² Much of Canadian constitutional law, he states, is explained by "the idea of mutual exclusion if practical, but concurrency if necessary".¹¹³ However, in the latter case, it is also necessary to look ahead, to consider possible problems of conflict, supplement, or duplication.

Education, it will be shown, has involved various kinds of concurrence between the two orders of government on the plane of extra-constitutional arrangement. As Lederman states

...it should be noted that the existence of a concurrent field means that there is room for political agreement between provincial and federal governments about whether the federal parliament or a provincial legislature undertakes the regulation of this or that phase of a concurrent matter. The precise equilibrium point in practice then would become a matter for political and administrative decision.¹¹⁴

While speaking in reference to the federal spending (and lending) power nearly thirty years ago, J.A. Corry observed that it "supports so much of the established political, social and economic structure that there is genuine reluctance to take steps that might wipe it out."¹¹⁵ Currently, in education for example, there are at the post-secondary level long-standing federal fiscal arrangements, legislation for federal transfers and tax abatements, and the more recent federal National Training Act in support of a wide variety of technical and vocational training programs. Corry concluded that

Perhaps it is not too wide of the mark to say that the adjustment of federal relations is now too delicate, too complex, as well as too serious, a matter to be entrusted in any extensive way to judges, because of the inflexibility of the techniques they apply.¹¹⁶

Such thinking explains the avoidance of judicial review to settle issues in education, especially where funding is involved. Hence the definition of "education",

the crux of the question of jurisdiction, remains within the flexible realm of extra-constitutional arrangements. This approach recognizes the complex nature of education *per se*, no matter how it is defined, the significance of the federal role in education, and, it is thought, an appreciation of the way in which matters of education lend themselves to aspect theory and practice. Nonetheless, the bottom line is the constitutional law which validates what the federal government does, or seeks to do, in education. This basis is identified in Chapter IV, to explain federal participation in education - constitutionally or extra-constitutionally.

END NOTES

1. J.A. Corry, The Power of the Law. Toronto: Hunter Rose Co., 1971, p.3.
2. Ibid.
3. Peter W. Hogg, Constitutional Law of Canada. Toronto: Carswell Co. Ltd., 1977, p.2.
4. K.C. Wheare, Modern Constitutions, 2nd ed., London: Oxford University Press, 1966. See also A.V. Dicey with introduction by E.C.S. Wade, Law of the Constitution, 10th ed. London: Macmillan, 1960. Introduction and Chapter XIV, pp. 417-438.
5. Reference Re Amendment of the Constitution of Canada, (1981) (Nos. 1,2,3), 125 D.L.R. 3d. 1. The main question at issue was whether it was *intra vires* of the Senate and of the House of Commons to cause the amendments proposed to be made by the British Parliament without the prior consent of the provinces. With the exception of Saskatchewan, the other provinces argued that such consent was required both conventionally and legally, since in the 114 years since Confederation Parliament had done this. But the majority of the Court saw "no limit anywhere in law" to the resolution Parliament was seeking. It was observed at page that

Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a Bill or a proposed enactment).

Moreover, the majority did not find that there had been any "crystallization" into law (of the consent process cited above).
6. Ibid., p.107.
7. Ibid., p.87.
8. Ibid., p.86.
9. Ibid., p.113.
10. Ibid., p.113., Laskin C.J.C., Estey and McIntyre J.J.
11. Ibid., p.84.
12. Ibid., p.84.
13. Manitoba Reference Re Amendment of the Constitution of Canada (1981) 11 Man.R. (2d) 1, p.13.
14. Hogg, op.cit., p.7.
15. Reference Re Amendment of the Constitution of Canada, op.cit.
16. F.R. Scott, The Canadian Constitution and Human Rights. Toronto: Hunter Co. Ltd., 1959, pp.16-17.
17. Hogg, op.cit., pp.421-422.
18. W.I. Jennings, The Law and the Constitution, 5th ed. London: University of London Press, 1959, p.136.
19. Constitution Act, 1867, Section 29.

20. F. Henry Johnson, A Brief History of Canadian Education. Toronto: McGraw-Hill Company of Canada, Limited, 1968, p.118.
21. See Mason Wade, The French Canadians 1760-1967, vol. I. Toronto: Macmillan of Canada, 1968.
22. C.E. Phillips, The Development of Education in Canada. Toronto: W.J. Gage and Co. Ltd., 1957, p.316.
23. See Speeches on Canadian Affairs, Robert Herbert, ed. London: 1902, at p.105 for a speech of February 19, 1867, which was given by Henry H. Molyneux, Earl of Carnarvon, to the House of Lords.
24. Constitution Act, 1949, Section 91(1) gave Parliament the power to amend the Constitution subject to such exceptions as regards rights and privileges by this or any other Constitutional Act granted or secured ...to any class of persons with respect to schools or as regards the use of the English or the French language.
25. Peter F. Bergen, The Legal Status of the Canadian Public School Board Pupil Toronto: Macmillan of Canada Ltd., 1961, Chapter 3.
26. This is implicit in the Northwest Territories Act R.S.C. c.48, at page 16 which makes the legislative powers (and executive powers) of the Commissioner in Council subject to federal over-ride.
Interviews: Department of Indian Affairs and Northern Development, Department of Justice, the Yukon Government, the Northwest Territories Government, P.C.O. See also F.R. Scott, Essays on the Constitution, Toronto: University of Toronto Press, 1977, pp.181-182; 234-235.
27. The Term 17 provision is now in the Newfoundland Act, formerly the British North America Act, 1949, 12-13 Geo. VI, c.22 (U.K.).
28. J.A. Corry, The Growth of Government Activities Since Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations. Ottawa, 1939, Introduction pp.1-18. At page 3 it is observed that

Confederation came just when laissez faire was at the peak of its authority. Thereafter, it began rapidly to decline and the pendulum swing again towards more active intervention by the State in economic and social matters.

Further to this setting politically, economically, and legally in respect to the formulation, then elaboration, of the Section 93 compromise, it is noted at page 4 that

Laissez faire philosophy, as interpreted in this country, has never objected to the principle of State promotion of national development, however much opposition might be aroused against particular expedients which were subsumed under it.
29. J.A. Corry, "Jurisdiction Under the Constitution in Education in Canada". The content of the quotation from this essay was discussed with the author in an interview, and re-confirmed with elaboration, at Kingston, July 20th, 1985.
30. Donald V. Smiley, Canada in Question: Federalism in the Seventies. Toronto: McGraw-Hill Ryerson Ltd., 1976. p.30. See also pp.27-32.
31. A.U.C.C. research prepared from the varied available historic sources by Denise Michaud, and given to the author orally.
32. Peter B. Waite, Macdonald: His Life and World. Toronto: McGraw-Hill Ryerson Ltd., 1975, p.42.

33. Marcel Trudel, Introduction to New France, Toronto: Holt, Rinehart and Winston of Canada Ltd., 1968, p.260.
 34. Canadian History in Documents, 1763-1966, J.M. Bliss, editor, Toronto: Ryerson Press, 1966. Quotation from Report of the Royal Commission of Inquiry on Constitutional Problems, Province of Quebec, 1956, Vol. II, pp.277-278.
 35. Encyclopaedia of the Laws of England: with Forms and Precedents, 2nd ed. Vol.5. Toronto: The Canada Law Book Company, 1907, p.59.
- The first grant in aid of education in England was made in 1833. An Education Department was established by Order in Council in 1839, appointing a Privy Council Committee to "superintend the application of any sums voted by Parliament for the purpose of promoting public education. Until the year 1870, ie. three years after the Constitution Act, 1867, and Section 93, the State's part in education was confined to distribution of an annual grant in support of the private efforts of the National (English) Church and other denominations. In England, the first system of public education began with the Elementary Education Act, 1870, 33 and 34 Victoria, c.75.
36. A.U.C.C. historical information and statistics.
 37. Ibid.
 38. Dr. N.A.M. Mackenzie, "Federal Aid to Education with Particular Reference to Higher Education". Mimeographed. A.U.C.C. Library, file 4022, p.7.
 39. J.A. Corry, "Higher Education in Federal-Provincial Relations", University Affairs, Vol.8, No.2. Text discussed in interview, 1985.
 40. J.A. Corry and L-P Bonneau, Quest for the Optimum: Research Policy in the Universities of Canada. The Report of a Commission to Study the Rationalization of University Research, Vol. I. Ottawa: A.U.C.C., 1972, p.186.
 41. Loc.cit.
 42. C.B. Sisson, Church and State in Canadian Education: A Historical Study, Toronto: The Ryerson Press, 1959, p.160.
 43. Great Britain Hansard, p.565. The same explanation was repeated in the debate, ot, p.805.
 44. Denise Michaud, "The Development of the British North America Clause 93: A Documentary History, Ottawa: A.U.C.C., unpublished, 1981. Interview with Ms. Michaud.
 45. P.B. Waite, The Life and Times of Confederation, 1864-1867, Toronto: University of Toronto Press, 1962, p.78.
 46. Loc.cit.
 47. Gordon to Cardwell, confidential dispatch of September 22, 1864. P.A.C., co188/141. Reference RG.76.8B. Vol. 63, pp.11-20. See also New Brunswick, Journal of the House of Assembly, 1865, appendix 10, p.5.
 48. The John A. Macdonald Papers, Vol.46, p.17988, P.A.C., microfilm C-1503.
 49. A.A. Macdonald, "Notes on the Quebec Conference, 1865", Canadian Historical Review, Vol.1, March, 1920, pp.26-47. At page 45, conference delegate Macdonald reports that Mowat's motion for "education" as a local power and D'Arcy McGee's separate school amendment were passed unanimously. University education was not mentioned.

50. See the John A. Macdonald Papers, Vol. 46, P.A.C., Microfilm C-1503 re: the notes taken by Conference Secretary, Major Hewitt Bernard.
51. Canada, Sessional Papers, No. 12, Volume III, Third Session, Eighth Parliament, 28 Victoria 1865), pp.3-4. See also Monck Papers, P.A.C., Confidential Dispatch, Nov. 7, 1864. MG271B1, microfilm A-755. pp.1-22. (The subject of education is not mentioned in either documentation.)
52. See: "A Footnote to Confederation: Why Was University Education Made a Provincial Responsibility?" CAUT Bulletin, Vol.17, No.2, Dec., 1968, p. 54.
53. Sir John A. Macdonald to Dr. Egerton Ryerson, letter of March 25, 1872, P.A.C. MG24K15.
54. Michaud, op.cit, p.6, No documentary evidence to show that universities were given some distinct consideration was found after the initial 1864 discussions.
55. J. Pope, Confederation: Documents Hitherto Unpublished, Toronto: Carswell Co.Ltd., 1895, pp.190-210.
56. Ibid, pp.233-238.
The word "for" each province was added at this point.
57. British Sessional Papers, House of Commons, 1867, Vol. XLVIII, pp.373-377. microfiche, National Library of Canada.

Provincial Terms at Union

58. James Collins Miller, National Government and Education in Federated Democracies: Dominion of Canada, Philadelphia: published by the author, 1940, pp.83-84. See also Revised Statutes of Canada, c.99, 383-4(1906)
59. Robin S. Harris, A History of Higher Education in Canada, 1663-1960, Toronto: University of Toronto Press, 1976, pp.226-227. (Note the establishment in 1906 of the McGill University College of British Columbia and the passing of the McGill University College Act.)
60. Ibid, p.230 re: Dr. H.M. Tory's services as an example.
61. G.W.D. Abrams, Prince Albert: The First Century, 1866-1966, Saskatoon: Modern Press, 1966, p.24.
62. Ibid, p.23. The "Diocese of Saskatchewan" then reached from Lake Winnipeg to the Rockies - covering parts of what are now Manitoba, Saskatchewan, and Alberta.
63. Ibid, p.40. See also Statutes of Canada, 1883, 46 Victoria, c.47, for the terms of incorporating "the University of Saskatchewan" and for empowering it to affiliate any number of colleges and to grant degrees in all faculties established. (At the outset however, the university was limited to tests and diplomas in theology only.)
64. Interview, Hon. Allan Blakeney, Toronto, 1988. See also Statement by the Hon. Allan Blakeney, Premier of Saskatchewan, on Fiscal Arrangements and Shared-cost Programs. Federal-Provincial Conference of First Ministers, Ottawa, June 14-15, 1976.
65. Interview, Hon. Gerald Regan, Ottawa, 1984.
66. Hon. David King, "Politics and Educational Policymaking", in Federal-Provincial Relations: Education Canada, edited by J.W. George Ivany and Michael E. Manley-Casimir. Toronto: OISE, 1981, p.109.

67. J.A. Corry, quoted by Hon. Norman MacKenzie in "Federal Involvement in Education", an address to the Invitational Conference on Emerging Trends in Canadian Education", 2 March, 1978, Regina, Saskatchewan School Trustees Association. Reconfirmed in interview with Dr. Corry.
68. Interview, Dr. Davidson Dunton, Ottawa, May, 1985. Dr. Dunton noted that the B and B Commission did not start out with terms of reference which related to "education" - a provincial matter he stated - but public interest on educational issues in language and culture made such consideration unavoidable, and on a broad basis. Previously, Dr. Corry noted (in an interview for this study) that while to the best of his knowledge, the Rowell-Sirois Commission had begun its work without any reference to education in its terms of reference, the public interest and research which followed made the consideration necessary. Researchers for the recent Macdonald Royal Commission made similar observations.
69. Commons Debates, April 10, 1984, p.2917.
70. Ibid.
71. Ibid.
72. Quoted by Norman Goble in Federal-Provincial Relations: Education Canada, Toronto: OISE Press, 1981, p.66.
73. Southam Literacy Report: Broken Words: Why Five Million Canadians are Illiterate, Toronto: McLaren, Morris and Todd, Ltd., 1988. See also UNESCO, Adult Illiteracy in Canada a Challenge, Occasional Paper No.42. Ottawa: 1983. See also J.C. Cairns, Adult Literacy in Canada, Toronto, C.M.E.C., 1988, pp.6-9.
74. Interviews and statistics, Canadian Penitentiary Services.
75. Reports, Canadian Child Welfare Association.
76. Department of Indian Affairs and Northern Development data. Study of provincial course guides.
77. A.B. Hodgetts, What Culture? What Heritage? A Study of Civic Education in Canada. Toronto: Ontario Institute for Studies in Education, 1968, p. 75.
78. John C. Johnstone, Young People's Images of Canadian Society. Studies of the Royal commission on Bilingualism and Biculturalism No.2. Ottawa: Information Canada, 1969.
79. Peter Regenstreif, "Some Social and Political Obstacles to Canadian National Consciousness", in National Consciousness and the Curriculum: The Canadian Case, Geoffrey Milburn and John Herbert, ed. Toronto: Ontario Institute for Studies in Education, 1974, p.62.
80. David Easton, A Systems Analysis of Political Life. New York: John Wiley, 1965, p.125.
81. To Know Ourselves: The Report of the Commission on Canadian Studies, T.H.B.Symons, Chairman. A.U.C.C., Ottawa, p.132.
82. Ibid.
83. Quebec. Report of the Royal Commission of Inquiry on Education in the Province of Quebec. Vol. I, p.78.

Judicial Review

84. Smiley, op.cit., p.23.
85. See Hodgetts, op.cit. and Regenstreif, op.cit. Review of regular prescribed provincial courses.
86. Brian Dickson, C.J., Supreme Court of Canada. Address, Osgoode Hall,
87. Hirsch et. al. v. Protestant Board School Commissioners of Montreal et. al. (1928) A.C. 200.
88. W.R. Lederman, "Thoughts on Reform of the Supreme Court of Canada," in Confederation Challenge, Ontario Advisory Committee on Confederation, Background Papers and Reports, Vol. II. Toronto: Queen's Printer, 1970, p.295.
89. A.G. Quebec and Greater Hull School Board, et. al (1984).
90. Tiny Separate School Trustees v. the King (1928) A.C.363.
91. Reference Re an Act to Amend the Education Act (1987) S.C.R., p.1148.
92. Miller, op.cit., p.121.
93. Dr. J.K. Barrett, a Roman Catholic, and A.Logan, an Anglican, initiated a case which was intended to quash a Winnipeg by-law that imposed taxes to support new public schools. They held the law to be *ultra vires* the Act of 1867 and the Manitoba Act in respect to separate public school rights. The Supreme Court of Canada agreed.
94. City of Winnipeg v.Barrett and Logan (1892) A.C.445.
95. Brophy v. A.G. Manitoba (1895) A.C. 202.
96. Miller, op.cit.,pp.139-140.
97. R. v. Hildebrand (1919) 3 W.W.R., p.286 (Man. C.A.).
98. Op. cit.
99. Angers v. Minister of National Revenue (1957) Ex.C.R. 83.
100. Johnson, op.cit., p.18.
101. Bernard Shapiro, "Education Canada: A Summing Up", in Federal Provincial Relations in Education, edited by J.W. Imray and Michael E. Manley-Casimir. Toronto: OISE Press, 1981, p.138.
102. Patrick Monahan, Politics and the Constitution: the Charter, Federalism and the Supreme Court of Canada. Toronto: Carswell, 1987.
103. Robert L. Borden, Canadian Constitutional Studies. Toronto: University of Toronto Press, 1922, p.55.
104. See Hogg, op.cit., pp.77-100.
105. Interview, Hon. Allan Blakeney, Toronto, 1989.
106. Alexander I. Wittenberg, The Prime Imperative. Toronto: Clark, Irwin and Co. Ltd., 1968, p.28.

107. The conflicts which arise may be remedied by application of the doctrine of paramountcy, unless there is express contradiction.
108. *Hodge v. the Queen* (1883) A.C. 117, 130.
109. W.R. Lederman, "Classification of Laws and the British North America Act", The Courts and the Canadian Constitution, W.R. Lederman, ed., Toronto: McClelland and Stewart, 1964, p.193.
110. Hogg, op.cit. p.84.
111. Lederman, op.cit. "The Concurrent Operation of Federal and Provincial Laws in Canada", pp.204-205.
112. Ibid. p.218.
113. J.A. Corry, Law and Policy, Toronto: Clark, Irwin and Co. Ltd., 1959, p.62.
114. Ibid.

CHAPTER IV

CONSTITUTIONAL POWERS RELATED TO FEDERAL PARTICIPATION IN EDUCATION

This Chapter identifies and describes powers in relation to education other than in that part of Section 93 which applies to provincial jurisdiction "in and for" each province. These powers are categorized eight ways to make them more understandable and to characterize their orientation to education or to aspects thereof. The categories are as follows:

- A. Basic Constitutional Powers
- B. General Powers
- C. Inferred Spending Power
- D. Specific Section 91 Powers
- E. Judicially Determined Powers
- F. Concurrent Powers
- G. Delegation and Inter-delegation
- H. Executive Powers

In total, thirty-two powers are identified - involving 29 different heads of power in constitutional law. In addition to the legal rules, reference is made to non-legal rules, or conventions, of the Constitution in A and H. These findings are the result of research to determine whether, as Hypothesis No. 1 states

Despite provincial jurisdiction for education in Section 93 of the Constitution Act, 1867, and its subsequent variants, there are also constitutional bases for federal participation in education.

The information and opinions gathered are used to draw conclusions on the constitutional nature and extent of this federal participation.

A. Basic Constitutional Powers

Provincial Constitutions

Each province uses its powers in Section 92 and 93 to make its own constitutional law. The federal government had, and has, constitutional power to influence provincial constitutions in their beginnings. In a 1927 reference, Re:Section 17 of the Alberta Act, concerning the variance of its education provisions and those of Section 93, the Judicial Committee of the Privy Council ruled that Parliament's constitutional legislation was *intra vires*.¹ Sections 2 of the Constitution Acts of 1871 and 1886 respectively - which relate to Section 146 of the 1867 Act - were held to support Parliament's power to make provisions for the constitution and administration of new provinces and for passing laws for peace, order, and good government for them, and for their representation in Parliament.²

The federal power in such matters begins with Section 146 which provided for the admission of other colonies.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed, and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.³

Of particular weight is the second section of the 1886 Act which states that

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment make provision for the consti-

tution and administration of any such Province, and for the peace, order, and good government of such Province, and for its representation in the said Parliament.⁴

In the Constitution Act, 1982, new provinces are to be admitted to the union in accordance with the terms of subsection 38(1) - ie., by consent of Parliament and at least seven provinces, with a total of more than 50 per cent of Canada's population. However, it is noted that the Act does not seem to directly repeal Section 2 of the antecedent Acts which empower Parliament to create new provinces. Such provision is not made explicitly in Section 53(1) concerning repeals and new names of constitutional acts. Yet repeal is implied in Section 42(1)(f). Thus, subject to the five limitations in Section 41 which require unanimity for amendment of the Constitution, the Court will have to decide when necessary, unless there is some superseding constitutional amendment. (The Meech Lake Accord proposed repeal of Sections 40 to 42 of the Act of 1982, and to require a provision for unanimity when new provinces are created.)

Notwithstanding the national government's influence on the constitutional beginnings of Canada's provinces, Parliament has created a post-Confederation power whereby it may suspend the Constitution - including the provincial constitutions. This power has existed since the enactment by Parliament of the War Measures Act during World War I. As described later, the power is based on national emergency, as defined in the Act, and as subsequently interpreted by the Courts.

Section 93

Section 93 is the principal and express legislative allocation of power in matters of education. It grants each provincial legislature the power to make laws in relation to education, but only "in and for" that province. This power is not extra-territorial. Thus it creates a national residual power which the provinces cannot assume, individually or collectively.

Section 93 is not in fact an exhaustive grant of power to make laws in relation to education, even when this residual is taken into account. It does not itself exclude some federal jurisdiction. As described in this chapter, it does not preclude considerable related federal jurisdiction. Effectively, it applies only to those education matters for which provincial statutory assertion is made under Section 93, in and for that province. As its history shows, this permits jurisdictional dormancy which, in turn, may invite federal interventions, or require them. Thus a matter like pre-school day care is categorized and regulated under Quebec's Education Act, but in the other provinces different, non-education treatment is applied in law. In the meantime, the federal government has entered the field, justifying its conditional shared-cost funding of day care for the poor as an exercise of its spending power. Should any of these matters result in judicial review, the Court will make the final ruling on the head of power and jurisdiction to which a matter in relation to education applies.

Since Confederation, most provinces have tended to be conservative in their approach to bringing Section 93 into effect. (The governments of Quebec almost retired from their responsibility in the century prior to the quiet revolution in the 1960's.) For most provinces, funding to afford change has been an obstacle. However, this situation changed greatly after World War II, when federal leadership and funding began to come into play substantially, in support of virtually all aspects of education and culture. The federal spending power was used in shared-cost programs in particular, to revitalize Canadian public education at all levels and to create a one-Canada approach to education. This also helped provinces to initiate new Section 93 responsibilities and to sustain old ones. In the 1960's, one Nova Scotia Premier even credited federal post-secondary grants as being an indirect benefit to financing elementary education, because of the education budget relief provided. (One western provincial official who was interviewed for this study in 1988 made a similar comment.)

Quebec's quiet revolution in public education was aided substantially by federal funding. This did not, however, lessen its governments' continued use of the "principle" of opting out of federal programs - a precedent which had been set on an issue of post-secondary funding by the previous Duplessis regime. This was done to lay claim to Section 93 jurisdiction totally - as if federal national powers in relation to education could not apply in a province. A province may lay claim to Section 93's residual this way in politics, but it cannot do so in law.

Such politics ignores the fact that the federal government has various direct and indirect powers in and for education - including, first of all, Section 93 itself. Federal governments have had full Section 93 responsibility for education in the territories since they were added to Canada in 1870. This federal responsibility applied in the massive areas transferred to Ontario and Quebec in 1912; it applies still in the Yukon and the Northwest Territories. Federal jurisdiction applies solely in all international affairs including education, because only Canada is sovereign internationally. There is, clearly, a federal residual power implied in Section 93 - that is, "in and for" education which is not provincial in the singular. The Fathers of Confederation and the Imperial Parliament drafted and enacted Section 93 to allow for this. As J.A. Corry has said and written

If there are national needs and objectives that require concerted educational policy in two, several, or all provinces, no provincial legislature is by itself competent in the matter, and judicial interpretation on comparable aspects of the distribution of powers under the British North America Act makes it clear that Parliament is competent, under "The peace, order, and good government" clause.⁵

This national dimension in education, which Section 93 in and for each province cannot reach, constitutes a substantial basis in law for use of federal legislative and executive power.

Federal power over education applies temporarily and nationally when the emergency power is in effect - that is, when Parliament suspends the Constitution. Education can be an aspect of both Section 91 and Section 92 powers - outside Section 93. As described in this chapter, there are Section 91 anomalies in relation to education which obviate application of Section 93. Federal and provincial concurrence applies in some matters relating to education, such as extension programs in agriculture. Moreover, concurrence can also apply by virtue of silence in the Constitution Act, as in the cases of research and culture. Federal jurisdiction related to education can also be derived from judicial review, a source of growth in constitutional law. In short, Section 93 power is not plenary for education, or for provincial jurisdiction over it.

In Section 93 (3) and (4), the federal Cabinet has quasi-judicial and discretionary powers. These apply when appeals are received, from any provincial jurisdiction where there are dissenting schools, concerning any act or decision of the given provincial authority. In addition, under Section 93(4),

the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and any Decision of the Governor General in Council under this section.⁶

Are there federal executive and legislative powers of supervision and remedy in addition to federal remedial powers for minority rights in education? Legally, what is the scope or reach of "any decision of the Governor General in Council" under this Section? Could this include power to act in matters of national concern in relation to education - such as to correct deficiencies in Canadian studies; or to assure national standards in post-secondary education; or to protect official language minority rights in education? In the latter case, if national provisions for official language minority rights in education in Section 23 of the Constitution Act, 1982 are not observed, could an appeal lie via Section 93(4)? It would take judicial review to answer these questions definitively, but

there seems to be reasonable grounds for presuming federal power in each of these cases.

In the meantime, how have the provinces and the federal government defined the Section 93 term "education" and its reach? As noted in Chapter III, this researcher's referral, in senior level interviews, to eight provinces (Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, New Brunswick, and Prince Edward Island) the federal government, and the Canadian Council of Ministers of Education, revealed no known formal legal study on these matters (as of August, 1989). There was no known published source of such study for the other provinces. Moreover, no full academic study could be found. In addition, in the federal Constitutional Amendment Bill, Part II, of June, 1978 a proposed revision consolidated Section 93 and its variants, and continued the provincial jurisdiction which the Act of 1867 had created. However, this revision proposal did not include the federal Section 93 (3) and (4) powers for recourse, redress and supervision. Nonetheless, in the 1982 Act, these federal powers were not dropped. No information could be found on the thinking involved, or its authors. No federal officials or legal officers commented. Nor did any of the provincial interviewees, even though the Bill's text was public.⁷

Section 93 continues to be something of a blank cheque to which, constitutionally, each province may commit its jurisdiction "in and for" education - subject first to the limits of its available financial resources, and later, to those of the central government as well. The provinces may treat such financial support as all there is to the federal residual in Section 93, but, legally, the issue is one of responsibility, not merely generosity. For without federal jurisdiction in a matter, there is no obligation for federal funding, only a policy discretion which can be turned on and off. (There is no record of any claim that use of the federal spending power in education might be justified on grounds of the national residual which is implicit in Section 93.)

Apart from a responsibility for funding education, the provinces have discretionary power in Section 93 to act or not, except to abolish an entrenched matter. This has resulted in discretionary exercises of Section 93 based, first, on age limits of entitlement and, later, obligatory attendance; on belated provision for the handicapped; and, at various later times in the various provinces, for public secondary education; and subsequent matters declared to be educational in and for a province. In 1966, future Prime Minister Turner expressed his constitutional opinion that

In the federal view, education means the imparting of knowledge through a standard curriculum during the period of childhood, adolescence and youth.⁸

Of course, this view did not preclude federal participation in such matters as research, language, and culture; in adult training and retraining for employment; in aid to individuals, institutions, and provinces for post-secondary education and related purposes. In 1978, Secretary of State John Roberts elaborated further, stating that

Section 93 of the B.N.A. Act does not say, as is often supposed, that all education is the responsibility of the provinces....of course each province and territory has the responsibility for running an educational system within its area of jurisdiction....The constitution does not exclude the setting of national goals in education. It does not absolve the federal government of responsibility for educational processes inevitably carried out by instruments within federal jurisdiction....Above all, the constitution does not rule out federal-provincial co-operation in the evolution of educational policy for Canada.⁹

Later, the Council of Ministers of Education of Canada declined such co-operation on grounds that Section 93 gives the provinces exclusive jurisdiction over education. Yet, Section 93 jurisdiction is allocated "in and for" each province minus extra-territorial jurisdiction in the singular, and in the plural - as in the case of the provinces, or via their association, the CMEC. This leaves a national residual which has to be federal, if not in Section 93, then in Section 91, or both. Moreover, because the term "education"

in Section 93 is not defined in meaning or reach, flexibility in its operational definition and use is encouraged.

All provinces have accepted federal funding support in Section 93 matters, even though most of them have expressed reservations about federal conditions. None has been more opposed to federal participation in education than Quebec, regardless of federal jurisdiction and spending. The resulting politics of education and culture has given Section 93, in and for Quebec, the status of a sacred cow, inhibiting scrutiny of constitutional issues, current and retrospective - including recognition of the extraordinary funding aid the Province receives from the federal government for its elementary, secondary, and post-secondary education.

Until Quebec's quiet revolution, notwithstanding the expectation of governmental action under Section 93, education was widely regarded as a department of religion, not to be contaminated by temporal politics. This reduced provincial responsibility in the public sector of Quebec's dual system to a discretionary minimum at all levels. (As the Hepburn report on Protestant education in Quebec noted in 1938, the idea of a severance of the state and education was mooted, although not by the Government of Quebec, or his Commission.) Since the Province's private secondary schools and universities were largely dependent on fees and charity, the rural and urban poor were virtually abandoned to basic level education where available. There were no universal tax-supported public secondary schools until the 1950's. Earlier, the exodus of 800,000 Quebecers to the United States in the late 19th century and another 300,000 during the Great Depression, did not evoke appropriate remedies via common tax-supported public education under Section 93.¹⁰ Necessary francophone elite support was lacking.

Nevertheless, Section 93 seems to have been a continuing concern in Quebec nationalism so that when, with broad support, the quiet revolution produced a major democratization of the goals, programs and administration of Quebec public education, Section 93 was made a focal point for the rescue and protection of Quebecois language

and culture. The role of the church's hierarchy to keep the faith in education was replaced by the mission of Quebec's new nationalist elite to keep "the" language, and "the" culture through education. To them Section 93 is a Quebec-only power which calls for exclusion of any federal residual for education which applies to Quebec - as if it was in the civil code of the province, which it is not.

Such a goal might have been achieved via proposed Sections (1)(b) and (3) of the Meech Lake Accord which stated that

- 1) The Constitution of Canada shall be interpreted in a manner consistent with
 - b) the recognition that Quebec constitutes within Canada a distinct society;
- 3) The role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec referred to in paragraphs (1)(b) is affirmed.

If this amendment had been made, the courts would have had to rule as directed. The Legislature of Quebec would have been given extraordinary (and uncertain) power compared to the other provinces in the matters concerned. An issue would have been whether Section (3) should be interpreted to give an override on federal jurisdiction in relation to education in Section 93. If yes, Quebec would have gained plenary jurisdiction. Whether this might have reached to federal powers in relation to education which are apart from Section 93 is another matter. (No reference case was initiated to clarify such matters.)

Meanwhile, Section 93 is entrenched in the Constitution of Canada, and no province has the power to change this unilaterally. Section 29 of the Constitution Act, 1982 reaffirms Section 93's protection of group minority religious rights in education. These two sections afford a double protection to religious minorities in Quebec, where legislative steps have been taken to create a new school system divided on language (French/English), not religion. Neither of these sections mentions language or culture in

education, even though, for the Quebecois majority in particular, these matters are closely linked in practice.

In comparison, the anglophone sector of Quebec's (former) dual education system had built and financed its early "separate" public elementary and secondary schools, and its private universities. This was achieved with leadership from the Province's anglophone elite who, in Montreal especially, were willing to make locally tax-supported public education a means of upward social and economic mobility.¹¹ Established early in the century, such schooling gave Quebec's Protestant and Jewish poor a chance to rise, and immigrants to join in - all via the English language education. This might be described as Quebec's first democratic revolution in public education.

Such long-term investment in Quebec, and their place in it, explains the deeply felt claims of this anglophone minority to full Quebec citizenship, especially for equal treatment in education. Nonetheless, Section 93 has given the Quebecois majority in the National Assembly the power to unify the organization and control of the province's school system - as the other provinces had done long before; to set common education objectives; to prescribe common courses of study (even if references to Canadian history and institutions are minimized)¹²; to end the convention of equal status of French and English as languages of instruction. This has demonstrated clearly, in Quebec as in the other provinces, that Section 93 is first of all, a tool of, and for, the provincial majority's interests. Such majority control can even be manifest in ethnocentrism, as native peoples have experienced in both provincial and federal schools. Hence there is need for constitutional protection of minority rights in education, and outside provincial jurisdiction in Section 93.

Treatment of minority rights in education is a basic test of education in and for a democracy - and in democratic federalism in particular. When the Constitution Act, 1867 was drafted, Section 93 was drafted to give the central government and Parliament

responsibilities for protecting minority group religious rights in education. Subsequent common, national "rights", as they are regarded politically, evolved from later uses of federal residual, spending, and other powers. These benefits were based only on policies, agreements, and statute law. They were not described or extended as constitutional rights, or tested as such in the Courts. Thus, whether such matters applied to all or to minorities, they could be altered or removed with recourse or redress.

Language is a crucial case in point and an omission in Section 93 terms. The assumption that Section 93 includes each legislature's power to determine its provincial language(s) of instruction has been affirmed in case law. However, this provincial power does not include any constitutional obligation to provide for minority languages - not even when an official language of Canada is involved. In Ottawa Separate School Trustees v. Mackell, a 1912 regulation, made under Ontario's School Act to prohibit the use of French as a language of instruction in its public and separate schools, was challenged. It was argued that minority French language rights were subsumed under religious rights in education in Section 93. The Privy Council ruled that this connection did not apply. Consequently, for French-Canadians, this meant that in Canada there was no constitutional guarantee of French as a language of instruction outside Quebec. For all French-Canadians, this created an issue of cultural and linguistic survival nationally. Quebecois nationalists have narrowed this issue to Quebec itself.

In successive language laws - Bill 63 (1969), Bill 22 (1974) which made French the official language of Quebec, and Bill 101 (1977)¹³ - English has ceased to have dual status in education in Quebec, and French has been made the language of instruction for everyone except those expressly exempted. These laws took increasing advantage of Section 93's gap in minority language rights in education as this applied to English. The Charter of the French Language (Bill 101) reaffirmed the collective cultural interests of the province's five million francophones, as a group, above the

convention of equal anglophone rights, and previously established law in Quebec which gave individual parents a right of choice in their children's education. This accommodated the nationalist goal of a distinct, or separate, Quebecois homeland. This also meant that minority English-language status in the Province's public education could be reduced to that allowed the francophone minorities - over one million persons - in the rest of Canada for so many years. Bill 101 and its parallels for francophone minorities elsewhere in Canada supported the proposition that the more autonomous the province - something which is implicit in Section 93 - the less it protects its minority.

Section 93's lack of minority language rights protection in education was corrected by Section 23 of the Constitution Act, 1982, which was framed to apply to all Canadian citizens. However, Section 23(1)(a), which gives new minority anglophone and francophone citizens a choice of official languages for their children's education, was made exempt from application in Quebec by terms of Section 59 of the Constitution Act, 1982. (This is one of the reasons why Quebec did not sign the 1982 Act amendment and why, erroneously, it is sometimes said to have been "left out" of the amendment to the Constitution in 1982.) In Quebec Section 23(1)(a) represents a protection of Section 93's majority accommodation in the Constitution until

...only where authorized by the legislative assembly or government of Quebec.¹⁴

Whether or not Section 23's full protection of minority language rights in French or English survives future constitutional amendments, there are other federal constitutional powers which complement and supplement Section 93 as a main source of jurisdiction in Canadian education. These powers are identified in the remainder of this chapter, and in Chapter V, in respect to the constitutional amendments of 1982 and education jurisprudence in Canada.

Preamble to the Constitution Act 1867

That non-legal rules are a part of the Constitution of Canada is made evident in the Preamble to the Act of 1867, in which fundamental elements in the structure and process of democratic governments were taken as given - before the specific allocations of power were made in the form of legally binding rules. Consequently, when referring in any way to jurisdiction in Canadian education, and to federal participation in it, it is necessary to start with this dimension of the Constitution in mind. For it, together with Section 93 and other specific parts of the Act of 1867, create the constitutional matrix within which Canadian education functions constitutionally. Moreover, this dimension also serves as the umbrella for the various political means by which extra-constitutional measures - as reflected in non-legal rules - are developed or applied to facilitate federal participation in education. The preamble to the Constitution Act, 1867 tells why the Act was passed and what it sought to achieve. It begins

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom...¹⁵

The model taken at the time was a constitutional government, with a constitutional monarch, and a parliamentary democracy. Included were political parties, the office of the Prime Minister, a public service to serve responsible government, freedom of speech, freedom of the press, freedom of person, a heritage of equality before the law. These are all non-legal rules for practice in Canadian politics and public administration, and for application in teaching and learning about government in Canadian schools.

The preamble was not a bill of rights. It was the embodiment of a set of ideals. It was a focus for non-legal rules of the Constitution which had been put into institutional practice in Great Britain and the British North American colonies to that time.

The Preamble's conventions are vital non-legal rules of the Constitution. They are institutional rules for politics, governance, and content for citizenship.

Royal Assent

When legal rules are made under the Constitution, they do not become law until they have received royal assent. Section 55 of the Constitution Act, 1867, gives the Governor General and the Lieutenant Governors authority to withhold assent to bills passed by their respective legislatures.¹⁶ This is, of course, an exceptional power and one to be used with careful justification in institutional, not personal, terms.

Royal assent is a discretionary power. Thus, while the government heads concerned may advise, in the final analysis, it is the Crown's representative who must decide. Even so, when a Lieutenant Governor - appointed in fact by the Governor General-in-Council - withholds royal assent to a provincial bill and refers it to the Governor General for decision on its fate, it is, in fact, the federal Cabinet that will determine that fate. To date, there is no record of an education bill being refused assent, although it could happen.

B. GENERAL POWERS

Residual Powers

Of three main general powers which the Constitution Act, 1867 allocated to the federal Parliament, the first and foremost is the residual power contained in the introduction to Section 91. Like the other two main general powers - declaratory and disallowance - it applies to any legislative subject matter, including education.

For clarity, the Section 91 residual power is described as follows:

Introductory Clause

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for Peace,

Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;

Declaratory Clause

..and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...(enumerations 1 to 29).

Deeming Clause

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.¹⁷

The introductory clause is the power-conferring part of Section 91 for enactments. It gives Parliament authority to enact laws "for", not "in relation to", peace, order, and good government. The words "in relation to" serve to confer powers in Section 91 to 95, albeit only "in and for each Province" in the case of education. The terminology as thus written indicates that Parliament can legislate only on that part of the totality "not coming within" the classes of subjects assigned to the provinces in 1867. However, apart from this express function of the general power in Section 91, a second function - which Professor Lysysk describes as wholly distinct - must be considered. It is the Section 91 emergency power created by judge-made constitutional law concerning p.o.g.g.

As the history of cases and references on the peace, order, and good government shows, it has been subject to wide review. Moreover, in the process, the Supreme Court of Canada has given it a broad construction. This is evident in cases ranging from 19th century disputes about the sale of alcohol to the 1975 Reference Re Anti-Inflation Act. In the latter reference, the Court approved what was deemed to be emergency action by the federal parliament, notwithstanding provision in Section 92(13) for provincial power over "property and civil rights".¹⁸

As the result of so many judicial reviews, it has become possible to verify the residuary nature of the federal p.o.g.g. power. To begin with, it seems clear that the mention of "matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces" indicates that any other matters fall within the jurisdiction of the federal parliament.¹⁹ This assures that the allocation of legislative powers in the 1867 Act was meant to be exhaustive. However, in an earlier review which was prepared in 1939 for the Senate by O'Connor, the p.o.g.g. power was held to represent the full federal power.²⁰ That is, the enumerated heads of federal power cited were regarded to be examples only and not separate from the introductory statement in Section 91.

Lederman, Hogg, and other contemporary legal scholars in Canada do not agree.²¹ They do not accept the idea, or theory, that the list of federal powers was, in fact, redundant. For one thing, such a list prevented broad provincial claims of jurisdiction under its potentially-residual Section 92(13). For another, the first consideration in judicial review is to look for a head of power which will sustain the statute at issue. The focus on the remainder follows after the federal Section 91 and provincial 92 heads of power are subtracted. Under certain circumstances the p.o.g.g. power may override these powers. This could also apply to Section 93.

Four tests have emerged from judicial review over the years to facilitate application of the p.o.g.g. power under Section 91. Each of these tests could have some application to jurisdiction over education, as they may have to the other heads of power in Canada's federal distribution of legislative and executive powers.

The first of these tests is the "gap test" which looks for openings in the distribution of powers to legislate. Of the few and significant gaps in which the p.o.g.g. power has been ruled to apply so far, are those, referred to in the definition of federal powers, of incorporation, and over communications. How p.o.g.g. applies to gaps in Section 93 remains for the Court to clarify and confirm. The same applies to the reach

of Section 93 as a primary provincial responsibility, in particular at the post-secondary level. In the meantime, however, obvious jurisdictional gaps apply in education and in related matters. For example, in a 1974 p.o.g.g. case, Jones vs A-G New Brunswick, the validity of the federal Official Languages Act was upheld in respect to its national application. In giving the Supreme Court's unanimous decision, Chief Justice Laskin declared that "on the basis of the purely residuary character of the legislative power thereby conferred" the Act was *intra vires* federal power.²² That is, the federal institutions and agencies to which it applied were within reach of p.o.g.g. in Section 91. (As described later, this Act had formed the basis for substantial official language grants in education to the provinces and territories from 1970 on - four years before the Supreme Court's decision on its *vires*.)

The second test, the "national dimensions test" (with its antecedent in the 1882 case, Russell versus the Queen)²³ was articulated by Lord Watson in the Judicial Committee of the Privy Council's ruling on the leading 1896 Local Prohibition case. In it he stated that

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to effect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.²⁴

Obviously Watson's test was broad. But, as subsequent Privy Council decisions stated by Viscount Haldane show, a different and more narrow point of view was to hold sway in the two decades to follow.

This involved the third "emergency test" which greatly limited the federal use of the p.o.g.g. power. For example, in the notable 1925 case, Toronto Electric Commissioners versus Snider, it was held that the p.o.g.g. power could be used only in

"cases arising out of some extraordinary peril to the national life of Canada, such as the cases arising out of war".²⁵ This interpretation meant that the Industrial Disputes Act, which had applied since 1907, was *ultra vires*. The p.o.g.g. argument was also weakened in respect to the claims of national interest as a justification - even in a time of bad economic depression - to provide for national human resource planning and employment arrangements under the aegis of federal authority. Instead, Canada was to have thirteen labour jurisdictions. This meant that a national system was possible only in time of emergency.²⁸ The application of this test to education seems unlikely, because of federal remedial and residual power in Section 93.

A fourth test emerged when the Canada Temperance Act, which had been the focus in the Russell case of 1882, was again challenged in 1946.²⁶ Arguing that emergency had been a decisive factor in all the p.o.g.g. cases since 1896, this factor was expected to be upheld once again. But Viscount Simon disagreed. Instead, their lordships held that the Russell case hadn't been decided on the factor of emergency; that the federal p.o.g.g. power was not limited to emergencies. Simon stated that, in the Judicial Committees's opinion,

...the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests, and must, from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order, and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so too, may be the drink and drug traffic, or the carrying of arms. In Russell versus the Queen, Sir Montague Smith gave us an instance of valid Dominion legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.²⁷

Significantly, the Supreme Court of Canada has decided all subsequent cases concerning the p.o.g.g. power according to this new Canada Temperance test, with the exception of the Anti Inflation reference.²⁸

The question of when and how legislative subject matter has a national dimension and, more importantly, a national concern, is yet to be clarified fully in law. However, in Munro v. National Capital Commission (1966), the Supreme Court ruling to permit zoning of a national capital region may have application here. The ruling took into account the refusal of Ontario and Quebec to co-operate in a matter of national concern which, then, required one national law to deal with a national concern. In analagous matters of education at the post-secondary levels of age and programs, there has been a longstanding federal interest. One example is the needs of youth - a focus for federal study and proposals in the late thirties, just prior to World War II, and, more recently, during a period of high and continuing unemployment. Another example is the federal claim to responsibility in matters of human resource planning and development through adult training programs for employment purposes, which has been claimed since the mid 1960's under the rubric of federal economic responsibility. Other examples include federal references in the 1980's to federal "national concern" in matters of post-secondary education goals and policies, which are described subsequently in this chapter.

Disallowance and Reservation

A second type of general power in the Constitution Act, 1867, which requires federal Executive action, embraces the federal power of disallowance of provincial acts, in Sections 56 and 90, and the Lieutenant Governor's discretionary power to reserve bills for federal referral, in Sections 57 and 90.

In what amounts to a federal quasi judicial power in Section 56, the federal cabinet may disallow a provincial law. Moreover, this may be done within a year's

delay of the Lieutenant Governor's assent. As LaForest's account of the pre-Confederation negotiations indicate, there was support from a number of the Fathers of Confederation, including Macdonald, Brown, Cartier, Tache and Langevin, for a central government annulling power over provincial legislation.²⁹ Later practice has been less enthusiastic for, as statistics show, the last time the power was exercised was in 1943 in respect to an Alberta law. Up to that point there had been 112 disallowances.³⁰

This has prompted some legal scholars to refer to the power as having become more hypothetical than real.^{31,32} In support of this view, the failure of its use in the Manitoba school crisis is cited. While there was no hesitation in using the power of disallowance against some of Alberta's Social Credit statutes, it was not used in 1937 against Quebec's infamous "padlock law", or in 1977 against some features of its Bill 101. However, in more recent years, disallowance was threatened as a deterrent to possible anti-labour enactments in Prince Edward Island and Newfoundland. In its 1981 Report on Fiscal Federalism, the House of Commons Committee referred to the federal power of disallowance as being "in abeyance".³³ This is further affirmed by the fact that the federal Justice Department routinely monitored all provincial legislation in relation to jurisdiction until 1982. There was no secret about this. The powers concerned, which were not amended or deleted by the Constitution Act, 1982, still apply.³⁴ The monitoring function can be resumed. Meanwhile, the powers concerned may still be used, although this is unlikely, given other ways of dealing with provincial legislation such as federally funded court challenges.

Since Confederation, education has been a subject for federal prudence where disallowance was a possibility. This was the case when in 1871 New Brunswick passed its Common Schools Act which compelled Roman Catholics to contribute tax support for public schools they did not want to use. The Governor General received petitions requesting disallowance action. Prime Minister Macdonald decided not to support such a measure on the grounds that the provinces had been given exclusive power to deal

with the matter in Section 93. He held that, although the Act in question was unfavourable to the religious denomination concerned, it was for those affected to appeal to their provincial legislature for redress. It was also held that the particular legislation was in respect of the general educational system as a whole and was not, therefore, specifically applicable to denominational schools. In any case, the motion for disallowance was eventually moved and defeated. This was followed by another resolution, which did pass, expressing regret at the passage of the law, and suggested that it be modified - all over the objections of Sir John. No action was ever taken on it.³⁵ Similar pressures for disallowance were evoked by an 1877 school act in Prince Edward Island. Again the federal government did not act.³⁶ Clearly, as F.R. Scott indicated later, the federal power of disallowance is not a power which can create new freedoms. It is a power which could, and can still if used, stop existing freedoms from being weakened or destroyed by provincial legislatures.³⁷

The federal power of disallowance of provincial laws and the Lieutenant Governor's power to reserve bills were upheld in Re the Power of Disallowance by the Supreme Court of Canada in 1938.³⁸ In this regard, when considering whether to disallow a provincial act, the federal government is expected to consider such criteria as constitutional validity, the national interest, and overlapping on Parliament's legislation.³⁹ In disallowance, it should be noted, there is scope for correction where a part, or parts, of the provincial act in question is found to be objectionable.

Before this happens, however, it is possible that the Lieutenant Governor may withhold royal assent. If this happens, the bill in question is referred to the Governor General for the federal Cabinet's decision on its final fate. The Lieutenant Governor is not expected to reserve a bill on his or her own authority, although this isn't expressly forbidden. In any case, reservation has occurred only four times since 1920 and never in respect to education.⁴⁰

Notwithstanding such history, the provinces have sought removal of both disallowance and reserve powers from the Constitution. This had been agreed to at the 1971 constitutional Conference at Victoria.⁴¹ It was reiterated at the 1978 Premiers' Conference at Regina.⁴² Meanwhile, the federal willingness to accept such change was linked to its objectives for entrenchment of political and linguistic rights in the Constitution. The unwillingness of some provinces to accept such a trade-off contributed to a lack of resolve in the final stages of constitutional amendment. Hence, as noted, the 1982 Act contains no provision for eliminating either federally-oriented power.

Declaratory Power

A third general power of the federal government is its declaratory power based on Section 92(10)(c) which states that provincial jurisdiction applies to "Local Works and Undertakings other than such as are in the following classes:" including

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

"For the general advantage of Canada" - which the Court has not yet defined - the federal government could expropriate provincial property as Section 92(10)(c) permits. The provinces could not, however, expropriate federal property by either legislative or executive means. This is because, since the leading 1892 case, Liquidators of the Maritime Bank, it has been constitutional law that the executive power follows the legislative power.⁴³

By exercising this extraordinary power, the federal Parliament could bring under its legislative (and executive) jurisdiction such provincial works as described. This would involve "works" as "physical things not services", as explained in the 1912 Montreal Street Railway Case.⁴⁴ This federal power has been used in respect to non-

education matters so far, for example local railways, canals, mines, atomic energy, oil refineries, certain telephone services, grain handling facilities, and elevators. In the latter case, the declaratory power was even exercised with respect to future elevators.⁴⁵ Thus, so far, there appears to be no restriction on the federal power to decide that a work or undertaking - whatever it may be - is "for the general advantage of Canada".

In his discussion of practice and theory of federalism, former Prime Minister Trudeau observed that

...if, for example, federal politicians are convinced that by their very nature the totality of the provincial governments cannot discharge their duties in some areas, surely the proper procedure is for those politicians to seek overt transfer of such areas into federal jurisdiction, either by way of constitutional amendment (as in the case of unemployment insurance), or by invoking federal powers under Section 92, paragraph 10(c).⁴⁷

Thus, for example, given the present and future problems in modern post-secondary education programs and finance, federal intervention could occur, notwithstanding Section 93. That is, it would be legally possible for the federal government to declare the physical, non-service component of a college or university in a province to be "for the general advantage of Canada". Such action might be variously rationalized, say, on the basis of the "national dimension" of post-secondary institutions, or because of the needs of particular fields of research and study. It would, however, be easier to incorporate its own university or universities, which it can do as described later, or use its provincial Section 93 capacity which applies in full in the territories.

Although the record indicates nine declarations between 1950 and 1961 and none since then,⁴⁷ the provincial premiers agreed unanimously at their 1976 Conference to recommend that, when the Constitution was amended, provision be made for the declaratory power to be made dependent on their concurrence.⁴⁸ Quebec then wanted abolition. Manitoba disagreed. British Columbia suggested that the Senate be required to give consent rather than the provinces. Thus the premiers' agreement at their 1978

Conference, and their proposal at the February 1979 Conference, led to more qualifications. In the end, nothing was changed.⁴⁹ Therefore, Section 92(10)(c) stands, even though it has not been used for some time. It is still constitutional law and as such still gives the federal Parliament the power to declare any work or undertaking to be for the general advantage of Canada. Whether this power is ever exercised in relation to post-secondary education remains to be seen.

Emergency Powers

There is not yet a modern provision in the constitutional statutes of Canada for dealing with constitutional government during crisis. There is the War Measures Act, a federal statute enacted in 1914, which was applied during both world wars, and again in 1970 at the time of the so-called Quebec crisis. At such times, the division or allocation of powers characteristic of limited government is transformed, temporarily, to provide the concentration of central authority necessary for emergency rule.⁵⁰ At such times, subordinate legislation - such as the Defence of Canada Regulations in World War II - is brought into play.⁵¹ Hence the consolidation of power and the suspension of rights involved in such circumstances affects every aspect of jurisdiction - including education - and is all the more formidable because we do not yet have a required procedure whereby the Supreme Court of Canada would determine the validity of the declared emergency when it occurs.

However, it has been established in early Privy Council and later Supreme Court cases that the Parliament of Canada does have emergency powers in wartime. The broad extent of this power is described in an obiter given in the 1976 Reference Re Anti-Inflation Act by Mr. Justice Beetz of the Supreme Court. This power gives Parliament

...for all purposes necessary to deal with the emergency, concurrent and paramount jurisdiction over matters which would normally fall within

exclusive provincial jurisdiction. To that extent, the exercise of that power amounts to a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament.⁵²

This means that if Parliament accepts that a state of war, invasion or insurrection - real or apprehended - is involved, the division of powers in Sections 91 and 92 is thereby suspended. Section 93 would also be affected, as federal initiatives in matters of education during World Wars I and II attest. However, as the record shows, almost invariably, these federal initiatives were taken after consultation with the provinces.

C. INFERRED SPENDING POWER

The spending power, as it is called, is a major means of federal participation in education. Its importance and use were not anticipated by the Fathers of Confederation who, obviously, did not foresee the rise of the welfare state with its applications to education. This federal power is called a gray area constitutionally, because the Courts have not ruled on its bases and *vires*.⁵³ The same applies to the provincial spending power, which can be, and sometimes is, used in support of educational matters of inter-provincial interest. As Prime Minister Trudeau, a constitutional lawyer, once noted, this situation can open the way for an erosion of democracy through the intergovernmental meddling which might arise. However, at the same time he writes

But it might avoid considerable misunderstanding if I state immediately and unequivocally that I hold equalization grants (enabling poorer provinces to keep pace with the richer ones) and counter-cyclical fiscal policies to be within the jurisdiction of the federal government.⁵⁴

The assumption that the federal spending (and lending) power is a constitutional means of federal participation in education was expressed in various political and senior executive interviews.

In expert evidence on constitutional law before the Joint Senate-House of Commons Committee on the Constitution in 1978, both the terms of Section 93 and the spending power were put into perspective in the following question and answer:

Mr. Gauthier:In the area of education, have you examined the definition of the word "education" in the 1978 context, as opposed to the definition given in 1867? Have you considered broadening it to include what is known as continuing education?

Mr. LaForest: We did try to define education. Generally speaking, we feel that education should continue to be a provincial responsibility. However, that does not mean that the federal government, in using its spending power, cannot intervene in the national interest. But spending power can only be exercised if the provinces do not prevent the federal government from doing so. Legislation is one thing, but spending power is something else. But just try to define it...this is where the Constitution comes in. The people must be able to live within the framework of a Constitution. Some overlapping will be inevitable. A Constitution consists of a very important but definable symbolic message which is never perfect and complete.⁵⁵

Other legal scholars hold similar views on the spending power - including, in some cases, that its justification depends on not constituting overt regulation of matters within provincial jurisdiction. In any case, as Professor F.R.Scott declared many years ago, there can be no constitutional impediment to the giving of a gift which can be accepted or rejected by the intended recipient - whether this is a government, a corporate entity, or an individual. However, as is shown by the history of conditional grants (including those for education) such federal gift-giving can include strings and little or no prior consultation when federal funding is to be reduced or cut off.⁵⁶ This happened in the 1960's when federal funding for secondary-level vocational education was phased out, and it has been a continuing concern in respect to the funding of bilingual education.

The important issue here seems to be compulsion. Thus when, for example, the federal government attaches conditions which amount to regulation of a program with provincial objects (as it does in the case of federal support for day care made under the Canada Assistance Plan), this is assumed to be acceptable legally, provided the province

or provinces concerned agree. This procedure obviates a compartmentalized treatment of education - a subject and function which is not "watertight" in theory or practice.

Use of the spending power in relation to education, has enabled the central government to respond to national interests and needs, and to introduce particular innovations - usually by means of cost-sharing arrangements which are hard to resist, politically and economically. The resulting goals and standards in the field of education have served to make up for Section 93 deficiencies in resources and resolve. The result is a strong harmonizing effect nationally, for all Canadian students in such common programs as bilingualism, adult training, and post-secondary education with its problems of equitable access and mobility. Nevertheless, there are concerns about undue federal influence on the content, control, and timing of programs and services, and as noted, about the certainty of continued federal funding.

Controversy over the federal spending power reached a high point during the time leading up to the Victoria Charter, when it centred on concerns about the effects of federal initiatives to introduce a program of comprehensive medical care insurance on a shared-cost basis. The issue of "taxation without benefit" was raised because taxpayers in provinces which opted out would still have to pay into the federal taxation used to fund the program elsewhere. Two more issues which arose concerned, first, how a national consensus on the need for shared-cost could be determined and, second, how to compensate provinces which opted out. No agreement could be reached on the formulas suggested. Moreover, in the decade to follow, controversy was maintained because the federal government began to cut back on its share and to shift to funding related to the growth of the GNP (with a formula for escalation), rather than to the amount of provincial contribution. This led to provincial demands for federal-provincial agreement before new shared-cost schemes were launched.

Consequently, at the February, 1979 Conference, the federal government and Prime Minister Trudeau obliged with a draft of a plan which called for the prior

agreement of the majority of the provinces, provided they represented at least 50 per cent of the population. Payment to individuals or corporate bodies in a province could not come into effect until the province had been consulted. No agreement was reached on these proposals. Thus the customary uses of the federal spending power continued, with impacts on education as well as health and other matters of joint federal-provincial interest or concern. Moreover, at the time of the Constitution Act, 1982, no changes were made to define or downgrade the federal spending power.

The precise nature of this spending power in the Constitution has yet to be specified, so, as in other countries, this power to spend or lend is broadly based. In a study published for the Rowell-Sirois Commission in 1939, Claxton and Gouin found justifications for grants-in-aid under circumstances less liberal than those which came to apply, as follows:

1. where the grant is made as ancillary to some specific power of the Dominion;
2. where the grant is based upon the Dominion's concurrent power in respect of agriculture under section 95;
3. where a Dominion statute authorizes the federal government or a federal minister to make funds available to the provinces for a particular purpose. Since there can be little doubt that the Dominion under its general power to deal with the public debt and property conferred by s.91(1), can expend its own money as it wills, even upon provincial objects, it is submitted that all such grants made without special statutory authority are *intra vires* of the Dominion.⁵⁸

Later, Quebec took exception to such ideas in its Royal Commission on Constitutional Problems which was appointed in 1954. Its authors rejected the doctrine of unlimited federal spending on various legal grounds. If such a federal power had been intended, they asked, why hadn't the Fathers of Confederation made this clear in explicit terms? The requirements of the "federative principle" it was argued, do not support the levying of taxes by one order of government for the benefit of the other.⁵⁹

McGill's Dean of Law, F.R. Scott, could not see any limitations on the federal spending power which he found was inherent in the prerogative power of the Crown.⁶⁰

Not long after, another Quebec constitutional lawyer, the Rt. Hon. Louis St. Laurent, summed up the bases for the federal spending (and lending) power as demonstrated in federal funding since 1917 - in support of matters of concern to provincial jurisdiction, including research. First, the funds come from the Consolidated Revenue Fund. Second, there is no compulsion legally. Third, such federal funds

...apply to classes of responsibilities which relate to matters within the legislative jurisdiction of the provinces but they do not amount to legislation controlling the administration or operation of these functions.⁶¹

In later opinions expressed by Laskin, LaForest, Hogg, and others, the federal government may make grants - whether conditional or unconditional - for any purpose, including matters which fall within provincial legislative jurisdiction.

To some extent these opinions relate to that in Chief Justice Duff's obiter in the 1936 Reference Re Employment and Social Insurance Act in which he stated that

...Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or accept it subject to such conditions.⁶²

On appeal, the Judicial Committee of the Privy Council agreed with the proposition (but with qualifications related to the scheme in question).

Notwithstanding such commentary, there is still no explicit federal spending power in the Constitution Act, 1867, nor in subsequent constitutional law. What very little relevant case law there is supports the federal spending power. Consequently, it must be inferred from three powers in the 1867 Act. These are, according to Professor Hogg, the federal powers to levy taxes in Section 91(3), to legislate in relation to "public property" in Section 91(1A), and to appropriate federal funds in Section 106.

These are the powers which have been used to give the federal government its enormous leverage in education and other fields.

D. EXCLUSIVE SECTION 91 POWERS

Fourteen heads of power with relation to education, actually or potentially, are identified and classified, with some overlap. Eleven of these heads of power are involved, fully or in part, with federal concerns and responsibilities in matters of economics. In order of description these are as follows: 91(2); 91(2A); 91(3); 91(5); 91(6); 91(10) and (12); 91(22) and (23); 91(24) in respect of "Indian lands"; and 91(25) in respect of the employment aspect of immigration. The latter four heads also relate to culture in various ways. Justice is dealt with directly in Sections 91(27) and (28). Defence is concerned in Section 91(7), and research is the primary aspect of Section 91(6).

Trade and Commerce

The Constitution Act, 1867 assigned exclusive jurisdiction in Section 91(2) to Parliament for the regulation of Canadian Trade and Commerce. Considering the scope and pace of growth in the industrial life of Canada which was to follow, this federal power could have been a significant means of national benefit and co-ordination economically. However, observance of such terms and intents by the Canadian courts in the early years were set aside by Privy Council rulings which created a course in the opposite direction, in deference to Section 92(13) as an over-riding residuum in various circumstances. Nevertheless, the central government has persisted in citing Section 91(2) in support of its initiatives in economic matters, including those related to education.⁶³

The appointment of the landmark Royal Commission on Industrial Training and Technical Education of 1910 was considered to be justified constitutionally by the Section 91(2) trade and commerce power. The elaboration of federal technical and vocational education which followed is described in Chapter VI. Since the mid-60's, federal initiatives in job training and re-training have been described by federal authorities as matters of economic and labour market concern which call for federal action, and which can be distinguished from "education" as a Section 93 matter. For example, such reasoning was pressed to the extreme by Prime Minister Pearson, who stated at the opening of the 1966 Federal-Provincial Conference that

Once the normal process of education for an individual has been completed and that individual is established in the labour force, measures of training thereafter to fit him to the constantly changing technological world are not "education" in the constitutional sense.⁶⁴

Apart from such semantics, there can be no dispute that the Act of 1867 variously concentrated legislative authority for national economic matters centrally. This includes federal powers and resources in the fields of taxation, spending, and lending - matters of vital concern in the support of education in Canada to date, especially at the post-secondary level. Should the federal spending power be limited by judicial review or by legal or political accord, there is the potential of the exclusive Section 91(2) power to fill the gap, e.g. in matters of adult training and re-training related to employment. In the meantime, there is considerable consensus in support of federal involvement in such matters as they relate to problems of illiteracy and unemployment.

Unemployment Insurance

The development of such consensus parallels the development of Canada's unemployment insurance scheme. Of particular interest in this regard is the Court's response, in 1935, to Parliament's Employment and Social Insurance Act. First the

Supreme Court and then the Privy Council found this act *ultra vires*, that is, unconstitutional, because contractual rights of employees and employers in relation to Section 92(13) were held to be involved.⁶⁵ To overcome this obstacle, the federal government set out to win the consensus of all provinces for a constitutional amendment. It achieved this when the opposition of the Duplessis government in Quebec was stilled by electoral defeat. The Constitution Act, 1940 permitted the addition of paragraph 91(2A) to the Act of 1867. This amendment gave Parliament legislative jurisdiction over unemployment insurance matters. The question in law is whether job training is an accepted aspect or adjunct of this power - notwithstanding the logic of such a relationship.

Ontario's position was given in a quotation from a speech by former Premier Wm. G. Davis to the 25th Annual Premiers' Conference in 1984 in which he stated that

A more aggressive and supportive stance by the federal government can be critical to increasing industrial training during down-turns. For example, under Section 39 of the Unemployment Insurance Act, income support is available to claimants who are attending approved training courses. The federal government could encourage industrial training through a more liberal interpretation of Section 39 by approving a wide range of on-the-job-training programs.⁶⁶

Section 39 of the Unemployment Insurance Act allows a claimant to enrol in a training program and to receive his or her unemployment insurance benefit in lieu of a training allowance.

Taxation

The Constitution Act, 1867, gave the federal government the power and advantages legally, administratively, and politically, of both direct and indirect taxation. Section 91(3) is a broad power which gives Parliament the power to make laws in relation to "the raising of money by any mode or system of taxation".⁶⁷ Yet, obviously, a federal tax designated to supply revenue for provincial legislative purposes would be

open to question. Moreover, as Laskin noted, the objection to this is that Sections 54 and 90 of the Constitution Act read in conjunction, indicate provincial responsibility for raising provincial revenue. He also noted that the taxing power, more than any other legislative power in our Constitution is a means to achieving other ends more than it is an end in itself. The issue this raises is whether and how federal taxation can be justified constitutionally when its revenue is used for purposes which are not within federal jurisdiction fully or partially.

The provinces need large sums of money to carry out their programs in such costly fields as health and education. They rely on appropriate tax sharing arrangements with Parliament to meet these demands. At the same time, control is an issue on both sides, and especially since taxation is, or can be, a corollary of regulation, if not a proxy for it. To add to the complexity of this two-sided problem of accountability, jurisdiction for post-secondary education is yet to be clarified, or settled by judicial review - if indeed either order of government would want this, given the various extra-constitutional alternatives which can apply.

Historically, it is interesting to note that the federal entry to direct taxation occurred as a temporary measure during World War I, to collect war profit taxes in 1916, and personal income tax in 1917. Corporate tax came next. In 1920, an indirect manufacturers' sales tax was imposed and other sales taxes followed.

Postal Service

Under Section 91(5) the federal Parliament has exclusive authority to legislate on postal services. It is thus possible under the federal Appropriations Act to subsidize the newspaper, periodical, and book publishing industry by lower than cost recovery or market rates, thus influencing the dissemination of Canadian and other educational and cultural materials. Federal powers for postal services and criminal law may also

combine to create a capacity for censorship.⁶⁸ Communications and cultural implications are referred to in Chapter IX.

Statistics

Section 91(6) gives Parliament exclusive legislative power over the Census and Statistics. In turn this enables the federal government to collect and analyze census and other statistical data on education, as defined in this study. Such information is available to government and non-government bodies with interests in Canadian education. This is described further in Chapters VI and IX.

Defence

Section 91(7) gives the federal Parliament exclusive jurisdiction in matters of the

Militia, Military and Naval Service, and Defence

Four dimensions of education were identified: (1) training of Canadian Forces personnel; (2) military education at the post-secondary level; (3) cadet training; (4) the education of CF dependants overseas and in Canada respectively. The National Defence Act was the statutory authority cited as the basis of authority for education and training related to the first three categories, and to certain administrative aspects of the fourth category. However, there was no legislation *per se* governing the education of dependants. This was authorized by Order in Council, thus implying direct application by Cabinet of the Section 91(7) power and, perhaps, other Section 91 power(s).

When Departmental legal counsel was asked about the constitutional (and statutory) authority for the second category, military college education, it was made clear, as described in Chapter VII, that the bottom line for this was the exclusive federal defence power, not Section 93. Moreover, federal degree granting could be included under such authority if deemed necessary.⁶⁹

Cadet training, the third category, is provided for under the National Defence Act. It still involves some integrated but extra-curricular linkage with some school programs across Canada. There may be an element of Section 93 involvement, however tangentially, where cadet training programs are integrated with provincial school operations. If so, the federal Section 91(7) defence would be paramount because its jurisdiction, like the cadet program, is national, not provincial. Moreover, in Canada, defence is not an aspect of any other power, including education.

In the fourth category, dependants education, there might be reason for considering that, in the case of the overseas school system, federal jurisdiction under Section 93 applies - just as it does ultimately and fully in the territories. This is unlikely considering the education jurisdictions of the NATO host countries whose agreement with Canada is for defence, not dependants' education. Thus Section 91(7) has to apply as the full and only source of jurisdiction for Canada's DND School Overseas. This service was initiated in 1954 on authority of a Cabinet Order in Council, not a military order. The Minister is the senior responsible official for DND schools, overseas and in Canada, not the military command. The overseas program is described in Chapter VII.

DND Schools in Canada. The earliest reference found in DND's historical archives to dependant education concerns a 1930 memo to the Chief of the General Staff from the Adjutant-General concerning provision for the education of dependant children of Permanent Force personnel stationed at Fort Osborne Barracks, Winnipeg. It notes that

As a result of legislation passed by the Province of Manitoba in 1923,
...the school at the Barracks was closed by the School District of
Tuxedo...⁷⁰

The children concerned were permitted to attend the Winnipeg schools without payment until 1930, at which time the provincial authority declined service, because the

Dominion Government did not (then) pay local taxes. Subsequently, the Department's Deputy Minister was reported to be of the opinion that

...this question of education of children is not a matter for consideration by the Department of National Defence but rather for the School Board and the parents of the children...⁷¹

However, the Adjutant-General himself observed that

Nevertheless, it will be noticed on H.Q. 1-1-182 that a school is in existence at Camp Borden for the education of children of personnel of the RCAF and RCCS and that the funds to provide a teacher are paid by the RCAF vote, vide folio 267 of H.Q. 921-3-82.⁷²

These children were taught in a school building at the barracks. Continuation of this school on DND premises was recommended because of distance to alternative schooling. Hiring a teacher for the Osborne School was proposed. An annotation states that

Minister decided that troops are responsible for education of their own children and school will not be established.⁷³

There is no reference to Cabinet decision in this policy matter, and no clarity on claims or otherwise on Section 91(7) jurisdiction.⁷⁴

During the late 1940's dependants education was introduced at defence establishments across Canada. The schools were never incorporated as a national school system under federal charter, although this could have been done. No claim was made of a national school system under either the federal defence power or the residual federal power, although this also was possible. DND schools in Canada followed the provincial courses of study, but this did not oblige them to abide by provincial supervision unless this was invited. In 1968 the Minister was empowered to authorize establishment of both elementary and secondary schools for CF dependants resident at defence establishments in Canada. This Order in Council stated in part that

Operation of the said schools is to take place under the direction of the Minister roughly in accordance with: ...4(a) the school shall be administered by the school committee or board in accordance with provincial Acts and under the direct jurisdiction of the provincial Department of Education.⁷⁵

This arrangement applied in all provinces except Quebec where DND's schools were private schools. In Quebec, Section 91(7) was recognized to the point that Bill 101 was not applied to Canadian Forces dependants attending base schools there. Moreover, no grants were paid to DND schools located on federal crown lands in the province.⁷⁶

The other nine arrangements made DND eligible for some provincial grants. Did such a voluntary arrangement waive Section 91(7) responsibility in the matter? The DND legal opinion was no.⁷⁷

To pursue the matter further, reference was made to a dispute involving DND school employees. In an Ontario local base case a salary agreement dispute was taken to the Ontario Labour Relations Board. The issue was: are school employees who in effect work for the federal government subject to Ontario labour law? The Board ruled that the provincial labour law entered into brought provincial jurisdiction with it. DND lost in a Division Court appeal 2:1. When its leave to appeal to the Ontario Court of Appeal was denied, the case was dropped. The question of DND's jurisdiction remained. Had DND not sought its particular provincial arrangements would the same have applied?⁷⁸

In a Quebec Superior Court ruling on AG Canada v. St. Hubert Base Teacher's Association, it was decided that the certification for collective bargaining under the Labour Code of Quebec had been invalid. Bergeron, JSC observed that

although it is true that the main purpose of the Department of National Defence does not focus on the education of servicemen's children, the fact nonetheless remains that it is a necessary adjunct which the Department of National Defence must take into account when endeavouring to achieve the ends for which it was established.⁷⁹

The ruling was overturned in appeal by the Quebec Court of Appeal. This was appealed to the Supreme Court of Canada.⁸⁰ The constitutional question having regard to Section 93 in relation to education was: can the Quebec Labour Code SRQ 1977, ch. C-27 apply to teachers hired by DND to teach its dependant children on military bases in the Province? Initially, the Quebec labour tribunal commissioner who dismissed DND's claim to jurisdiction had declared

the schooling of these children, "who are not service members", is definitely within provincial jurisdiction.⁸¹

The Superior Court did not agree that there was jurisdiction to certify. The Appeal Court disagreed unanimously. The Supreme Court restored the original ruling unanimously. This allowed for education provided on military bases to be regarded as necessarily incidental to federal Section 91(7) jurisdiction. Judge Chouinard of the Supreme Court, who wrote the judgement, did not accept an analogy between the circumstances where in the AG Canada v. the Branch Affiliate of Base Borden Collegiate Institute et.al., provincial labour law was applied.⁸² In the Quebec case, the federal government had not entered into an arrangement to make its schools subject to provincial controls. Thus while DND leaves itself open to such regulation when it negotiates to do so, it needn't do so. When it doesn't, Section 91(7) applies - at least to its employees.

Judge Chouinard observed that

...it is possible that a question may be raised, either in theory or in practice, regarding the power of the federal government to establish schools on military bases and, so to speak, to operate in the field of education reserved to the provinces; but that is not at issue in the case at bar.⁸³

The teacher union respondent was careful not to raise this issue. Significantly, as Judge Chouinard also observed

Additionally, following the Order of this Court determining the constitutional question neither the Attorney General of Quebec nor any other Attorney General has intervened.⁸⁴

That is, Section 91(7) in relation to its dependant education was not made an issue. It was, in effect, conceded.

Fisheries and Oceans

Under Section 91(12) Parliament has exclusive legislative power in matters concerning

The Sea Coast and Inland Fisheries

Under Section 91(10) Parliament has related, exclusive jurisdiction over

Navigation and Shipping

In the first case, the federal government is vested with responsibility for regulating fisheries in all Canada, and for administration of the fisheries in the tidal waters which are part of Canada. While delegation of authority over management of inland fisheries has been made to some provinces, responsibility remains federal. In the second case, extensive mapping of Canadian waters and related publications are involved. In both cases, federal responsibilities include research and research support, training of personnel, and publication - for practice as well as for wider educational use. The size and complexity of such economic and research endeavours, is evident in the extent of Canada's waters, waterways, related resources and environmental concerns, and its claims to a 200-mile limit on the Atlantic, Arctic, and Pacific Oceans off the Canadian coast. Demands for scientific and technological education and employment are significant. The knowledge outputs for education are also significant.⁸⁵

NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No 2)

Copyright

Sections 91(22) for "patents of invention and discovery",⁸⁶ and Section 91(23), for copyrights, combine in exclusive federal jurisdiction over copyrights and intellectual property.⁸⁷ This empowers the federal government to legislate for the protection of the rights and property of those concerned. Of course these matters affect the full range of educational resources.

The federal Copyright Act (R.S.C. 1970, Chapter C-30) applies to all media - that is, to printed works, films, audio and visual materials, and computer software. Exemption does not apply because learning materials are intended for student use. Permission of the owner of the copyright is required regardless of use or user. Section 17 of the Act provides that copyright is deemed to be infringed by any person who does anything with a work that only the copyright owner has a right to do.⁸⁸ This leaves the way open to liability and damages to be avoided by consent, royalty payment, or purchase. While the federal government does not supervise implementation of the legislation in Canadian educational institutions, the owners of copyrights may use it to protect their property. In this regard the defence of "fair dealing" in Section 17(2) of the Act has been narrowly construed, thus putting a brake on widespread and extensive use of copyrighted materials of various kinds for school use, especially in times of austerity.⁸⁹ How this federal jurisdiction and law translates, or can translate, into benefits to the owners of copyrights is not known, but the sum involved is assumed to be substantial.

The federal government also has jurisdiction to make and to implement treaties in all such matters, thereby influencing the supply of educational resources from abroad, and the export of Canadian equipment and materials of an educational nature. Other federal powers related to the import, export, and distribution of these resources, include jurisdiction over such matters as tariffs, customs, postal rates, domestic and international trade. The federal criminal law power also applies to matters ranging from libel and

obscurity to hate propaganda, and unfair competition. In short, there is a unilateral, federal capacity for influencing content in Canadian education.⁹⁰

Apart from this, educational materials are authorized by the respective provinces to match their prescribed courses of study. This balkanizes the research, development, sale, and use of Canadian school materials. It also limits the creation of such materials to the financial capacities of the respective provinces. Hence the importance of federal support for the research and production of Canadian educational materials.

Indians and Indian Lands

Section 91(24) gives Parliament exclusive jurisdiction over two related heads of power, namely

Indians and Lands reserved for Indians.

Lands "reserved" for Indians are lands which they have not ceded to the Crown in right of Canada. Unceded Indian lands can be transferred only to the Crown in right of Canada by treaty as affirmed by the Royal Proclamation of 1763. Indeed, this proclamation reflects Indian land claims based at common law.⁹¹

The question who in constitutional law is an "Indian" is discussed here in relation to old and new education rights for this class of persons (and for those in the broader definition of aboriginal peoples in the Constitution Act, 1982). Suffice to say that the federal order of government has assumed and exercised an unchallenged jurisdiction over ultimate responsibility for the education of "Indians" - meaning Indians and Inuit - since the Reference Re Eskimos of 1939 initiated by Quebec.

For Indians, this jurisdiction has been expressed since 1867 in the federal Indian Acts which have served to establish the administrative and legal framework for Indian affairs, including provisions for education.⁹² There are treaties with the Crown which, as constitutional documents, have in some instances made implicit or explicit provisions

for education.⁹³ The first of the treaties with tribes was in 1764; the last in 1923.⁹⁴ In particular the numbered treaties with Western Indians contain various terms for assuring education. For example, Treaty Number 4 signed with Cree, Salteaux, and other Indian tribes at Qu'Appelle, September 15th, 1874 states:

Further, Her Majesty agrees to maintain a school in the reserve allotted to each Band as soon as they settle on said reserve and are prepared for a teacher.⁹⁵

Main areas not yet covered by treaties include the Yukon, the central and eastern Arctic, most of British Columbia, the Maritimes, and central and northern Quebec. The Ungava District of the N.W.T. was transferred to Quebec by delegation in 1912 from Crown lands in right of Canada. This was done by an Act of Parliament - prior to Indian land settlement, and without any surrender of federal Section 91(24) jurisdiction for "Indians and Indian lands". This Act, which was later used as a basis for the James Bay "Agreement" (not treaty), is not listed in the Constitution Act, 1982 Schedule I of Constitutional Acts of Canada. The federal government established and itself administered the schools for Indians and Inuit in this territory.

In 1966, the Report of the Royal Commission of Inquiry on Education in the Province of Quebec, Part I, noted the complexity of the juridical position of Indians in Canada. Accordingly, in a revisionist commentary on these federal and Section 91(24) matters, it was stated:

In Quebec, the provincial government has until now let the Indian Affairs Branch of the federal government concern itself with the education of Indians.⁹⁶

It was then only recommended

...that financial agreements covering the inclusion of Indian children in the public schools be reached in accordance with general standards established jointly by the Department of Education and the Indian

Affairs Branch in the Department of Northern Affairs and National Resources.⁹⁷

This indicated that, rhetoric aside, federal jurisdiction re Indians was recognized. Nevertheless, constitutionally, in the parallel matter of Eskimos (the Inuit), it was claimed that, since 1960, the Government of Quebec had acknowledged its responsibilities with regard to them. Without making a direct claim for provincial jurisdiction, it was argued

...yet because education is under exclusive jurisdiction of the provincial government for all the rest of the population, it is altogether fitting that Quebec should accept full responsibility in this field for a people which has too long suffered neglect, and that it can do so without thereby provoking jurisdictional conflicts.⁹⁸

In 1898, Quebec's boundaries were extended north to the Eastmain River by federal legislation which omitted mention of unceded Indian lands - an action which could hardly remove federal constitutional authority in the matter or extinguish Indian title claims at common law. Section 2 of the Quebec Boundaries Extension Act (1912) S.C. Chapter 45, for the transfer of Ungava, obligated Quebec to recognize aboriginal rights and obtain surrender of such rights. Yet when, in 1971, the first Bourassa government launched its James Bay hydro electric project it did so without consulting the native peoples concerned. They in turn asked the federal Trudeau government to intervene. It offered financial aid for litigation instead. When, in 1975, an injunction was obtained, it was promptly overturned by the Province's Court of Appeal. To make the best of the situation native peoples then entered into the first James Bay "Agreement" - without making a test of the Ungava transfer legislation.⁹⁹

Notwithstanding this, the federal government alone by virtue of Section 91(24) has the exclusive prerogative to make treaties with the Indians. Hence the legislation which transferred Ungava to Quebec does not seem to be constitutional if the federal

order of government attempted to delegate a legislative power to Quebec which the Constitution and constitutional case law clearly prohibit.

Criticism of the James Bay Agreement and related federal and provincial legislation by the native people directly involved, and their national leadership, has led to strong opposition to the James Bay No. 2 Project. This second fait accompli may be complicated in law by the initial terms of the Agreement. In any case, the constitutional law in respect to Parliament's 1912 is fundamental. In it federal responsibility is retained. Moreover, as the Supreme Court has made clear in recent rulings and obiters in the Sparrow Case federal trust in respect to Indians (and Inuit) under Section 91(24) creates a federal duty to protect native peoples and lands. This included Indian lands as property and as a basis for self government.

In an interview for this study, the Hon. Claude Morin, Quebec's Minister of Intergovernmental Affairs when the James Bay Agreement was being framed, and a signator for Quebec, was asked where jurisdiction for Indians (and Inuit) was perceived to lie. The reply was Section 91(24) - that is, under federal jurisdiction. He also described Section 93 as the clearest part of the Constitution - one which enabled only the provinces to use the term "education" for legal purposes.¹⁰⁰

A prior interview was held for this study with the Hon. John Munro, federal Minister of Indian and Northern Affairs when the Constitution Act, 1982 was put together and enacted. He was also minister when provisions for "self-government" for natives on uncaded lands in northern Quebec was promised and enacted in 1984. Mr. Munro said that any legal advice received from federal Justice Department officials was that Section 91.24 vested in the federal order of government jurisdiction which was "all inclusive" in any area, including education. There is, he said, a "clear legal capacity" for this federal jurisdiction which is deemed to assure federal paramountcy over all other matters in Section 91 and the provincial powers, including Section 93. The Justice Department legal opinion was, he said, that Indians could control their own education

and that provincial jurisdiction in education - i.e., under Section 93 - could not override the federal Section 91.24 jurisdiction involved. He added that there was "no doubt" in his mind that the federal government has this authority. "I think that the Indian people are on a pretty safe basis," he said, in regard to self governing jurisdiction over education. He cited over a hundred years of federal responsibility, with never any provincial request or claim to take over native education; and he also mentioned a "political morality" - or convention - which was at stake in regard to the federal responsibility involved.¹⁰¹

Efforts to achieve native self government, including federal responsibility for education, are described further in Chapter V. Suffice to note here that Indian peoples have not given up on a constitutional entrenchment of such power, including its application to education. Throughout Canada, including Quebec, these people have expected Section 91.24 to be the bottom line in constitutional law in relation to their education. In this regard, the proposed terms of the Meech Lake Accord for further constitutional amendment, including Quebec's interests in this matter, evoked their questions and concerns. The same applies to the Quebec nationalist advocacy of separation within the Province's legislature and elsewhere. In response, the native peoples in Quebec have made it known that they do not wish to lose their Canadian citizenship and all that this entails with respect to their heritage rights in the Constitution Act, 1867 and the Royal Proclamation of 1767 with its affirmation of pre-existing Indian land title in common law. The constitutional relationship is with the Crown - first Imperial and then in right of Canada. Hence the suggestion that Quebec, or any other province, could have a jurisdiction related to Indians and Indian lands, which can be derived from a compact theory of Confederation, is rejected out of hand.¹⁰²

This political matter was settled constitutionally in the 1981 Supreme Court Reference cited by majority ruling (of Laskin, Chief Justice, and Judges Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer) which declared that

Theories, whether of a full compact theory (which, even factually, cannot be sustained, having regard to federal power to create new Provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan) or of a modified compact theory, as urged by some of the Provinces, operate in the political realm, in political science studies. They do not engage the law, save as they might have some peripheral relevance to actual provisions of the British North America Act and its interpretation and application.¹⁰³

Quebec did not gain any federal Section 91(24) jurisdiction via the James Bay Agreement. Federal governments have not given up such responsibilities and powers to the provinces because they can not do so without constitutional amendment. Even such amendment would be in conflict with Indian treaties as pre- and post-Confederal documents having the force of constitutional law.

That the Mulroney government has not changed this federal position was made clear by the Hon. Bill McKnight, Minister of Indian Affairs and Northern Development, in a speech to the Cree General Assembly at Chisabi, Quebec, August 2nd, 1988. Mr. McKnight said

Let me assure you, we support the development of your governments in the context of your special relationships with the federal government. There is no intent in our community self-government policies to force Indian people out of federal jurisdiction. You are with us through Section 91(24) of the Constitution Act of 1867, and we believe that self-government communities will retain their special relationship with us.¹⁰⁴

This interpretation of Section 91(24) jurisdiction includes federal responsibility for Indian (and Inuit) education and fits all information and opinion gathered for this study with the exception of one opinion. This opinion was stated by Hon. Claude Morin, a former Parti Quebecois Minister of Intergovernmental Affairs and, prior to that, a deputy minister of the same field. It goes without saying that other Quebec politicians and officials would agree with him, politically if not legally. Nonetheless, the federal position has come to include the Council of Ministers of Education of Canada, which in

its report to the OECD Centre for Educational Research and Innovation of September, 1986, stated in part, that

The Government of Canada (the Federal Government) is directly responsible for education...of Canada's Native Peoples (Indian and Inuit)...¹⁰⁵

The acid test for federal jurisdiction over Indian (and Inuit) education as described above will be measured by the establishment of native self-government in this field. Former Chief Justice Laskin's "enclave theory" in this respect is still a moot question in law. If upheld in law, this theory would support arguments for limited self-government on Indian lands without the constitutional amendment the Trudeau government promised and planned. Perhaps Laskin's professorial opinion that "provincial laws are inapplicable on a reservation" seems to exceed the actual terms of Section 91(24).¹⁰⁶ Thus, such immunity from provincial power has been questioned by Lysyk, and by LaForest.¹⁰⁷ In a subsequent 1974 case, Cardinal versus AG Alberta, Laskin, as Chief Justice, modified his views in his minority opinion, to concede that provincial laws which are not "integral of the land as such" may apply.¹⁰⁸

Education was not at issue in this case, nor was the deeply-held cultural (and educational) link with the land which native peoples in Canada have had for centuries. Moreover, the question of how Section 93 relates to the federal government's responsibilities under Section 91(24) in respect to Indian education has never been a focus of judicial review. A good part of the reason for this seems to be an overwhelming range of expert opinion that this is not necessary. Nevertheless, Quebec might challenge this jurisdiction for reasons which include its concerns about territory as well as education. Such a Quebec claim, it was suggested by a senior representative for the native peoples of Canada, already stems from the politics of a separatist agenda which Section 91.24 complicates greatly.

Exclusive Section 91.24 jurisdiction in their affairs and lands is a matter of concern amongst the Indian peoples, who cite the additional constitutional claims of their treaties with the Crown in the right of Canada - concluded and pending, in Quebec, and elsewhere in Canada. The goal of constitutional amendment to give Indians entrenched legislative powers in certain matters of local government, including education, is still on the agenda for change.

Naturalization and Aliens

Section 91(25) makes Parliament responsible for legislation on matters concerning naturalization and aliens. This power makes the federal government responsible for ensuring that necessary language and citizenship education is provided for new citizens as required.¹⁰⁹

Criminal Law Power

The Criminal Code of Canada extends to education in several ways, as shown by a definition of this law. Under Section 91(27), the federal government is responsible for legislating on criminal law for all Canada. However, until the 1935 ruling of the Judicial Committee of the Privy Council in British Coal Corporation versus the King, the Supreme Court of Canada was not the final source of appeal in Canadian criminal law.¹¹⁰ Until then, Parliament could not legislate to regulate or prohibit an appeal in such matters to the Imperial body, notwithstanding Section 91(27).

In Canada, criminal law is a federal responsibility, while in Australia and the United States, it is a state responsibility. In Canada, the terms and case law which relate to education produce national harmonizations in law and practice - notwithstanding the provinces' Section 93 jurisdictions in and for education.

As in other jurisdictions, the meaning of criminal law has been difficult to define. Case law provides gradual clarification. Viscount Haldane's definition of

criminal law as a subject matter which belongs to "the domain of criminal jurisprudence" is of course, too narrow.¹¹¹ Lord Atkin's definition of it as an act "prohibited by penal consequences" is too broad.¹¹² To compensate, Professor Hogg has identified the missing element (in the Margarine Reference of 1951) as "a typically criminal public purpose."¹¹³

The Law Reform Commission of Canada holds that criminal law "primarily has to do with values".¹¹⁴ That is, crimes are not merely punished; they are also regarded as wrong. In Canada, the Commission sees three thrusts for the criminal law. First, it aims towards humanity, and therefore prohibits acts "violating common sense standards of humanity". Second, it aims at freedom. Thus, for example, at common law, nothing is a crime unless the law says it is. Third, the criminal law which Parliament legislates is expected to aim at justice.¹¹⁵

The criminal law, like other laws, applies to schools. It imposes a duty to observe its rules on administrators, teachers and students alike. While it may be "policy" in many school jurisdictions to ban corporal punishment, it is still legal under Section 43 of the Criminal Code which states that

Every schoolteacher, parent or person standing in the place of a parent, is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Failure to observe such a requirement could result in a charge of assault under Section 244 of the Code. Individual rights of students may be involved in actions under the Young Offenders Act - for example, in the taking of a statement from a young person.¹¹⁶ School officials must be knowledgeable about this and other aspects of criminal law related to such matters as those involving searches and drugs.

Matters such as sedition, blasphemy, criminal libel, violation of the Official Secrets Act, spreading false news detrimental to the public interest, the wilful promotion of hatred - offenses in the Criminal Code and related criminal law - will not be

tolerated because they happen to be taught, contained in texts, or occur on school premises.¹¹⁷ Thus for example, regardless of what the Keegstra case has been demonstrating - it is still in appeal - about inadequate school administration, Section 282 of the Criminal Code forbids the wilful promotion of hatred in the name of "education".¹¹⁸ This was demonstrated when this case was brought to trial. The same would occur in similar cases, regardless of provincial responsibility for school curricula and their administration under Section 93.

Corrections

The exclusive federal power in Section 91(28) for "the Establishment, Maintenance, and Management of Penitentiaries" makes the federal government responsible for the education of the inmates of all federal prisons and the in-service training of management and staff.¹¹⁹ Reference is made to this in Chapter VII.

E. JUDICIALLY DETERMINED POWERS

Treaty-making

In a shrinking and ever more inter-dependent world, treaty-making is of increasing use and importance. In a federal state, the distribution of powers is neither complete nor clear without constitutional reference to external affairs. In Canada's case, the matter has been a focus of recurrent debate between the two orders of government - in particular with regard to subjects of provincial jurisdiction.

In large part this is because Canada's Constitution Act, 1867 did not make reference to external affairs. In the United States, Article 6 of the Constitution makes a treaty law, regardless of subject matter which would otherwise be within the legislative power of the states.¹²⁰ From the outset, the Australian Constitution conferred on the Commonwealth Parliament power over "external affairs".¹²¹ In both federations, the

supreme courts have ruled that full power to implement treaties resides with the national legislatures, whether or not the subject matter of the particular treaty is within the exclusive competence of the states. In Canada's case, Section 132 of the 1867 Act was its colonial point of departure in external affairs, as its text indicates:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries.¹²²

During this time, it was clear that only the federal order of government had both the executive and legislative powers required to deal with implementation of the Empire provisions of Imperial treaties. Meanwhile, Canada evolved towards recognized, independent status internationally.

After considerable development of Canada's sovereignty, and in circumstances of the Great Depression which called for national action to deal with matters related to employment, the Conservative Government of R.B. Bennett sought to use Section 132 to establish executive and legislative power to implement international treaties - in labour in this case. The antecedent Radio Reference of 1932 which led to federal jurisdiction in broadcasting was encouraging. In this reference, the Privy Council had accepted the claim that federal legislation to implement a treaty was within the federal peace, order, and good government power in Section 91. However, insofar as Section 132 was concerned, Lord Dunedin took the view that, although the Radio telegraph Convention in question was not, strictly speaking, an Empire treaty, "it comes to the same thing".¹²³ In the Labour Conventions Case (A-G Canada v. A-G Ontario) of 1937, Section 132 was found not to apply. Lord Atkin held that federal executive and legislative power to implement treaty obligations to which Canada was bound "as part of the British Empire" did not carry over to those which bound Canada "as part of her new status as an international person".¹²⁴

The Labour Conventions Case - which involved conventions rather than treaties - rests on the reasoning that

For the purposes of Sections 91 and 92, i.e., the distribution of legislative powers between the Dominion and the provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects, so will the legislative power of performing it be ascertained.¹²⁵

That is, legislation for implementing a treaty must be addressed to a distribution of powers rather than be classified "in relation to" the particular treaty. The result is a watertight doctrine, or approach, which is difficult to reconcile with education - in theory and practice, and with the constitutional laws (and silences in law) which relate to it in Canada.¹²⁶

Section 92(13) on property and civil rights was held to apply in this landmark labour case, even though there was no doubt that Section 132 was to give Parliament the power to implement treaties. This ruling, some have held, has inhibited Canada's role in external affairs by making it impossible to assure implementation of treaties in such fields as labour, occupational health and safety, human rights, and education. Thus, in matters of education, Canada is not able to guarantee implementation of treaties related to education as required: because of the provinces' separate and varied uses of Section 93; or, because of their refusal to use this power where their jurisdiction applies.¹²⁷ (Sections 2(1)(b) and (3) of the Meech Lake Accord text for amendment could possibly have been interpreted in judicial review to grant Quebec limited treaty-making powers. This could have resulted from recognition of Quebec as a "distinct society" within Canada and also the role of its legislature and government to preserve and promote this.)

As Professor Delisle notes in his references to Lord McNair's The Law of Treaties, 1961, p.37, a federal state may divide its power to make treaties between two

orders of government or, as in the cases of the United States, Canada, and Australia, vest the whole of it centrally. As he also notes, where the constitution of a federal state is silent on the distribution of treaty-making power, "there is a presumption in International Law that the regional governments have no such power".¹²⁸ In Canada, because such power is full and exclusive centrally, only the federal order of government may negotiate, sign, and ratify international treaties.¹²⁹

Since 1867, it has been clear that the provinces have not had either executive or legislative power to make treaties. In clear terms, the Constitution Act, 1867 limits the jurisdiction of each province to its respective territory, including its legislative power in and for education. The Parliament of Canada did not have the power to legislate extra-territorially either until the enactment of Section 3 of the Statute of Westminster in 1931, at which time no parallel power was given to the provinces. Nonetheless, Quebec's argument of many years for "special status" has been that, in matters affecting provincial jurisdiction, including education, it has, or should have, a "right" to negotiate treaties with francophone governments. These claims have been broadly-based within Quebec. During the 1960's in particular, the Province's initiatives in external affairs in education and culture with France, Belgium, et.al. prompted the Pearson government, and its successors to date, to decline these claims on grounds of the Canadian Constitution and international law and practice.¹³⁰

One way this has been done is to distinguish between treaties and agreements, and for the federal government to enter into treaties on a nation-to-nation basis prior to any province-to-nation agreements and actions in, say, education or culture.¹³¹ This makes the provinces delegates of the national government in whatever subject of provincial jurisdiction happens to be involved. This approach fits Canada's domestic situation in constitutional law, since, as Laskin observed,¹³² no prohibition applies to interprovincial agreements, hence to federal-provincial agreements which are woven into the fabric of Canadian education. However, to be constitutional, these transactions

cannot constitute delegation or interdelegation. Meanwhile, in keeping with the British constitutional inheritance in treaty-making, the federal Executive assumes the leading role in the conduct of external affairs and related treaty-making - usually without prior Parliamentary direction and control, although such power is always there.¹³³

Federal power to act in treaty-making of all kinds is supported legally in three ways: by constitutional terms or their absence; by judicial review; and by the residual of the royal prerogative. In fact, a strong case is made for exclusive federal treaty-making power by reference to the gradual delegation of the royal prerogative from the Monarch to the Governor General (and Governor General-in-Council).¹³⁴ As Canada's constitutional history shows, advance along this line began with the Imperial Conference of 1926, followed with the Statute of Westminster in 1931, the Seals Act in 1939, and culminating with the transfer of the Letters Patent in 1947 - a part of Canada's Constitution.

In several interviews for this study with officials of External Affairs, the royal prerogative was cited as a source of constitutional authority for federal participation and control internationally in matters of education. For example, when Canada's official representatives are being chosen to attend international meetings of sovereign nations to deal with education, the final authority in all choices is the federal Cabinet in an exercise of the prerogative power. Consultation occurs with the provinces on candidates to represent Canada, and on the terms of proposed international agreements in relation to education. However, where the federal government itself has the constitutional power to make and implement treaties, or agreements in relation to education, no provincial consultation is necessary. Matters of an educational nature which are under direct federal authority (or concurrence) apply here, such as military training or research in various fields of science and technology. CIDA programs and other such international programs may be determined by the federal government unilaterally, as they often are. Implementation of international treaties and agreements is determined by

jurisdiction. Thus, when federal jurisdiction in relation to education is plenary or concurrent, the central government may fulfill its commitments as it requires. But when Section 93 is involved, as for schooling, then the consent and co-operation of the separate provinces is required.

If ever judicial review is required, the Court might be called upon to distinguish between matters in relation to education which are local and those which are, or have been made, national. Hence the concern of some provinces, and of Quebec in particular, about one-Canada education programs which have been made national via the federal spending power. Apprehension about how the Court might rule on the federal spending power as a means of implementing inter-provincial matters in language, culture, and education has evoked alternative proposals for constitutional amendments from some provinces, particularly Quebec. Had the Meech Lake Accord been transformed into constitutional law, the federal spending power would have been made more clearly constitutional. This would also have acceded to Quebec's demands for a constitutional power for provinces to opt out of national programs - but not the funds involved. However, Meech Lake's Section 106A would have made receipt of such opting out conditional on establishing a parallel program with goals that matched the national program. How this could have been monitored, or how accountability for use of national funds could have been assured is not certain.

What does seem certain is that when Quebec's Section 93 is combined with Meech Lake's interpretive "distinct society" clause, no federal participation in matters related to education seems politically acceptable - international treaties and agreements or not; national "objectives" or not. Hence claims of full sovereign power over education were expected to follow Quebecois majority claims to distinctiveness in language, culture, and communications.

Communications

The Constitution Act, 1867 does not mention either transportation or communication as subject matters for allocations of legislative power, even though several modes of each are referred to. Section 92(10), which contains the declaratory power described, gives the provinces power to make laws in relation to "local works and undertakings" other than those in three classes:

- (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the provinces;
- (b) Lines of steam ships between the province and any British or foreign country;
- (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

These exceptions are heads of federal power by virtue of the terms of Section 91(29) which gives federal jurisdiction to

29. Such classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Given the close connection between education, culture, and communication, the field of communication has been the focus of considerable political and legal argument between the two orders of government. In this the courts have played a critical role and have given the national government a pre-eminent role and powers. Still, the controversy continues, motivated by the increasing scope of modern technology in telecommunications and its significant impacts on economics, regulation, taxation, education, and culture.¹³⁵

The 1932 ruling of the Privy Council in the Radio Reference case marks an important chapter in revision of Canada's Constitution. The ruling went beyond the geographic approach in Section 92(10) for allocating modes of transportation and

communication. It centred on paragraph (a) which exempts these various modes from exclusive provincial jurisdiction over local works and undertakings. In the case of radio waves - and, thereafter, similar means of communication - their Lordships found that transmission of such electronic communication was not only not limited to separate provincial boundaries, but could not, in fact, be so limited. The p.o.g.g. clause was also found to be in support of federal jurisdiction in such broadcasting - and its future forms.¹³⁶ Hence in 1977, in Public Service Board versus Dionne, a case concerning cable television in which the local aspect of the service was emphasized by lawyers for the provincial interest, federal jurisdiction was maintained - as an adjunct of its jurisdiction over the field of broadcasting. Quebec's logic in this case was appreciated by the Court, but not its avowed goal of gaining jurisdiction over all intra-provincial broadcasting and related communications - in terms of licensing, content, and related matters.¹³⁷

The other provinces agreed with Quebec in the matter of provincial jurisdiction over cable communications, but the federal government held out for national jurisdiction in telecommunications. It did, however, propose a Standing Committee for Communication Policy, with federal and provincial representation, to advise a parallel committee of ministers. Resultant proposals for building provincial representation into the administrative - but not legislative - scheme of things for handling matters under the rubric of broadcasting were presented in amendments to the federal Broadcasting Act.¹³⁸ These changes were not adopted. In 1979 the federal government compromised further by offering a draft of constitutional amendments to the February Conference on constitutional matters. Concurrent jurisdiction was suggested, with federal paramountcy over such matters of national concern as guaranteeing Canadian content, national programs and services, technical standards, and so on. That is, there would be a continuing role on the part of the federal government in broadcasting which provided for, among other things, "enlightenment" - a euphemism for education - and culture.

Apart from this, agreement was reached to transfer licensing power of cable operators to the provinces, and for retention of some federal control in matters of content and technical standards. Still Quebec was not satisfied. Then Liberal Leader Claude Ryan suggested that neither order of government have jurisdiction over broadcast content; that provinces should be able to establish their own broadcasting stations.¹³⁹

These changes did not come to pass in the form of constitutional amendment in 1982. Provisions under the Broadcasting Act with respect to the C.R.T.C. (the Canadian Radio-Television and Telecommunications Commission) remained. Thus Section 27 of the Broadcasting Act gives the federal Cabinet authority to "issue directions to the C.R.T.C. in accordance with Section 22(1)(a) of this Act, which states that "no broadcasting license" - for education or any other purpose - "shall be issued, amended, or renewed pursuant to this Part"

(a) in contravention of any direction to the Commission issued by the Governor in Council under the authority of the Act...¹⁴⁰

In the Consolidated Regulation under this Act, Chapter 377, Sections 2 and 3, classes to whom broadcasting licenses "may not be issued and amendments and renewals of broadcasting licenses may not be granted" include

- 3(a) Her Majesty in right of any province; and
- (b) agents of Her Majesty in right of any province.

In short, a province seeking to establish educational broadcasting of any kind must first establish "an independent corporation" as has been done, for example in the case of TV Ontario. This means that, notwithstanding a province's jurisdiction under Section 93, it may not itself, or have an agent, establish such educational broadcasting. For, as Section 4 of this regulation makes clear, among the agents to be excluded is "a municipal or public body empowered to perform a function or duty on behalf of Her Majesty in such right..."

On the other hand, an "independent corporation" means a corporation that the C.R.T.C. is satisfied is "not directly controlled" by any of the bodies described above.¹⁴¹ A license may be granted to such an independent corporation "for purposes of the following types of programming":

(a) programming designed to be presented in such a context as to provide a continuity of learning opportunity aimed at the acquisition and improvement of knowledge or the enlargement of understanding of members of the audience to whom such programming is directed and under circumstances such that the acquisition or improvement of such knowledge or the enlargement of such understanding is subject to supervision or assessment by a provincial authority by appropriate means, and (b) programming providing information on the available courses of instruction or involving the broadcasting of special education events within the educational system, which programming, taken as a whole, shall be designed to furnish educational opportunities and shall be distinctly different from general broadcasting available on the national service or on privately owned broadcasting undertakings;¹⁴²

Thus the federal order of government exerts continuing influence and authority in broadcasting - in radio, television, and cable, with its varied uses.

In CBC's presentation to the CRTC for re-licensing in 1979, particular attention was paid to its "expression of Canada" and the resulting need for sustained support of its services. In reply the CRTC noted that Parliament had established the CBC to be "predominantly Canadian in its content" and it went on to concur with the President of the CBC who said that

We are on the verge of relinquishing one of our country's greatest resources - the social, cultural, and educational potential of television - to another country. Unless we do something about it.¹⁴³

What that is remains to be seen. But in the meantime, the influence of television in pre-school, home education is enormous. The same applies to information and education for all children, youth, and adults in Canada.

Incorporation

The Constitution Act, 1867 omits an express federal power for making laws in relation to the incorporation of companies with objects other than provincial. Section 92(11) gives provinces the power to make laws in relation to "the incorporation of companies with provincial objects". In the leading 1881 case, Citizens' Insurance Company v. Parsons, the Privy Council ruled that the federal Parliament had a residuary power for incorporating companies with objects other than provincial.¹⁴⁴ That is, it could incorporate companies with objects beyond the limits of only one province. (This includes companies of an educational nature.) This federal power was also supported by the p.o.g.g. provision in Section 91, since this power extended "to all matters not coming within the classes of subjects assigned exclusively to the Legislature of the provinces".¹⁴⁵

There remains some debate as to whether limitations on the provinces in Section 92(11) apply to territory and function, or just the former. Nevertheless, when this section is read in conjunction with Section 93, both limitations apply, since the provinces are denied extra-territorial or extra-functional jurisdiction by virtue of being limited to legislative power "in and for" each province. Consequently, federal power to create educational corporations of various kinds and levels is not prohibited.

Porter, Blishen, et al. note that

The federal government might wish to go further and establish a certain number of national institutions of higher learning along the lines of the Australian National University. In the past, as we have seen, it established military colleges to support its defence responsibilities. It could create other universities or colleges to support any number of its other responsibilities.¹⁴⁶

Laskin is quoted in regard to his suggestion that Section 92(11) permits such educational incorporation - and without the need to refer to ancillary federal powers.¹⁴⁷

In the meantime, federal letters patent have been issued for various corporations of an educational nature, including, for example, Northland Open University, a non-profit university which provides career-oriented education with degrees.¹⁴⁸

In federal circumstances, the capacity to incorporate naturally raises the issue of the capacity to regulate. It is therefore necessary to distinguish between the legislative powers when the two orders of government are involved. Lederman states

It is decidedly wrong to say that only the appropriate provincial legislature can regulate what its provincially incorporated companies do in any and every respect. It is likewise wrong to say that only the federal parliament can regulate what its provincially incorporated companies do in any and every respect.¹⁴⁹

Such reasoning flows from the aforementioned Parsons Case in which a company which had been chartered federally was held liable to provincial regulations which applied to its fire insurance contracts.¹⁵⁰ This distinguishing was elaborated on in subsequent cases over the years. However, in this case it was also observed by Sir Montague Smith of the Judicial Committee of the Privy Council that

The incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada.¹⁵¹

This reasoning applies in the matter of federal incorporation of educational bodies with objects beyond the Section 93 jurisdiction of one province. Thus when the Northland Open University was given a federal charter which included the authority to grant degrees, Ontario responded promptly with legislation to prohibit the granting of degrees within its Section 93 jurisdiction without first satisfying its particular criteria. A confrontation with Ontario was avoided because this body, chartered federally, established a main office in the Yukon (where federal jurisdiction over education applies) and one of its branch offices in Quebec (where no statutory prohibition applies under Section 93 in that jurisdiction).¹⁵²

Lederman's analysis shows that there are six constitutional situations which could apply to incorporation. The various kinds of educational corporations could test any one of the following situations:

1. A federal company engaged in a business subject to federal jurisdiction.
2. A federal company engaged in a business subject to provincial jurisdiction.
3. A federal company engaged in part in a federal business and in part in a provincial business.
4. A provincial company engaged in a business subject to provincial jurisdiction.
5. A provincial company engaged in a business subject to federal jurisdiction.
6. A provincial company engaged in part in a provincial business and in part in a federal business.¹⁵³

In the case of No. 2 for example, federal Newstart Corporations established in the 1960's to give training and related help to disadvantaged persons were incorporated provincially and subject to provincial regulation in education.

Apart from the aforesaid complexities and uncertainties in law in matters of jurisdiction in education, the federal government can itself achieve its various goals in education, training, research, and related matters by contracting out to public or private bodies under provincial jurisdiction. It has done this for some time, with both dictated and negotiated terms, in the field of adult training and related matters. Thus the federal government has an alternative to incorporation of federally chartered bodies to achieve or support particular ends in the field of education.

F. CONCURRENT POWERS

Section 91 of the Constitution Act, 1867 gives concurrent legislative powers over agriculture and immigration to Parliament and the provincial legislatures, but with federal paramountcy in both cases.¹⁵⁴ For agriculture this involves longstanding activi-

ties in research and extension - a euphemism for agricultural education. For immigration, this includes a federal responsibility for human resource planning nationally.

Silence in the 1867 Act with respect to research creates a clear case for concurrence.¹⁵⁵ The same applies to culture, as various legal scholars suggest. Welfare is another subject matter omitted in the 1867 Act, but provincial jurisdiction applies in the health field by virtue of Section 92(7) powers. The cost of such programs and services, plus common needs, have led to the development of *de facto* concurrence in a number of respects. Labour is another subject field where, although the courts ruled that both the federal and provincial orders of government have separate jurisdictions, emergency events can change this, however temporarily. (Federal labour jurisdiction was paramount during both world wars, by means of the War Measures Act.)

Education itself - by its nature, by its context in a democratic federal state, by the resourcing requirements needed to attain desired standards with equity - seems logically to be a field where concurrence is to be expected. There are grounds for concurrence in post-secondary education, given its research and cultural components and national aspects.

Notwithstanding provincial jurisdiction in health and welfare, the federal government has a large involvement in both matters. This is based mainly on the spending power - in the inferences which combine out of Sections 91(1A), and 106 as already described. Other Section 91 heads of power are involved too: to accommodate federal responsibility for military personnel and veterans, (ss.7) quarantine, and the establishment of marine hospitals (ss.11), "Indians" (ss.24), and inmates of penitentiaries (ss.28).

Thus, in health, the federal government has been involved in research, health education, and human resource development, as well as conditional fiscal measures such as those covered in the Canada Health Act. Welfare involves conditional expenditures

too - in support of the Canada Assistance Plan, with its educational and other aspects, and the Family Allowance scheme with its educational support and implications.¹⁵⁶

As important as the subject of environment is to modern thought and behaviour, it was not an express subject for legislative power in the Act of 1867. Consequently, each order of government assumed jurisdiction in such matters on lands over which it held primary jurisdiction. In the case of the federal government, this opened the way to research, regulation, international treaties, inter-governmental agreements, and funding of such matters - conditionally or otherwise. In all such matters, education is considered to be an important aspect, as this concerns discovery of new knowledge, and the dissemination of environmental knowledge to experts and the general public. It is also a vital means in efforts to protect the environment.¹⁵⁷

G. DELEGATION AND INTERDELEGATION

Delegation

It is impossible for either the federal or provincial governments respectively to enact legislation which is full enough to meet all law-making requirements in most given subject fields. Hence the provisions which are made in their respective enabling legislation to permit designated subordinate bodies to exercise delegated law-making powers, and to have, as permitted in such legislation, discretionary power for so acting. In most instances, these delegations are made to the Governor, or Lieutenant-in-Council: that is, to the federal or provincial cabinets.

What was described as "plenary and ample" was deemed to describe Parliament's power to delegate to its subordinate bodies, according to an *obiter dictum* in the leading Privy Council case of 1883, Hodge versus the Queen.¹⁵⁸ Subsequently, in a challenge of the validity of the delegation of legislative power in the War Measures Act, the Supreme Court of Canada ruled, in Re Gray of 1918, that the delegating terms

had the effect of giving the federal Cabinet plenary legislative power for as long as the Act remained in force.¹⁵⁹ Thus, during World Wars I and II some education-related innovations were legislated by such delegated authority.

Whether actions taken in relation to education should have been discontinued, or dissolved, after the War Measures Act was lifted did not become a constitutional issue. Thus for example, the National Research Council, with its functions in research, education, and scientific and technological training just kept on elaborating after its beginning in 1916. But the massive World War II youth and adult instructional programs for employment in the defence industries and such programs as the Commonwealth Air Training Program ended with the war and were not emulated in peacetime.

The Yukon and Northwest Territories have been delegated federal powers for government subject to federal veto. Provisions have been considered and made for federal delegation of some self-government powers to native bands.

Interdelegation

Over the years various proposals have been made to permit a delegation of power from one order of government to the other - to achieve the intended purpose more efficiently or effectively. The Macdonald Royal Commission has commented on the need in education for "harmonizing" Canada's legislation on education. Co-operation in such matters has never been precluded, politically or legally.

There is no express provision for inter-delegation of powers in the Constitution Act, 1867. Thus the courts have been called upon to define and decide in cases or references related to this substantive procedure. In such matters it is necessary to make a distinction between legislative and administrative interdelegation. The question is, if law-making power cannot be delegated, is it possible to delegate implementation power?

In the 1950 Nova Scotia Interdelegation Case AG N.S. v. AG Canada, the Supreme Court of Canada ruled that legislative interdelegation was unconstitutional, because of the affects this would have on "basic political responsibility and account-

ability."¹⁶⁰ Subsequent rulings on this procedure have modified the restriction. In education, there has been no interdelegation *per se*.¹⁶¹ The Constitution Act, 1982 permits transfers from provincial legislatures to Parliament of legislative powers in education and other cultural matters - not merely their delegation.

H. EXECUTIVE POWERS

Prerogative Power

A prerogative is a peculiar, or exclusive, privilege which may be variously vested - in an official, in respect of an office, or in an official body. Such privilege may involve certain advantage, immunity, or power. In the British system of government, the Crown - meaning executive government - retains what Hogg describes as "a few vestigial prerogative powers" which originate in the common law rather than in statute, and whose existence and extent are determined by the courts.¹⁶²

The Letters Patent, made under the authority of the royal prerogative, are a part of the Constitution of Canada. This is important in Canada's case because the Constitution Act, 1867 did not include a formal grant of treaty-making power. Of further significance is the delegation of powers in the 1947 Letters Patent transaction which included a comprehensive delegation authority to the Governor General "to exercise all powers and authorities lawfully belonging to Us (the Monarch) in respect of Canada".¹⁶³ Hence the federal government's claim to represent Canada - in education and other fields of jurisdiction - whether federal or provincial.

Given the powers of assent, which in Section 55 of the Constitution Act, 1867 may be exercised by Lieutenant Governors and Governors General, disputes arose over who the Lieutenant Governor represented, in this and other matters. Was this officer a representative of the federal government in colonial style? Was he or she a representative of the Crown like the Governor General? In the 1892 case, Liquidators of the

Maritime Bank versus Receiver General of New Brunswick, the issue was settled.

Speaking for the Privy Council, Lord Watson rejected the idea of subordinate status for Lieutenant Governors, or provincial governments.¹⁶⁴ Sovereign and co-ordinate orders of government in Canadian federalism were affirmed. It was thus made clear that if Lieutenant Governors were not representatives of the Crown, the powers and prerogatives of the Crown would not be available to the Lieutenant Governor and, therefore, to the provincial cabinets. Instead, such powers and prerogatives would be held by the Governor General and federal Cabinet. Moreover, if this were permitted, the allocation of legislative powers to the provinces in 1867 - including that which relates to education - would not have been complemented with a matching allocation of executive powers and prerogatives.

The federal Executive may exercise prerogative powers, via Cabinet, which the provinces cannot challenge. For example, in the field of education, as defined in this study, the Prime Minister could, through federal executive means, create a Secretary of State for Education, the way one has been created for Science and Technology. Similarly, the latter ministry could be given the high status it enjoys in other western countries. Prime Ministerial initiative - with necessary executive clearance after, as required - might be exercised, as it has been, to create Royal Commissions to examine issues and concerns in education or related matters. Appointments requiring particular high qualifications in education, scientific research, culture, and so on, could be made to deputy head positions and special advisory posts - to enhance federal presence and influence in educational affairs in Canada and abroad.

Executive Authority

Executive authority is a significant factor in federal participation related to education. It can apply to policies and actions which are based on a presumption of constitutionality. It can also apply, via "executive federalism," to policies and actions

which are, or may be, of a *de facto* nature. The exercise of federal Executive authority in relation to education seems to fit a continuum that reflects the degrees of constitutional certainty of federal actions - ranging from understandings, through protocols, to administrative agreements, to orders-in-council and statutes.

Exercises of federal Executive authority related to education were considered to be on constitutional grounds in all cases, according to former Liberal federal Ministers and senior federal officials at PCO in particular. This includes a presumption of constitutionality in all uses of the federal spending and lending power. It also applies to federal orders-in-council passed on federal constitutional authority directly, without necessity of a federal enabling statute.¹⁶⁵ This constitutional certainty hasn't been accepted by Quebec, perhaps as a matter of political policy. Nor has it been shared by the Council of Ministers of Education of Canada, perhaps as a matter of executive politics.

Although the CMEC has no governmental authority, or constitutional basis for this, it has had a history of both avoiding and refusing executive relations with the Government of Canada - whether or not educational matters at issue are of a national nature. At no time was such CMEC behaviour more determined than when, in 1982, the Trudeau Cabinet approved its "National Objectives of Federal Programs that Support Post Secondary Education" - a legal action taken in the belief that the federal government has the necessary primary and concurrent powers to take such action.¹⁶⁶

Federal capacity for Executive action to match the ten objectives was focussed in the Ministry of State for Social Development, whose Minister, Hon. Jack Austin, was Chairman of the Cabinet Committee on Social Development. MSSD's role and functions included particular attention to the field of education, broadly defined.¹⁶⁷ This was noted in interviews which the writer had with the Minister and some senior officials, and in reviews of documentation, just before the Ministry was terminated by the brief Turner Government. MSSD termination was effective September 1st, 1984, by

Executive Order-in-Council P.C. 1984 - 3037 made under the Ministries and Ministers of State Act. The related Cabinet Committee function did not end, and at the time there was no reason to expect a decline in Chief Executive and Cabinet interest in education under Prime Minister Turner. However, without on-going Ministry leadership and support services, and with the election of the Mulroney Government which did not have a public agenda for education at the time, there was a return to ad hoc ways of handling educational policy-making and implementation - centrally, and via the various federal department and agencies concerned with functions and aspects of education.

In the meantime, Cabinet's responsibilities in such matters apply as a matter of constitutional convention. Cabinet has latent capacities in times of emergency. It has its prerogative powers - some via the Prime Minister - in matters of treaty-making and ratification, as described. It has its various agenda-setting capacities and budget review and approval roles in respect of federal spending matters. It has its policy-making and approval roles in respect to matters of federal-provincial relations concerning education-related affairs. It is the source of final Executive defence when established educational programs, services, or expenditures are cut by departmental and agency heads - because of other priorities in austerity circumstances and, because, for some of these officials, education may be perceived as an area of "soft federal jurisdiction".

A final and significant Cabinet role in education is the part it and its Ministers play in "executive federalism" - a mode of elite membership, methods and accommodations which seems more akin to corporate private government than to origins in public government. This is shown in preference for extra-constitutional political and/or administrative arrangements within and between the two orders of government, as alternatives to the unpredictable but constitutional nature of judicial review. Generally, its elite-level relations, which are usually transacted in secret, do not involve public, party, or legislative participation appropriate to decision-making in and for public education in a democracy.

Conclusions Re: Hypothesis No.1

As hypothesized, despite provincial jurisdiction in relation to education in Section 93 and its variants, there are also varied constitutional bases for federal participation.

Federal jurisdiction for participating in education begins with its pre-Section 93 jurisdiction for setting the constitutional terms when each new province is created from territory under its jurisdiction, including its Section 93 conditions for legislating on education. It includes federal Section 93 jurisdiction for education in the territories, and a federal residual power, nationally and intergovernmentally, which is derived from the explicit exemption in the terms of Section 93 of provincial jurisdiction over education extraterritorially. Jurisdiction for international relations in education is federal, because the provinces are not sovereign bodies in international law.

Section 93 places the federal order of government in a quasi judicial role in respect to protection of particular minority group religious rights in education, and in a potential supervisory role in regard to all educational legislation. Although Section 93 gives each province authority to choose its language or languages of instruction in public schooling, the protection of minority language rights in education has been a federal responsibility since 1867, as confirmed in case law.

Certain anomalies in Section 91 give the federal order of government responsibility for education, notwithstanding provincial jurisdiction for education under Section 93. These anomalies include federal responsibilities for education under: the Section 91.7 defence power; Section 91.24 jurisdiction for Indians and Indian lands; Section 91.28 jurisdiction for penitentiaries. Federal jurisdiction for criminal law under Section 91.27 applies to education in various respects including a federal responsibility for training all Canadian police officers in criminal law enforcement. The federal order of government has Section 91 responsibility for the training of its public servants.

There are aspects of education in virtually all federal powers of legislation. Because such matters are ancillary or incidental, they are not likely to be challenged, or made subject to legal limitations. (The same applies to aspects of education in provincial legislation, other than that which falls under Section 93 jurisdiction.)

Some federal powers may be used to limit Section 93 powers, including the general powers of disallowance and reserve. Limitations may also be placed on provincial legislation and executive action related to education, through use of the powers of disallowance and reserve. The p.o.g.g. power gives Parliament the legislative power to intervene in matters where such criteria as emergency or the national interest apply. In judicial review federal order of government gained the power to incorporate companies with objects that are other than provincial in the singular - including educational companies. Section 92(10)(c) gives the federal government jurisdiction to legislate in respect to "works" to the "general advantage of Canada", including those which are educational. Finally, because some of these federal powers have not been used for some time, or not at all, does not mean that they are obsolete. They are there - in constitutional law - and, as some legal scholars have noted, they can still be applied.

Section 91 contains several heads of power of an economic nature which, separately or in combination, facilitate federal participation in education. Chief among these powers is the inferred federal spending (and lending) power which, potentially, gives the federal government a considerable influence on educational programs, especially at the post-secondary level. Federal power to tax directly and indirectly has formed the capacity for the federal spending (and lending) power. Federal postal jurisdiction affects rates and service in respect to the dissemination of educational materials. Moreover, in combination with the exclusive federal criminal law power nationally, the postal power allows for federal censorship. Functions of a research and development nature, as well as those of an economic nature, are both governed under several federal powers. These apply to statistics, navigation and shipping (and the surveys and

mapping involved), and in relation to patents and copyright (in addition to control of exports and imports of educational materials and the taxes involved). Federal responsibility applies to naturalization - citizenship - of aliens.

Federal power over the full field of communications and telecommunications - the modern means of mass education - was gained via judicial review. Treaty-making is another such power, although it is also based, in part, on the federal prerogative power. Power to implement treaties in education and related matters domestically is, however, limited where separate provincial jurisdictions apply.

Silence in the Constitution Act, 1867 with respect to research and culture has left the way open, constitutionally, to federal participation in these fields. Concurrence with federal paramountcy applies in agriculture and immigration respectively. It exists in *de facto* forms in labour, health, welfare, the environment, and other fields, with educational implications in every case. Concurrence is an inherent quality of education - in terms of its societal origins and bases, and in matters of function. It could apply to post-secondary education (as distinct from schooling).

Delegation of legislative and administrative authorities is possible within jurisdictions, subject to the terms of the enabling legislation. The most dramatic example occurs when, with Parliament's approval in time of emergency, the Constitution is suspended and federal executive and related legislative powers are delegated to the federal Cabinet to be applied nationally. Through judicial review, interdelegation - which was not provided for in the Constitution Act, 1867, - was made constitutional for administration (as distinct from its enabling legislation). Constitutional amendment provisions under the Constitution Act, 1982, which permit transfer of legislative power in relation to education and to culture as described in Chapter V, now make need for such interdelegation in education unnecessary.

Constitutional conventions, which relate to education as well as to law and politics, flow from the British inheritance of law and government in the Preamble to the

Constitution Act, 1867. These non-legal rules have been added to since that time with respect to matters of education and its governance in Canada. As the Supreme Court observed, in the Reference on Amendments to the Constitution of Canada (1981), meetings of first ministers, which have involved matters of education periodically, may, perhaps, have become a constitutional convention. The same applies to other conventions, and to customs and usages which have developed with respect to various forms of federal participation in education nationally, as described in Chapters VI to IX.

Avoidance of an operational definition of "education" in judicial review (as in the Constitution Acts to date) creates flexibility in handling educational affairs - whether they fall under Section 93 or the other Sections and powers cited. This avoidance of judicial review has left some basic matters, such as post-secondary education, in *de facto* concurrent form. All of these matters and factors contribute to extra-constitutional processes and transactions in politics - within and between the two orders of government. However, use of none of these processes are necessary to achieve any of the forms of federal participation identified in this study.

END NOTES

A) Basic Constitutional Power

1. Reference Re Alberta Statutes (1938) S.C.R. 100; (1938) 2 D.L.R. 81.
2. Constitution Act, 1871, Section 2. Constitution Act, 1886, Section 2.
3. Constitution Act, 1867, Section 146.
4. Constitution Act, 1886, loc. cit.
5. J.A. Corry, "Higher Education in Federal-Provincial Relations", University Affairs, Vol.8, No.2, December, 1966, p.3. Interview to clarify and confirm, Kingston, 1985.
6. Constitution Act, 1867, Section 93, ss.(3) and (4).
7. Interviews and referrals. See also Canada. Constitution of Canada, Final Report. The Special Joint Committee of the Senate and of the House of Commons, Fourth Session, 28th Parliament, 1972, p.78.
8. Hon. John N. Turner, Politics of Purpose. Toronto/Montreal: McClelland and Stewart, 1968, p.62.
9. Hon. John Roberts, Notes for an Address to the Conference, the Humanities Society: Towards a New Coalition. Secretary of State Department publication, Ottawa, 22 November, 1978.
10. David Munroe and Guy Rocher, The Development of Education in Quebec, Research Report for the Royal Commission on Bilingualism and Biculturalism, 1966, 1966, p.21.
11. See Protestant Education in Quebec: Report of the Quebec Protestant Education Survey. W.A.F. Hepburn (Director of Education, Ayrshire, Scotland), Chairman of the Survey. Quebec, 1938.

See also Terry Copp, The Anatomy of Poverty: The Conditions of the Working Class in Montreal, 1897-1929, Toronto: McClelland and Stewart, 1974. See also Poverty in Canada, John Harp and John R. Hofley, editors. Scarborough: Prentice-Hall of Canada Ltd., 1971. See also Alison Prentice, The School Promoters: Education and Social Class in Mid-19th Century Upper Canada, Toronto: McClelland and Stewart, 1977.
12. In The Protestant School Board of Greater Montreal et al. and AG Quebec (1989), S.C.C. Ruling of March 16, 1989. File No. 204-15. The appellant boards sought a declaration from the Supreme Court of Canada that Section 16(7) of the Province's Education Act and regulations were *ultra vires* because of inconsistency with Section 93(1) of the Constitution Act, 1867. It was argued that the Protestant minority had a right to manage and control its schools and, subject to the general rules of the Province, regulate the curriculum in its schools. Among the issues raised to protect and preserve values and priorities in the curriculum of their school system, the appellants cited at page 32 that
The obligatory and only course in Canadian history, "History of Quebec and Canada", does not touch upon any history of Canada, apart from Quebec, from 1929 to the

present. No optional course in Canadian history may be taught without the consent of the Minister.

The appeal was dismissed. In Quebec, Section 93(1) is entrenched only so far as it applies to the denominational guarantee. Courses such as the above, which may be used to silence the memory and learning of Canada's history, are thus legal.

13. See Bilingual Tensions in Canada, Robert M. Laxer, editor. Toronto: Ontario Institute for Studies in Education, 1988. See also Charter of the French Language, RSQ, 1977, c.C-11.
14. Constitution Act, 1982, Section 59.
15. Constitution Act, 1867, the Preamble. See also F.R. Scott, The Canadian Constitution and Human Rights, Toronto: Hunter Rose Co. Ltd., 1959, pp.16-18, concerning the content and purposes of the Preamble.
16. The Privy Council ruled through Lord Watson in Liquidators of Maritime Bank v. Receiver General of New Brunswick that "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion Government" (p.447).

B) General Powers

17. Note also "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Power Authority", K. Lysyk, Canadian Bar Review, Vol.57, 1979, pp.531-574. It is noted (p.536) that the Constitution Act, 1867 contains two parallel residual clauses. The Introductory Clause of Section 91 applies to matters "of a general character", while the provincial residuum in Section 92(16) applies to matters of "a private or local nature".
18. Reference Re Anti-Inflation Act (1976), 68 D.L.R. (3d) 452.
In some leading antecedent cases concerning p.o.g.g. the Privy Council treated Section 92(13) as another provincial residuum.
19. As Hogg notes (op.cit., p.241), "the residuary nature of the federal power ensures that every possible subject of legislation belongs to one or other of the federal Parliament or the provincial legislatures". The Constitutions of the United States (1787) and Australia (1960) provide for enumerated federal powers and residual states powers.
20. The Senate of Canada. Report Relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters. Ottawa: Queen's Printer, 1961. The text is a report of William F. O'Connor, L.C. and P.C. of the Senate of 1939.
21. Hogg, op.cit., pp.243-246. See also W.R. Lederman, op.cit.
22. Jones v AG New Brunswick (1975) 2 S.C.R. 182.
23. Russell v. The Queen, (1882), 7 A.C. 829. In this case, it was explicitly stated that Parliament might justify encroachment on provincial power if the subject matter was of national importance.
24. A-G for Ontario v. A-G for Canada (Local Prohibition Case) (1896) A.C. 348.

25. Toronto Electric Commissioners v. Snider (1925) A.C. 39.
26. A-G for Ontario v. Canada Temperance Federation (1946) A.C. 193. Judicial Committee of the Privy Council.
27. Ibid., pp.205-206. This decision represents a repudiation of the emergency test and puts forward the new test quoted. In Russell (1882) the Canada Temperance Act was upheld - without a definition of the general p.o.g.g. power in the case. In the 1896 Local Prohibition case which followed, Russell was said to have rested on this federal power, but without indicating what its limits were. Watson's (Russell) broad national dimensions test (which could perhaps have been applied in education matters) was replaced by an emergency test. As Hogg notes (op.cit., p.257), from 1896, the Privy Council had insisted on an emergency in every p.o.g.g case.
28. This temporary scheme was upheld by a majority of the Supreme Court of Canada on grounds that there was a "rational basis" for the Act in question. Yet there was more than ample factual data to show that at the time the Act was passed an "emergency" did not apply. This would seem to make it very difficult to challenge the ground of emergency, thereby opening the way as Hogg observes (Op.cit., p.256) for the federal Parliament to use its emergency power "almost at will".

Disallowance and Reserve Powers

29. G.V. LaForest, Disallowance and Reservation of Provincial Legislation. Ottawa: Queen's Printer (for the Department of Justice), 1965, pp.5-12.
30. Ibid., Appendix A.
31. Hogg, op.cit., pp.39;41. See also Bora Laskin, The British Tradition in Canadian Law, London: Stevens and Sons, 1969, pp.121-122 (re: disallowance and reserve).
32. LaForest (op.cit., p.62), states that "the practice of disallowing statutes for injustice, which had been on the wane since Macdonald's death in 1891, was definitely ended with the coming to power of Sir Wilfrid Laurier's Liberal government", because Laurier would "brook no intervention by the Federal Government in matters exclusively assigned to the Provinces". Note also Hogg, op.cit., p.39;41.
33. House of Commons. Fiscal Federalism, p.21. For opinions in support of subsistence, see e.g., Dawson, The Government of Canada, 4th ed., pp.231-235 and J.R. Mallory, The Structure of Canadian Government, Toronto: Macmillan of Canada, 1971, p.328.
34. Interview, Justice Department. Audits on a sampling basis have replaced the full review.
35. LaForest, op.cit., pp.38-42.
36. Ibid., pp.42-43.
37. F.R. Scott, "Dominion Jurisdiction Over Human Rights", in Essays on the Constitution: Aspects of Canadian Law and Politics, Toronto: University of Toronto Press, 1977, p.237. See also F.R. Scott, The Canadian Constitution and Human Rights, Toronto: Hunter Rose Co. Ltd., 1959, pp.23-24.
38. Reference Re the Power of Disallowance and Reservation (1938) S.C.R. 71.

39. Interviews, Justice Department.
40. LaForest op.cit., Appendix B. Note that under Section 90 of the Constitution Act, 1867, provincial legislation is subject to disallowance (by the Governor General) and reserve (by the Lieutenant Governor).
41. Jeffrey Lawrence, "Constitutional Reform: the Division of Powers", Library of Parliament, 1980. Mimeographed.
42. Ibid., p.16.

Declaratory Power

43. Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, (1892) A.C. 437.
44. Montreal v. Montreal Street Railway (1912) A.C. 333.
45. The King v. Eastern Terminal Elevator Co. (1925) S.C.R. 434.
46. P.E. Trudeau, Practice and Theory in Federalism in Social Purpose for Canada, Michael Alwin, ed. Toronto: University of Toronto Press, 1961, p.383.
47. A. Lajoie, Le pouvoir declaratoire du Parlement. Montreal: University of Montreal Press, 1969. see also Justice Department statistics and Jeffrey, op.cit.
48. Ibid., p.19.
49. Loc.cit.

Emergency Power

50. Canada, Statutes, 5 George V, c.2 (1914), War Measures Act. This Act comes into force when the federal government proclaims that "war, invasion, or insurrection, real or apprehended, exists". The federal government is thereby empowered "to make regulations on almost any conceivable subject" as Hogg notes (p. 252). Moreover, as he also notes (p. 215), this Act transfers to the federal Cabinet "virtually the whole legislative authority of Parliament". See Peter W. Hogg, Constitutional Law of Canada, Toronto: Carswell, 1987. Note also the support for this legislation under the federal p.o.g.g. power as per Haldane in Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co. (1923), A.C. 695. Such power is to be temporary, however, some changes in relation to education with far-reaching effects have remained. Federal entry to, and subsequent use of direct taxation in World War I is another example. See also "Emergency Government in Canada", David Edward Smith, The Canadian Historical Review, Vol.50, No. 4, Dec., 1969, pp.429-448.
51. See for example Defence of Canada Regulations, Ottawa: King's Printer, 1939 which notes at the outset a federal standing interdepartmental Committee on Emergency Legislation which was set up under authority of P.C. 531, of 14 March, 1938. Note, e.g., provisions for "control of means of communication".
52. Reference Re Anti-Inflation Act (1976) 2 S.C.R. 373.

C) Inferred Spending Power

53. Interviews. See P.E. Trudeau, op.cit., p.382 concerning the possible eroding effects of the "power of the purse" on Canadian democracy, whether the spending power exercised is federal or provincial. Note also his subsequent view (p.383). See also P.E. Trudeau, Federal-Provincial Grants and the Spending Power of Parliament, Government of Canada Working Paper on the Constitution. Ottawa: Queen's Printer, 1969.
54. Trudeau, op.cit., p.383 footnote.
55. Special Committee of the Senate and the House of Commons, Minutes of Proceedings and Evidence, 3rd Session the the 30th Parliament, 1977-78, Wed., Sept. 6th, 1978, pp.9-10.
56. See also G.E. Carter, Canadian Conditional Grants Since World War II. Toronto: Canadian Tax Foundation, 1971.
57. Proceedings of Federal-Provincial Conferences. See also G. LaForest, The Allocation of Taxing Power Under the Constitution. Toronto: The Canadian Tax Foundation, 1967, pp.36-41.
58. B. Claxton and L. Govin, Legislative Expedients and Devices Adopted by the Dominion and the Provinces. Appendix No.11, prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, King's Printer, 1940.
59. Report of the Royal Commission of Inquiry on Constitutional Problems, Quebec, 1956, Vol. II pp.216 et. seq.
60. F.R. Scott. "The Constitutional Background of the Taxation Agreements", 2 McGill Law Journal, 1956, p.6. This opinion on the prerogative adds to the inferred powers of Sections 91(3), 91(A), and 106 identified by other legal scholars. The prerogative power permits the expenditure of public funds for matters of development or welfare which are of value or benefit to the nation.
61. Rt. Hon. Louis St. Laurent, House of Commons Debate, January 29, 1957, p.754. See also D.V. Smiley, Conditional Grants and Canadian Federation, Toronto: Canadian Tax Foundation, 1963, pp. 17-27.
62. Reference Re Employment and Social Insurance Act, 1935 (1937), A.C. 355.

D) Exclusive Section 91 Powers

Trade and Commerce

63. Section 91(2) is broad and general in terms in comparison with the restrictive terms of the United States federal commerce power (Article 1, section 8(3)). However, judicial review has broadened this power in the United States. In Canada, Privy Council rulings had the opposite effect, to eliminate overlapping with Section 92(13). See George F.G. Stanley, A Short History of the Canadian Constitution. Toronto: The Ryerson Press, 1969, pp.123-125.
64. L.B. Pearson, Opening Statement at the Federal-Provincial Conference on Financing Higher Education. Ottawa: P.C.O., 24 October, 1966.

Unemployment Insurance

65. A-G Canada v. A-G Ontario (Unemployment Insurance) (1937), A.C. 355.
66. W.I. Davies, 25 Annual Premiers' Conference, 1984. Address.

Taxation

67. See Gerald V. LaForest, The Allocation of Taxing Power under the Canadian Constitution, Toronto: Canadian Tax Foundation, 1967.
68. Gerald A. Beaudoin, "Newspapers and Constitutional Competence", in Newspapers and the Law by Walter Tarnopolsky, et al., Royal Commission on Newspapers, Research Publication No.3. Ottawa: Department of Supply and Services, 1981, p.89.

Statistics

Defence

69. Interviews and reports, Judge Advocate General's Office, Department of National Defence.
70. Department of National Defence, memorandum, Adjutant-General to Chief of Staff, Ottawa, Dec. 3, 1930 (H.Q. 188-1-11), DND Archives.
71. Ibid.
72. Ibid.
73. Ibid.
74. Loc. cit. and interviews, Department of National Defence.
75. Canada. Order in Council PG 1968-13/228 of February 15, 1968 (based on s. 12(1) of the National Defence Act, RSC 1970, c.N-4.
76. Interviews: legal counsel, Judge Advocate General's Office, DND. Interview, Hon. Claude Morin, 1988.
77. Interviews, Judge Advocate General's Office, DND.
78. Ibid.
79. A.G. Canada v. St. Hubert Base Teachers' Association (1978).
80. A.G. Canada v. St. Hubert Base Teachers' Association (1983).
81. Ibid.
82. AG Canada v. the Branch Affiliate of Base Borden Collegiate Institute et al. (1980).
83. AG Canada and St. Hubert Base Teacher's Association, op.cit.
84. Ibid.

Fisheries and Oceans

85. Interviews and documentation, Department of Fisheries and Oceans.

Copyright

86. Constitution Act, 1867, Section 91(22). See also Patent: Questions and Answers, Ottawa: Department of Consumer and Corporate Affairs, 1984.
87. Constitution Act, 1867, Section 91(23). See also Copyright: Questions and Answers. Ottawa: Department of Consumer and Corporate Affairs, 1984.
88. Copyright Act, R.S.C. 1970, chapter C-30, Section 17. Also interviews and reports, Department of Consumer and Corporate Affairs.
89. Ibid., Section 17(2).
90. Beaudoin, op.cit., pp.86-88.

Indians and Indian Lands

91. Calder et al v. AG British Columbia (1973), 34 D.L.R. (3d) 145. See also; Sparrow v. the Queen et al (1990) S.C.C. Ruling of May 31, 1990. File No. 20311; Simon v. the Queen et al (1985) 2 S.C.R. 387; AG Quebec v. Sioui et al (1990) S.C.C. Ruling May 24, 1990. File No. 20628.
92. Indian Acts, 1876 - including R.S.C. I-6.
93. Documentation and interviews, Department of Indian Affairs and Northern Development, Treaties and Historical Research Centre information.
94. See Living Treaties: Lasting Agreements. Report of the Task Force to Review Comprehensive Claims Policy. Ottawa: Department of Indian Affairs and Northern Development, Dec., 1985.
95. Canada. Treaty No.4 between Her Majesty and the Cree and Saulteaux Tribes of Indians. Ottawa: Queen's Printer, 1966, p.7.
96. Report of the Royal Commission of Inquiry on Education in the Province of Quebec, op.cit., Vol III, pp.119-120.
97. Ibid., p.131.
98. Ibid., p.127.
99. The James Bay and Northern Quebec Agreement: (Agreement between the Government of Quebec, the Societe d'energie de la Baie James, the societe de developpement de la Baie James, the Commission hydroelectrique de Quebec and the Grand Council of the Crees, the Northern Quebec Inuit Association and the Government of Canada). Quebec: Editeur officiel du Quebec, 1976. Section 16 (pp.268-275), Cree Education and Section 17 (pp.276-290), Education (Inuit). The Cree and Inuit School Board were thereby placed under Quebec jurisdiction (administratively). See also Chief Robert Kanetewat et al v. The James Bay Development

Corporation and the AG Canada. Unreported Quebec Superior Court, District of Montreal. Ruling of Malouf, J., Nov. 15, 1973. File No. 05-04841-72.

100. Interview, Hon. Claude Morin, September, 1988.
101. Interview, Hon. John Munro, Ottawa, 1985.
102. Interviews, Louis Bruyere, President, Native Council of Canada, et.al. Ottawa, 1987,88,89. The compact theory also has no relevance to the vast territorial lands - including Ungava - which did not become part of Canada until 1870.
103. Reference Re: Amendment of the Constitution (1981),(Nos.1,2,3) 125 D.L.R. 3d. 1. Quoted from Supreme Court Decisions on the Constitution,1981. Toronto: James Lorimer and Co.Ltd.,Publishers,1981,p.40. File No. 05-04841-72.
104. Hon. Bill McKnight, notes for speech to the Cree General Assembly, Chisasibi, Quebec, 2nd August, 1988, p.13.
105. Council of Ministers of Education, Canada, Multicultural Education Policies in Canada, Toronto: CCME, 1986, pp.i-ii.
106. Bora Laskin, Canadian Constitutional Law, 4th ed., as revised by A.S. Abel, Toronto: Carswell, 1975, p.523.
107. Hogg, op.cit., p.387.
108. Cardinal v. A-G Alberta (1974) S.C.R. 695.

Naturalization

109. Constitution Act, 1867, Section 91(25) documentation and interviews, Secretary of State Department.

Criminal Law Power

110. In British Coal Corporation v. The King (1935) A.C. 500 the Canadian Parliament was found to have the constitutional power to exclude appeals in criminal cases. This ruling reversed the Privy Council ruling in Nadan v. The King (1926) A.C. 482 in which the powers of Section 91 could not annul the prerogative right of King in Council to grant leave to appeal to the Privy Council. In the interval, however, the Statute of Westminster was enacted in 1931 which provided that the Colonial Laws Validity Act shall not apply to any law made after commencement of a Dominion; that from then (Section 2, ss.2) no law and no provision of any such law shall be voided on ground of repugnance with a law of England. By Section 3 Dominions were given full power to make laws for operation extraterritorially. By Section 4, no Imperial Act passed after the 1931 Act shall apply as a part of the law of a Dominion unless it so requests. Lord Sankey for the Privy Council said that a "prime element of Canadian sovereignty" would be impaired if at the will of its citizens there could be appeal to a tribunal in whose constitution it had no voice. However, it was not until 1947 in A-G for Ontario v. A-G for Canada (Privy Council Appeals Case) A.C. 127, that appeals in civil law of the Privy Council were ruled unconstitutional, thereby giving Canada full legal sovereignty at last and making the Supreme Court the final appeal tribunal in all Canadian law, criminal and civil.

111. See Board of Commerce (1922) A.C. 191; pp.198-199.
112. See Proprietary Articles Trade Association v. A-G Canada (1931) A.C. 310, 324.
113. Hogg op.cit., p.280.
114. Law Reform Commission, Report: Our Criminal Law. Ottawa: Department of Supply and Services, 1976, p.5
115. Ibid., pp.7-9.
116. Young Offenders Act, Section 56.
117. F.R. Scott, "The Special Nature of Canadian Federalism", in Essays on the Constitution: Aspects of Canadian Law and Politics, Toronto: University of Toronto Press, 1977, p. 182.
118. See Globe and Mail editorial, "How We Deal With Hate", Monday, July 22, 1985. See also Criminal Code, Section 282. This case is in appeal.

Corrections

119. Constitution Act, 1867, Section 91(28). Also interviews and documentation, Department of the Solicitor General.

E) Judicially Determined Powers

Treaty Making

120. Constitution of the United States, Article 6.
121. Constitution of Australia, Section 51(29).
122. Constitution Act, 1867, Section 132.
123. Radio Reference (1932), A.C. 304, 312. See Stanley, op.cit., p.140.
124. The Labour Conventions Reference, (1937) A.C. 326.
125. Ibid.
126. Ibid., pp.326,354.
127. See I. Bernier, International Legal Aspects of Federalism, London: Longmans, 1973, pp.152-158.
128. R.J. Delisle, "Treaty-Making Power in Canada", in Background Papers and Reports: Ontario Advisory Committee on Confederation. Toronto: Queen's Printer, 1970, pp.118-119.
129. Ibid., p.119.

130. Interviews: P.C.O. and Departments of Justice and External Affairs. See also Mitchell Sharp, Federalism and International Conferences on Education: A Supplement to Federalism and International Relations, Ottawa: Queen's Printer, 1968.
131. Interviews. See also Delisle, op.cit., p.117 and Edward McWhinney, "The Constitutional Competence Within Federal Systems for International Agreements", op.cit., pp.151-157. See also Paul Martin, Federalism and International Relations. Ottawa: Queen's Printer, 1968.
132. Bora Laskin, The Provinces and International Agreements, op.cit., pp.105-106.
133. In the Labour Conventions Case (A-G for Canada v. A-G for Ontario (1937) A.C. 326, 347-48), Lord Atkin notes that "Within the British Empire there is a well-established rule that the making of a treaty is an executive act...".
134. See Hogg, op.cit., p.182.

Communications

135. Interviews: CBC; Department of Communications; Secretary of state Department. Note that telecommunications is defined in the Interpretation Act, R.S.C. 1970, C.I-23, 528 as "any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system".
136. Radio Reference (1932), AC 304.
137. Public Service Board v. Dionne (1978) 2 S.C.R. 191. Note that, subsequently, federal and provincial proposals for regulating telecommunications services and facilities were considered by first ministers at their September 1980 Conference on the Constitution. Note also that federal jurisdiction over broadcasting and cable television has been upheld consistently since the 1932 Radio Reference, as in the Dionne case. See also Minister of Communications, Proposals for a Communications Policy for Canada: A Position Statement by the Government of Canada. Ottawa: Information Canada, 1973. (The Green Paper). See also..Minister of Communications, Communication: Some federal Proposals. Ottawa: Information Canada, 1975 (the Gray Paper).
138. Interviews and documentation, Department of Communications and C.R.T.C. See also Lawrence, op.cit.
139. Ibid. Note also an overview and analysis of constitutional issues by Robert J. Buchan, et.al., Telecommunications Regulation and the Constitution. Montreal: The Institute for Research on Public Policy, 1982.
140. Broadcasting Act, R.S.O. Sections 22(1)(a) and 27.
141. Order-in-Council P.C. 1972-1569, July 13, 1972; S.D.R./72-261. Canada Gazette Part II, July 26, 1972, p.1047. Re: "Direction to the C.R.T.C. on Ownership by Provinces or their Agents".
142. Ibid.
143. C.R.T.C. Decision: Renewal of the Canadian Broadcasting Corporation's Television and Radio Network Licences, 30 April 1979, p.10. Interviews with Dr.A.W. Johnson, Dr.D. Dunton and Dr. Robert Rabinovitch, Deputy Minister, Department of Communications.

Incorporation

144. Citizens Insurance Co. v. Parsons (1881-82) 7 A.C. 96.
145. Ibid.
146. John Porter, Bernard Blisshen, et.al., Towards 2000: The Future of Post Secondary Education in Ontario. Toronto: McClelland and Stewart Ltd., 1971.
147. Ibid., pp.133-134.
148. Northland Open University Letters Patent, 1976. Program descriptions. Interviews: Consumer and Corporate Affairs Department; Secretary of State Department; Justice Department, Association of Universities and Colleges of Canada and Northland Open University. This is one of many and varied education and training-related bodies incorporated under federal law. It is, so far, one of the few post-secondary incorporations. It is an independent, non-profit corporation whose Charter permits the awarding of earned certificates, diplomas, fellowships and academic degrees.
149. W.P. Lederman, "Divided Authority in Canada to Incorporate Companies and to Regulate the Telecommunications Industry," in: Canadian Constitutional Law: Cases, Notes and materials on the Distribution and Limitation of Legislative Powers Under the Constitution of Canada, 2nd ed. by Jean D. Whyte and W.R. Lederman. Toronto: Butterworths, 1977, p.10.
150. Citizens Insurance Company v. Parsons (1881-82) 7 A.C., 96. (See also C.P.R. Company v. A.G. for B.C. (1950) A.C. 122; Queen in Right of Ontario v. The Board of Transport Commissioners for Canada (1968) S.C.R. 118; A-G for B.C. v. A-G for Canada (1924)).
151. Ibid., p.117.
152. Interviews: Department of Consumer and Corporate Affairs, Secretary of State Department, and Ontario Department of Education.
153. W.R. Lederman, op.cit., p.16-17.

Concurrence

154. Hogg, op.cit., pp.95 and 102.
155. Interviews, M.S.S.D., P.C.O., P.M.O., MOSST. Science Council of Canada, N.R.C.
156. Department of National Health and Welfare interviews and reports. See also Keith G. Banting, The Welfare State and Canadian Federalism, Montreal: McGill-Queen's University Press, 1982, Chapter IV, "The Constitutional Bureau", pp.47-58.
157. Interviews and reports, Environment Canada.

F) Concurrent Powers

G) Delegation and Interdelegation

158. Hodge v. The Queen (1883) 9 A.C. 117.

159. Re Gray (1918) 57 S.C.R. 150.

Interdelegation

160. A-G Nova Scotia v. A-G Canada (Interdelegation Case) (1951) S.C.R. 31.

161. Interviews, Department of Justice.

H) Executive Powers**Prerogative Power**

162. Hogg, op.cit., pp.5-6.

163. R.S.C. 1970, Appendix II, No.35.

164. Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick (1892) A.C. 437.

Executive Authority

165. Interviews: MSSD; PMO; PCO; Secretary of State Department. "National Objectives of Federal Programs that Support Post Secondary Education", Federal Cabinet ratification, July 7th, 1982.

166. See Council of Ministers of Education letter to the Secretary of State, Hon. Gerald Regan, of September 28th, 1982, signed by Dr. Bette Stephenson, Minister of Education for Ontario. Interviews, Secretary of State, Ministerial, Deputy Minister and Assistant Deputy Minister levels. (See also Education Act, Province of Ontario).

167. Interview, Senator Jack Austin, 1984.

CHAPTER V

IMPACTS OF THE CONSTITUTION ACT, 1982

This chapter identifies the origins and nature of rights in Canadian education. A distinction is made between the positions in law with respect to each of these matters at 1867 and 1982. The first benchmark for education is Section 93, which has already been described and analyzed. The second relates to the Constitution Act, 1982 in two respects: its provisions for new rights in education and its possibilities for such additional rights; its provisions in Part V for amending the constitution in education or other cultural matters. The chapter ends with conclusions in relation to Hypothesis No. 2, which proposes that

Constitution Act, 1982 amendments, including new terms for amending the Constitution, increase the scope and flexibility of federal participation in education in relation to antecedent jurisprudence.

A. RIGHTS IN CANADIAN EDUCATION

Bases for Rights in Canadian Education

Canada's inheritance of British traditions of government and law, with its heritage of basic rights, did not include provisions for rights to, or in, public education. The slow evolution there of the idea of public education did not generate such jurisprudence. The English reformation experience was different from that of Prussia, where in 1763 state responsibility for education was put firmly in place - the same year New France was turned over to the British Empire. In England then, and for nearly a century to follow, education was not considered to be a proper business of the state. Universities were under royal charters to distance them from state control. (Even in the

United States at 1860, there were only 17 state universities out of a total of 246.)¹ It was enough that the British upper classes were educated for leadership, until popular enlightenment and such reforms as fuller manhood suffrage in 1867 made education of the masses necessary in politics as well as industry.

In French Canada there was no right to education to be derived from the civil law to 1763. Thereafter, French Canadian reliance on the Church in education was reinforced by the excesses of the French Revolution and by suspicions of state schools as means of Anglicization.

When Section 93 was enacted in the 1867 Act, laissez-faire philosophy was at its height in economics with spillovers in politics and education. Canada's provinces were to have the power to legislate in relation to education, but the when and how was up to them. The only requirement was for separate public schools, where these had been established in law before Confederation. Schooling did not have to be provided. It did not have to be made free or compulsory.

In the common law concerned, there was no recognition of educational right or duty.² This was left to statutory provisions and, in Canada's federal system of limited governments, to the constitutional entrenchment of some rights which can be changed only by difficult amendment process. (In Britain's form of unitary government with this common law background, the doctrine of parliamentary sovereignty means that the legislature can legislate and abrogate educational rights whenever this is voted in Parliament.)

In Canada, Section 93's guarantee of the rights and privileges of denominational schools places a limitation on the sovereignty of both orders of government. The Section's provision for federal remedial action in this matter also limits provincial sovereignty.³ The 1982 Act's rights provision and potential, apart from Section 93, limit provincial sovereignty further. The Act's Section 24 provisions for enforcement increases limitations on the sovereignty of both orders of government, because it grants

standing for litigation to anyone where rights or freedoms guaranteed by the Charter are at issue.³

Judicial review is important because, in Canada, the right to education in all its aspects is derived from statute and case law.⁴ The basic constitutional provision, Section 93, gives the provinces statutory responsibility for educating children and youth. In some circumstances, the same responsibility applies to the federal government. Provincial and territorial legislation on education is therefore subsumed under this constitutional law. This in turn involves statutes or ordinances which specify the qualifications for school attendance, including the limits of compulsory attendance. In support of such law, the federal family allowance payments were first contingent on school attendance, public or private. Subsequent funding has been supportive of school attendance in a non-coercive way.⁵

As a result of those rights created or clarified in case law, the principle has been clearly established that the right to education is, in law, the right of the child. It is not held by the parent or guardian; nor is it subject to the discretion of a board of education or any other person or entity anywhere in Canada. For example, in the 1928 Saskatchewan case, Wilkinson v. Thomas, the Court ruled that children covered by the age range specified in the provincial school act have an imperative right to school attendance and education, and that this right is not subject to the discretion of parents or school officials. Furthermore, it was held that school boards are under absolute obligation to provide for the child's education and may, if they fail to do so, be required to do so by writ of mandamus.⁶ Case law has also established the principle that, in order that the child's right to education may be attained, school boards are obliged to provide, or provide for, necessary accommodation and facilities. This was made clear enough in a 1928 New Brunswick case, Ex Parte Gallagher.⁷ The principle established has been applied with elaboration in later cases. The circumstances under which support must be provided are broad and costly, considering the rights established in statute across

Canada for free access to elementary, secondary - including technical and vocational - and special education, to age 21 in most cases, and beyond in some.

Rights to education are hollow unless rights in education are secure too. Democracy itself is still the most important of the safeguards of civil rights. An independent judiciary is the next line of defence. The common law, with its bias for individual rights and freedoms, is the other protection. As Professor Hogg states

The traditional civil liberties, especially the great "political" liberties of belief and expression, do not derive from the positive law or governmental action, but from an absence of positive law or governmental action.⁸

Thus, what is left unprohibited in these circumstances, constitutes the civil liberty of speech - the essence of education in a free society.

References in the Charter of Rights and Freedoms, and in the literature, make it necessary to make a clear distinction between "rights" and "freedoms". Such a clarification was made in the 1969 Report of the McRuer Royal Commission Inquiry into Civil Rights for the Province of Ontario. In it, Mr. Justice McRuer and W.R. Lederman stated that

Powers and rights are quite specific and detailed, properly speaking, and they are defined or given by common law or statute.... The specific power is spelled out in the law, with corresponding specific duties resting on other persons to give effect to it. The so-called freedoms or liberties are much more general and indefinite in their nature.

It therefore is necessary to make some analysis of the distinction between rights and powers on the one hand, and liberties, freedoms and privileges on the other....Rights, duties, and powers, because of their specific and definite obligatory content, belong together....liberties, freedoms, or privileges which, while they are essential concepts of a legal system, nevertheless lack the specific and detailed obligatory character of rights, duties, and powers.⁹

Hence the importance of the Charter's specific new rights in education, and its potential for the courts to establish additional rights.

The range of potential rights in education is considerable. This is shown in the discussion which follows in respect to eight areas where such rights are either established or potential. These areas are related to religion, language, culture, multiculturalism, native peoples, economics, and various other areas for rights, including the atypical categories in special education, literacy, private schools, new citizens, and the aged.

Religious Rights

In Canada, religious rights in public education are, as already described in the terms of Section 93 and Article 17 of the Newfoundland Act, 1949, limited to only those classes so designated. Freedom of religion, including the right to be excused from religious instruction in schools where such observances are a part of the curriculum, is protected under the federal criminal law power in Section 91(27) of the Constitution Act, 1867. For, as made clear by Rand's obiter dictum in the 1953 case, Saumur v. the City of Quebec and AG Quebec, provincial legislative powers in the Constitution were not intended for making religious enactments or for protecting religious beliefs. "Legislation in relation to religion", he said, "and its profession, is not a local or private matter" and, moreover, "the dimensions of this interest are nation-wide".¹⁰

The place of natural law in relation to the Constitution was made clear in a subsequent case concerning compulsory religious education. In a 1958 case, Chabot v. Les Commissaires d'Ecoles de Lamorandiere, the plaintiff, Chabot, a Jehovah's Witness, was held to have the right to have his children sent to the defendant's school, because it was the only one in the district. Moreover, the plaintiff's children were not obliged to participate in religious exercises and instruction while in attendance at this school, regardless of the Quebec Education Act and Roman Catholic Committee regulations requiring this. The majority of the Court held that positive law could not, nor be interpreted to, abrogate religious liberties based on a natural right to religious freedom.¹¹

Thus, the parental right to control their children's religious education is rooted in natural law and, as such, can neither be abridged nor abrogated by provisions of the positive law.

Section 29 of the Constitution Act, 1982 preserves rights or privileges guaranteed "by or under the Constitution" in respect of denominational, separate, or dissentient schools. Quebec's Section 93 minority group religious rights situation at the union is given double protection against provincial replacement.

Language Rights

In Canada, except where entrenched provisions apply constitutionally, determination of the language of instruction (but not minority language rights in education) has been left to each province to decide under its Section 93 power. One clear exception from 1867 on, was that, by the terms of Section 133, use of French and English applied to the records and journals of Parliament and the Legislature of Quebec, and in any Court of Canada or Quebec established under the Constitution Act, 1867. The result in Quebec, but not elsewhere in Canada, was a dual status for French and English in these institutions and, in addition, in the schools - to accommodate the Province's long-established anglophone minority. This generous accommodation, however, was not based on a legal rule of the Constitution.

Up to 1969, Quebec's laws seem to have been silent on language in Quebec education.¹² This left the matter open for a century, to the benefit of the province's anglophone minority. Thus it could be argued that, as the result of Quebec's former dual system of public schooling, a constitutional convention had developed for French-English language equality. This was before Bills 22 and 101. There is no obligatory or entrenched provision in any of the Constitution Acts to require a province to legislate minority language rights in education. However, as case law shows, Parliament has been able to enact minority language rights in education with common national applic-

ations by acting on federal jurisdiction apart from provincial jurisdiction under Section 93.

When, in 1970, the federal Official Languages Act came into force, with provisions for financial aid to education and instruction in the official languages, federal legislation accommodated both English and French minorities everywhere in Canada. Quebec took immediate advantage of the significant financial benefits involved to help maintain its English language education as both a first and second language. The other provinces responded by initiating some education in French as a first language and improved instruction of French as a second language.¹³

Earlier, however, the issue of the language of instruction reached serious proportions in the politics of education in Ontario and Quebec - in particular in 1917 - when the Judicial Committee of the Privy Council gave its rulings in the case of Mackell v. Ottawa Separate School Trustees.¹⁴ The main issue in this adjudication was whether language as a right or privilege was protected under Section 93's provision for dissenting schools. The Privy Council ruled that it was not. On a second issue of whether French in Ontario separate schools was protected by "right of custom", the answer was no again. In the circumstances, the court could not see the French language as a natural right. Finally, on the issue of whether French had been protected by treaty in the Quebec Act, 1774, the answer was that such a civil right did not exist. Clearly, Section 93 was not a protector of minority language rights in education - not in Ontario, in spite of its growing francophone population - or elsewhere. The responsibility for guaranteeing minority language rights in education lay with the federal order of government.

A similar dispute arose later in Quebec in reaction to its Legislature's enactment of Bill 22, the Official Language Act, 1974, to make French the province's sole official language. This time, ten Protestant school boards instituted suits aimed at invalidation of sections of the Act considered prejudicial to minority anglophone interests in education. The ruling in Protestant School Board of Greater Montreal, et.al. v. Minister of

Education of Quebec of 1976, was given by Deschenes, C.J., Supreme Court of Quebec.

The Chief Justice reviewed the history of the text and jurisprudence related to Section 93. He considered antecedent disputes in Quebec and other jurisdictions in their historic contexts, observing that

At each of these solemn moments in our history the Courts have distinguished between language and faith, between culture and religion; they have recognized constitutional guarantees to the denomination of schools only and never did they interpret the British North America Act, 1867, as an instrument of the protection of the language or culture of a particular group.¹⁵

Hence, as in Mackell, it was held that Section 93(1) referred to exclusive power of the Province in matters of education which apply to the denominational aspect of the schools, but not to the language in which they operate. The choice of the official languages of instruction was thus left to the Provincial legislatures, thereby placing minority language groups in an inferior position under provincial law. For the second time, a residual national responsibility for minority rights in education was confirmed in case law. Yet it would still take 53 years from Mackell before a federal Act to support official languages was enacted, and 65 years before minority official languages in education would be entrenched in the Constitution.

In 1977, the Quebec Legislature adopted the Charter of the French Language, a statute which reaffirmed French as the official language of the Province, and more.¹⁶ Bill 101, as it was called, set an agenda for francization with broad demographic social and economic consequences in Quebec, as witnessed by the decline of the anglophone community through exodus and impediments to immigration. The goal of the Quebec Charter was a francization across the board: the legislature, the courts, the civil service, the workplace, and the school system.

This situation, as it applies to the school system, is described in Chapter VIII of the Quebec Charter "Language of Instruction", which provided that instruction was to be

in French in kindergarten, elementary, and secondary schools "except where the chapter allows otherwise".¹⁷ Section 73 permitted a child's instruction in English, provided either of the parents requesting this had received his or her elementary education in Quebec, or had been domiciled there when the Act came into force, and had received his or her education in English outside Quebec.¹⁸ Exemption also applied for siblings of children already in English schools when the Act came into force. This provincial legislation denied Canadian citizens, wanting or needing to move to Quebec from elsewhere in the country, the right to have their children continue their education in English, unless the parents happened to meet the specifications described. Exemption was available for temporary residents. Anglophone aliens or others wanting their children to be educated in English were to have no option other than education in French. In all cases, Section 84 provided that no secondary school-leaving certificate was to be issued to a student who did not have a speaking and writing knowledge of French as required by the Province's curricula.¹⁹

A notable and unannounced exception was the dependent population of the Canadian Armed Forces. In this case, it was not certain whether the Province had waived its legislation in deference to the federal government's exclusive power in Section 91(7) of the Constitution Act, 1867, or to avoid substantial shared education costs which could result.²⁰ (In Quebec, the Department of National Defence has paid the full cost of educating its dependent children and youth.)

The Quebec Government defended its use of the Constitution Act, 1867, Section 92(1) to override the entrenched provisions of Section 133 which makes French and English equally official languages of the Province's courts and legislature. This action made it appear that the Quebec legislature was using Section 92(1) to add federal powers to its provincial constitution, and was, perhaps, setting a precedent for doing this in other matters.²¹ In two related 1979 cases, AG Quebec v. Blaikie and AG Quebec v. Laurier,²² the Quebec Superior Court granted a declaration that the Quebec Legislature

cannot unilaterally amend Section 133. (It is assumed that the same would have applied to Section 93.) Accordingly, subsections 7 to 13 of Chapter III of the Quebec Charter were declared wholly *ultra vires* the jurisdiction of the Quebec legislature. In 1981, the Supreme Court of Canada affirmed both judgements in an appeal from the Attorney General of Quebec in Blaikie v. AG Quebec.²³

The final test of Quebec's language law in education was to come about with the advent of the "Canadian Charter of Rights and Freedoms" within the Constitution Act, 1982. This occurred in a 1982 case, the Quebec Association of Protestant School Boards, et.al. and the AG Quebec (No. 1),²⁴ in which the federal government was among the intervenors. At issue was the *vires* of Quebec's Charter of the French Language in contradiction to the entrenched provisions for minority official language rights in education in the Constitution Act, 1982, Section 23, subsections (1)(b) and (2). The culmination of this litigation came in a 1984 landmark decision of the Supreme Court of Canada, AG Quebec v. Quebec Association of Protestant School Boards et.al. (No. 2).²⁵ The purpose of the appeal was to determine, by means of a declaratory judgement, whether or not the provisions contained in Chapter VIII of the Quebec Charter of the French Language (Bill 101) were consistent with the Constitution Act, 1982. The Supreme Court ruled that there was an inconsistency and that the Quebec legislation was *ultra vires* to the extent of this inconsistency. Sections 72 and 73 of the Quebec Charter were found to have no force or effect²⁶ as a consequence of the Constitution Act, 1982 Section 52(1) and (2)(a) which state that

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) The Canada Act, including this Act;

Moreover, the limitations imposed by Section 73 were deemed not to be reasonable within the meaning of Section 1 of the Canadian Charter of Rights and Freedoms which

...guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²⁷

The children of anyone educated in English in Canada outside Quebec were to be admitted henceforth to the Province's English schools for education in the English language.

The immediate Parti Quebecois Government reply was that it would comply with the ruling reluctantly. As Premier Levesque said

We will implement the ruling just as we implemented the ruling concerning our language of legislation because we're a society of laws and because we're in the federal system such as it is.²⁸

He expressed concern about abuses of the ruling in the case of families who wouldn't normally qualify for English education in Quebec sending their children elsewhere.

"That would take us back to an era of free choice", he said, "and the French speaking population will never accept that". He also noted that the Supreme Court ruling had, he thought, imposed Canada's "profoundly tarnished Charter of Rights" on Quebec without the Province's consent.²⁹

Section 23. The provisions in Section 23 of the Constitution Act, 1982 for minority language education rights, are unique in education law in Canada and elsewhere. There is no parallel in the International Covenant, the European Conventions, or the Constitution of the United States. Its full terms are as stated in Appendix D.

In Quebec Association of Protestant School Boards et. al. (1984) the Supreme Court of Canada described Section 23's legal nature as follows:

Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly,

are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s.23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada.³¹

In Reference Re Education Act of Ontario and Minority Language Rights (1984), this was explained by the Ontario Court of Appeal in terms which fit official bilingualism in Canada.

Since 1867, the French and English languages have had official status in Canada. The Charter has recognized bilingualism. Its provisions apply to both anglophones and francophones wherever they may reside. No doubt with a view to the future strength and unity of the country, it has made provision for minority language education rights... Prior to the passage of the Charter, the necessity of preserving the minority language and thus the culture of the minority by educational rights has been recognized. The Royal Commission on Bilingualism and Biculturalism stressed this principle. It has been observed that the Premiers' Conferences held in 1977 and 1978 unanimously recognized and stressed this concept. Section 23 of the Charter has given effect to this principle and made it part of the "supreme law of the land".³²

Section 23 was made to apply nationally, in order to correct, and to prevent, obstacles to equity in minority official language education rights and involuntary linguistic and cultural assimilation.

In Protestant School Board of Greater Montreal, et. al. v. the AG Quebec (1989), the issue of denominational schools raised the problem of the ambit of Section 93. In turn this served to help distinguish between the nature of education rights in Section 93 (1867) and Section 23 (1982). In reference to Section 93(1), Beetz, J. stated that

While it may be rooted in notions of tolerance and diversity, the exception in s.93 is not a blanket affirmation of freedom of religion or freedom of conscience. The entrenched right of specified classes of persons in a province to enjoy publicly-sponsored denominational schools based on a fixed statutory benchmark should not be construed as a Charter human right or freedom or, to use the expression of Professor Peter Hogg, a "small bill of rights for the protection of minority religious groups"... as Professor Pierre Carignan explains in "La raison d'être de l'article 93 de la loi constitutionnelle de 1867 a la

lumiere de la legislation preexistante en matiere d'education" (1986), 20 R.J.T. 375, at p.457.³³

The translation of Professor Carignan's statement says

In the case under consideration, the drafters in 1867 certainly did not see this as a fundamental right. If they had, it would have been given the same protection throughout Canada. The only effect of the provision is to prevent various legislatures from backing away from the legislation on denominational schooling in effect in 1867 in their respective territories. Accordingly, the extent of the constitutional protection varies from one province to another. By so doing, the drafters were demonstrating not so much a preference towards entrenchment as a desire to facilitate the creation of the proposed federation by disarming the opposition of those who, favouring denominational schools, might fear that a political reorganization would threaten already established legislative protection in this area.³⁴

In contrast, Section 23 aims at equitable, national accommodation of the two official languages, in and through education. It was created as a fundamental right in all Canadian education for all citizens, apart from Section 93, as the relevant constitutional law requires. It serves Quebec's anglophone minority, and the francophone minorities in the other provinces. It applies in New Brunswick, where bilingualism was entrenched in the 1982 Act. It applies fully except for the permission granted to Quebec in Section 59 of the Constitution Act, 1982 to suspend application of Section 23(1)(a) - the "Quebec Clause", which makes a discriminatory distinction between citizens born in Canada and elsewhere. Section 59 was not an element in the early versions of the Charter text (of 1981 and 1982). Nor was it included in the federal-provincial agreement of November 5th, 1981. It was added at the eleventh hour to make the Section 23 reform acceptable to the Quebec government. The Province is thereby exempted from Section 23(1)(a) until consent is given by either its legislative assembly or its government - something unlikely for some time to come, if ever.³⁵

That Section 23 is a fundamental right is also evident in its entrenchment out of the reach of the 1982 Act's Section 33 "notwithstanding" clause. This clause gives

Parliament and the provincial legislatures the discretionary power to exercise their legislative sovereignty over Section 2, or Sections 7 to 15 inclusive. Plainly, Section 23 adds to education rights in Canada and to the content involved. Moreover, it does so on a national, uniform basis. This is complemented by need and provision for appeal to the courts, thereby assuring constitutional case law of common application. The provision for judicial review limits the alternative of executive federalism in its present *de facto* form. It would do the same to executive federalism in the *de jure* form which passage of the Meech Lake Accord amendments to the Constitution would have created. It does not rule out federal responsibility for defending and supporting minority rights which is implicit in the 1867 Act.

To increase the authority of legal rules and limit the expediencies of extra-constitutional politics, the federal government has funded court cases related to issues in, first, Sections 93 and 133 (1978), then, Section 23 (1982) and, finally, Section 15 (1985), which the Mulroney Government added to this list. The path to further constitutional case law on the variable of equality of treatment is broadening.

As confirmed in an interview with Dr. Davidson Dunton, former co-chairman of the Royal Commission on Bilingualism and Biculturalism, the Commission did not have any specific mention of education in its initial terms of reference.³⁶ Public interest and concern made it necessary to consider education - in relation to culture and minority rights. Since this was done within the context of the 1867 Act, consideration of a possible Section 93A resulted.³⁷ The federal government did not pursue this option. In fact, none of the federal or provincial officials interviewed even commented on it.

However, before the Parti Quebecois government enacted Bill 101, Premier Levesque proposed a reciprocal accord whereby anglophone children moving from other provinces would be granted the same language education rights as their respective provinces accorded their francophone minorities. Prime Minister Trudeau reacted by stating that "one does not negotiate on the heads of children".³⁸ He then put reciprocity

on the agenda of the 1977 First Ministers Conference in St. Andrews. An agreement in principle was reached to provide for official language minority education, where numbers warranted. This position was clarified and strengthened at the 1978 Premier's Conference in Montreal where it was agreed that

Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province where numbers warrant.³⁹

The Trudeau Government prepared the final Section 23 text in liberal and specific terms for entitlements, and in general terms for facilitation, including the provision "where numbers warrant", which would invite judicial review and the entrenched standards this would impose nationally. There was no requirement for continuity of federal funding support which had started in 1970; this was understood. The federal government was not designated to act in a national capacity; this was implicit.⁴⁰ Had the model of Section 93 been applied to Section 23, there would have been explicit provisions for appeals to the federal Cabinet and Parliament as Section 91(4) permits. The Court may ultimately rule that this alternative applies.

Meanwhile, if this continuity of federal residual responsibility is challenged, Section 23 grants citizens both a collective right to education in the two official languages of Canada, and a qualified individual (parental) right of choice. It creates a minority official language right in education on a common, national basis which, constitutionally, is apart from each province's Section 93 jurisdiction. This complements the federal residual in jurisdiction in relation to education.

The provision for the freedom of parents to choose the language of instruction of their child is in keeping with the B and B Commission's recommendations "that the rights of Canadian parents to have their children educated in the official language of their choice be recognized in the educational systems".⁴¹ The parents' freedom to choose their child's religious instruction was an established right in Quebec law. The

parallel of language did not change this approach. Quebec's nationalists, or parochialists as some describe them, disagreed with the extensions of this parental right. Ostensibly to protect an endangered majority language, they insisted on Bill 101's removal of choice on the variable of language.

The idea of an active federal responsibility to ensure Section 23's observance is raised in the Ontario Court of Appeal ruling of 1984 in Reference Re Education of Ontario and Minority Language Rights.

The judiciary is not the sole guardian of the constitutional rights of Canadians. Parliament and the provincial legislatures are equally responsible to ensure that the rights conferred by the Charter are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention. Minority linguistic rights should be established by general legislation assuring equal and just treatment to all rather than by litigation.⁴²

Presumably, implementation would be the focus of this "general legislation" which could be national or provincial. There would be financial implications involving both orders of government too, because it would not be just to expect local taxpayers to pay all the costs of Section 23's elaborations in law.

Since 1970, federal governments have achieved this end by *de facto* means, through bilateral but comparable conditional financial agreements in support of official languages education. As of 1984, there seemed to be sufficient common ground in these agreements to permit the parallel of the federal (adult) National Training Act - administratively, but not politically. Apart from this, harmonization of general provincial legislation could be achieved by simultaneous enactments, provided all provinces could agree. In the meantime, Court rulings will, in effect, prescribe the scope and content of legislation related to the specifics of Section 23 implementation.

Clearly, Section 23 implementation is not left to the politics of executive federalism. Nor is its legal enforcement left entirely to governments, federal or provincial. This is because parents, who are the beneficiaries of the rights which Section 23 con-

fers, have standing for taking legal initiatives. In Section 24(1), clear constitutional provision is made for obtaining judicial orders for compliance and for damages (as in the United States). This provision is as follows:

24(1). Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This provision applies only to breaches of the Charter. Therefore, other unconstitutional acts would have to be challenged by the established methods. The potential for inflexible constitutional rulings concerns the provinces.⁴³

Section 23 applies to three categories of parents who are citizens of Canada: in subsections (1)(a), (1)(b), and (2) respectively. In the first category of parents, (1)(a) confers upon "citizens of Canada" who are members of the anglophone minority in Quebec or the francophone minority in the rest of Canada, "the right to have their children receive primary and secondary school instruction in that language in that province". This right applies only to parents (and citizens) in certain conditions. It does not apply in Quebec where new citizens were immigrants. In the English-speaking provinces paragraph (a) will apply to persons (1) who are Canadian citizens, and (2) whose first language learned and still understood is French. This right will also apply to persons from other provinces of Canada and elsewhere (provided they have become Canadian citizens). Paragraph (a) will not include persons whose first language is neither English nor French. Their children will have to attend school in the English (majority) language. Finally, paragraph (a) does not apply to a person who is one of those province's English majority but who resides in a minority French area. This provision thus makes one distinction between citizens and non-citizens, and another (in minority situations) between a person whose first language "learned and still understood" is French or English, and a person with another language.

Section 23 is silent on what such an "understanding" is to involve and who is to make such a determination, when, and how, or even if tests will be required. Significantly, it does not say that provinces or local school authorities are to decide such matters. The court will have to decide - unless they can be accommodated without dispute by legislation or by political or executive agreements. At the very least, the federal government could be involved as an intervener in the first case, and as a direct and principal participant in the second case.

The second category of parents (and citizens) is provided for in paragraph (1)(b), the "Canada Clause", which applies to all of Canada, including Quebec. It assures citizens of the right to have their children educated in the minority language of any province in which they now reside, on the basis of their having had their primary instruction in that language anywhere in Canada. For example, if a parent who had received his or her primary education in English in, say, Saskatchewan, moved to Quebec the child's right to primary and secondary education in English would apply. If, however, that parent had received his or her education in French in Saskatchewan, a claim to education in English would not apply in Quebec. The parent concerned would be in the same position as an English-speaking immigrant to Canada entering Quebec. That is, no right to education in English would apply to the child.

In the third category of parent (and citizen), continuity of language instruction in the family is provided for in Section 23(2) in all of Canada. Citizens of whom any child has received, or is receiving, primary or secondary instruction in French or English in Canada, have the right to have all their children receive primary and secondary school instruction in the same language. This seems to include any of the thousands of Canadian parents who have had a child in a French immersion program and who moved to Quebec.

The foregoing entitlements to minority language rights depend upon the provisions made for implementation in Section 23(3)(a) and (b). The first refers to numbers

of children warranted; the second refers to facilities. In both cases Section 23 is silent. It does not specify the "number" sufficient to warrant minority language rights in education. Nor does it make local boards or provinces responsible for making such a determination. Instead, the decision is left to the courts, or to political or executive agreement by extra-constitutional means. That a broad, liberal interpretation of the Section is to be expected from the courts has already been indicated in a 1984 reference case before the Ontario Court of Appeal, Re Minority-Language Education Rights. This case was concerned with parts of the Act, including its extensive delegations of duties and discretion to local school boards which enabled these authorities to determine the numbers necessary for French minority instruction at the elementary and secondary levels. The Court found the Ontario Act in contradiction to language rights law. First, these rights under Section 23 were to benefit the parents, not the pupils - regardless of whether or not, as the Ontario Education Act required, they were "French-speaking". Moreover, the Act's requirement that the province's local school boards have the duty and discretion to determine whether such minority education provisions were necessary, only if minimum groups of 25 for elementary and 20 for secondary could be assembled, was found to be inconsistent with the new constitutional law. The determination of "where the number of those children so warrants" is to be made by the legislature because the rights and obligations involved extend beyond local boundaries. As well, the quality of education provided to the minority must be equal to that provided to the majority. Moreover, the parents of pupils who use minority facilities are entitled to participate in their management and control - as Ontario has recognized. In making its ruling the Court declared that

Section 23 of the Charter particularly must be given such a liberal interpretation for it enacts new rights and in effect creates a code which establishes minority-language education rights for the nation.⁴⁴

Section 23 does not define the meaning of "educational facilities" - a potentially varied and costly matter. Instead, such determination is left to the courts, or to alternative extra-constitutional means. In either case, it is possible that paragraph (3)(b) might be read in conjunction with Section 15(1) of the "Charter of Rights and Freedoms" which says that

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.⁴⁵

An earlier 1983 New Brunswick Queen's Bench ruling in Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Minority Language School Board No. 50 generated some interesting clarifications of Section 23 in respect to bilingual schools. A minority English language school board in northeastern New Brunswick had accepted francophones into both its regular and immersion classes. (The French-speaking minority in the Province have had their own school system since 1980.) Two provincial francophone groups went to Court to stop these practices. Richard, J., Chief Justice of the New Brunswick Court of Queen's Bench, acknowledged that bilingual schools can promote assimilation. However, it was held that Section 23 was to be a guarantee of no more than the right of the linguistic minority to education in the minority language. The provision does not constitute a duty for the linguistic minority to exercise its right, nor for a right to education in the language of the majority. It does not restrain school boards which provide French immersion classes for francophones in English-speaking schools, or which provide francophones with instruction in English.⁴⁶

In summary, it should be noted that Section 23 linguistic rights apply to all public schools, whether they are denominational or not. Also, Section 93 minority denominational group rights are not at variance with the individual linguistic rights in Section 23. Thus, in Ontario's case, where Professor Magnet has estimated that about

ninety-five per cent of the Province's 500,000 francophones are educated in separate schools, the review of the constitutionality of secondary school inclusion under Section 93 did not preclude provision for minority language education rights. Ontario education law was amended accordingly. This corrected one hundred and seventeen years of injustice to Ontario francophones. In the view of Professor J. Magnet

The historical background suggests that Section 23 must receive a large, liberal and robust interpretation - in a spirit that foresees widespread mobility for francophone minorities without fear that the education system will attack the children.⁴⁷

This is what the Court has been doing in the case of Section 23. This is what it might do, should other matters of rights content in the Charter be raised from rhetoric to constitutional rules. When this happens, as Chief Justice Deschenes of the Supreme Court of Quebec observed in 1982 in the case of Section 23's minority language education rights, such rights will apply uniformly throughout the country. He stated that

The entire approach of constitutional law is intended to ensure a liberal interpretation and generous and uniform application of the law throughout the country ...we must therefore not hesitate to interpret the Charter in a broad and literal manner that it calls for, as a significant part of the Canadian Constitution.⁴⁸

This kind of jurisdiction already applies to the national residual which the terms of Section 93 explicitly create, by excluding the provinces from extra-territorial jurisdiction in education. Entrenched Charter rights limit both orders of government legislatively. Applied to education, as in the case of Section 23, these new rights would represent jurisdiction in addition to Section 93 jurisdiction. Since this will occur on a national basis, as it does in Section 23, federal participation is implied and required. Thus, if Section 93 was to be involved, there would have to be an amendment to the Section. In such a case there would be need for an appeal provision to the federal Cabinet and Parliament, as there is in Section 93(4) in the case of denominational rights

in education. Thus, when entrenched minority rights in education are provided for, outside Section 93, this should not preclude such appeals in addition to those which may be referred to the Courts. Finally, when entrenched rights in education are created, the federal order of government will be drawn into curricula in new education rights fields, the way it has been in the matter of official languages in education.

Section 23 evoked widespread claims among minority francophones across Canada for the right to the management and control of their minority language school, or system. Of all cases, Mahe v. R. in Right of Alberta (1990) is the most significant to date. Having failed to obtain declarations from both the Alberta Court of Queen's Bench and the Court of Appeal, the appellants took their case to the Supreme Court of Canada. At issue was the right to manage their school in Edmonton for 242 pupils in kindergarten to Grade VI and 73 immersion students in Grades VII and VIII - children from a population of about 2900 parents and citizens whose language first learned and still understood was French. (The school had been established in 1984 by the Edmonton Roman Catholic Separate School District No. 7.) The Supreme Court ruled that the appeal should be upheld.

The Court declared

The general purpose of s.23 of the Charter is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population..... Section 23 is also designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the "equal partnership" of the two official language groups in the context of education..... Where the numbers warrant, s.23 confers upon minority language parents a right to management and control over the educational facilities in which their children are taught.⁴⁹

This constitutional case law applies to the anglophone minority in Quebec, as well as to francophone minorities in the rest of Canada.

Cultural Rights

Cultural rights were not mentioned in the Constitution Act, 1867. The idea of including such rights in the Constitution Act, 1982 amendments was dropped, save for oblique references to aboriginal rights and freedoms in Section 25 of the "Charter of Rights and Freedoms", to multicultural heritage in Section 27, and to a reaffirmation of existing denominational rights in education in Section 29. The term is used for the first time in Section 40 in reference to amendment under subsection 38(1) which refers to transfer, to Parliament, of provincial legislative powers relating to "education or other cultural matters". Education's integral link with culture is recognized in this new constitutional law, together with the potential for continuation of federal participation in such related matters.

Multicultural Rights

Section 27 of the new Charter declares that it

..shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.⁵⁰

The Section was not a part of the October, 1980 version of the Charter. It was added by the Special Joint Committee, January 31st, 1981. It is an interpretative provision and as such does not seem to offer any guarantee of such rights. Whether or not it is more rhetorical than operative is yet to be decided in law. In the meantime, the federal government has made substantial provisions to recognize its policy commitment to the matter, including its connection with education, as described in Chapter IX.

One anomaly in the federal operations to date in such matters is the exclusion of the first peoples - the Indians and Inuit - from the operational definition and action associated with "multiculturalism" as a focus for federal research, programs, and services - including those related to education. One reason for this is the longstanding, separate budgetary and administrative treatment of native affairs, including education. It

also fits the special status native peoples have in Canadian constitutional law. However this dichotomy diverts attention from the very multicultural nature of the Indian, Inuit, and Metis populations in Canada. The challenges their languages and cultures pose in education are considerable - in curriculum development and instruction, and in cost. Such matters may account in large part for a reluctance on the part of provincial governments to take over this indigenous multi-cultural education.

Canada's native peoples have their cultures rooted in their lands. Hence, when their multiculturalism is taken into account under Section 27, they may gain in law another means of protecting their aboriginal rights and land title claims.

Native Rights

As noted, the only reference to race in the Constitution Act, 1867 is to "Indians" in Section 91(24). This has made the federal government responsible for ensuring the education of the class of persons so defined legally, in accordance with the provisions of the Indian Act and with regard for the terms of Section 93, wherever and however these apply.

When the Constitution Act, 1867 was framed there was no known thought of granting native peoples minority rights in education to help them protect their various cultures, religions, and languages. Instead, the assumption seems to have been made that education was to be primarily a means of introducing the first peoples to Christian religion and non-native "civilization". Consequently, the education pattern became largely one of turning native pupils over to missionary schools - often far removed from their communities - to accommodate early church initiatives in education bent on assimilation.

F.R. Scott and others have mentioned that the foundations for recognition of minority rights were well laid before Confederation. As a result, such rights were made a residual responsibility of the federal order of government. However, while the federal

government did continue to recognize native rights to education, it did not recognize such rights in education. Its approach then, and until recent years, was paternalistic. Thus, over the years, the control of the missionaries was replaced by the control of bureaucrats. Moreover, until fairly recently, the assumption of cultural inferiority - the ultimate cultural injury - has underlain both federal and provincial approaches to native education.⁵¹ Consequently, for those Indians and Inuit concerned, the educational choice, at school and elsewhere, has only recently begun to shift from one of cultural assimilation to one of cultural enrichment. (Until the Constitution Act, 1982, the provinces had been responsible for Metis education. This remains but it could be altered via federal support or judicial review.)

Native rights are referred to in three parts of this new constitutional law: in Sections 25, 35, and 37 of the Charter of Rights and Freedoms - in Parts I, II, and IV respectively. Section 34, which declared that "the aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" had been in the federal patriation package but was dropped to satisfy several premiers.

Section 25. Section 25 does not seem to create any new rights, or even to strengthen existing rights. It states that

The guarantees in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.⁵²

Although no new rights were created, the Proclamation of 1763 is reaffirmed - as a reflection of Indian (and Inuit) land title claims at common law. This jurisprudence was finally clarified in Calder, et al. v. AG B.C. (1973).⁵³

Despite such a legal basis for title and self-government the status quo remains protected, together with its uncertainties in basic matters of definition. "Aboriginal" rights are not defined. Nor are treaty rights. Yet historical research will show that education was treated as a senior government concern before Confederation and, as described in Chapter IV in relation to Section 91(24) of the Constitution Act, 1867, as a specific item and matter of federal responsibility, in treaties and otherwise, after Confederation.

Section 35. Section 35, the single section in Part II, "Rights of the Aboriginal Peoples of Canada", makes a significant change in federal jurisdiction and in potential for federal participation in education. It does this by definition, to include the Metis people in the body of constitutional law which has applied to the Indians from 1867, and to the Inuit from 1939. For, as the subsection states

In this Act, "aboriginal peoples of Canada" include the Indian, Inuit and Metis peoples of Canada.

The constitutional and practical question which now arises is whether the class of persons described as "Indians" in the 1867 Act equate with those defined as "aboriginal" in the 1982 Act. In the 1939 Reference Re Eskimos, the Supreme Court of Canada determined, on the basis of a pre-confederation review of historical usages, that the term "Indians", as used in Section 91(24), was synonymous with the term "aborigines". Hence Eskimos (Inuit) were to be subject to the constitutional law in this Section. (This enabled Quebec, whose initiative had evoked the reference, to avoid responsibility for its Inuit residents.) The term "Metis" may or may not be found to equate legally with such law.⁵⁴ In any case, the Metis of Canada are now recognized as aboriginal peoples for the purpose of the Constitution Act, 1982.

In 1983, a Section 35.1 was added by the Constitution Amendment Proclamation, 1983 to commit the Government of Canada and provincial governments to the principle that "before any amendment is made to Class 24 of Section 91 of the "Consti-

tution Act, 1867" to Section 25 of this Act, or to this part", a constitutional conference of the Prime Minister and premiers with such items on its agenda will include aboriginal representation. (This provides for continuity after the Section 37 Constitution Act, 1982 conferences of 1983, 1984, 1985, and 1987.) The amendment does not change Section 35's place outside Part I of the Charter. This means that it is not subject to the "reasonable limits", etc. terms of Section I, Part I. It also means that the enforcement provisions of Section 24 (which apply to the Charter's Part I sections) do not apply to it.

Section 37 The third provision in the Act relating to Canada's aboriginal peoples is the single Section 37 of Part IV which called for a constitutional conference to be held within one year of this Part coming into effect.⁵⁵ At the four constitutional conferences which followed, the constitutional entrenchment of native self government powers was a major goal for native representatives. Included was a strong claim for Indian control of Indian education based on the conviction that this power had never been given to the provinces. A 1972 policy paper presented to the Minister of Indian Affairs and Northern Development by the National Indian Brotherhood stated that

The federal government has legal responsibility for Indian education as defined by the treaties and the Indian Act. Any transfer of jurisdiction for Indian education can only be from the Federal Government to Indian Bands. Whatever responsibility belongs to the provinces is derived from the contracts for educational services negotiated between Band Councils, provincial school jurisdictions and the Federal Government.⁵⁶

For this representative organization, the idea of the provinces using Section 93 jurisdiction to block their goal of self government in education is out of the question.

Past and present senior officials of the federal government, including the Hon. Gordon Robertson, emphasized that the provinces had never sought constitutional responsibility for the education of Indians, although there have been rhetorical claims in

Quebec politics in recent years.⁵⁷ In interviews with representatives of the native peoples of Canada, and with various senior federal political, executive, and legal sources, federal jurisdiction for Indian education was held to apply. Some senior provincial sources agreed. Quebec has taken a different position, politically, but not legally to the extent of litigation or a reference case.⁵⁸ However, to date, the Quebec government has not made a substantive claim in law to Section 93 jurisdiction for education of Indians (and the Inuit), or for Section 93 paramountcy over Section 91(24) in this matter.⁵⁹

The Inuit have aspired to provincial status, with jurisdiction over the matters involved, including education. Their goal is Nunavut, the eastern of two proposed new provinces in what is still the Northwest Territories. Leadership in this task comes from Inuit Tapirisat of Canada, a non-profit, non-sectarian, and non-partisan organization founded in 1971 to represent all Canadian Eskimo peoples. In 1979, ITC established the Inuit Committee on National Issues, to represent the Inuit views on constitutional matters. Towards this end, the Committee played a significant role in the First Ministers' Conference on aboriginal constitutional matters in 1983 and 1984.⁶⁰ Meanwhile, the Nunavut Constitutional Forum, which ITC established in 1982, has been doing research, consultation, and publication work, to produce constitutional proposals which will advance the goal of Inuit self government in the Inuit homeland.

In this regard it is declared that

Nunavut will not only be a provincial-type government, but also the homeland of the distinct and ancient Inuit culture.⁶¹

Language is the essence of culture. The Inuit majority in Nunavut has long suffered for the fact that government administration has been inaccessible to them because it is conducted in English and French.⁶²

Culture and its preservation is of particular interest to minorities ...Although Inuit are a majority in Nunavut, they, like Quebecois, are a minority in a country dominated by another culture.⁶³

Along with language guarantees, education is the key to cultural survival.⁶⁴

Accordingly, ITC recommended that the requisite powers over education in a Nunavut constitution include special attention "to the authority under which new and unique institutions of higher education would be established".⁶⁵ Nonetheless, whatever steps are taken towards the creation of provincial sovereignty in the North, they will require the initial exercise of Parliament's leadership and authority followed by the general amendment procedure in subsection 38(1) of the Constitution Act, 1982. (The Meech Lake Accord's proposed unanimity requirement for the creation of new provinces did not become constitutional law.)

Canada's Indian peoples have attached great significance to their treaty rights - including those provisions which have related to education. They refer, as noted, to the Royal Proclamation of 1763 which states, in part, that

Great Frauds and Abuses have been committed in purchasing Lands of the Indians to the Great Prejudice of our Interests and to the Great Dissatisfaction of the said Indians.⁶⁶

Without referring to the legal need for purchasing Indian titles, this Proclamation - which has the force of a constitutional statute predating Confederation and has never been repealed - sets down the procedures for acquiring such titles. This was legislation for all the British colonies in North America. As such, it became legal doctrine in support of aboriginal title in rulings of the Supreme Court of the United States during the tenure of Chief Justice Marshall. In one early nineteenth century case, for example, Indian title was held to be a legal right beyond mere occupancy and should be respected as such until extinguished by the courts.⁶⁷ In another case shortly after, it was ruled that Indians could transfer their title to the government only.⁶⁸ These judgements have been referred to in Canadian cases.

In Canada, aboriginal title as legal doctrine seems to have been established with the approval of the Privy Council in the leading St. Catherines Milling case of 1888.

The decision says, in part,

It was suggested in the course of the argument for the Dominion that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them.... That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign. The lands reserved are expressly declared to be the will and pleasure of the sovereign that, "for as their hunting grounds, under his protection and dominion". There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purpose of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.⁶⁹

Hence the significance of such matters in the recent plans and proposals for the constitutional creation and entrenchment of local legislative powers for Indian bands, with jurisdiction in education.

The federal government has claimed authority for instituting such a change on the basis of its two heads of legislative power in Section 91(24) of Constitution Act, 1867: over "Indians" and over "Indian lands", the matter referred to in the law on aboriginal title. Such federal jurisdiction is believed to be "all inclusive" according to former Minister of Indian Affairs, the Hon. John Munro, in an interview for this study. A "clear legal capacity" is perceived in the matter. Hence the goal of creating limited, local sovereign power in certain legislative matters, including education, is deemed possible on federal initiative because of its Section 91(24) powers. Moreover, to negate any suggestion of a mere delegation of authority in such a matter, the initial plan was for its entrenchment by constitutional amendment.⁷⁰ Note was taken of an unbroken

and unchallenged federal role and responsibility in Indian education, and of the fact that no provincial government has ever asserted jurisdiction.

This was confirmed in interviews at the Ministerial level for the Department of Indian Affairs and Northern Development, at the Secretary level at the Office of the Privy Council, and by senior counsel in constitutional law for the Department of Justice. Federal jurisdiction in Indian education was deemed to be all inclusive under Section 91(24) in Justice opinion.⁷¹ Federal paramountcy is thus assumed on matters under the Section 91 power. Thus, in spite of Section 93 (as it applies to the provinces separately), the native peoples could be given legislative power in education. If this was done by constitutional amendment, as intended by the Trudeau and Turner Governments, the provinces could not override Indian legislation on Indian education.

In his opening statement to the 1984 Constitutional Conference of First Ministers on Aboriginal Constitutional Matters, Prime Minister Trudeau spoke of injustices that the aboriginal peoples have long endured and continue to suffer - in economic disadvantage, social degradation, and political obscurity. The greatest injustice, he declared, has been the fact that their condition has been "almost totally ignored by the mainstream society, including its governments".⁷² He went on to refer to self government as a "broad subject-heading that can encompass most if not all the particulars" in the Conference agenda.⁷³ He also said that

There is nothing revolutionary or threatening about the prospect of aboriginal self government. Aboriginal communities have rightful aspirations to have more say in the management of their affairs, to exercise more responsibility for decisions affecting them. These functions are normal, and essential to the sense of self-worth that distinguishes individuals in a free society.⁷⁴

Institutions of self-government may well turn out to be different for different communities in different parts of Canada, not just among Indians, Inuit, and Metis, but among communities within reach of these peoples as well.⁷⁵

Attention was drawn to the all-party support of the Penner Report on Indian Self-government, and the proposals which it made for the Indians deriving the authority and responsibility for self government from legislated delegation of federal powers and constitutional entrenchment respectively.⁷⁶ With respect to the aspirations of the Northern Inuit Mr. Trudeau said

The Government of Canada has agreed in principle to the division of the Northwest Territories, and is ready to give favourable consideration to the Inuit proposals.⁷⁷

In the draft amendment prepared by the federal government for the consideration of the first ministers, there was provision to

..include in the Constitution the right of the aboriginal peoples to self-governing institutions.⁷⁸

Education was to be such an institution.

As the Inuit Committee on National Issues subsequently reported, the 1984 First Ministers' Conference failed, in part because no agreement could be reached on constitutional amendment, and also "because many of the governments involved refused to approach aboriginal self government as a serious issue".⁷⁹ However, native representatives were able to win assurance from the new Conservative government that self government would still be a priority item on the agenda for the 1985 First Ministers' Conference.

Unfortunately, this conference coincided with the Neilson Task Force's study team report on Indians and Natives which, amongst its thorough review of financial facts, produced some controversial proposals which did not take relevant history into account as fully as necessary. In the case of education, for example, it was suggested that

Although provinces could take over the operation of federal schools on reserves, such a straight transfer would be neither politically nor financially desirable at this time.⁸⁰

This evoked strong opposition from native peoples across Canada who had already faced such a point of view and, they thought, put it aside for good. As Leslie and Maguire state

In June, 1969, a White Paper on Indian Policy was tabled in the House of Commons. The Indian Act was to be repealed, the Department phased out over a five-year period, and a transfer to the provinces of federal services to Indians undertaken. The Indian people rejected these proposals and in 1970, faced with near unanimous opposition, the Federal Government shelved the Paper.⁸¹

Very costly capital and operating expenditure grants, which the federal government had negotiated to facilitate the "integration" of Indian pupils into provincial schools, fell wide of the mark in use and benefit, because of this opposition.⁸² A shift was made to the improvement of reserve schools and the self government in education approach, described but underestimated, by the Neilson Task Force accountants.

Some provinces, in the West in particular, seemed to take the view that native self government was a dead issue after the 1984 First Ministers' Conference. At that conference, and subsequently, concern was sometimes expressed over the issue of the province's plenary jurisdiction in local government (under Section 92(16) of the Constitution Act, 1867). Section 93 was not singled out as a basis of objection for native self-government in education, because this would have interfered with the status quo involving federal responsibility and costs for Indian education.⁸³

Had this occurred, there would also have been a break with the all-party recommendations of the Senate and House of Commons in support of greater parental and group control in Indian education via federal jurisdiction under Section 91(24). The conflict that such a break would cause is reflected in a quotation from former Chief Dan George, who once told a meeting of British Columbia teachers

Let no one forget it, we are a people with special rights guaranteed us by promises and treaties. We do not beg for these rights, nor do we thank you. We do not thank you for them because we paid for them, and, God help us, the price paid was exorbitant. We paid for them with our culture, our dignity, our pride and self-respect. We paid, we paid and we paid until we became a beaten race, poverty-stricken and conquered.⁸⁴

Education is thus an especially important remedial measure to native peoples. It is a natural and effective means for them of ensuring their own enculturation, as well as an acculturation to the larger Canadian culture. Moreover, considering the problems associated with rural and urban poverty which affect over ninety per cent of the Canadian native population, education is, for them, a means of combating social and economic disadvantages analogous with those in similar situations in the third world.⁸⁵

Naturally, such problems are not satisfied by regular education programs and services alone, as the high native teenage suicide rate suggests.⁸⁶ The same applies to education lacking in appropriate cultural inclusion and enrichment. It is also evident that effective linkages are required between education, culture, and the economics of employment and living.

Economic Rights

There was no mention of economic rights in the Constitution Act, 1867 - probably because of the ultra laissez-faire philosophy of the times. There was no explicit education-economic link built into this Act either, unless the federal spending powers was meant to meet such a need.

Provision in The Constitution Act, 1982, Section 36, Part III, to promote equal opportunities, "Equalization and Regional Disparities", seems to read more like a philosophical statement than a legal requirement. Professor Hogg finds that the commitments stated are probably, "by their vagueness and intensely political character not justiciable".⁸⁷ Such flexibility, as in the case of Section 93, would not rule out extra-

constitutional arrangements of political and executive kinds. The explanation of conventions, or non-legal rules, makes this clear enough.

Some of those interviewed - including legal counsel and officers of the Canadian Teachers' Federation who are accustomed to the vagueness of the 1867 constitutional law in relation to education, foresee possibilities in Section 36. One possibility mentioned most often was that of "equal benefit", as an extrapolation on traditional forms of equalization by means of per capita grants which disregard the differences in provincial need and means for achieving results at national standards or norms.⁸⁸ Thus the call, in subsection (1)(a), for "promoting equal opportunities for the well-being of Canadians" might be interpreted in law, if not extra-constitutionally, as a justification for federal expenditures in support of education which will assure equal benefit, regardless of disparities - as in the case of the Canada Student Loan Plan.

Such an approach is supported in subsection (1)(b) with its commitment to

(b) furthering economic development to reduce disparity in opportunities.

No reference is made to poverty directly, or to the rights of the poor which relate to education in various ways - from access, to child support, to training for jobs. However, reference is made, in subsection (1)(c) to "providing essential public services of reasonable quality to all Canadians". (Various education and related programs and services for promoting regional development and human resource development are referred to in Chapters VII and VIII).

Section 36 was not a last-minute addition to the agenda for constitutional amendment. It was included in the October, 1980 draft. However, the wording of subsection (2) was altered in the final April, 1981 draft to include express reference to "equalization payments" as follows:

Sec. 36(2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial

governments have sufficient revenues to provide reasonably comparable levels of taxation.

The "principle" of federal transfer payments for such purposes is assumed to be well-established in the health, education and other fields, as the history of Canadian federal-provincial fiscal relations shows. However, the amendments made in Part VI of the Constitution Act, 1982 in Section 50 (and formerly Section 92A of the Constitution Act, 1867), add to provincial taxing power. This change concerns provincial non-renewable natural resources, forestry resources, and electrical energy, and gives to those provinces which have such wealth, both direct and indirect taxing powers. For, as subsection (4) states

In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities if the production is exported in whole or in part from the province...

The distribution of such wealth is variable amongst Canada's provinces. The return on such wealth, including taxation, is also variable, depending on the economic demands for these resources and their maintenance. Therefore, assuming sustained benefit for those provinces so endowed, there remains a need for equalization by fiscal policy and means for the less fortunate jurisdictions, and thus a continuing federal role, regardless of Section 50.

Other Education Rights

Among other categories of rights which have been, or are being, recognized in education, five are referred to here. All of these categories are, or can be, affected by federal influence. The first is described as special education, and includes those matters of rehabilitation for persons disabled in workplaces under federal labour legislation.

The second concerns literacy - a matter in which for some time there was considerable federal funding and direction. The third relates to private schools - a growing and diversified alternative to regular public schools - which may be incorporated by either provincial or federal charters. The fourth concerns new citizens' rights in education, provincially or federally. The fifth refers to emerging rights in education for senior citizens.

Special Education. Those classes of atypical persons so recognized in law have legal or human rights in various forms, of what is called "special education" in all jurisdictions. This includes children and youth with various mental, physical, emotional, and multiple handicaps. In some jurisdictions such as Ontario, it also includes the gifted.⁸⁹ Throughout Canada provisions for the disabled may also be included in special education. The high costs of such service increase the importance of unilateral and collaborative federal efforts in research, programs, and funding, mainly under such rubrics as health, welfare, and training.

Human rights legislation at both orders of government has established and extended employment and, thereby, training rights to various classes of handicapped youth and adults. The main legal approaches to establishing these rights on the provincial and national planes are as follows:

- 1) case law interpretation of provincial education acts;
- 2) express statement of education rights in provincial education acts;
- 3) express right to education in a provincial human rights act;
- 4) a right to education developed from the new Charter of Human Rights and Freedoms in Section 15.⁹⁰

Section 15, which relates to equality "before" and "under" the law, and to equal protection and benefit "of" the law, declares that

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Moreover, subsection (2) states that

(2) Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Consequently, when rights in, or related to, education are established in such matters, new funding requirements are created. Resulting capital and operating costs may be beyond local and provincial resourcing capacities. If so, federal participation may be welcomed, or even requested.

Literacy. Canada's incidence of basic illiteracy - that is, inability to read and write - is an anomaly for a Western democratic state. Over one million Canadian adults and youth not attending school are illiterate. Over three times as many have reading skills insufficient to cope with such materials as newspapers, work instructions, or job applications.⁹¹ At the next stage above basic literacy, "functional illiteracy", rates depend on the standards set. Thus, according to the 1976 census, 4,376,655 Canadians declared they had less than Grade IX schooling.⁹² Even allowing for overestimation of status on the one hand, and for underestimated benefits of self-education on the other, the problem, and the issues raised from it, is significant. Moreover, as other kinds of literacy for study, work, and living, are taken into account - such as technical literacy and computer literacy - the need for continuing education beyond the public school years is evident.

Everywhere, literacy is a means to positive ends. It is, as Professor J.C. Cairns says, a tool for expanding the intellect and for self-fulfillment. It leads to participation in society. These attributes and its many skills create a perception of literacy as "a wedge for democracy".⁹³ In addition, the human resource development it facilitates creates the kind of human capital all modern states require. Hence the Federal Task Force

Report, "Employment Opportunities for the 80's" recommended increased federal commitment to the elimination of illiteracy in Canada. Yet, ironically, while federal politicians were calling for such support then - as they have done since, according to interview information - in the late 1970's federal executive and bureaucratic steps were being taken, in the name of austerity, to withdraw funding support for the programs for assuring basic and functional literacy in training for unemployed youth and adults. According to federal and provincial information, the provinces did not seek such curtailment or want it. The under-education involved is both a provincial and national problem.

Private Schools. Dissatisfaction with regular public schools is as varied as pluralism permits. Those who object to a non-secular environment want denominational schooling. Those who prefer an emphasis on traditional subject matter and discipline, or various kinds of specialty training, want schools to meet those ends. The satisfying of these ends creates problems of school jurisdiction, use of public funding for education, and even the long term viability of the public school systems in Canada.⁹⁴ One question which arises in such matters is the rights of private schools *in* Canadian law. Another concerns the role of the federal order of government in relation to these non-governmental institutions.

Professor R.M. Stamp classifies schools neither owned nor operated by government in Canada in four periods. These are described as: schools of necessity (1780 - 1850); schools of privilege (1850 - 1900); schools of innovation (1900 - 1960); schools of protest (1960 - to the present).⁹⁵ In the latter case, impetus for protest has been given by concerns over language, religion, and culture - all matters in which, under the Constitution Act, 1982 the federal order of government has renewed interest in law and practice. Thus, since the 1960's, there has been a decentralization of education, public and private, under the general terms of the Constitution Act, 1867. On the other hand,

there has also been a greater capacity in constitutional law since the Constitution Act, 1982 to permit federal participation in these matters as they relate to education - both public and private. For example, according to Ministry of State for Multiculturalism data and operation, federal funding in support of official language and multicultural law and policy nationally can and does help to harmonize legislation and practice in such matters across Canada. Federal powers of incorporation for federal or intergovernmental education bodies - at any level - provide another means of nationalizing education - ironically, by privately-initiated means.

The 1867 Act gave the federal government these powers. In Section 93, it also gave the federal government and Parliament powers of intervention to protect denominational rights in education. The Act of 1982, with its new rights provisions and potential goes far beyond such matters. It also creates new incentives for extra-constitutional political arrangements and, should these not apply, for judicial review to resolve claims for new rights.

A constitutional right to establish a private school of any level may now be found in Sections 2 or 7 of the Canadian Charter of Rights and Freedoms, as the relevant parts of Sections 2⁹⁶ and 7⁹⁷ show

s.2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion, and expression,...

s.7. Everyone has the right to life, liberty, and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

One possible use of 2(a) is to resist the application of laws to practices demanded of a particular religion. There is already pre-Charter case law on this, related to education and to other matters.⁹⁸ There are also ways and means of establishing private schools in all jurisdictions.⁹⁹ If this is also deemed by the courts to be supported by constituti-

onal right as well, then there will be considerable implications for the funding of such schools - and in some provinces at least, greater need for federal fiscal support.

There are several terms in Section 7 which await legal definition. The phrase "principles of natural justice" has, for example, no established meaning in Anglo-Canadian law. Perhaps it is synonymous with "natural justice", as W.S. Tarnopolsky has suggested.¹⁰⁰ If so, an established body of content would be available. The emphasis would thus be limited to procedure. As well, the phrase could be interpreted as meaning substantive due process. If so, what Dr. B.L. Strayer has described as "substantive requirements as to the policy of the law in question" could be imposed.¹⁰¹ In any case, the courts will decide when called upon to do so. In the meantime, extra-constitutional means continue to be possible through intergovernmental politics.

New Citizens. The federal and provincial governments have concurrent jurisdiction over immigration, with federal paramountcy where conflicting laws on the same immigration matters apply. Education for new citizens has not been a topic of conflict. Both jurisdictions recognize the right and necessity of new citizens who do not speak either of the official languages to gain fluency for citizenship purposes. Accordingly, federal funding help and program support are provided.

Senior Citizens. Both orders of government are responding to the education needs of senior citizens. At the provincial level this involves benefits in adult education, including reduced course fees. At the federal level there has been research into the needs of the aged, in matters of education and culture, and the policy implications concerned.¹⁰²

B. CONSTITUTIONAL AMENDMENT IN EDUCATION

The history and function of constitutional amendment in Canada covers two periods which involve change but not discontinuity. The first period began with the Constitution Act, 1867 which created a federal residuary that eliminated a need for constitutional amendment. The second period began with the Constitution Act, 1982 which included provision for a formal amendment procedure to complete Canada's constitutional sovereignty.

Background to Amendment

Amendment was not envisaged as a major concern in the text or intent of the Constitution Act, 1867. The situation was different in the United States and Australia where, in both countries, an amending power was necessary because, at the union, the residual power was held by the States or the People. In Canada, however, as F.R. Scott wrote

...the Canadian constitution needed no power of amendment. All future contingencies were provided for by the residuary grant to the national Parliament. There is never any need to take away authority from a province over a matter of purely local importance.¹⁰³

Education "in and for" a province under Section 93 is a matter which Parliament cannot legislate on without constitutional amendment. This is provided for in the 1982 Act, as described. However, federal legislative or executive action in education which is extra-territorial to provincial jurisdiction is another matter. Federal orders-in-council for national goals, standards, and programs for more than one province have legitimacy.

To refute such a federal power the compact theory of confederation was invented based on the claim that the provinces created the Dominion. Quebec has been its chief advocate. However, the new Dominion of Canada was the creation of the Imperial Parliament. The provinces, as former colonies lacking sovereignty including that over

education, could not delegate power which they did not have. They could not prevent Parliament's subsequent creation of new provinces until the Constitution Act, 1982 created a provincial and population majority formula. The Meech Lake Accord emulated the compact theory with a requirement for unanimous provincial agreement.

The Supreme Court of Canada declared in 1981 that the compact theory does not apply to the Canadian Constitution and did not apply to Canada's creation. All seven judges in the ruling concurred that

Theories, whether of a full compact theory (which even factually cannot be sustained, having regard to federal power to create new provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan) or a modified compact theory, as urged by some of the provinces, operate in the political realm, in political science studies.¹⁰⁴

Thus at 1867, Parliament was clearly granted the residual necessary to deal with unforeseen contingencies, including jurisdictional matters, silent or assumed, of national concern.

"Education" has never been exempted totally from federal jurisdiction to deal with such contingencies, thereby obviating amendments to Section 93. At Confederation the terms "education" and "schooling" were generally regarded as synonymous, and both were distinguished from "university" on a number of variables. A "university" by definition has always been more than a local matter - doubly so in Canada's nation-building circumstances. Silence in the Constitution has not necessitated amendment, certainly not to limit implied federal jurisdiction in research and culture - two vital elements of post-secondary education. The same applies to the unforeseen contingencies involved in communications and telecommunications, matters of plenary federal jurisdiction as the result of judicial review. Both are vital elements in education, and on a national basis. Section 93 does not include jurisdiction for national minority rights in education because this was a federal constitutional responsibility at Confederation and it remains so. In the meantime, federal initiatives in respect to minority rights in edu-

cation and their creation are constitutional. They take nothing away from Section 93 jurisdiction.

Amending Procedure

A general amending procedure was created by the Constitution Act, 1982. Section 38(1) calls for amendment to the Constitution of Canada first by resolutions of both the House of Commons and the Senate (with capacity in Section 47 for an override of the Senate) and, second, by resolutions of at least two-thirds of the provincial legislatures, provided that they represent at least 50 per cent of the provincial population. This means that such amendments would require the support of either Quebec or Ontario.¹⁰⁵ No province would have a power of veto. This concerns Quebec, especially in matters of language, culture, and education. (Ironically, the Mulroney government might have been able to use these amendment procedures to enact the Meech Lake Accord without the consent of the dissenting provinces.)

Section 41, however, requires unanimity in five matters. These include: (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; (b) a province's right to a number of members of the House of Commons not less than the number of Senators by which it is represented at the time this Part comes into force; (c) the use of English and French languages, subject to Section 43; (d) the composition of the Supreme Court; (e) amendment to this Part. Education is not mentioned.

In Section 40 education and culture are singled out as follows:

s.40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

On the surface, this arrangement seems to accommodate Quebec's special concerns and insistence on opting-out rights, but the provision applies to all provinces. Moreover, it

applies to all aspects of education, and it recognizes education's link with culture(s). (This is a connection Quebec nationalists do not want in constitutional text.) According to one member of the special committee of Parliament which studied the constitution prior to the 1982 amendments, there seemed to be two points of view on the section. In one, it could serve as an "escape clause" - to permit accommodation on either the provincial or federal sides. In the other, it could serve as an "obligation" on the federal side - to ensure that the matters concerned were provided for, equitably, in all of Canada.¹⁰⁶

Professor Hogg, who was also interviewed on this matter, suggests that the purpose of the obligation for the federal government to provide compensation is

..to ensure that a province is not pressured by financial considerations into abandoning jurisdiction over educational or cultural matters.¹⁰⁷

Suppose, as he suggests, the required two-thirds of provincial approval could be obtained for an amendment to permit a transfer of authority over universities. (This is assuming that *de facto* concurrence does not apply or that *de jure* concurrence could not be established or confirmed in judicial review.) If Section 40 did not apply, there would be a strong incentive for the provinces which did not agree with such a transfer of jurisdiction to go along, in order to avoid the costs involved. Section 40 guards against this, and leaves provinces free to decide whether to opt out or not, without financial burden.¹⁰⁸

The federal government can still issue letters patent for incorporation to post-secondary institutions with objects which are not limited to one provincial jurisdiction. It may establish its own post-secondary institutions - scientific and technological institutes for instance - with or without degree granting power. It could also contrive its support of adult training for employment, research, and culture on an executive federalism basis, pending confirmation or otherwise of jurisdiction in judicial review.

In any case, when the court is called upon to make interpretations under the new Constitution Act, 1982 provisions in Sections 38(1) and 40, it will face decisions on what, constitutionally, "education" is, what "other cultural matters" are, and what constitutes "reasonable compensation". As before the 1982 Act, provinces may opt out of programs which involve provincial jurisdiction. Now, however, federal compensation has become obligatory in constitutional law only in the case of education or other cultural matters. What this compensation is to involve is not defined, and this too could be made a subject for judicial review.

In the Meech Lake Accord signed in June, 1987, a Section 106(a) was proposed to supersede Sections 40 to 42. If enacted, the terms in Section 40 which link "education" and "culture" in constitutional text would have been erased. Federal obligation to provide funding under a Section 106(a) would have remained, however, and have been extended to all federal programs affecting provincial jurisdiction. This is something Quebec wanted to achieve: optimal capacity to opt out of virtually all national schemes without loss of the funds involved.

The proposed amendment reads as follows:

106 (a)(1). The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.¹⁰⁹

The provision for compliance with national "objectives" is weak in comparison to standards which could be more specific and subject to accountability. How the Court interprets "exclusive provincial jurisdiction" in relation to this national residual in Section 93 will also be significant, especially in Quebec's case, given its political claims to full and exclusive jurisdiction over education regardless of constitutional law to the contrary.

The Court's ruling in this regard might have been affected by an interpretative clause in the proposed Meech Lake amendment package. For example, reference to Quebec's "distinct society" in the body, not Preamble of the text, as Quebec first agreed, might have been interpreted in a way which tended towards giving Quebec exclusive and exhaustive jurisdiction over education, with the exception of entrenched minority rights in education. (Legal opinion remains divided on such interpretation.)

So far there are two such entrenched rights in relation to education. The first involves denominational rights in Section 93. The second involves official language rights in Section 23. The first permits the provinces to deal with minority rights separately, subject to appeals under Section 93 to the federal cabinet and Parliament. The second supports a bilingual one-Canada, with appeal to the courts and probable appeal to the federal government. As noted, Quebec's Charter of the French Language (Bill 101) has been ruled invalid in respect to the provisions of Section 23(1)(b) and (2). However, as also noted, Section 23(1)(a) shall not come into force in respect to Quebec until its legislative assembly or government agree.

Impacts of Judicial Review

From 1867 to 1982, politicians and legislators were very concerned about the impacts of judicial review on the distribution of powers to govern, not their growth. In 1930 such constitutional growth occurred to federal advantage when, via judicial review, broadcasting was put under federal jurisdiction. The Fathers of Confederation had not envisaged this modern development. It was not necessary to do so because all matters of legislation not put under local control at 1867 were to be covered by the federal residual power. Unexpected development of post-secondary education, as distinguished from schooling, might also fit this rationale.

In his Opening Statement (as Premier of Saskatchewan) to the First Ministers' Conference on the Constitution in 1980, the Hon. Allan Blakeney noted that some will argue that the role of the Court should be "severely restricted". He then quoted from a

Canadian Bar Review article written by the Hon. Jacques-Yvan Morin, Quebec's Minister of Education, who said

The essential *raison d'être* of federalism, in a bi-national country like Canada, should be to protect the values and rights of the constituent group and their autonomy, even against the will of the majority group. If you introduce into the Constitution a "principle of growth", such as that which has been developed in the United States, and the techniques of interpretation which are corollaries of this principle, you can have no stability in constitutional matters and no feeling of security, at least in French Canada.¹¹⁰

This explains Quebec's support for the doctrine of parliamentary sovereignty (in Quebec) via Section 33, the notwithstanding clause. The same applies to other provinces who supported this feature of the Meech Lake Accord. Yet, the entrenched provisions of the Act of 1982 take the last word and power away from the legislatures and give it to the courts and their judges. Even before 1982 there was reluctance in both orders of government to seek judicial review in matters of education because of the unpredictability implicit in Section 93's general terms, and lack of clear definition of the meaning and reach of "education".

The rights content in the Constitution Act, 1982 seems to be a fertile ground for judicial policy-making. This has already been demonstrated in judicial elaborations of Section 23(3) in regard to enrolment warranted, facilities to be available out of public funds for minority official language education, and the management and control of the schools concerned. This could occur in the case of other rights content in the 1982 Act, even in the case of rhetorical statements of rights which relate to education. The Court might even use its judicial power in order to compensate for a lack of government action in matters of educational reform to meet Canada's sovereign requirements, and the challenges of the Information Age. (The Supreme Court of the United States used judicial opportunities to remedy racial segregation in schools and to create minority language rights in education).

One long-standing federal pledge was for some form of entrenched, limited self government for Canada's first peoples. While entrenchment would require formal amendment, it would still be possible under constitutional law before and after 1982 to provide for a particular jurisdiction in education notwithstanding Section 93.

Federal legislation for self government which is tied to the James Bay Agreement provides for increased local control of education, although not on a sovereign basis. The same applies in the Sechelt Agreement in British Columbia. Hence critics refer to "spruced up" local government only. Entrenched sovereignty is yet to come.¹¹¹

A related matter is the eventual creation of new northern provinces, where Section 93 powers would apply. Both matters were deemed by native peoples to have been put in jeopardy by the proposed terms of the Meech Lake Accord for further constitutional amendment. The Accord's all-province consent on creation of new provinces and, presumably, on agendas related to First Ministers' discussions of entrenched self-government for native peoples (unless by means of treaties) was a matter of deep concern to them. They regard such provincial control as a perverse resurrection of the "compact" theory of Canada's (three-colony) creation in 1867 - before the territories were transferred to federal jurisdiction in 1870 by the United Kingdom with their Indian (and Inuit) land rights intact.

Since the enactment of the Canadian Charter of Rights and Freedoms, the judiciary, Judge Rosalie Abella states, has become "ensnared" in public policy debate

From its own unique and apolitical perch, it has been ushered into the political arena to play a role in the determination of public policy.¹¹²

Professor Peter Russell notes that this Charter will add assessment of the constitutionality of government actions to the Court's powers of judicial review. Before 1982, the main constitutional issue in disputes concerning governments was the division of powers between the federal and the provincial orders of government. Since then, increasing attention has been paid to the rights of citizens, creating the consequence of finding

federal or provincial legislation unconstitutional because individual or group rights have been harmed. As Russell states, such findings violate the federal division of powers.¹¹³ Of course, language and education cases seem like prime sources of stress to such a division of powers, at least as it is perceived politically.

Conclusions Re: Hypothesis No. 2

This hypothesis proposed that The Constitution Act, 1982 amendments, including the terms for amending the Constitution, increase the scope and flexibility of federal participation in education in relation to antecedent jurisprudence. This presupposes the two positions described on constitutional law in Canadian education: the first from 1867 to 1982; the second since 1982. This classification has relevance on three main variables, given fundamental changes in institutional roles and relationships made in the Act of 1982. These involve: (1) the making of legislation; (2) its judicial review; and (3) political and executive alternatives to judicial review.

Legislation. The Constitution Act, 1867 is a benchmark for comparison. Without federal participation in education, Section 93, its express legislative provision, is a prescription for fragmentation of education policy, law, programs, and financing, in and among the thirteen distinctive systems of education involved. Co-ordination in education matters which are not national or concurrent is still precluded without the co-operation of the governments concerned. Nonetheless, Section 93's vague terms of definition and reach, its extra-territorial exclusions, give the federal order of government considerable scope for flexibility. The constitutional grounds for federal participation are further expanded by the various federal and concurrent powers already identified.

The terms of Section 93 show clearly that limitation in each province to legislation in relation to education "in and for" that province was deliberate on the part of the Fathers of Confederation and the Imperial Parliament. This fundamental constitutional arrangement was in keeping with the intention of giving the federal order of

government any legislative power which had not been made local in the founding Act of 1867. A statute of Parliament was all that would be required. The absence of an amending procedure and the federal p.o.g.g. power support this interpretation. Moreover, since Section 93 did not define what the term "education" meant constitutionally, the way was open to its flexible interpretation and application - politically, administratively, and legally. Considerable agreement was found to support the opinion that, at Confederation, Section 93 applied to no more than the elementary and secondary levels of public education. This is assumed because, at the time, the term "education" was synonymous with "schooling" as basic public education where available, and with optional attendance at that. Moreover, the Section refers to public schools and to public separate schools only. This opened the constitutional door to federal participation in post-secondary education which, in 1867, was under private auspices. Silence in the Constitution Act, 1867 on matters vitally related to modern post-secondary education - research and culture in particular - indicate federal concurrence in these matters and, by extrapolation, in the form of post-secondary education developed to meet national as well as local interests. This explains the *de facto* character of federal participation in post-secondary education now, and the ample grounds for it being made *de jure*. When plenary federal jurisdiction in the modern fields of communication and telecommunication are added, federal participation in virtually all education is inevitable. The Act of 1982 did not change this.

Minority education rights represent jurisdiction in addition to that in Section 93. This too has applied since 1867 when minority group denominational rights in education were given the protection of the federal Cabinet and Parliament under Section 93 subsections (3) and (4). Although there is no jurisprudence on federal action in support of these denominational rights, the constitutional capacity to invoke federal action remains. Nonetheless, it was established in Mackell that Section 93 does not protect minority language rights in education. This jurisprudence was a belated incentive to the B and B

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Commission study and recommendations related to education, and the subsequent framing of the federal Official Languages Act in 1970, with its policy of financial support to French and English as first and second languages in education. This was federal flexibility in education above legal criticism. None of the aforesaid matters was changed by the Constitution Act, 1982.

The Mackell ruling underlined the fact that matters of minority rights in education involve jurisdiction which is additional to Section 93 and is national in application. This considerable field for flexibility and federal participation in education with clear constitutional authority was apparent in respect to minority official languages rights in education in 1970, and certain in 1982. This is why Section 23 in the 1982 Act is such a major reform. It removes each province's exclusive power to stipulate the languages of instruction in schools fully, by creating an entrenched and overriding minority language right in all Canadian education in the two official languages. This promotes and protects a bilingual, one-Canada approach in Canadian education.

Section 23 is all the more unique because, as the law reads, and as the Court has ruled, the right of choice in language of instruction is the parent's. The main author of this reform was Prime Minister Trudeau, who seems to have been acting not so much as a politician but as a determined parent, committed to putting family before tribe, and one Canada before two. This ensured the ultimate flexibility in education in, and for, a democracy: the parent's choice. Of course, in Quebec this clashed with an elite perception of collectivism imposed arbitrarily by the majority who have control of the levers of government. This explains the bitter opposition of the province's nationalists to Section 23, and their determination to have it removed as it applies to Quebec.

The provisions for minority rights in education in Sections 93 and 23 create and reaffirm a precedent for further minority rights in education, with direct or indirect federal responsibility involved. The Act of 1982 identifies specific subject matters for doing this - through either future constitutional amendment, or judicial review, or both.

The potential for flexibility in such matters, in addition to Section 93 jurisdiction *per se*, is significant. In fact, the prospects of a significant common national dimension in Canadian public education has become inevitable.

Until 1982 the doctrine of parliamentary sovereignty was supreme in Parliament and the provincial legislatures, except for the few entrenched provisions described. The Constitution Act, 1982 placed considerable limitations on this doctrine. It gave legal status in the Constitution to some rights which had long been non-legal rules, or conventions, and to some which were statutory (including former Prime Minister Diefenbaker's statutory Bill of Rights). Significantly, a constitutional right to education was not included.

In the Constitution Act, 1982 significant rights and freedoms entrenched in Sections 2 to 15 are made subject, in Section 33's "notwithstanding clause", to superseding parliamentary sovereignty if the legislature concerned chooses. These rights include the "fundamental freedoms" in Section 2 which (in relation to education) involve (b) "freedom of thought, belief, opinion, and expression...; the "democratic rights" in Section 3,4,and 5; the mobility rights in Section 6; the legal rights in Section 7 to 14; the equality rights in Section 15 (which did not come into effect until 1985). When an Act is passed with a declaration that its terms apply notwithstanding a particular Charter right, that right's effect becomes nugatory. However, under the doctrine of parliamentary sovereignty, a non-legal rule could still be cited and considered. Since 1982, by the terms of Section 33, Parliament and the separate provincial legislatures have been able to put such rights legislation on hold for up to five years, and on a renewable basis. Of course, such use of the "notwithstanding" clause will merely continue the practice of parliamentary sovereignty which was adopted from Britain, where it continues to apply, as it does in various Commonwealth countries. This is not the case in the United States where, in effect, judges not Congress have come to say what the Constitution is. Meanwhile in Canada, although Section 33 may be applied and

renewed, the politicians who do so must face accountability in re-elections. Thus, withholding application of a right in particular legislation becomes a partisan and public issue. Since the governed can still give direction, democratic theory and practice remain - albeit after the fact.

Maximum flexibility was created in the 1982 Act in Sections 38 and 40 which permit a transfer of provincial jurisdiction to legislate in education from a provincial legislature to Parliament, subject to the necessary amendment consent. The Act of 1982 made this possible without unanimous consent of the provinces. (The Meech Lake Accord amendments would have required unanimous consent - a virtual impossibility.)

Judicial Review. The history of Section 93 is one of conservatism in both provincial implementation and judicial review, and of significant final rulings outside Canada until 1947. The Constitution Act, 1867, including its Section 93, were treated more as a regular Imperial statute than as a constitutional statute. This was reflected in Privy Council rulings on appeal, in narrow, even mean, emphases on text - in particular where minority language rights in education were at stake. In contrast, since 1982, the Supreme Court of Canada has led the way, and the lower courts have followed, to give the new Charter rights a liberal interpretation. This has been most evident in elaborations of the terms of Section 23.

The Court's power to interpret the law is one thing; its power to implement it is another. Nevertheless, as Professor Magnet has observed, a new situation has been created which may call upon the Court to make judgments in matters which the doctrine of judicial independence, or separation, reserves to the legislature and the executive. (This is what an activist court of the United States has done, in particular since the landmark Brown case in the 1950's which made racial segregation in American schools unconstitutional.) This represents a significant leap in the judiciary's capacity for flexibility in law and policy, yet, Professor Peter Russell has observed that there is nothing new in judicial policy-making; certainly, it has been going on since 1867. The

Constitution Act, 1982 will inevitably expand this decision-making as entrenched rights issues are settled by judicial review. The same will apply if governments do not act as the law requires. Such judicial review may produce unpredictable results which will tend to limit flexibility in politics and administration for extended periods.

Dr. J.A. Corry's preference for a law-policy dichotomy was based on his study of both administrative and constitutional law and political science fitted to responsible government. His view pre-dated the 1982 Charter and its entrenched rights which only the Court can interpret authoritatively. Legislators and their administrators can still retain flexibility in their handling of rights matters related to education, provided they can learn to check their adversarial relations. The choice is theirs politically. Such political decision-making would be appropriate in democratic education, since it would retain the linkage between people and elected representatives. The flexibility created would promote public participation in education policy-making, provincially and nationally. (Our judges aren't voted in or out by the public.)

The rights which are entrenched create an impression that, somehow, they are more significant than rights which weren't so identified. The idea of entrenched rights might also encourage the idea that they are absolute, thus setting aside the legal reality that, sometimes, rights have to be weighed against each other in judicial review. Moreover, anyone who wishes to claim a right may not do so automatically. In this regard it is significant that the 1982 Charter gives standing to groups and to individuals, as well as to governments, to seek judicial review. From this point of view, there has been an increase in legal flexibility related to recourse and remedy - albeit with results which may be limiting on future political flexibility.

Jurisprudence does not create itself. When controversial issues in education or language are fuelled by funding, cases and rulings are assured. Special groups are also supported and galvanized into a litigious rather than a political approach to advocacy. Finally, a set of rights which is stated in general, or even rhetorical terms, make it very

difficult for judges to "find" the law. The dearth of relevant pre-1982 Section 93 jurisprudence adds to this problem, so judges may end up making the law. In such circumstances, they will be drawn, or pushed, into policy-making which should derive from electorally-based politics, with its democratic alternations of government and its legislative changes to improve unsuitable statutes. In public education and its governance, this is an essential democratic requirement. The proposed Meech Lake amendments would have facilitated this in relation to those rights subject to the notwithstanding clause. They would not, however, have affected Section 23, or Section 24 with its provision for Charter rights enforcement via the courts.

Executive Federalism

Since Section 93 of the 1867 Act and its variants allocate legislative power over education (which is "in and for" each province) to the Legislature only, the legitimacy of "executive federalism" applied to education is strictly limited to the Province's education law. No separation of powers applies constitutionally. Moreover, a province's education law and executive action related to it are *ultra vires* in extra-territorial matters. Since this applies collectively, the Council of Ministers of Education, Canada, has no constitutional power. It cannot be a proxy for the federal order of government in matters related to education.

The Meech Lake Accord would have created a constitutional form of executive federalism, had it been enacted. Meanwhile, the flexibilities in Section 93 before the Act of 1982 have been limited by the creation of new and potential rights in, or related to, education apart from Section 93. Judicial review in the circumstances has become a sword of Damocles in executive federalism. If anything, this ready alternative to the politics of executive federalism (which federal support for Section 23 court challenges has demonstrated) may foster significant improvements in federal-provincial relations in education at all levels. (The financial stakes alone encourage this.) Somehow political

and executive flexibility has to be sufficient to head off unnecessary and unpredictable judicial review. This might evoke a return to more open, representative policy-making in education, and a curtailment of executive practices which do not fit this democratic orientation.

Summary. On balance it appears that the rights amendments and amendment provisions of the Constitution Act, 1982 will increase the scope and flexibility of federal participation in education in several respects. The Court has made it known that it will interpret as required, but it does not wish, in effect, to legislate and administer. Section 23, and subsequent minority rights in education which the Charter may foster, will draw the federal order of government into a continuing national partnership in Canadian education. To fulfill this role, it has the national residual power and it has complementary resources. The prospect of entrenched and costly judicial rulings concern the provinces greatly. This will encourage political and executive co-operation in matters of education policy-making more than anything else to date.

END NOTES

1. Trustees of Dartmouth College v. Woodward (1819) 4 Wheaton 514. In 1817, the New Hampshire legislature enacted changes to Dartmouth College's Charter of 1769, to add to the number of its trustees, to fill positions and create a Board of Overseers with veto power. The United States Supreme Court ruled that a corporate charter is not subject to change via legislation because it is granted by the state.
2. Peter F. Bergen, The Legal Status of the Canadian Public School Pupil. Toronto: Macmillan of Canada Ltd., 1961, pp.48-60. Because the common law recognized no educational right or duty, this had to be achieved by statute. The result everywhere in Canada is compulsory education (within specified ages), which places the burden of effort on the parent and child, and a "right", which places the burden of performance on the educational authorities. See also W.F. Bowker, "Basic Rights and Freedoms: What are they?" The Canadian Bar Review, Vol.37, 1959, pp.43-65.
3. See Peter W. Hogg, Constitutional Law of Canada. Toronto: Carswell Co. Ltd., 1977, pp.421-422.
4. Bergen, op.cit., p.60.
5. Interviews and documentation, Department of National Health and Welfare.
6. Wilkinson v. Thomas (1928) 2 W.W.R. 700
7. Ex Parte Gallagher (1892) 31 N.B.R. 472
8. Peter W. Hogg, op.cit., p.418
9. J.C. McRuer and W.R. Lederman, Report No.2: Ontario Royal Commission Inquiry into Civil Rights, Volume 4. Toronto: Queen's Printer, 1969. p.1493.
10. Saumur v. the City of Quebec and A.G. Quebec (1953) 2 S.C.R. 299.
11. Chabot v. Les Commissaires d'Ecoles de Lamorandiere (1958) 12 D.L.R.(2d) 796.
12. See A.G. Quebec V. Quebec Association of Protestant School Boards (1984) S.C.C. transcript at p.15.
13. Interviews and review of bilateral agreement documents, Secretary of State Department.
14. Mackell v. Ottawa Separate School Trustees (1917) A.C. 62. The Privy Council therefore ruled that Section 93 did not give the separate schools of Ontario a right to use French as the language of instruction.
15. Protestant School Board of Greater Montreal, et al. v. Minister of Education of Quebec (1976) C.S. 430, (1976) 83 D.L.R.(3d) 645, p.673.
16. Charte de la langue francaise, R.S.Q., 1977, c. C-11. (Bill 101)
17. Ibid., Chapter VIII.
18. Ibid., Section 73.
19. Ibid., Section 84.
20. Interviews, Department of National Defence; Interview Hon. Claude Morin, Quebec.

21. The same approach might later have been applied to Section 93 with its federal residual.
22. A.G. Quebec v. Blaikie and A.G. Quebec v. Laurier (1979) 2 S.C.R. 1016; 101 D.L.R.(3d) 394.
23. Blaikie v. A.G. Quebec (1981) 123 D.L.R.(3d) 15.
24. Quebec Association of Protestant School Boards, et al. and A.G. Quebec (No.1) (1982) 140 D.L.R. (3d) 19.
25. A.G. Quebec v. Quebec Association of Protestant School Boards et al. (No. 2) (1983) 140 D.L.R. (3d) 33.
26. Ibid., p.4 summary (in a unanimous ruling).
27. Loc.cit.
28. Ottawa Citizen, Friday, August 10th, 1984, pp.1 and 12.
29. Loc.cit.
30. Constitution Act, 1982, Section 23.
31. Quebec Association of Protestant School Boards v. A.G. Quebec (No. 2) (1984) 140 D.L.R.(3d) 321, at p.331.
32. Reference Re Education Act of Ontario and Minority Language Education Rights (1984), 10 D.L.R.(4th) 491 at pp.517-518.
33. Protestant School Board of Greater Montreal et al. v. A.G. Quebec (1989) S.C.C. ruling of March 16, 1989. File No.20415 at p.18.
34. Loc.cit., Professor Pierre Carignan. Translation.
35. Interview, Hon. Claude Morin, 1988.
36. Interview, Dr. Davidson Dunton, 1985.
37. F. Henry Johnson, A Brief History of Canadian Education, Toronto: McGraw-Hill Co. of Canada Ltd., 1968, p.182.
38. E. McWhinney, Quebec and the Constitution, p.72.
39. Queen's University, Institute of Intergovernmental Relations, The Response to Quebec: The Other Provinces and the Constitutional Debate, 1980, p.52.
40. Interviews: Secretary of State Department; Justice Department; P.C.O.
41. Report of the Royal Commission on Bilingualism and Biculturalism, Book I, The Official Languages, Ottawa: Queen's Printer, 1967, p.149.
42. Re: Minority-Language Education Rights (1984) 10 D.L.R.(4th) 491 at p.547.
43. Constitution Act, 1982, Section 24.
44. Re: Minority-language Education Rights (1984) 10 DLR, (4th), 491 at 518.
45. Constitution Act, 1982, Section 15. See also Peter W. Hogg, Canada Act 1982 Annotated. Toronto: Carswell Co. Ltd., 1982, pp.50-51.

46. Societe des Acadiens du Nouveau-Brunswick Inc. et al. v. Minority Language School Board No.50 (1986) S.C.R. 549.
47. J. Magnet, "Minority-Language Education Rights (1982)", A Supreme Court Law Review, 195 at 213.
48. Quebec Association of Protestant School Boards v. Procureur General du Quebec (1982) 673 at 686-87.
49. Mahe v. R in Right of Alberta (1990). S.C.C. ruling of March 15, 1990. File No.20590 at pages 3 and 4. The Court further stated that
In order to fulfill the purpose of s.23, the Section should be viewed as providing a general right to minority language instruction with paras (a) and (b) of subs.(3) qualifying this general right. Section 23 encompasses a "sliding scale" of requirements, with subs.(3)(b) indicating the upper level of the range of possible institutional requirements which may be mandated by s.23 (a government may, however, provide more than the minimum required by s.23) and the term "instruction" in subs.(3)(a) indicating the lower level.

This sliding scale approach is meant to guarantee the type and level of educational rights and services appropriate under Section 23.

See also Mahe v. Alberta (Govt.)(1987) 6 W.W.R. 331; AG Quebec v. Quebec Association of Protestant School Boards (1984) 2 S.C.R. 66; Lavoie v. AG Nova Scotia (1989) 91 N.S.R. (2d) 184; Commission des Ecoles Fransaskoises v. Saskatchewan (1988) 48 D.L.R. (4th) 315; Reference Re Minority Language Educational Rights (P.E.I.)(1988) 69 Nfld. & P.E.I.R. 236; Greater Montreal Protestant School Board v. AG Quebec (1989) 1 S.C.R. 377.

50. Constitution Act, 1982, Section 27. See W.S. Tarnopolsky, "The Equality Rights (ss.15, 27 and 28)" in Canadian Charter of Rights and Freedoms: Commentary. W.S. Tarnopolsky and Gerald A. Beaudoin, eds. Toronto: Carswell and Co. Ltd., 1982, pp.439-442. Section 27 is described as "a purely declaratory and interpretive" provision. Thus it is uncertain what rights interpretation a court could give. In any case, Section 27's broad aims aspect must be seen in relation to the other sections of the Charter, especially Section 15 with its "equal benefit of the law" terms.
51. Interviews and archives, Department of Indian Affairs and Northern Development Department and Native Council of Canada. See also E.R. Daniels, "The Legal Context of Indian Education in Canada", Edmonton: University of Alberta. Ph.D. thesis, 1973.
52. Constitution Act, 1982 Section 25 as amended by the Constitution Act Amendment Proclamation, 1983. Native rights are undefined in this Section. Moreover, it remains to be determined, either by judicial review or constitutional amendment what they might be, or whether this Section is nullified by the equality provisions of Section 15 which is of general application to all Canadians.
53. Calder et al. v. AG B.C. (1973) 34 D.L.R. (3d) 145. The issue of aboriginal title did not arise until the Trudeau Government's Indian Policy statement of 1969 which would have liquidated aboriginal title by assimilation via repeal of the federal Indian Act. Significant jurisprudence followed when, in 1970, the Nishga tribe tried unsuccessfully to obtain a declaration of aboriginal title to particular lands: first from the B.C. Supreme Court (where Gould J. could find no proof of contract, no document to acknowledge Nishga title); then from the B.C. Court of Appeal (where this decision was upheld unanimously). The Nishgas did not win their case before the Supreme Court of Canada. However, six of the Supreme Court judges found that an aboriginal title at common law had existed, or could exist, in B.C. Hall J. referred to the Indians (and Inuit) as "prima facie owners of the land" (on which they have lived for centuries).

The issues in this case evoked a doctrine which proposed that aboriginal rights are superseded - i.e., extinguished - when they come in conflict with provincial laws of general application. However, this interpretation is contrary to the constitutional history and law which apply. As imperial law, the Royal Proclamation of 1763 had force from then to 1867. It was not changed in 1867, or in 1982 when for the first time amendment in Canada might have been considered. It was never subject to colonial or dominion amendment to 1982 whereupon Section 25 of the Constitution Act, 1982 entrenched its full provisions. The Royal Proclamation thus remains as a strong basis for self-government on Indian (Inuit) lands, including jurisdiction over education - regardless of provincial veto.

Note that, subsequently, Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development (1980) 170 D.L.R. (3d) 513 (Federal Court, Trial Division, Mahoney, J.) was the first case in Canada's jurisprudence to grant a declaration of aboriginal title at common law. This judgement also found that (in 1870) when Rupert's Land was transferred from the Imperial Government to Canada, the Hudson Bay Company's obligations re: aboriginal title were transferred to Parliament. (Such law applies still equally in the Keewatin District and the Ungava District of "New Quebec".)

54. Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada, Sections 25, 35 and 37" in Canadian Charter of Rights and Freedoms: Commentary, Walter S. Tarnopolsky and Gerald-A. Beaudoin, eds. Toronto: Carswell Co. Ltd., 1982, pp.468-470.
55. Constitution Act, 1982, Section 37. Sub-section (1) of this Section calls for a constitutional conference to be convened within a year of April 17, 1982 and to be composed of the Prime Minister and the premiers. Provision is made for the invitation of aboriginal representatives in sub-section (2) and of Yukon and Northwest Territories representatives in sub-section (3). Section 54 provides for the repeal of Section 37 as of April 17, 1983.
56. National Indian Brotherhood, Indian Control of Indian Education. Policy Paper presented to the Minister of Indian Affairs and Northern Development. Ottawa: N.I.B., 1972, p.5. Note for example, Canada, Treaty No.4 between H.M. and the Cree and Salteaux Tribes of Indians, Ottawa: Queen's Printer, 1966 at p.5 where H.M. "agrees to maintain schools for instruction in such reserves hereby made as the Government of the Dominion of Canada may seem advisable whenever the Indians"
57. Interviews: P.C.O./F.P.R.O. Department of Indian Affairs and Northern Development and Department of Justice. See also Ian Creery, The Inuit of Canada, Report No.60 for Minority Rights Group Ltd., London, England, 1983. See also Daniel Francis, A History of the Native Peoples of Quebec, 1760-1867, Ottawa: Department of Indian Affairs and Northern Development, December, 1983, 88p.
58. Interview, Hon. Claude Morin, 1988.
59. Interviews: Department of Indian and Northern Affairs; Department of Justice; the P.C.O.
60. Interviews and information: Inuit Tapirisat of Canada; the Inuit Committee on National Issues and the Nunavut Constitutional Forum; Mr. Frank Carter, former Associate Secretary, the federal Cabinet, April 9, 1985.
61. Nunavut Constitutional Forum. Building Nunavut: A Working Document With a Proposal for an Arctic Constitution, 1983, p.11 (in a constitutional preamble discussion).
62. Ibid., p.18.
63. Ibid., p.20.
64. Ibid., p.24.

65. Loc.cit.
66. Royal Proclamation of 1763, as reproduced in R.S.C. 1970, App.II, No.1.
67. Fletcher v. Peck (1810), 7 Cranch 87. The Supreme Court of the United States decision was stated by Chief Justice Marshall. See R. St. J. Macdonald, Chairman, Faculty of Law, University of Toronto, Report on research Project on treaty and Aboriginal Rights of Canadian Indians and Eskimos, April, 1970, pp. 14-20.
68. Johnson v. McIntosh, (2 I.U.S. (8 Wheaton) 240 (1823)). See also Wm. R. Morrison, A Survey of the History and Claims of the Native Peoples of Northern Canada. Ottawa: Department of Indian Affairs and Northern Development, 1983, pp. 15-27.
69. St. Catherines Milling and Lumber Co. v. The Queen, (1887) 13 S.C.R. 577. (1888) 14 A.C. 46 (JCPC). Note that "plenum dominion" is less than full sovereignty. That is, as Chief Justice Marshall had ruled in antecedent American case law, the rights of aboriginal people were limited by the sovereignty of the ruler, or of the state. As in Canada, the native right to land is at least "usufruct" - ie. theirs to enjoy although the property is vested in another, the Crown in right of Canada in Canada's case.
70. Interview, Hon. John Munro. Also related interviews at the Department of Indian Affairs and Northern Development, PCO, and the Department of Justice. See statement by Hon. John Munro on the Indian Self Government Bill, June 27, 1984, issued by the Department of Indian Affairs and Northern Development. Note reference p.3 to proposal to give Indian nations clear legal capacity to govern themselves effectively in education, et al. The constitutional opinion was that in education, provincial jurisdiction (i.e. Section 93) would not override.
71. Interviews. Justice Department, Public and Constitutional Law.
72. P.E. Trudeau, Opening statement to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples. Ottawa, March 8, 1984, p.2.
73. Ibid.
74. Ibid., p.9.
75. Ibid., pp.9-10.
76. House of Commons. Indian Self-Government in Canada: Report of the Special Committee, First Session of the 32nd Parliament, 1980 - 81 - 82 - 83. (Chairman Keith Penner M.P.)
77. Trudeau, op.cit., p.13.
78. Ibid., p.17.
79. I.C.N.I. Newsletter, Vol.1, No.4, p.2.
80. Indians and Natives. A Study Team Report to the Task Force on Program Delivery, Ottawa: Department of Supply and Services, Feb. 1985, p.388.
81. John Leslie and Ron Maguire. The Historical Development of the Indian Act, 2nd. ed. Ottawa: Indian Affairs and Northern Development Department, 1978, p.193.
82. Interviews and Documentation: Department of Indian Affairs and Northern Development.
83. Interviews: DIAND, P.C.O., and Justice Department. Conference information.

84. Dan George, Speech for a meeting of British Columbia teachers broadcast on CBC Radio's program, "Indian Magazine", 17th May, 1969.
 85. Interviews: C.I.D.A. and Department of Indian Affairs and Northern Development. Such an analogy has not been considered; nor have research and other data been exchanged as a regular practice.
 86. Trudeau, op.cit., p.1. The rate for native growth is estimated at ten times that of their non-native peers in Canada.
 87. Peter W. Hogg, Canada Act 1982 Annotated, Toronto: Carswell, 1982, p.84.
 88. Hogg, op.cit., p.82.
 89. Education Act, R.S.O. as amended to September, 1986 c.129, Section 1(1)63, etc. and Regulation 554(2)3.
 90. David Cruikshank, "Human Rights and Charter Rights in Special Education". Canadian Special Education Legal Issues in Education Conference, 1982, p.35.
 91. In the Canadian Business Task Force on Literacy's report, Measuring the Costs of Illiteracy in Canada of February, 1988, prepared by Woods Gordon Management Consultants, it is noted at page 7 that the direct costs to business and industry alone due to effects of functional illiteracy are estimated to be about \$4 billion per year.
- Southam's estimate of 4.5 million functional illiterate adults Canadians (or 24 per cent) is higher than the 1981 census estimate of 21 per cent. But as the Southam study shows, while there may be about 1.7 million wrongly described as functionally illiterate, there are about 2.4 million who have at least Grade 9 who should be in this classification.
- When Ken Dryden was Ontario's Youth Commissioner, he reported in 1988 that when the Province's private schools are excluded, 40 per cent of its beginning Grade 9 students do not graduate from Grade 12, and 76 per cent do not graduate from Grade 13; and of the 31 per cent who go on to post-secondary education, only about two-thirds of them graduate. (These students represent about 36 per cent of the total Canadian school enrollment.)
- See also "Adult Illiteracy in Canada" in Adult Illiteracy in Canada: A Challenge. Prepared by Audrey M. Thomas. Ottawa: Canadian Commission for UNESCO, 1983, p.11. Note also the Report of the Senate Standing Committee on National Finance on Canada Manpower re: 1974-75 expenditures.
92. Census, 1976.
 93. J.C. Cairns, "Overview of Some of the Issues" in Adult Literacy in Canada: A Challenge, op.cit., p.11.
 94. Report of the Commission on Private Schools in Ontario, October, 1985, p.11.
 95. Robert W. Stamp in The Best of Times, The Worst of Times: Contemporary Issues in Canadian Education, Hugh A. Stevenson, Robert W. Stamp and Donald J. Wilson, eds. Toronto: Holt Rineholt and Wilson Ltd., 1972, pp.445-470.
 96. Although Constitution Act, 1982, Section 2 applies to "everyone" and, seemingly, not to corporations *per se*, it does not seem logical that "persons" - including corporate entities - seeking incorporation for school purposes would be prevented in law from doing so, as now.
 97. Ibid., Section 7.

98. Chabot v. Les Commissaires d'Ecoles de Lamorandiere (1957) Que. Q.B. 707 (C.A.).
99. Incorporation applies provincially, or federally as, say, in the case of an interprovincial school such as Frontier College, if provisions under the particular Education Act do not facilitate private school establishment, etc.
100. W.S. Tarnopolsky, The Canadian Bill of Rights, 2nd ed. Toronto: McClelland and Stewart, 1975, p.264.
101. B.L. Strayer, Minutes of Proceedings and Evidence of Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. First Session of the 32nd Parliament, 1980-81, Jan. 27, 1981, p.46:3
102. Documentation, Department of Health and Welfare and Advisory. Interview, Director, National Advisory Council on Aging.
103. F.R. Scott, "The Special Nature of Canadian Federalism," in Essays on the Constitution, Toronto: University of Toronto Press, 1977, p.187.
104. Reference Re: Constitutional Amendment (1981), quoted in The Supreme Court Decisions on the Canadian Constitution, Toronto: James Lorimer and Co. Ltd., 1981, p.40.
105. Constitution Act, 1982, Section 38.
106. Interview, Dr. J. Hawkes.
107. Hogg, op.cit., pp.86-87.
108. Ibid.
109. Meech Lake Accord, Section 106(a)(1). In the ten tries for amendments preceding the Act of 1982 (starting with the 1927 Dominion-Provincial Conference to act on the Balfour Declaration of 1926), education was never an agenda item. In response to the eighth federal attempt in 1975, the premiers proposed creation of a new concurrent power with respect to culture. The idea surfaced in Section 40 as synonymous with education.
110. Interview, Hon. Allan Blakeney (1988) and text of an article by the Hon. Jacques-Yvon Morin. See also Opening Statement: Supreme Court of Canada; Hon. Allan Blakeney, Premier of Saskatchewan, First Ministers' Conference on the Constitution, Sept. 8-11, pp.2-3.
111. The Cree-Naskapi (of Quebec) Act, 33 Elizabeth II, ch.46. Section 21(i) states that an object and power of bands is "to promote and preserve the culture, values, and traditions of the Crees or Naskapis, as the case may be" (Education *per se* is not mentioned). See James Bay and Northern Quebec Agreement Implementation Review, Feb., 1982, Ottawa: D.I.A.N.D., 1982. An Act Relating To Self-Government for the Sechelt Indian Band, 33-34-35 Elizabeth II, ch.270. Section 14(g) of this Act gives legislative powers of council for "education of Band members on Sechelt lands".
112. Rosalie Abella, "Public Policy and Canada's Judges: the Impact of the Charter of Rights and Freedoms," Gazette: the Law Society of Upper Canada, Vol.XX. 1986, p.218.
113. Peter H. Russell, "The effect of a Charter of Rights on the policy-making role of Canadian Courts," Canadian Public Administration, Vol.25, No.1.

**THE CONSTITUTIONAL NATURE
OF FEDERAL PARTICIPATION
IN CANADIAN EDUCATION**

by

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of Political Science in partial fulfillment
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CHAPTER VI

DEVELOPMENTS IN FEDERAL PARTICIPATION IN EDUCATION

This Chapter identifies significant developments in the initially slow growth of federal participation in education. On the whole, these developments showed a sensitivity to the constitutional law involved and an awareness of the politics of education. Generally, they were based on an element of national interest.

When information and opinion was gathered for this study, note was taken of any indications of a federal intention to intervene in provincial jurisdiction. The data described show that most federal participation has been preceded by prior study, and by consultation with the institutions and publics concerned. Almost invariably this has involved some consideration at the federal Executive level of the relevant economic, social, political and constitutional issues. In the preliminary stage, such formal devices as Royal Commissions, Executive, Parliamentary and other federal studies, and some conferences, have been used. Enquiry, and the resulting recommendations, have been characterized by non-partisanship and by dialogue with special interest groups - ranging from business and industrial to social, cultural and academic. In the latter case, for example, the federal government has had a long and supportive association with the Canadian Education Association. This organization became a prime initiator for the formation of the Council of Ministers of Education of Canada, in order to encourage national intergovernmental dialogue and action in Canadian education, with the understanding that this would include the federal government.¹

The Royal Society of Canada has also been a consistent supporter of federal participation in education nationally. Relationships of the Royal Society of Canada to

higher learning in Canada and the national government have been noteworthy from its inception. Leadership in its formation was provided by then Governor General, the Marquis of Lorne, who, in 1881 called together leading scholars of the nation in the fields of literature and science to consider the venture. This was followed the next year by the first meeting of the Society in the Parliament Buildings and, in the year thereafter, by federal incorporation. From the outset, federal grants were provided, mainly in aid of publication costs. Professor Miller describes the Royal Society - in its early years at least - as "essentially an educational agency to the national government".² This is evident in the various national educational interests and causes the Society has supported over the years, starting with advocacy of a National Library under federal auspices. From its beginning, it has also provided a co-ordinating contact with other learned societies in Canada, including affiliate participation at meetings. To date, however, this has not included recognition of "education" in Canada as one of the Society's fields for Fellowships, even though interest in matters of education nationally has been variously demonstrated. For example, when, in the late 1920's, the federal government established a Royal Commission to study policy concerning the control and use of broadcasting, the Royal Society presented a report and recommendations which reflected a broad and modern outlook on the meaning and purposes of public education. In this report, Dr. H.M. Tory stated that

...by the very nature of the case, broadcasting is destined to become an educational force of first-rate importance. This will apply both to general education as conducted in schools and colleges and the education of the public at large in questions of national interest.³

Parochialism in Section 93 jurisdiction over education has not been reflected in Society publications and recommendations.⁴

Later, the federal government added its own policy analysis and advisory bodies to its institutions of governance. Some were established at arm's length, like the Science Council of Canada. Some are an integral part of Cabinet government, in par-

particular the Federal-Provincial Relations Office of the PCO and the Ministries of State with Secretariat support. Interviews and review of reports show that all such bodies have national concerns related to education. Thus at the (former) Ministry of State for Economic Development, it was learned there was an interest in devising an economic model for education nationally. At the (former) Ministry of State for Social Development, steps were being taken to consolidate program and policy information on all federal involvement in education. The Secretary of State was first designated to direct and co-ordinate some of the federal government's involvement in education. Then it was required to report on federal involvement in post-secondary education.

No significant evidence was found during the gathering of data and opinion for this study to indicate that intervening in the separate provincial jurisdictions "in and for" education had ever been an official federal policy. Federal officials at the ministerial (4) and deputy head (5) levels, commented in interviews that unilateral intervention in such matters was neither a federal goal nor practice.

In this study, two main kinds of federal participation in relation to education were observed: national initiatives which apply to matters of common concern, or need, and application; remedial actions which apply to particular deficiencies in a province's programs and resourcing, as measured against national standards. The combined result has been a development of federal participation in Canadian education on a broad and varied basis.

In this Chapter, twelve categories, in approximate order of incidence, are used to identify and describe the main developments in federal participation in Canadian education and related matters. In each case, descriptions are chronological. The three earliest developments were: (1) the federal land grants and their consequence in establishing public education in Canada; (2) the establishment of federal research and of federal research support on a national basis; and (3) the development nationally of technical training in response to business and industrial needs. Significant consequences

in and for all aspects of Canadian education were created by (4) exclusive federal jurisdiction, first over broadcasting, and then over telecommunications. Demands for social and economic justice on an equitable basis nationally has promoted (5) the development of federal social assistance in relation to education and (6) an interest in the inherent constitutional capacity and the economic need for regional development in relation to education. (7) The constitutional significance of language in education nationally was made evident in early litigation and later lobbying based on concern for minority language rights. (8) The development of continuing education nationally - outside the regular school system - grew out of the adult education movement. (9) Financing for capital and operating costs to support and expand post-secondary education institutions and programs was accelerated after World War II, and came to include extensive provisions for (10) student loans and (11) student housing. (12) Federal and national post-secondary policy objectives grew out of the aforesaid initiatives and the national needs involved. These are identified and evaluated for their utility and jurisdictional significance. (Federal involvement in military education and education for native peoples is described in Chapters IV, V, and VII.)

1) Land Grants

In the United States, the making of land grants by the Crown in support of public services, including education, was an economic measure of longstanding before independence and was continued after it was achieved. Under Congress' Morrill Land Grant of 1862, each State was granted 30,000 acres of federal public land per Congressman to be used for the endowment of colleges, and the support of the agricultural and mechanical arts. The practice of such central government leadership and support for post-secondary education was adopted in Canada over a hundred years before Confederation.⁵ Land grants in support of local education in Nova Scotia are cited as early as 1732. In 1784 the government of what became New Brunswick included particular pro-

vision for the establishment of schools by means of land grants for generating revenue. In Prince Edward Island, since all public land had been alienated from the Crown to private proprietors, at Confederation grants in lieu were provided for maintenance of local works, including schools.

In Quebec, provision for land grants in aid of education were included in Governor Murray's Instructions from the British Government of December 3rd, 1763. When, in 1774, the same Imperial authority commanded the dissolution of the Order of Jesuits in Canada, it was expected that revenue from the lands concerned might be diverted to support education - as had been done earlier in France. In 1816 the Order's lands were transferred to the Royal Institution for the Advancement of Learning, a body which had been created by Lower Canada statute in 1801. By 1846, the income which had accumulated was allocated for educational purposes by the legislature of the Colony of Canada. Up to this time, as Miller reports, such revenues had been used without distinguishing between either Protestant and Roman Catholic institutions or between common and higher education.⁶ It was not until after 1867 that such apportionment was made by law and on the basis of the respective Protestant and Roman Catholic populations, as determined by the last census.

In early Upper Canada, the relationship between religion and education was close enough that aid to the clergy had an indirect impact on education. As a result of the Constitution Act of 1791 - which divided the Colony of Canada into Upper and Lower provinces - what were called "clergy reserves" were allocated to the Protestant clergy. Of course this evoked a dispute about which denominations were to benefit, ending only in 1854 with the reversion of unsold clergy lands to the Crown.

Land grants were used throughout the times described to promote the establishment of grammar schools and universities with royal charters. King's College, New York (which later became Columbia College) received its royal charter in 1754. King's College, Nova Scotia, was similarly chartered in 1790, King's College, New Brunswick,

in 1800, and King's College in York (Toronto) in 1827. McGill University received its royal charter in 1821 with senior government assistance. Such benefit was available to other institutions of higher learning, before and after Confederation.

At Confederation the joining provinces, and later British Columbia also, continued to derive benefits from Crown lands within their boundaries, i.e., as the Crown in right of the respective province. The Dominion of Canada itself did not have possession of any Crown lands until the admissions to Canada of Rupert's Land in 1868 and the North-western Territory in 1870. Before the creation of Manitoba that year, particular attention was paid to the matter of land grants in support of education, in the new province and in the Northwest Territories. This resulted in "An Act Respecting the Public Lands of the Dominion," of 1872.⁷ In Section 22 of this Act, provision was made for reserving two sections of land in every township as an endowment for local education. Subsequent federal lands legislation concerning schools made provision for the disposal of school lands and the regulation of investment of the revenues from the sale or lease of these lands. Administration of these matters was handled by the federal Ministry of the Interior. This federal control continued after Saskatchewan and Alberta became provinces in 1905. This arrangement included federal subsidies in lieu of income the provinces might have received from these school lands. Manitoba's efforts to have control of its natural resources led to references being sought from the Court by all three Western provinces and a federal commission to study the matter. The result was agreement to transfer natural resources to these provinces. The Saskatchewan and Alberta Natural Resources Acts of 1930 both contained the same paragraph 6 which declared that

Upon the coming into force of this agreement, Canada will transfer to the Province the money or securities constituting that portion of the school lands fund, created under sections 22 and 23 of the Act to amend and consolidate the several Acts respecting Public Lands of the Dominion, being chapter 31 of 42 Victoria, and subsequent statutes, which is derived from the disposition of any school lands within the

Province or within that part of the Northwest Territories now included within the boundaries thereof.⁸

The federal land provisions described facilitated the formation of several thousand local school districts in the three provinces. Establishment of local school governments was a requirement of Section 93 implementation in these provinces. For the pioneers concerned - many of them immigrants - this involved a significant introduction to democratic processes in school governance.

Subsequently, Indian lands (under Section 91.24 of the Constitution Act, 1867) were recognized as the territorial bases for self government in education. Proposed constitutional amendment to achieve this is described in Chapter V.

2) Research

Although research is not mentioned in the written constitution of Canada, it is an integral part of the cycle in which new knowledge is created, transmitted through education and training, applied in technology, and elaborated in further research. Without exception, all scientists interviewed for the study held research to be an integral part of education. This suggests that distinguishing between the two is illogical in theory and dysfunctional in practice. This would not, however, preclude use of semantics to distinguish between the two matters for political purposes, or legally for jurisdictional reasons. So far, given Section 93's vagueness, gaps, and resultant flexibility, this has not happened in law. Linkages in logic and practice, between "education" and research, between it and culture, and between it and communications, may have thwarted all judicial review attempts to date to elicit from the Supreme Court of Canada a definition of "education". In any case, according to several federal and provincial senior officials interviewed for this study, apprehension about such judicial rule-making has deterred governments from litigation and references to settle disputes over education. Instead, executive federalism with its political flexibilities, has been promoted.

An exception to such flexibility is the Quebec nationalists' claim, via Section 93, to jurisdiction over education and research. At the 1966 federal-provincial conference on financing higher education, Premier Johnson stated the position that "education and research are indivisible at the university level".⁹ This interpretation did not win the support of the other governments. Later, prior to the Constitution Act, 1982, a judicial reference on the federal involvement in post-secondary education, including research, was proposed "hypothetically" by a PQ Minister to ministerial representatives of the other provinces who rejected the idea. One reason given was the fear that the Court might affirm such a federal role constitutionally. Another fear was that the status quo, with its federal fiscal support, might be declared unconstitutional.¹⁰

The idea of distinguishing between "research" and "university research" has not caught on in political circles outside Quebec. It has not caught on in Canadian scientific circles either, judging from comments made in interviews at all the federal councils for research grants - where peer arrangements apply on a national basis, and where in the scientific and technical fields, there is scope for research co-operation within and between both the public and private sectors. One senior federal scientist with a Quebec background described a dichotomy between research and university research as dysfunctional. Another senior scientist said that such an arrangement would serve only expedient political purposes, not the cause of science and the national interest.

In 1975, the federal Ministry of State for Science and Technology (MOSST) observed that "most scientific activities may be said to have importance to education either directly or indirectly". Because of this, the development and use of science as it relates to national objectives is deemed to be relevant to higher education policy.¹¹ In interviews conducted for this study with senior scientists in which this particular matter came up - at the Ministry of State for Science and Technology (MOSST), the Science Council of Canada, Agriculture Canada, Environment Canada and NRC - jurisdiction was not perceived as an issue, or barrier, to such federal policy-making.

In a more recent report to the 1987 National Forum on Post-Secondary Education in Canada, R.L. Watts states that, in supporting Canadian university research, the federal role has been "particularly important". Noting that the Constitution Act, 1867 assigned education responsibility "primarily" (but not exclusively) to the provinces,

... historically this constraint has not been considered to apply to university research.¹²

Silence in Section 93 supports this view. The federal residual power in the 1867 Act expressly affirms it. Moreover, according to all legal opinion expressed, judicial review would reconfirm federal power for jurisdiction in relation to research. In the meantime, *de facto* national action in matters of research, before and after Confederation, has strengthened the legitimacy of the federal responsibility and role in this critical aspect of post-secondary education. An absence to date of a successful legal or political challenge to this federal involvement has the same effect. The research history concerned explains why.

Throughout the 19th century, the British Imperial government and its colonial governments responded to the Industrial Revolution's expanding pressures for new scientific and technical knowledge and manpower skills first with support for research, then by instituting public education at the basic level and, finally, by technical training in schools and industry. British Imperial power was at the forefront of the Industrial Revolution in which the importance of research was well recognized, and used by its governments.¹³ Central government initiatives in research in the Colony of Canada were already abundantly evident - notably in the monumental geological research work begun in 1842 by the Geological Survey of Canada, and continued from 1867 by the government of the Dominion of Canada. As an example, the Survey's publication of Geology of Canada in 1863 is credited with founding the nation's mining industry.¹⁴

Such research achievement and its constitutional implications did not escape the notice of the Fathers of Confederation whose allocations of constitutional power then,

and thereafter, were to include the natural resources contained within the territorial allocations of national and provincial jurisdictions.

The terms of the Constitution Act, 1867, with its explicit provision for federal residual power, its Section 91 economic powers in particular, its power of disallowance over any provincial legislation, the flexible terms of Section 93 with its federal residual powers to act nationally in matters of education, gave the federal government a formidable matrix of capacities for industrial, educational and research policy-making and action. Such powers fitted the East-West nation-building required, as well as providing an effective resistance to American domination.

Federal jurisdiction in research has never been made an issue in judicial review. It is a clear link and lever for federal participation in the research component of Canadian post-secondary education which it has done so much to foster and support. From the outset, Canada's federal research efforts have addressed national development needs and priorities. Federal research activities have been aspects of all federal Section 91 powers and the concurrent powers, including support for research initiatives in and through post-secondary education. The resultant inputs form a significant body of knowledge in all kinds of post-secondary education, and on continuing and expanding bases. Economic benefits, including human resource development, have been considerable. The same applies to national post-Confederation research and its applications in agriculture.

Agriculture. The most notable example of concurrent power in Canadian education has been the significant, nation-wide role the federal Department of Agriculture has played in agricultural research and extension (education), a role which has had both national and international consequences. A first milestone in this was the enactment in 1886 of the federal Experimental Farm Station Act.¹⁵ By means of this legislation, provision was made for a decentralized program of research and education in Canadian agriculture, with, from the outset, strong, co-ordinated central direction and support.

From the first five farms (at Nappan, Brandon, Indian Head, Aggasiz and Ottawa), this operation has grown to a Research Branch with 43 major research establishments and 15 sub-stations - to accommodate the full range of concerns in agricultural research and practice and the needs of all parts of Canada. To support this work there is a large central library as well as decentralized station and specialized libraries. There are also substantial laboratory facilities, staff expertise in all aspects of agriculture and the food system, and working and funding relationships with the various university, governmental and international bodies engaged in agricultural research and education. The present Research Branch staff of about 3600 includes about 900 research professionals, the majority of whom are qualified at the Ph.D. level.¹⁶

At what is termed the present Central Experimental Farm "campus", there is now a network of institute and special services support which includes the following: a Bio-systematics Research Institute, a Chemistry and Biology Research Institute, an Engineering and Statistical Research Institute, a Food Resource Institute, and a Research Program Service to handle the collection and dissemination of scientific information by such means as publications and conferences. The work done embraces provisions for training and development of scientific personnel - both staff and university students - and the employment of researchers and support staff in all aspects of modern agriculture.

When the federal government launched its research and education programs in agriculture a century ago, over three-quarters of the Canadian workforce was engaged in farming - producing then only enough food for itself and the other quarter of our population, and that at a high percentage of the consumer's dollar. Now about 6 per cent of the population is so engaged and its percentage of the consumer dollar has fallen considerably. The census information for 1871 (just before the advent of federal experimental farm research and extension) shows that there were an estimated 368,000 farms in Canada. By 1921, after the wheat and settlement boom in the West, the number had

risen to 711,000. However, with the growth of industrialization and urbanization, and changes in farming technologies, this number had declined to 316,000 by 1971. Meanwhile, demands for food expanded and diversified. This in turn created a continuing need for new knowledge in plant and animal breeding and disease control, and for appropriate technologies in both cases. Such research has contributed to virtual self-sufficiency in food and, through sales of surpluses, to balance of payments benefits for the Canadian economy.

All of this has been achieved in a mainly one-crop country, where only about 14 per cent of its land is arable and where, now, about 10 per cent of its area is farmland. That federal research and extension services plays an important role in this achievement cannot be denied.

Agriculture Canada now accounts for roughly 50 per cent of the research and development in Canadian agriculture - down from its almost total effort at Confederation and for long after. Universities now do an estimated 25 per cent of this work - some of it with Agriculture Canada assistance. Industry does about 16 per cent - some of it with similar help. Provincial research establishments, which have had a co-operative relationship with the central body, do about 6 per cent of this work and the National Research Council (NRC), which has had the same relationship with its federal peer body, does about 3 per cent of this work.¹⁷

Research of this kind has been done and supported on a continuing basis - justified by need and by authority to act. Times of national emergency, or crisis, have also evoked a need for federal research efforts. The War Measures Act of 1914 was an umbrella for extensive federal research initiatives during both World Wars I and II.

National Research Council. In 1916, while this Act was in effect, the National Research Council (NRC) was established as an advisory council on scientific and industrial research - to complement the policy-making responsibilities of a Privy Council Committee on the same matters.¹⁸ NRC started by surveying Canada's scientific

resources and problems - including the training needs of the country's scientific talent which had been migrating to the United States for education and work. It took immediate notice of an absence of laboratories and libraries to support scientific and technological training and research in and for Canada. To correct this deficiency nationally, a system of scholarships for students and grants to university professors and institutions was created. This was paralleled with the start of NRC's own laboratory work in 1925. By the advent of World War II, the system had grown to 21 laboratories nation-wide, from Halifax to Vancouver. All the while, the central programs and facilities in Ottawa were being expanded until, with the inclusion of Canada's premier library of science and technology, and the provision for scientific publication in all major fields of its research, NRC became what has been described, by its President (the former Rector of Laval University), as "Canada's M.I.T.", a "university" in every respect operationally, but for classrooms. A federal charter is all that is needed to create such a status.

Medical Research Council. In 1938 NRC established an associate committee on medical research - a body which was separated from it in 1960 and reorganized as a granting council in 1974. Its main purpose is to provide funding support for both medical research and research training conducted in Canada's 16 schools of medicine, its 10 dental schools, and 8 schools of pharmacy. Its grants are divided up amongst 26 sub-fields, each with its representative peer group which must recommend on the allocation of funds. Grants are made on national criteria which are agreed on by MRC and its representative peer review committees. These grants are made on the basis of excellence, as judged against these criteria - not on the basis of provincial quotas. As reported in interviews for this study with NRC and some peer participants, spillover benefits nationally in the various fields of medical research specialty include professional group-building, improved utilization of scarce expertise and information, and the development of policy consensus in research matters. As reported also, new knowledge and a research base for training are prime goals.¹⁹

Science Council of Canada. The Science Council of Canada is a direct result of recommendations made by the notable Glassco Royal Commission of 1960-63, which discovered that the advisory and policy-making means for developing science policy were largely inoperative. (The Privy Council Committee had met very infrequently; a deputy head Advisory Committee met only once a year; NRC's policy-making lacked adequate representation from industry, labour and the provincial research councils.) The Science Council was created in 1968. The secretariat, though, was placed in the PCO instead of under the President of the Treasury Board as had been proposed. This action required amendment a year later to distinguish the Science Council more clearly from the PCO.

An interest in science education is implicit in the Science Council's overall responsibilities.²⁰ This has been demonstrated in its special studies of post-secondary and post-graduate requirements for human and physical resources. It has also been demonstrated in an extraordinary and most necessary national review of science curricula in elementary and secondary education in all provincial and territorial school systems in Canada. As described in Chapter VIII, this two million dollar study with follow-up review and publication was begun in 1981, after necessary governmental agreements had been negotiated. One result, apart from proposals for the renewal and updating of science curriculum, teacher training, and support services, was a commendation from the Government of Quebec.²¹

Ministry of State for Science and Technology. In response to continuing science policy development and implementation problems and to related studies, a Ministry of State for Science and Technology (MOSST) was established under the Ministries and Ministers of State Act of 1970. The Macdonald Report, (which had been commissioned jointly by the Canadian Council of Universities and Colleges, the Canada Council and the Science Council of Canada in 1968), noted a significant increase in both governmental and university research without overall planning and direction at the national

level.²² The OECD Review of National Science Policy: Canada of 1969 suggested that federal-provincial conferences might be used to develop a national strategy for education to encourage innovation and the use of new technology through the country's school system.²³ The Senate Science Special Committee on Science Policy - the Lamontagne Committee - of 1970-73 made a number of recommendations of fundamental significance to the purposes and conduct of Canadian science, technology and education. The Committee saw a need for national goals in science and technology to be compatible with the goals of Canadian society - a basic matter in Canadian education too. It also saw a need for balance in federal research efforts and expenditures to embrace not only basic research but that related to social and industrial research and development as well. It proposed federal financial responsibility for basic research and a separation of teaching and research at universities, in order to make it possible for university scientists doing pure research to concentrate on such work. It proposed that three granting agencies be organized to help meet mission-oriented research need.²⁴

MOSST's mandate includes responsibility for formulating and developing goals, priorities and policies, for optimal development and application of science and technology in support of national objectives. The absence of a national set of education goals, or of one locus of responsibility and activity within the federal order of government to meet this need, limits both MOSST's policy making and its policy implementation where education is concerned.

Natural Sciences and Engineering Research Council. The Natural Sciences and Engineering Research Council (NSERC) started operations April 1st, 1978 - continuing a reorganized approach to former NRC granting support of research and research training in the natural sciences and engineering. A basic goal is the development and maintenance of a high level of expertise in these fields. The use of representative peer reviews to evaluate and recommend on proposals for grants is said to produce the same benefits the MRC obtains.²⁵

Canada Council. The Royal Commission on Arts, Letters and Sciences of 1949-51 - the Massey-Levesque Commission²⁶ - has been described as Canada's first national royal commission on post-secondary education. In recommending formation of a Canada Council, among other things, it showed concern for such problems as underfunding of Canadian universities, a shortage of funds in support of the arts and humanities, and an orientation in Canadian higher education to cater to a small elite. Consequently, to ensure equality of opportunity, recommendations were made for student scholarships, and loans and grants to universities for capital and operating costs - all under the aegis of the federal spending power. Parliament responded by enacting the Canada Council Act in 1957, "to foster and promote the study and enjoyment of, and the production of works in, the arts".²⁷ The Council, headed by a Director and a 21-member board appointed by federal order-in-council, makes decisions on policies and programs to give financial aid and services to qualifying individuals and organizations. An Arts Advisory Board, and advisory committees for the various disciplines, assist the Council and its staff. Professional arts representatives from across Canada serve on selection committees and program juries. The Council works in cooperation with provincial and federal cultural agencies, including the Bureau of International Cultural Relations of the Department of External Affairs. The Council, which reports to Parliament, was given a \$50 million endowment fund by Parliament when it was founded, and annual grants since then. It also receives private donations.

When in 1977 the Government Organization (Scientific Activities) Act of 1970 was amended, three research granting councils were designated: MRCC, NSERC and the Social Sciences and Humanities Research Council of Canada (SSHRC), whose activities were then separated from the Canada Council. The mandate and funding of SSHRC included provision to support research on education as a field of professional study.²⁸

Educational Technology Research. In 1967 the NRC set up a pilot study to experiment with the use of computers as aids to learning. A central computer facility was used by NRC and several research establishments across the country. NRC designed the terminals and computer programs so that participating colleges, universities and school systems could enter selected information including instructional programs into the national data system for wider evaluation and use.²⁹ Early in the 1970's the Departments of Communication and the Secretary of State approached the federal Cabinet for permission to launch a special operation for educational technology research.

Virtually all research with a direct federal responsibility has spillovers in scientific knowledge, technological applications and human resource development. This influence is augmented in Canadian post-secondary education: by federal mission-oriented research contracts via federal departments and agencies; by conditional grants and contributions to university research via the federal granting councils; by unconditional federal post-secondary transfers of funds and tax abatements, (with expected use, in part, for university research); and by integrating federal research libraries, scientific and technological data banks, laboratories, and expert personnel, with Canadian post-secondary education institutions and programs.

3) Technical and Vocational Training

The idea of technical education as a solution to national economic and social problems gained acceptance early in this century as the impacts of the industrial revolution grew across Canada - in industry, agriculture, and business. Thus in 1910, in response to business and industrial calls for leadership, the federal government appointed a Royal Commission on Industrial Training and Vocational Education. However, it did not do so without careful consideration of Section 93. Liberal M.P. Hugh Guthrie provided the necessary semantics to convert the common usage "technical edu-

cation" to "technical training". For this he was thanked both by then Leader of the Opposition, R.L. Borden and by then Minister of Labour, W.L. Mackenzie King, who went on to say that

In a comparatively new and almost undeveloped country such as Canada, it would be seen eminently wise, in the first place, to take stock, as it were, of the resources which the country possesses, and in the next place endeavour to come to a conclusion as to the most effective way by which these resources can be developed.³⁰

Of course Mr. King was speaking about the national development of human resources.

This statement was followed by his tactful letter to the Premiers of December 13th, 1909, as follows:

Dear Sir, - The Dominion government is considering the advisability of appointing a Royal Commission to inquire into the needs and present equipment of the Dominion as respects industrial training and technical education, and into the systems and methods of technical instruction obtaining in other countries, particularly in Great Britain, France, Germany and the United States. It is intended that the commission shall be solely for the purpose of gathering information, the information when obtained to be published in a suitable report to be at the disposal of the provinces and available for general distribution.

I may say that the view of the government is that a commission of the kind suggested might render valuable services to the Dominion as a whole, since it would be in a position to conduct an inquiry on a wider and more comprehensive scale than might be considered desirable or possible in the case of the different provinces, and which if undertaken by the provinces individually must lead inevitably to the duplication and reduplication of energy and expense.

It is recognized, however, that the work of such a commission, to be of national service, should have the hearty endorsement of the governments of the several provinces of the Dominion, and I am, therefore, writing to ask if the appointment by the federal authorities of a commission of the character and scope suggested would meet with the approval of your government, and to inquire, in particular, inasmuch as some doubt has been expressed on the point, whether exception to such a course would be taken on any ground of jurisdiction.

Yours faithfully,
(signed) W.L. Mackenzie King.³¹

Six provinces welcomed the proposal: British Columbia, Alberta, Saskatchewan, Nova Scotia, New Brunswick and Prince Edward Island. Ontario and Quebec expressed qualified approval, but Manitoba conducted its own study.

The Commissioners, who reported in 1913, did not provide arguments in support of federal aid to technical training. They did, however, recommend that an annual sum of \$350,000 be provided over ten years to the provinces on a population basis to assist "the teaching of drawing, manual training, nature study, experimental science and pre-vocational work including domestic or household science in elementary schools".³² In addition, and also on a population basis, 3 million dollars a year over ten years was proposed to promote industrial training, technical education and industrial scientific research. The war stopped implementation. But in 1919, the first federal Technical Education Act provided for 10 million dollars over ten years in a flexible, cost-shared plan which included teachers' salaries, facilities and program costs. All provinces participated and a number of precedents were set. The establishment of vocational schools was promoted, and by 1922 there were 16 in Ontario alone.³³ Federal funding was available to provincial vocational programs provided that half the students' school time was devoted to such studies. There was still no policy-making on a national basis, not even in response to problems of the Great Depression.

In 1939 this legislation was replaced by the federal Youth Training Act with its intended emphasis on education at the secondary level. With the advent of World War II, however, a greatly expanded emergency training program was set up under the authority of the War Measures Act. It was administered mainly by the federal government after it had been set up by means of federal-provincial agreements. The remarkable result was the training of thousands - including a large percentage of women - for wartime industries and the Canadian Forces. For example, over 10,000 pilots were trained in Canada in the Commonwealth Air Training Plan.³⁴

In 1942, a revised Vocational Training Co-ordination Act made provision for a national Vocational Training Advisory Council. This provided for representation from both orders of government. This legislation also enabled the federal Department of Labour to establish a wide range of vocational programs on a cost-shared basis. These programs included training for the unemployed, apprenticeship support, training of supervisors for industry, training of disabled persons, and vocational courses at the secondary level.

In an interview for this study, then Clerk of the Privy Council and Secretary to the Cabinet, Robert Bryce, recalled that Prime Minister Diefenbaker was "quite concerned" about the unemployment problem during his tenure and, himself, had assembled a group to study this matter and its solution. "In typical Diefenbaker style," Mr. Bryce said, "he took the lead himself." Mr. Bryce and others recommended a vocational education emphasis. This emphasis was accepted, only to have it coincide with the baby-boom arrivals into secondary and post-secondary education and, in the Pearson Government to follow, by Quebec's conversion to non-secular, democratized public education. Quebec advisor, Dr. Jacques Parizeau, "saw the handwriting on the wall". The CGEP's were "invented" and, expediently, they were designated as post-secondary institutions. Mr. Bryce recalled, "We were set up for the (financial) kill by Parizeau and others".³⁵ This was the second of Ottawa's major, unknown or forgotten measures in support of Quebec's quiet revolution in schooling.

The first of these measures was provided for in the Diefenbaker Government's Technical Vocational Training Assistance Act for programs to upgrade vocational education and facilities under agreements with the provinces. The three main groups targeted for help were: (1) youth in secondary school who intended to enter the labour market directly; (2) youth and adults who had completed secondary education and who desired training before entering this market; (3) adults who had left regular school and who were employed or sought employment at a trade or occupational level. Initial

federal contributions were up to 75 per cent for capital construction and facilities costs. When cost per person in the 15 to 19 age group reached \$480, Ottawa's capital contribution was to continue on a 50:50 basis. Results in vocational program development and access were impressive. For instance, between 1961 and October 1965, the expansion of facilities across Canada grew as follows:

<u>Type of Institutes Created</u>	<u>Number</u>	<u>Student Places</u>
Technical and Vocational High School	526	260,166
Trade School	156	31,462
Combined Institute and Institute of Technology	38	24,692
Minor Projects (under \$10,000)	126	
Totals	846	316,320

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At the same time, existing programs which were continued included training of teachers and supervisors for technical and vocational education. All aspects of such education were involved in a federal bill that came to about \$600 million in the five years before its end. As Prime Minister Pearson stated later, \$400 million of this had been used to build new vocational high schools.³⁷ In scope, magnitude and timing, this federal participation had a formative impact on all Canadian secondary education.

Technical and vocational curricula were updated and expanded for use in the modern institutions described above. At the same time, there was a spillover of technical and vocational courses and programs for use in comprehensive high schools and Quebec's secondary-level public colleges of general and vocational education (CGEP's) which offer a common 2-year program leading to university and 3-year courses leading to employment. Enrolment in training programs was increasing from 52 per thousand in 1959 to 93 in 1963. The number of students aged 15 to 19 who remained in school

rose from 40 per cent in 1955, to 55 per cent in 1960, to 66 per cent in 1965. Costs rose with these numbers and with program diversification. Federal capital and operating funding was a crucial factor in this improvement.

The October 1966 Federal-Provincial Conference is remembered as the antithesis of co-operative federalism. This was because, unexpectedly, the Pearson government announced that it was dismantling the established scheme for federal technical-vocational support. The provinces were to use the infrastructure, which had been built with substantial federal aid, and assume most of the operating costs. Henceforth, the federal government would buy its adult education requirements from the provinces. The "regular" education involved, including vocational education at the secondary level, was to be treated as a provincial responsibility under Section 93. In future, the federal government would focus on adults and, in response to recommendations of the AUCC's Bladen Commission on financing higher education in Canada, aim for a 50:50 federal-provincial support of post-secondary education.³⁸

The provinces were overwhelmed by the Section 93 capital and operating responsibilities they would have to assume at the secondary level in technical and vocational education. This included Quebec, which had earlier objected to federal participation in training on constitutional grounds. At one stroke, Quebec's Section 93 rhetoric on the subject of secondary education was answered, a Diefenbaker initiative was retired, and federal participation in post-secondary education was established for the future on a 50:50 basis which was concurrent in effect, if not in constitutional law.

There then followed a shift away from prospects for the sort of comprehensive approach to federal policy-making and financing for post-secondary education which would allow for greater equity in human resource development - via both degree "education" and non-degree "training". Consequently, Canada's total current and future human resource development needs were not analyzed and balanced before federal funds were allocated in these related categories. (Had this been done, there would have

been more consideration of the developmental and compensatory needs and priorities for all Canadians of post-secondary level age. It would then have been possible to consider education on a continuum which starts with the problem of under-education. This would have promoted national awareness and action to deal with Canada's grim picture of lost potential in employment and citizenship through a high, continuing incidence of basic and functional illiteracy in all provinces and in the territories.)

In the Adult Occupational Training Act of 1967, provision was made for federal purchase from the provinces of compensatory and retraining courses and services for adults. This legislation and funding gave the federal government some leverage for dictating programs and standards with national requirements purposes. The arrangement also permitted abuses, as some federal officials mentioned in interviews for this study. These were said to include make-work for the provincial training bureaucracies and some training of doubtful practical value. In any case, the federal adult training legislation showed a capacity for combatting illiteracy in the two official languages, and for providing compensatory education, including opportunities to complete high school matriculation.

Problems were perceived by management at the federal Department of Employment and Immigration (EIC), when some of these graduates elected to seek university education rather than some form of technical training for more immediate employment. In the planning done by the federal bureaucracy, training had been justified solely as an economic means for making disadvantaged persons employable in the short term. The social and educational benefits produced went beyond the employment concerns of federal labour economists.

By the fiscal year 1977/78, federal literacy support costs were exceeding \$170 million per annum. A comment had been made on such expenditure in a Senate Finance Committee's review, and was used by federal senior bureaucrats to promote spending cuts on selective economic grounds. In interviews with five senior EIC

officials, they indicated that this operational policy decision was a necessary cost efficiency measure in a time of austerity in federal budgeting. The measure was taken notwithstanding Parliament's war on poverty a decade earlier, and the Senate's more recent report on poverty in Canada showing great need for remedial measures in education, including the task of eliminating illiteracy as a factor contributing to, and intensifying, the adverse effects of poverty on individuals and their families.

To rationalize what was done, a distinction was made at EIC between "employables" and "unemployables", before training dollars were to be allocated to federal training programs for employment and re-employment. One rationale, devised by some senior EIC officials was that the Department's mandate and expenditure were to be directed to problems and remedies in the "economic world". Illiteracy was thus described as being primarily a social problem whose correction alone would not assure immediate employment. Its remedies and costs, so the argument went, lay in the "social world" - starting with the Provinces' Section 93 responsibility for elementary and secondary education. Surely the least the provinces could do, they argued, was to assure basic literacy. In the case of adults, one senior educational EIC manager expressed doubt about the value for money, so to speak, of spending to make older persons literate, since this would not suffice to make them employable.

The "two worlds" cleavage between things economic and things social was mentioned several times in interviews at EIC. As the Department's statistics show, the entry to training of so-called "unemployables" (including illiterates) was cut back steadily. EIC computer file data requested for 1984 show that, in all Canada, not one person with a schooling status below Grade 8 was admitted to the basic development and skills training program.³⁹

From the mid 1960's, the federal government had claimed constitutional power to act nationally in matters of adult human resource development for employment. In federal policy and programs, this involved adult training which included a skills

development program with remedy of illiteracy as a starting point. Federal initiatives and purchase or support of provincial training services were justified by reference to Section 91 economic powers - in particular the federal trade and commerce power cited by EIC legal counsel and others - and by use of the federal spending power.

When former federal Ministers of the Secretary of State and Labour were asked why there had been a major cutback in federal funding for the literacy component in training for employment and re-employment, they expressed dismay and claimed not to have been fully aware of this situation. Certainly, according to interviews for this study with provincial ministers and senior education officials, none of the provinces wanted cut backs on federal support for literacy training. The senior bureaucratic answer in two EIC interviews was that, in times of austerity, cuts are best made where federal jurisdiction is perceived to be "soft". This had the effect of making literacy a pre-requisite for federally-funded job training, even though this was not the intent of existing Government policy or the legislation.

This issue was not clarified in Parliament's National Training Act of 1982 or its regulations. All provinces participate in the Act's implementation and funding arrangements, thus representing a substantial federal legislative claim to jurisdiction in education nationally - for training related to human resource development at all levels of education, and for populations of post-secondary ages. This role was not seriously contested by any province. This may be because other Section 91 powers apply, including federal jurisdiction for unemployment insurance created by constitutional amendment in 1942, and the implications for job training which unemployment raises nationally. Hence, federal jurisdiction over unemployment insurance matters was explored as a final and potential source of federal power for jurisdiction in training of the unemployed. Does this power include a federal responsibility for training to remedy, or even to prevent, unemployment? The constitutional amendment does not answer directly, but this might be read into it in judicial review.

In an interview for this study, the Hon. John Munro, Parliamentary Secretary to the Minister of Manpower and Immigration (1966-68) and Minister of Labour (1972-80), was asked if an unemployment insurance and training linkage had ever been formally considered, as a regular practice, where required. The answer was yes. The main reason he gave for the federal government not proceeding along this line in the 1960's was not cost but, rather, an insufficiency of provincial educational capacities. This situation was judged to apply then in spite of previous massive federal capital and operating expenditures which had been made in aid of technical and vocational education development at both the secondary and post-secondary levels in all provinces.⁴⁰

In Canada, unlike the situation in Europe, it was noted that business and industry prefer to recruit workers pre-trained at public and private expense. In the post-war years, the provinces were hard-pressed to keep up with college and university expansion requirements, notwithstanding substantial federal funding for this purpose. Consequently, as observed throughout this study, training for more immediate employment seemed to be tied to what, in the competition for limited public funds, might be perceived as lower education for lesser jobs - an endeavour in which the federal order of government could have unchallenged participation, politically and even constitutionally.

It is possible to place all vocational human resource development on the same continuum. For instance, former Labour Minister and Prime Minister King did not make any distinction between upper and lower levels in his 1909 statement on national need for human resource development. Later, however, when the Pearson Government claimed federal jurisdiction to train and retrain adults for the Canadian labour market, J.A. Corry expressed the hope that higher education was not to be excluded from this constitutional claim. He stated that

It is to be hoped that a reading of this particular assertion along with other general disclaimers in the text of his proposal about federal authority in education will not give rise to inferences that the federal

government has neither status nor lively concern in the education of highly skilled and highly educated manpower in the universities. It would be incongruous to be asserting federal authority over training for run-of-the-mill jobs in the labour force and abandoning it totally for all professional, scientific, and technical personnel educated by the universities. It is the latter who will be critical for national objectives in the future.⁴¹

In the writer's interview with him in 1985, Dr. Corry reaffirmed this opinion on the matter.

4) Broadcasting and Telecommunications

In the 1932 landmark Radio Reference, the Judicial Committee of the Privy Council ruled that Parliament had plenary legislative jurisdiction for broadcasting. From the outset, this federal power has had the potential of national application in the related fields of education and culture. As Canada has moved into the post-industrial "Information Age", this power's scope has been expanded greatly by Supreme Court rulings that federal jurisdiction over broadcasting extends to telecommunications.

Significantly, this national jurisdiction was granted at a time when the technological means of mass communication were opening an avenue for national cultural as well as commercial purposes. This constitutional decision came when the influence of American culture, and its commercial aspects, was already showing considerable potential for stifling the growth of a Canadian identity. Federal plenary power was granted in spite of provincial competition for jurisdiction, which, had it had been successful, would have balkanized "broadcasting" constitutionally and negated its use as a modern national means of education.

Before the judicial ruling in favour of national jurisdiction was made, it was already evident that the means of mass communication had potential for both positive and negative uses; that borders would not necessarily be barriers to such communication. To Canadians it seemed possible to distinguish between external sources and

content, and internal ones; that what a sovereign power did within its own jurisdiction could be regulated to meet its interests - in culture, education, and commerce.

The Aird Royal Commission, which the MacKenzie King Government appointed in 1928 to study radio broadcasting, conveyed a widespread belief in the potential of broadcasting for giving voice to Canadian concerns and for helping to build Canadian identity. Forceful proposals were made about the educational purposes and uses of broadcasting. For example, in its brief to the Commission, the Royal Society of Canada recommended

That a plan of operation should be devised that would emphasize the public character which a broadcasting service can render; the place which it must occupy in the educational system of the future; and the importance to the public of the educational character of the service, as compared with the merely mercantile enterprises that can be associated with it.⁴²

The Commission also marshalled facts and arguments for the national policy-making and action to follow, as soon as Parliament had the constitutional power to enact the necessary legislation. In its report of 1929, the Commissioners recommended accordingly. They advised that the federal government take the lead in national broadcasting and regulate the system. They proposed that broadcasting in Canada have three main purposes: to educate; to entertain; to foster and interpret Canadian nationalism. The first enabling legislation used the term "educate" without equivocation. Later, because of the politics of the provinces' Section 93 jurisdiction, legislation used the euphemism "enlightenment". This legislative term, according to a senior CBC program official who was interviewed for this study, was always intended to mean education. An educational function in Canadian broadcasting was further described as necessary and unavoidable, and as a matter above political partisanship.

Although the first steps towards establishing the Canadian Radio Broadcasting Commission were taken by the Liberals, their Conservative successors were no less supportive. Prime Minister Bennett declared that:

Broadcasting could be a most effective instrument in nation building, with an educational value difficult to estimate.⁴³

Parliamentary support was on a non-partisan basis and there seemed to be consensus on the educational potential of broadcasting technology. In addition, some prior provincial school broadcast trials helped to set the stage for early federal-provincial co-operation.

Federal jurisdiction over broadcasting implied responsibilities, with resources to match, for participation in the development of Canadian education and culture. From the beginning radio broadcasting technology was used to meet national and regional needs in content and services in both education and culture. Federal participation was continued in the same way with television and has expanded to include the new forms of telecommunications as these arise. In relation to this, federal jurisdiction over telecommunications has been under pressure from some of the provinces. Of greater concern, however, have been the fears of Canadian nationalists who anticipate pressures for increases in Americanization in the field of pay television programming and ownership of services. The error here, they hold, would be to treat culture as just another commercial matter, and not consider carefully the differences in values and content between, say, Canadian culture and American culture.

Impacts through television of American culture on Canadian culture and education are felt in all parts of Canada, by every age group - in particular by impressionable children. Current average television viewing for Canadians is conservatively estimated by researchers at the federal Department of Communications at about 24 hours per week, or about the same as regular class time for elementary and secondary students. Total hours of pre-school age viewing up to first grade entry are variously estimated at between 5000 and 6000 hours involving values, contexts, content which

may be predominantly American.⁴⁴ Yet this pervasive cultural and educational intervention - via Canadian pay cable television - did not prevent the provinces from opposing a federal assumption of its jurisdiction over cable licensing and control in order to set Canadian content standards.

From their respective inceptions, the CBC, CRTC and NNBAP (Northern Native Broadcasting Access Program to CBC facilities) have been intended to be vital means of achieving Canada's national cultural objectives. In the latter case, Northern native broadcasting could be said to embrace a combination of federal jurisdictions related to communications, education and culture. These include the 1932 judicial ruling on broadcasting, Section 91 responsibilities for native peoples and their education, and federal Section 93 power for education in the territories. Thus, federal broadcasting jurisdiction has afforded an unimpeded opportunity for educational and cultural broadcasting in the native vernaculars, as well as in the official languages.

Educational Broadcasting. By 1944 there was a National Advisory Council on School Broadcasting, with representatives of each of the provincial departments of education and from the various national education organizations. In 1953 school television was included as a council advisory responsibility. Meanwhile, one of the various experiments in radio education that demonstrated its potential was the CBC French Network's Radio-Collège series of 1941 to 1955. Subsequent CBC radio and television production has included a wide range of well-researched educational broadcasts, with related learning materials available for purchase, to complement formal or informal studies at all levels. By the mid 1970's, CBC was carrying about 4000 elementary and secondary radio and television school broadcasts. Until 1970, the national corporation paid the full cost of this educational programming. As of 1975, the President of CBC could report that the CMEC had come out "strongly for a continuation of the Canadian School Broadcasts".⁴⁵

In the United States, television has been widely and primarily regarded as a means of entertainment. It has also been regarded as a major commercial industry, rather than as a modern cultural service. From the outset, the CBC has tried to counter and balance American broadcasting orientations and influences. One means of doing so has been its collaboration with the provinces in educational programming. Another means has been the Board of Broadcast Governor's (later CRTC's) regulation of Canadian content rules in radio and television broadcasting. This has involved federal broadcasting licences, including, after 1968, licenses for provincial, non-commercial educational ultra high frequency television services (which are given federal funding assistance through the Department of the Secretary of State). To date, this educational broadcasting is carried on by provincial educational corporations (not by provincial governments) which, because of the costs involved, the CRTC has licensed only in Ontario, Quebec, Alberta and British Columbia.

Prior to the establishment of these provincial educational television services, the federal government had been moving to the establishment of a national Education Broadcasting Agency. This was expressed in the 1968 Broadcast Act in Section 3(i) as "facilities should be provided within the Canadian Broadcasting System for educational broadcasting". This legislation had been preceded by the federal government's White Paper on Broadcasting which indicated its willingness to enter into bilateral agreement with any province to make CBC's broadcasting facilities available. (CBC had long been involved in negotiation and agreements with the provinces to facilitate educational broadcasting; it continues to do so.) National content control was not included in the proposal for national educational television broadcasting, although the CBC's commitment to Canadian content in broadcasting has always been its main *raison d'être*. As described in a senior CBC interview, the provinces were expected to have common interests in various subject fields where the issue of jurisdiction should not be an issue - such as the sciences, mathematics, the fine arts, French and English as second

languages. There were hopes for common programming of Canadian studies in history and civics, which, as shown in research past and recent, have fared poorly. There were expectations that the provinces would be attracted by common instructional needs of the emerging Information Age.

In spite of these potential benefits, and even though there was no express threat to provincial jurisdictions in education, the governments of Quebec and Ontario seized upon this issue to allege intrusion on their separate Section 93 jurisdictions. They acted as if broadcasting, the modern means of mass and distant education, had not arrived; as if Canadian education was too particular and narrow for common, national expression; and as if the federal order of government had never won plenary jurisdiction over broadcasting. Quebec enacted *ultra vires* broadcast legislation. Ontario enacted its Educational Communications Authority Act, to create its own educational broadcasting service, although it lacked the broadcasting jurisdiction to do so itself. The Trudeau government backed down on its educational initiative for all the provinces and all Canada, even though it had the jurisdiction to act in broadcasting and on general education for national purposes.⁴⁶ The result was an effective veto on federal-provincial co-operation to improve Section 93 implementation everywhere in Canada, by means of shared broadcasting services and programs. This stopped an opportunity to correct common shortcomings such as in provincial treatment of Canadian history and civics.

Educational Technologies. For some years, communication technologies have been emerging with the potential for educational and cultural content which could be used either for Canadian use and control, or for external interventions. These include optical fibres for multi-cable uses, digital switching systems, and satellites. Canada has been heavily reliant on imports of foreign technology in telecommunications including an expanding variety of computer and foreign, patented video software materials. This has increased the deluge of foreign broadcast programming, with all its cultural and educational impacts, in English-speaking Canada in particular.

At the provincial level, the response has been the organization of committees to study, in the narrow, traditional, school-bound sense, the problems of education and cost. Federal educational technology research and initiatives were taken much earlier. In 1967, N.R.C. established and funded research on the application of computers to learning. N.R.C. was also in the forefront of Canada's satellite development and applications. The federal Department of Communications, established in 1968, had an active interest in educational technology research and development from the start.

In 1972 the federal Cabinet was advised by the Minister of Communications, and the Secretary of State, that there were wide disparities in provincial ability to finance modern educational technology.⁴⁷ As an executive federalism measure, it was decided to seek agreement with the Canadian Council of Ministers of Education for an education technology strategy to recommend how every province could best use the new telecommunications and computer technologies. This was done, and a research program was jointly approved. When the provinces chose to make their participation optional, any agreements were to be bilateral only.

Such parochial views of Section 93 seemed to put the brake on a more national approach to policy-making and implementation related to educational technology. Nevertheless, an Educational Technology Branch was established in the federal Department of Communications to administer the research and agreements which might be made with the provinces, and to co-ordinate the related inputs of NRC, NFB, and the various federal departments and agencies which might become involved. The new Branch was also aided by working committees in the areas of communications systems, audio-visual systems and computer-communications systems. Yet, in spite of its promising beginning, its operation ceased in 1975. Why this happened could not be ascertained. In any case, a federal-provincial task force was later established to report on the use of satellites for educational service throughout Canada. This involved an interest in geostationary Anik satellites linked to earth stations for relay of educational

and other programming. Educational use of this technology on a national scale would have involved the federal Crown corporation Telesat Canada as the telecommunications carrier and, also, the Canadian Radio-Television and Telecommunications Commission's (CRTC's) regulation of the service rates. A report was issued (in 1981) with recommendations for educational use, subject to constraints of cost and the issue of control.

The constitutional linkage between culture, education and communications has been of critical importance to Quebec governments, beginning with challenges to federal involvement in broadcasting and leading on to its involvement in telecommunications. In both cases Quebec lost its constitutional arguments: to the Judicial Committee of the Privy Council in the first matter; to the Supreme Court of Canada in the second. Still its governments have persisted, making Section 93 a leading edge in establishing a claim to cultural distinctiveness, or sovereignty, and a basis in international law for the status and power of an associate state. This is incompatible with the Constitution of Canada as it has evolved, including its federal structure. It raises the question of what revisional repercussions would follow Quebec's full sovereign power in education, culture and communications. One question concerns the role of the Supreme Court in such matters. In any case, the argument for such control persists and incremental concessions in its direction are sought under the less constitutionally alarming language of a "distinct society".

The Quebec case and its societal connection was expressed clearly by Premier Rene Levesque in his opening statement to the Federal-Provincial Conference of First Ministers on the Constitution in September of 1980. Of French Quebecers he said

We are the only representatives of our race, on a continent where everyone else is and remains forever destined to speak another language and to live another culture; it is for this reason that Quebec insisted from the beginning that, at the very least, it have, for itself alone, a democratic parliament with sovereign powers in the areas which at that time were felt to be essential to maintaining and developing its national identity. It goes without saying that these powers are still essential, particularly in the spheres of language policy and education. There can be no

question of taking these powers away from our National Assembly in any way, nor can they be to the slightest degree subject to outside decisions.⁴⁸

He went on to say

And what is essential - the key, for us - is the division of powers. For the past thirty or forty years at least, as our society became more modern and felt the need to equip itself with new or more complete tools, every government of Quebec, without exception, has continually called for these tools. I am speaking, for example, about what my immediate predecessor, Mr. Robert Bourassa, called cultural sovereignty, which includes communications.⁴⁹

These arguments, with their direct consequences for Canadian francophones outside Quebec, Canadian anglophones inside Quebec, and the first peoples of Canada, the native peoples of Quebec - did not produce constitutional accommodation in 1982. Debate will continue over jurisdictions for culture, education or communication.

5) Social Assistance Related to Education

As a nation, Canada was slow to care for its poor, notwithstanding the plight of the children and youth involved. As Osborne notes, the federal government did not recognize a responsibility in the matter until 1927, when the Old-Age Pension Act was passed with an arrangement for 50:50 federal-provincial funding.⁵⁰ This created a precedent for future shared-cost programs justified constitutionally by use of the federal spending power, even though the national objectives to be achieved involved areas of provincial jurisdiction.

In 1966, during Canada's then "war on poverty", Parliament passed the bill to introduce the "Canada Assistance Plan". It replaced four separate federal-provincial programs which assisted the blind, the disabled, the elderly and the unemployed. It was made universal so that all persons in financial need could be helped regardless of the causes of their need. The two primary purposes of the Plan were to provide adequate

support to these persons and to help in preventing poverty. To qualify for federal funding the provinces were required to meet prescribed national standards. Three procedural conditions applied: a needs test, an appeal system, and a prohibition on any provincial residence criterion.

The poor were to be, and are still, the main beneficiaries of the social programs funded under CAP. As of 1981, for example, about a third were disabled; about 30 per cent were single parents; about 20 per cent were unemployed; 10 per cent were at a pre-retirement stage and 5 per cent were members of large, low-income families. All were eligible for educational benefit in some form, as they still are.

Included in its original objectives, according to Dr. Joe Willard, then Deputy Minister of Welfare, was its first and universal goal of adequate assistance to persons in need. Educational measures were implicit in its protective, preventive, rehabilitative and developmental welfare services "to help prevent and remove the causes of poverty and dependence". The same applied in its objective to support provincial efforts "to prepare and motivate" recipients of welfare assistance, "to take advantage of vocational rehabilitation, training and placement services designed to get them into full employment".⁵¹

Spillovers from this and related federal programs for remedy and prevention of poverty came to include federal support for literacy training and basic education. To the present, school attendance is, sometimes, made a qualifying factor for welfare support for school-age youth. During the 1960's in particular, education was looked upon as a means of breaking the cycle of poverty - with its dysfunctions in relation to culture, citizenship and employment.

About three-quarters of CAP's social assistance is for food, shelter and clothing costs of individuals or families. A wide range of social services is also provided for child welfare, day care, institutions for the disabled, the mentally ill and the retarded, and for counselling services. Fifty per cent of federal funding in both categories is

provided under CAP, Part I. In addition, federal payments of 50 per cent of specified costs of welfare services are made to persons who are in need, or are likely to become so, if such help is lacking. Part III of CAP also allows for federal payments of 50 per cent of specified provincial or territorial costs of work-related projects designed to improve the employability of persons who have particular difficulty undertaking job training or in finding or retaining employment. In addition to general assistance as described, CAP shares in costs of homes for special care - e.g., for battered women and children. It shares in residual health care costs which are excluded from universal care programs. It shares in costs of children in foster homes. This helps to assure minimum readiness for school attendance and benefit.⁵²

Day Care. Welfare services include day care for the children of the needy, or of those likely to become needy. The provinces have had clear legislative discretion to place day care under their respective Section 93 powers and make it a part of the regular system of public education. When handled professionally, day care involves educational objectives and learning. This is an increasingly common characteristic of non-profit day care - the only category to meet the national standards to qualify for federal funding under CAP. Only Quebec has used its Section 93 jurisdiction to provide for day care services as an entitlement for all the Province's children. The other provinces used various non-educational heads of provincial power, to avoid Section 93 obligations and costs.⁵³

In addition, federal funding is allocated in support of the National Day Care Information Centre. This organization conducts research nationally and provides information and consultation on day care matters, including services, standards, and staff training. Of related benefit is the federally supported National Clearinghouse on Family Violence which also conducts research nationally and provides information and consultation.

This compensatory help is vital to the children and youth concerned. Counting children of compulsory school age attendance only (at under 16), in 1982 they numbered 1.112 million - a total then on the rise.⁵⁴ Given the critical home and family factor in any child's education, formal and informal, it is significant to note the distribution by province of poor families. In 1982 this situation was as follows:

<u>Province</u>	<u>Rate of Poverty (%)</u>	<u>Number of Poor Families</u>
Newfoundland	21.5	29,000
P.E.I.	15.8	5,000
Nova Scotia	15.7	35,000
New Brunswick	19.7	36,000
Quebec	16.9	295,000
Ontario	11.9	278,000
Manitoba	16.6	44,000
Saskatchewan	13.2	34,000
Alberta	10.5	65,000
British Columbia	11.9	91,000
<hr/>		
Canada	13.9	912,000

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The federal government's influence under CAP (with its national standards) has been of significant and sustained remedial benefit nationally, regionally and locally - in matters of welfare, education and culture.

Family and Youth Allowances. The national Family Allowances program is an integral part of Canada's social security system. It has been an important means of promoting and extending school attendance and benefit. The Family Allowance Act of 1944 was conditional on school attendance (or acceptable exemption), stating in Section 4, subsection 2a as amended that

The allowance shall cease to be payable if the child does not regularly attend school as required by the laws of the province where he resides,.....

This has amounted to a federal facilitation, or support, of school attendance in every Section 93 jurisdiction. The Neilsen Task Force on Program Policy concluded that CAP is "an effective federal/provincial partnership for the alleviation of poverty throughout Canada." Despite administrative deficiencies, it is also considered "indispensable to the development and provision of social services to the most disadvantaged Canadians."⁵⁶

The Quebec Schooling Allowances Act of 1964, which was implemented to help parents of youth ages 16 and 17 to maintain their schooling, was a stimulus for the federal government to legislate its similar Youth Allowances Act of 1964. The features and options of these Acts were carried forward in the Family Allowances Act of 1973 with its provision for payments indexed to the cost of living. This Act also permits provinces to vary federal allowances in relation to either child age or number of children or both, provided the minimum is not less than 60 per cent of the federal rate, and the payments average matches the federal rate. (Alberta varies the rate on an age basis; Quebec varies federal and provincial payments according to age and the number of children in the family.)⁵⁷

No research could be found which assessed the impact of family allowances on school attendance, achievement and retention. Part of the reason is that it is not a provincial practice to identify students who are poor, or culturally disadvantaged for statistical, research or curriculum purposes. Thus a province's department of education, or a local school board, cannot be evaluated on its record to determine what it does in curriculum, teaching, and related services, to identify and remedy the learning problems of children and youth who live and learn in poverty. Nevertheless, Canadian school administrators believe that family and youth allowances have been of benefit in terms of school attendance and education.

For disadvantaged families, their children's right in principle to a public education requires a necessary minimum level of family economic means - for food, clothes, and books - and enough social status to enable them to take advantage of public

education programs and services. Further help for the poor in these matters is made possible by the federal Child Tax Credit program which is described in Chapter VIII for 1983/84.

Vocational Rehabilitation. The federal Vocational Rehabilitation of Disabled Persons Act of 1961 authorized the Minister of National Health and Welfare (with Cabinet approval) to enter into 50:50 cost-sharing agreements with the provinces to cover costs of a comprehensive program for disabled persons. This arrangement continues under CAP. Moreover, to qualify for federal funds, provincial programs must still have vocational rehabilitation objectives, and they must also be designed for making physically and mentally disabled persons ready for employment.

The terms of the federal-provincial agreement regarding the "Role of the Province" in program, Part 5(3)(6) states that a Provincial Coordinator shall

encourage the provision of adequate remedial and educational services for disabled children and ensure continuity of services by determining when and whether or not they should receive vocational rehabilitation services under this Agreement.

About 100,000 people across Canada receive benefits: assessment; counselling; prostheses, wheelchairs, technical aids and devices; vocational training; learning materials; maintenance allowances; and employment placement.⁵⁸

No complaints were heard on CAP's direct and indirect support to education for the disadvantaged and disabled from any of the federal or provincial politicians and officials interviewed for this study. Nor were any complaints from these sources noted in the related documentation.

6) Regional Development

Federal involvement in regional development flows nationally and constitutionally from territorial limitations placed on provincial powers under Sections 92 and 93 in The Constitution Act, 1867. It is supported by Section 91 economic powers, the "peace,

order and good government" power for action in emergency and/or in the national interest, and by the federal spending power. Regional development, including its application to education, training and research, is a means of both promoting equalization in standards and opportunities amongst the provinces, and of nation building. It is not, and never has been intended as a form of subsidy. It is a constitutional matter, as recognized explicitly in Section 36 of the 1982 Act.

From its inception in 1969, the federal Department of Regional Economic Expansion (DREE), (and its successor, the Department of Regional Industrial Expansion, DRIE), contributed to the establishment and funding of educational facilities and programs. Contributions and/or loans negotiated by federal-provincial agreements were used to aid underdeveloped and slow growth areas - work continuing under DRIE to its conclusion in 1989. These federal programs employed a sequence of innovations, involving first education and training, and then research and development.

During the early 1960's, before this special federal department was available, federal leadership and assistance was provided for in programs aimed at agricultural and rural development.⁵⁹ These programs included those under the Agricultural and Rural Development Act (ARDA) and its complement, the Fund for Rural Economic Development (FRED). They also included the Area Development Agency and the Atlantic Development Board. In all cases, lack of education was a concern, and it was considered to be a significant cause of poverty and of related regional disparities in economic development, employment and incomes.

Concern with education as a fundamental means of correcting these problems was clearly evident in DREE's first four plans and agreements. The first was in Northeastern New Brunswick, where about a third of the potential work force was unemployed, where schools had not been consolidated, and where some teachers had not much more than elementary education. In the second agreement, which covered parts of northern Manitoba and its predominant Métis and Indian population, about three-

quarters of the cost, which included education and training, was funded by the federal government. In the next agreements, in the Gaspé and Prince Edward Island, respectively, training was again a remedy - for indigenous occupations and for mobility. The latter plan included federal capital and operating expenditures which, as in other cases in poor rural areas, included benefits which provincial Section 93 jurisdiction should have covered.

In these and subsequent regional development cases, education was made a significant means for upgrading disadvantaged individuals, groups and communities - economically and socially. DREE's Special Areas Program attempted to assist provinces with development of their own program obligations in education, to remedy human resource deficiencies to the point where economic development was feasible. "Free access" was a criterion for the individuals to be helped. Accordingly, DREE provided funds for training allowances to help those concerned prepare themselves for new employment and improved income. These expenditures in people and communities were looked upon as investments, not subsidies. Training was facilitated, where appropriate, through the federal Adult Occupation Training Act. Under this legislation, the federal government assumed the full responsibility and cost of training for "adults" (defined in the legislation as being beyond school leaving age), for up to one year. Other federal departments participated in regional development for disadvantaged persons - again as investments in human capital, and not as subsidies.

The Newstart program, planned and initiated by the Department of Manpower and Immigration was a unique education measure of national scale, but local impact.⁶⁰ This innovative program aimed at harmonizing with the various provincial systems of education, assisting them in developing their own programs and facilities for salvaging and upgrading disadvantaged and under-educated people, so that they could qualify for employment. Each Newstart operation was a federal body incorporated provincially. These incorporations were carried out by the federal government in compliance with the

ruling of the Supreme Court of Canada in P.E.I. Potato Marketing Board v. Willis (1952). In this reference, the Court decided unanimously that each legislature could only exercise its respective legislative powers according to the terms of Section 91 and 92.

Beginning in 1969, six of these corporations were established in designated areas in six provinces: Nova Scotia, New Brunswick, P.E.I., Manitoba, Saskatchewan and Alberta. Each had its local board of directors. They all attempted to satisfy both common objectives and those particular to the given situation. Innovation continued in the design of curriculum and materials for the adult education required, with a free, national exchange of ideas and practices. Particular attention was paid to developing basic education, including literacy and life skills for work and citizenship. A great deal of the education work done, including its flexible democratic approach to organization, was a model for similar and future work - in Canada and elsewhere.

The Newstart program was limited to a duration deemed sufficient to demonstrate how education related to employment and social development could work, and was intended to be continued provincially and locally as required. Unfortunately, when federal program and financial support ended, provincial activity for the disadvantaged adult category declined. In general, this was most apparent in the case of basic literacy education, and probably accounts for substantial and expanding federal funding of such education, through the employment training programs of the Department of Manpower and Immigration and its successor, Employment and Immigration Canada (EIC) - until the 1977 austerity cuts.

In 1978, the Ministry of State for Economic and Regional Development (MSERD) was established by order-in-council.⁶¹ It was to serve as a policy secretariat to the Cabinet Committee for Economic and Regional Development (formerly the Board of Economic Development Ministers). In 1982, Prime Minister Trudeau announced a reorganization of the economic departments involved that would make regional eco-

conomic development their shared responsibility. Earlier, in 1974, the federal government had negotiated bilateral General Development Agreements (GDA's) with all of the provinces. Under these agreements, DREE entered into various subsidiary agreements, some of which related, directly or indirectly, to education and training, and to research and development. In 1982, responsibility for such matters was turned over to MSERD under the title of Economic and Regional Development Agreements (ERDA's), each of which was to run for a ten-year term. Again, provisions for education support were involved, but more incidentally, as elements in substantial funding to regional businesses and industries, including some large established private enterprises. To compensate for, and complement local research and development, DREE funds were used before their expiry and augmented as necessary. The funds were used to establish a number of scientific and technological programs and facilities fitted to regional economic needs and potential in the area of renewable resources - agriculture, forestry, and fisheries.

The Special Recovery Capital Projects Program (SCRAP) expenditure was part of an extraordinary one-time federal recession-fighting program.⁶² It was apart from, although related to, the regular regional expenditures through ERDA's which, after a series of changes in the federal government, were being implemented by DREE and the Department of Trade and Commerce, until transferred in 1984 to the Department of Regional and Industrial Expansion, (DRIE). The SCRAP program was established in April, 1983 with a five year plan and, as described in Chapter VIII, a budget of \$2.4 billion. The focus was research and development related to the critical economic area of renewable resources, with spillovers in employment, the training and development of scientists and technologists, and content for post-secondary education. Federal authority to act was based on concurrence. (Jurisdiction in agriculture is concurrent. In forestry, it is primary for the provinces on provincial lands and primary for the federal government on federal lands. Federal jurisdiction over the fisheries is primary, as it is over oceans and inland waters.)

7) Languages in Education

The federal order of government is deeply involved in the complex, controversial and constitutional matter of languages in education. This has happened on three planes: (1) bilingualism, as this applies from 1970 to the two official languages of Canada; (2) ethnic heritage languages under the rubric of multiculturalism; (3) languages of the native peoples of Canada. Problems in policy, law and practice on the three planes intersect within the federal government. They also intersect between it and the provinces where, under Section 93, options in respect to languages of instruction still apply.

When provincial statutory language rights and privileges in Canadian education were superseded by an entrenchment in Section 23 of the Constitution Act 1982, a national minority language right in education was created in constitutional statute for English-speaking and French-speaking citizens. The constitutional significance of this major reform in Canadian education on a national basis is analyzed as it relates to Canada as a whole, and to Quebec's efforts since 1982 to obtain an amendment to the Constitution which would have given it what the Meech Lake Accord describes as "distinct society" status. (What this means literally and legally has not been specified.) In conclusion, the Court Challenges Program, which the Government of Canada sponsors and funds to promote judicial review and rulings on issues of language and education, is described to clarify Section 23's purposes and effects.

Bilingualism. The federal policy on bilingualism, which grew out of recommendations of the Royal Commission on Bilingualism and Biculturalism, has exerted a significant influence at all levels of Canadian education. This began with Parliament's enactment of the Official Languages Act in 1970 and the establishment that year of the Language Programs Branch in the Secretary of State Department. From the outset there were two main purposes to be achieved through education in support of the two official languages of Canada: the education of Canadian students whose first language is

French or English; instruction in French and English as second languages. Necessary programs and services were to be developed by means of bilateral federal-provincial agreements.

The Language Branch of the Secretary of State Department established programs to provide funding assistance for the two forms of official language support, at the elementary, secondary and university levels.⁶³ For the initial phase, 1970 to 1974, federal expenditure was about 300 million dollars. All provinces participated in this federal initiative based only on federal statute law for the twelve years preceding the Constitution Act, 1982, which gave it a constitutional basis. In Quebec, where from the start the greatest proportion of federal bilingualism funding was to be provided, all anglophone students were immediately designated for federal minority official language support. There was no significant Section 93 complication.

From 1970, the federal government has also established programs to foster bilingualism in provincial public administration, national associations, and the private sector. This has been apart from the federal government's program for establishing bilingualism in the federal public service. To promote bilingualism at the university level, federal grants have been made to institutions which offer courses, including language training, in the second official language of Canada. Federal grants have been provided for travel bursaries to help post-secondary students who cannot obtain such benefit in their own province. Federal bursaries have been provided for related teacher training. Federal assistance has also been provided for special projects to enable the provinces to propose and test innovations which may improve bilingualism through education. In contrast to the federal government's bilingual program for adult public servants, where instructional costs have been high and their benefits marginal in operational terms, the Secretary of State Department's support programs for children and youth have produced educational and cultural results beyond expectations. With a necessary initial emphasis on the elementary level, the second official language program

has taken root in all the provincial school systems and has become a distinctive national dimension in Canadian public education. The learners become bilingual, and they do so while experiencing a more challenging curriculum. They acquire a respect for the second language and its origins. They learn tolerance for speakers of the other official language too, and for their cultural values and history. Some critics note that these students may develop feelings of elitism, because learning the two official languages calls for greater use of ability, and, as they know, bilingualism will improve their job and career opportunities over unilingual students - especially in the federal public service. Nevertheless, for growing numbers of children and youth, to be Canadian is beginning to mean being bilingual.

Curriculum development and its implementation costs will increase, as elementary level bilingual students continue their studies at the secondary level and beyond. This has evoked the concern of the provinces and the Council of Ministers of Education, Canada (CMEC). When, for example, bilateral agreements were renegotiated in 1979 for the next five years, and the federal government indicated that in the last year, 1983-84, there would be reductions in formula and non-formula payments, the provinces, including Quebec, voiced strong objections. Speaking through CMEC, they were adamant that federal funding for official languages education be continued.⁶⁴ Coincidentally, the matter was renegotiated to provincial satisfaction at the same time as the drafting and enactment of entrenched minority official language rights in education nationally in Section 23 in the Constitution Act 1982. For political reasons, a protocol was declared between the federal government and the CMEC as an umbrella, so to speak, for the bilateral agreements and provisions which would have applied anyway.⁶⁵

In a subsequent interview for this study, former Secretary of State, Serge Joyal, expressed the view that there was a moral basis, and more, for continued national support of official languages education. He noted the federal government's positive role from 1970, and its national interest in this matter during the intergovernmental and

public discussions on constitutional amendment. Combined with the obvious expectations of the provinces for continued federal support, there seemed to be, he said, an implied obligation - call it an unwritten rule - for continuing federal support of minority and second official language education in all of Canada. He felt that this had been understood and would be honoured by future governments.⁶⁶

The Court Challenges Program. In 1978, with Cabinet approval, the Secretary of State Department established a "Court Challenges Program" whose basic purpose was to seek court rulings clarifying language rights guaranteed by the Constitution. At the outset, federal financial aid was provided for test case litigation involving language rights under Sections 93 and 133 of the Constitution Act 1867. In 1982, the program was updated to include a special committee to advise the Secretary of State on applications for financial assistance to challenge federal legislation or action. In addition, all applications for aid under the Program were to be decided in relation to six criteria, as follows:

- 1) The issue sought to be litigated should involve a challenge based on Sections 93 or 133 of the Constitution Act 1867, or on Section 23 of the Manitoba Act, 1870, or on Sections 16 to 23 of the Canadian Charter of Rights and Freedoms;
- 2) The issue should be one of substantial importance and have legal merit;
- 3) The issue should have consequences for a number of people;
- 4) Duplication should be avoided; thus, when a legal issue is before the courts, another person espousing the same cause in the same or in another case should not receive financial assistance;
- 5) In general, because interveners do not have carriage of the action, they should not be funded, especially when the Attorney General of Canada is himself an intervener in the case;
- 6) Assistance should not be given when the authorities concerned have given an appropriate assurance of action that would modify the legislation or action under challenge so as to ensure full compliance with the Constitution.⁶⁷

The Program has had the effect of combining federal Executive and Court power, although the two are separate. It signalled that the Canadian Charter's minority official language rights in education are to be implemented. It facilitated attack on Quebec's Bill 101 in particular and it has promoted the Court's elaboration of Sections 16 to 23 in constitutional rulings. In the case of Section 23, however, as described in Chapter V, the pursuit of Section 23 jurisprudence invites particular confrontation with Quebec.

Multiculturalism. The Royal Commission on Bilingualism and Biculturalism evoked an ethnic interest in a Canadian pluralism based on all origins. Responses in politics led to federal and, then, to provincial "multicultural" policies - all with implications for education. For the federal government, multiculturalism became a balance to the thrust being made to foster bilingualism in the two official languages. For individuals biculturalism was neither a federal objective nor an obligation. Students and adults have not been expected to become bicultural, or, in the case of Canadians of non-English and non-French origins, tricultural. Such misconceptions about national bilingualism in the two official languages, with its voluntary individual participation, developed and still exist as outlets for bias and bigotry.

In the realm of education, federal multicultural policy aimed first at drawing attention to, and showing respect for, the contributions which Canadians of various former cultural heritages had made to the building of Canada and Canadian society.⁶⁸ Those who cherished their cultures and languages of origin were encouraged to enjoy and share these heritages. Mutual tolerance was to benefit everyone.

In each province, the Section 93 question was to decide how, if at all, to include heritage cultures and languages in the school program, given its primary obligations for transmitting Canadian values and content in education. Federal support for multicultural education was provided on a request basis through a multicultural directorate established within the Department of the Secretary of State. This support was applied to the

development of programs and instructional materials, and to teacher training. Multicultural policy analysis and services were extended further when a Ministry of State for Multiculturalism was created.

To stay clear of conflicts with whatever provincial multicultural curriculum there might be, the federal government has made its heritage language grants to ethnic community groups directly, in support of the activities they conduct after school and on weekends. This also serves to make a distinction between such extra-curricular programs and the federal government's objective of making the two official languages the national languages of instruction and the measures of literacy in all of Canada's school systems.

Multiculturalism does not mean that citizens and immigrants of the various ethnic origins would be entitled by right to special heritage language public schools, or to public school instruction in these languages. Regular public education is expected to mean instruction in either of the official languages of Canada, English or French. Public education in Canada, as in other countries, is a prime means of political socialization. It involves a basic acculturation of newcomers to Canadian values, society, and institutions. For citizens this process is one of enculturation. Multiculturalism in Canadian education is not an alternative to this political function of public education. Newcomers seeking citizenship status are expected to qualify by being able to speak one or both of the official languages, and also to have a knowledge of Canada and its heritage. The provinces are partners with the federal order of government in concurrent jurisdiction over immigration (with federal paramountcy). This involves shared responsibilities for the curriculum required by adult immigrants to prepare for their citizenship qualification. There is also joint responsibility in official language education where required.

This shared responsibility for new citizens has not prevented the province of Quebec from claiming "distinctive", or even "distinct" (as in separate) status - as a

society, and/or as a culture on behalf of its French-speaking populace. Section 93 has been a focal point for these claims. This power, it is argued, justifies Quebec's efforts to protect and advance Quebecois culture and language through public education. But, given the national minority religion and language protections of the Constitution Acts of 1867 and 1982 in education respectively, with other related direct and residual federal powers, Quebec does not have, and was never given, constitutional powers in education to make its majority French culture and language the exclusive emphasis in its system of education. This explains the Meech Lake Accord proposal to facilitate this status and power.

Critics of Quebec's Bill 101 legislation say that it implies exclusive jurisdiction, because of its denial of parental right to choose the child's language of instruction. When this legislation was contested with funding from the federal governments' Court Challenges Program in 1984, the Supreme Court ruled it to be *ultra vires* in respect to its limitations on Canadians moving to Quebec. However, this prohibition did not apply, and was not applied, to immigrants regardless of their language of origin.

Primacy of French language and culture in Quebec education was implicit in the Meech Lake Accord proposal for further constitutional amendment. Placement of the vague "distinct society" clause in the interpretative body of the text instead of in the preamble was significant - doubly so since a reference case to the Supreme Court to clarify the matter was avoided.⁶⁹ Meanwhile, who qualifies, and where, as a true French Canadian continues to be debated by Canadians of both French-speaking and other origins. Many immigrants to Quebec of non-French language origins seem to reject the assimilation implied by a "distinct society", based on a primacy of Quebecois culture and language in Quebec. The distinct society ignores the first peoples, despite their status and rights in Constitutional law and at common law.

The opposition of minorities within Quebec to "sovereignty association" - the ultimate constitutional dichotomy in education and culture - was mentioned in some

federal official interviews for this study, by persons concerned about the anglophone minority within Quebec and the francophone minorities elsewhere in Canada. Dualism or outright separation would create immediate and substantial changes in Quebec's present constitutional powers and the national limitations on them in respect to minority rights which now apply in culture and education. (This is assuming that Canada would make a constitutional amendment to grant the necessary legitimacy.) In particular, minority language rights in education would be affected. There would be a shift to group (majority) rights over minority rights. The policy basis for multiculturalism in education would change. The status and rights of the aboriginal peoples who have long resided in what is now Quebec would become a complex issue in law and morality. Pre-Confederation constitutional rights and claims, which not even Parliament could relinquish without the consent of these aboriginal peoples would apply. Land title claims at common law would also be involved - to secure a means to both self government and cultural survival.

There might be grounds for arguing that, since the 1982 Charter amendments, once a heritage language has been legislated for under Section 93 it has been entrenched constitutionally. This is by no means as clear as it is in the case of the Section 93 power for each province to create or extend separate schools which, once established, are entrenched and are not subject to removal by provincial statute. Perhaps the rhetorical reference only to heritage culture in the Charter heads off this complication for public education. The Court will decide this constitutional question when, inevitably, it is asked to do so.

If this happens, a first question would be whether a group right was created. A propos, a major debate has long existed in Quebec on the issue of whether constitutional cultural and linguistic rights should be on a group basis, as Section 93 provides for on the variable of religion, or on an individual basis, as Trudeau's advocacy of Section 23 in the Constitution Act, 1982 made constitutional. In creating this mile-

stone for the future of Canada and Canadian education, Canadian nationalism almost won a battle with Quebec nationalism. But, as Section 59 of the Constitution Act, 1982 requires, the Quebec legislature must approve Section 23(1)(a) before it is made law in Quebec. If approved, Section 23(1)(a) would give citizen parents of immigrant origin who had first learned and still understood English the parental right to have their children receive primary and secondary education in that official language. They were, and are, still denied that right, and they would certainly not have obtained it via the proposed Meech Lake constitutional amendment.

For other Canadians, however, Section 23 guaranteed the continuity of minority English-speaking rights in Canadian education, including Quebec, until constitutional amendment changes this. Equally important, at last French-language minority rights were both established and protected in all of Canada - again until constitutional amendment changes this.

In Quebec education, the compensation of multiculturalism does not seem to match the choice of official languages in Canadian citizenship that English-speaking newcomers seek for themselves and their children. Meanwhile, Quebec, which has been generous in its provisions for making ethnic languages subjects of study, has resisted making them languages of instruction. Coping with French-English "bilingualism" within Quebec is enough of a cultural and educational problem in the task of preserving and developing Quebecois culture and language. If more is done via multiculturalism in Quebec education, perhaps the Quebecois cultural heritage and language might be placed in jeopardy. Section 93 was not intended to produce this result.

Native Cultures and Languages. As noted in Chapter V, the Indian, Inuit and Métis peoples of Canada - ca. one million by their estimates as of 1984 - have never been included federally or provincially under the rubric of multiculturalism, although they are Canada's first and foremost examples. Nor have the Métis been recognized either as Canada's first and foremost example of biculturalism and bilingualism.

However, since 1982 all three peoples have been recognized constitutionally as our "aboriginal peoples". The Indian peoples of Canada, and by means of judicial review the Inuit people, have been under exclusive federal jurisdiction in Section 91(24) of the Constitution Act, 1867. In addition, the Indian peoples have had additional constitutional status and claims via treaties - in existence or abeyance - which are deemed by them to flow from the constitutional provisions related to them in the Proclamation of 1763 and their antecedent land claims at common law which this constitutional document reflects. These treaties, which can and do involve matters of education and its administration are not mere administrative agreements for, once signed, they become constitutional documents with the force of constitutional law.

The constitutional and cultural aspirations of all these groups were to be resolved in the special constitutional deliberations as provided for via Section 37 of the Constitution Act, 1982 with its provisions for constitutional meetings and decisions. The expected result was to have been a common entrenched provision for creating limited but sovereign native self government for particular heads of power, including education. However, in interviews for this study with three native participants at the 1985 Constitutional Conference, they reported that the actual agenda seemed to focus on Quebec's constitutional grievances, thus overshadowing and delaying the intended agenda.⁷⁰ There was also a feeling amongst native peoples that the 1987 federal-provincial conference on native constitutional issues had been permitted to fail, to make way for an upcoming Meech Lake arrangement which would exclude native representation and concerns.

The proposed Meech Lake Accord amendments, which followed this conference and which were prepared to persuade Quebec to sign the Constitution Act, 1982, (even though it applies to Quebec legally) included a provision whereby any one province could veto creation of a new province. Presumably, the particular sovereign powers of self government which federal plenary jurisdiction for Indians and Indian lands could

facilitate could also be vetoed by any one province. This is interpreted by native peoples as a veto on their cultural survival. Thus, notwithstanding the treaty avenue to constitutional creation of versions of native self government, Canada's native people felt that they would be cheated if the Meech Lake Accord had proceeded without amendment. They want to remain in Canada. For Indian, Inuit and Métis peoples there are no societies or cultures in Canada more genuinely "distinctive" than theirs.⁷¹

8) National Continuing Education

As described in three senior federal interviews, to 1984 at least, the Government of Canada had become increasingly involved in a massive, diverse "out-of-school", or "after-school", program of Canadian education and culture for all ages, and for adults in particular. Main elements have included broadcasting, films, government publications, tax-free reading materials, national libraries, museums, galleries, parks and historic sites. Most of these public programs were available without cost where possible, and at minimal cost where necessary. The taxpayers of Canada - including the not-so-generous corporate sector - footed the bill. Several museum officials commented that free admission seemed to be a small price to pay for Canadian acculturation and enculturation. The test of means was not to be so great as to exclude the poor. Support for such public benefit was not a source of partisan debate. Such matters seem to have been considered above politics and, indeed, above commercialism.

The CBC and the National Film Board have both had a chief mandate to reflect and interpret Canada to Canadians. NFB has produced films both for provincial school curricula and general education. These materials were also intended to compensate for the dearth of such material in the provincial school systems and, especially, in regular theatres. The Government of Canada has acted (through the Public Archives of Canada, the National Museums, and the various departments) as a publisher of Canadian books - historical, cultural and scientific - at reasonable cost. Government departments and

agencies produce much information of an educational nature. These learning materials have usually been free, with provision for quantity supply to schools on request. The bilingual text and teaching resources on the Constitution Act, 1982, have had wide school distribution and use in Canadian classrooms. Output of learning materials from most of the federal scientific departments and agencies have had widespread school use for years.

To 1984, tax expenditures and postal subsidies were still intended to facilitate the publication of Canadian books and periodicals and their dissemination. Postal subsidies applied to libraries were also intended to promote such dissemination and use. Taxes on reading materials were avoided, in order to promote literacy and education. One strongly expressed view was that learning from the printed word should not be taxed - at school or after school. Another was that expenditures on job training which remedy illiteracy have social and educational benefits, as well as economic ones.⁷²

The observations and recommendations of the Massey-Levesque Report awakened interest in, and concern for, Canadian culture and cultural institutions as part of the general education system of Canada - as a complement to formal schooling for some, a compensation for lack of it for others. Canada's late start in such matters made what was being done even more important. For instance, the National Library of Canada was established in 1953 - 70 years after Sir John A. Macdonald, an avid reader himself, is quoted in Hansard as saying that Canada should have

... a national library containing every book worthy of being kept on the shelves of a library.⁷³

As of 1984, the Government of Canada had about 200 libraries, including the National Library, in its system, with gratis services the rule.⁷⁴ (NRC's Canada Institute for Scientific and Technical Information (CISTI), the country's foremost library of science and technology, has charged for its researching service linked to library use or loans). No province has been able to develop a comparable science and technology library.

Moreover, as observed in the Massey-Levesque Report, and as informed in interviews for this study at the Social Sciences and Humanities Research Council of Canada (SSHRC), most provinces still lack library services resources in the humanities and social sciences, sufficient to meet the contemporary needs of scholarship and research.⁷⁵

National parks and historic sites were described as being of educational use as well as for recreational enjoyment. Some of the sites, Louisburg for example, are of major historical significance. Where user fees have been involved in such cases, these have not been excessive. National museums and galleries were free to the public, to encourage learning and enjoyment. When in 1983/84 arrangements were finalized for building three large museums, there were no stated plans for admission fees. This, it was mentioned at the time, would amount to asking Canadian taxpayers - private and corporate - to pay to experience their natural and social heritage over and above the expenditures already made or required by statute to build, operate and staff the institutions, programs and services concerned. Another interview comment was that it would be akin to fee-paying private education. Again the idea was that such facilities were an extension of free public education.⁷⁶

In Chapter IX, the Canada Council's role in promoting artistic creation, presentation and training is described. Such assistance has been directed both at and beyond the formal post-secondary systems education in Canada, to foster education and culture. For example, federal funding for heritage languages instruction was based on out-of-class endeavour. Clearly the assumption has been in all the matters described that learning is lifelong; that it may be either formal or informal; and that it may occur under Section 93 jurisdiction or beyond it.

9) Federal Post-Secondary Participation

Antecedents to central government involvement in post-secondary education in Canada begin before Confederation with the granting of civil charters to these bodies as

independent, private institutions. To Confederation, and for some time thereafter, there was no significant state regulation of these bodies by government. There was an appearance at least of independence from any regular education law. Accordingly, there was no legal obligation for governments to make grants to them - in land or money - although this was done, at discretion, from time to time.

Before Confederation, when research and its support were concerns of both the Imperial and colonial governments, a national and integrative capacity for post-secondary level research was created within the central government. This established a national source of support for research development in institutions of higher learning throughout the country as they evolved. The training and development of specialists in science and technology was a corollary of such direct national involvement, and this was reinforced by their employment in mission research fields associated with federal jurisdiction. The national development of experimental stations, laboratories, statistical services, grant and contracting measures, scientific and technological libraries, research publications and so on were logical outcomes of this history of a national focus on research linked to nation-building and development, as well as to the advancement of learning.

When the Dominion Astrophysical Observatory - the largest of its kind in the world with its 72-inch telescope - was ready for operation at Victoria in 1918, this was but another in a series of national research achievements with post-secondary spillovers. The work of the Dominion Hydrographer continues - in name and function. The maintenance and elaboration of such national ventures are dependent on no more than the vision and will of Canada's federal governments. No provincial vetoes apply, and none would be constitutional.

There has been a predominant, direct linkage between federal science and technology and Canada's post-secondary institutions. Other matters involving national concern and jurisdiction, such as culture, official languages, and communications, have

involved the use of extra-constitutional measures such as federal-provincial conferences, protocols, and agreements.

Intergovernmental action in Canadian post-secondary education is in large part due to Parliament's enactment in 1945 of the Veteran's Rehabilitation Act. This major step in the history of Canadian education was taken as the nation's response to the needs of service personnel who were returning home with limited job prospects because of a lack of adequate schooling, first in the Great Depression, and then through the war years. This federal measure facilitated post-secondary education for over 50,000, and training to over 85,000. It was a massive investment in Canada's post-war social and economic development. It was also an immediate shock to the country's post-secondary education capacities, because at one blow, veterans made up over half of all Canada's university enrolments.

Dr. Douglas J. Kenny, former President of the University of British Columbia described the situation at the time to the recent Parliamentary Task Force on Fiscal Federalism, commenting that

To simplify greatly, Canadian universities at the end of the Second World War dwelled in bland obscurity from society, focussed their activities on teaching at the undergraduate level, almost wholly neglected graduate studies and research, had enrolments no larger than four per cent of university age group, and were funded frugally at levels by provincial governments who thought of them as orphans of dubious paternity.⁷⁷

The terms of Parliament's Veteran's Rehabilitation Act entitled universities to a direct subsidy of \$150 per annum per veteran. Capital aid was also provided for the construction of new buildings and facilities to accommodate the influx. Federal capital and operating aid was necessary because the costs were beyond the means of most provinces to pay. Interestingly, this landmark venture, intended to be of limited duration, did not evoke political controversy or constitutional issues. That would follow

when the precedents embodied in this temporary legislation - direct federal capital and operating aid to universities and federal funding support to all qualifying Canadian students regardless of their financial means - were to be carried forward under other federal legislation and executive orders.

Robert Bryce, the principal senior federal public servant responsible for preparatory work on the 1945 Act and for federal planning for its implementation, was asked, for this study, what consideration there had been of the issue of jurisdiction in education at the time. His reply was that in the federal government there had been no in-depth constitutional study and advice. This was confirmed in related senior interviews at the Justice Department, where it was also noted that, as of 1984, no such in-depth study was known to have been done there. In any case, as Mr. Bryce explained, it was assumed in 1945 that, constitutionally, the federal order of government had ample grounds for meeting Canada's educational support obligations to its war veterans. He added that in this regard his opinion had not changed. Section 93 was not deemed to have been a stumbling block.⁷⁸

As mentioned previously, provincial interviews and research references indicate that to 1988, there had been no known provincial government constitutional studies on the extent of Section 93 jurisdiction. Nor had this been done by the Council of Ministers of Education of Canada (CMEC), to 1988. Apart from this, several federal senior management and legal opinions given for this study, have held, or suggested, that the federal government has concurrent power in post-secondary education broadly defined. Some ministerial opinion was similar. In any case, in 1982, the federal Cabinet formally approved a set of federal objectives related to post-secondary education for Canada. Previously, Prime Minister Trudeau made his Government's idea of shared post-secondary jurisdiction clear again when he stated in the House of Commons, that

...if those provinces which claim jurisdiction in this field can look after their own field of jurisdiction, they should be able to pay at least 50 per cent of the costs.⁷⁹

Two former premiers with law backgrounds who were interviewed for this study referred to concurrence in post-secondary education related to matters of national interest, needs, financial support, and student mobility. Some senior provincial officials, including a Deputy Minister of Education, expressed doubt that post-secondary education was, or was ever meant to be, an exclusive provincial power. A CMEC President (and lawyer) conceded that an interesting case could be made for federal concurrence in judicial review, but that instead of risking this, the flexibility which executive federalism affords through Section 93 seems more prudent and beneficial to all concerned.⁸⁰

The test of the Veteran's Rehabilitation Act precedents for federal action in post-secondary college and university education - assuming no test of concurrent jurisdiction - occurred after the veterans' program was ended as scheduled in 1951. This was coincidental with the Massey-Levesque Report on national development in the arts, letters and science, which was, in effect, a national royal commission on post-secondary education that recognized a need for purposeful national involvement in research, culture, education and the aspects of fiscal equalization involved. In recommending such measures, the Commission identified main educational problems facing Canada, such as: the unsatisfactory financial condition of universities; inadequate aid to the arts and humanities; post-secondary benefit for a small elite; seriously inadequate libraries.

Related Commission recommendations included federal aid to universities on a population basis; establishment of the Canada Council and N.R.C. as research granting agencies; establishment of a National Library of Canada. The federal government was given an incentive to act. Without being deterred by opposition in Quebec, it initiated direct funding to universities for the fiscal year 1951-1952 by Order-in-Council, at 50 cents per capita of provincial population. This was not a large sum, but the precedent was significant. Prime Minister St. Laurent defended this measure, stating that

The government has also reached the conclusion that it is in the national interest to take immediate action to assist the universities to perform functions which are quite essential to the country ...it is our earnest hope that no provincial authorities will regard this financial contribution as in any way replacing their own obligations to the institutions which they have been supporting in the past.⁶¹

The Duplessis Government did not challenge federal government action in education for veterans under the federal defence power. But in 1951, when the veterans' program ended, it took issue with direct and continuing federal aid to Quebec universities on the grounds that it violated its Section 93 jurisdiction. From 1952 to 1960, the Quebec Government forbade its universities to accept federal grants, even though they were to be paid at arms length, through the Canadian Universities Foundation which the federal government had appointed for the task. In 1960/61, a precedent-making opt-out procedure was agreed to with Ottawa that would permit Quebec to use the revenue obtained from an abatement of one point of federal corporate income tax to help finance universities instead of accepting a direct federal grant. This created the impression that Quebec had full responsibility for education and its funding, which, as this study shows, has never been the case.

Pending the Court's ruling on the legal meaning and reach of the term "education" beyond schooling, or a constitutional amendment to clarify the matter, political claims and expediency will continue to apply. For example, on taking office, Premiers Bourassa and Levesque claimed jurisdiction for what was called "cultural sovereignty". For Mr. Levesque, this included education, culture and communications. This was translated into group "rights" to be decided for the majority - the opposite of Trudeau's approach to individual rights protection in education in the 1982 Act. No Quebec government has actually sought a constitutional reference to ascertain what, legally and constitutionally, "education" means under Section 93.

In the lengthy process of constitutional evaluation preceding the 1982 Act the provinces and the federal government had ample opportunities to produce a consti-

tutional definition of education, and to clarify jurisdiction in post-secondary education. These initiatives did not occur.⁸² Constitutionally, uncertainties remain as to what "education" should mean, and encompass, how jurisdiction for it should be distributed, and how it should be funded.

This situation has been complex in Quebec, given its present nationalist policies in education in combination with its peculiar handling of Section 93 responsibility after Confederation. From 1867 its public schooling was largely limited to the elementary, or basic, level where compulsory attendance was not introduced until 1943. Moreover, full service at this level was not provided to all of rural Quebec until the Duplessis government achieved this. The plight of the Catholic poor in the Montreal public schools at the turn of the century was tantamount to an abandonment of state responsibility under Section 93. Thus, as the province was about to begin its quiet revolution in the 1960's, Professor Mason Wade referred to its "submerged eight-ninths of the social iceberg" - the mass of French Canadians there who he described as "under-privileged economically and intellectually".⁸³ These Canadians in particular were to benefit most from the educational reforms to follow, including the massive and largely unrecognized contributions to their initiation and maintenance via the Government of Canada.

Of the oppressive situation before the bureaucratic revolution of the 1960's, in which Church control over education would be replaced by state control, Professor Wade had this to say:

...Most French Canadian youth lacked the opportunity to acquire education beyond the primary level. This level was in itself low, because of the prevailing view among the people that education beyond the merest rudiments was something of which their children had no need, unless they were destined for professional careers. Compulsory education for all until the age of fourteen was only recently ordained; in the past boys, particularly in the rural districts, tended to leave school at ten or twelve, to work on the family farm or in factories ...This situation long survived in French Canada because there has never been a great middle class with its typical concern for educational opportunities for all - the class which is the real strength of a democracy and predominant in English Canada, the United States, and Great Britain. Since the middle

of the last century the French-Canadian elite has become more bourgeois-minded, but its social outlook is still reminiscent of that of the seigneurs of New France. In its view, it alone is qualified by heredity and training for leadership; the masses, in their place, are commendable and lovable, but their place is to accept the elite's leadership in all things.⁸⁴

Quebec's experiment of a Ministry of Education reporting directly to the Legislature was ended in 1875, to be replaced by a Council of Education with two confessional committees - one Roman Catholic, the other Protestant. Successive Quebec governments did not end this practice until after the quiet revolution, when the recommendations of Msgr. Parent's Royal Commission for sweeping reorganization and democratization of the educational system under a unified Ministry control were implemented. In the interval, for the Catholic majority, Quebec public education was, in effect, a department of the Church.⁸⁵ Thus, when change occurred it was not without some strong objection from the Province's Catholic hierarchy. Such control of Quebec education was described in an interview with the Hon. Serge Savard. He had given the same account in an address earlier stating that

Those of you who remember some of the issues of the time know that we were fighting with Paul Gerin-Lajoie to create a Department of Education in Quebec, believe it or not. Today that seems like a 19th century battle, but at the time we had their majesties, the lord bishops, who were vehemently opposed to the initiative of Mr. Lesage's government to provide Quebec with a public education infrastructure accessible to all. At that time, I asked that a distinction be made between the seminaries and colleges: that the former be used for vocational training and the latter be open to all, with no discrimination on the basis of religion. We all received a little dressing-down from Cardinal Leger, who incidentally is a personal friend, but that has nothing to do with his role. That was simply the debate of the time.⁸⁶

In the Catholic system of public and private education, the idea that religion was a vital element in it was supported by a popular view that politics should be kept out of education and its governance. No doubt this was partly because of the patronage tradition which was brought in check by the quiet revolution. Even before this however, in

1956, Msgr. Parent, Rector of Laval University, could say in defence of academic freedom at the university level that

It would be better for a nation to have no universities, than to have them in servile submission to political powers.⁸⁷

Under Quebec's old system, with its fragmented educational system and the division of authority for its governance, the state could not perform its duty in public education at any level. This is reflected in the striking contrast between the pace and nature of elementary and secondary development in the Protestant system - which most immigrants preferred - and the class-oriented practices of the Catholic system. For example, a full high school course in the French Catholic public schools was not authorized until 1956.

Thus at 1961, while most Quebec elementary education was then in the public sector, the private sector still supplied most of the secondary and higher education, on a fee basis, or means test for the poor. At this time Quebec had six universities, all private - the three French-language institutions having both civil and papal charters. The Collèges Classiques (founded by the Jesuit Order in 1636) had long held a virtual monopoly over preparation for entry to studies in theology, medicine and law. They operated autonomously at both the secondary and baccalaureate levels. Their educational, social and political influence was significant - a factor the federal government was to learn when these institutions, along with the seminaries, were excluded from the first federal post-secondary grants on grounds that for funding purposes they did not meet national criteria for college or university status. As suggested, this institutional offence may have intensified the political opposition to perceived federal intrusions on Quebec's claim of an exclusive educational domain.

Quebec's political rhetoric about educational sovereignty in Section 93 has sometimes been overwhelmed by a greater need for funding to pay for its substantial educational reforms. This has evoked political expediency, to obtain as much federal

aid as possible, preferably without conditions. Quebec has not been alone in this, but it has been the most successful - notably in the area of post-secondary funding.

Considerable financial benefit was gained for Quebec when, in 1967, the Pearson Government introduced its Federal-Provincial Fiscal Arrangements Act. This new Act aimed at shared-cost funding of post-secondary education on a 50:50 basis. The provinces were concerned that this change was to involve an end to the former Diefenbaker government's massive federal capital and operational funding which established infrastructure and programs in vocational and technical education across Canada. This program had been knowingly aimed at both the secondary and post-secondary levels because of the significant related needs involved. For the Pearson Government, the proportion of vocational and technical education funding going to the secondary level - a clear provincial responsibility - had become a real concern. As a result, the entire arrangement was to be phased out and replaced by the federal purchase of employment training as required. Emphasis was to be on shared-cost funding of post-secondary education to provide greater support for meeting the growing needs of universities and colleges.

The provinces now took an expedient chance to compensate for the loss of one kind of federal aid at the secondary level with the gain of another. This opportunity was provided by the issue of where the "junior matriculation" graduation level for secondary education ended and post-secondary education started. According to Robert Bryce, the senior federal financial negotiator at the time, Ontario began the procedure with the claim that its Grade XIII was equivalent to first year university. This brought forth each province's definition of this dividing line. It literally permitted five provinces to have their constitutional Section 93 cake and eat it too: Quebec, Ontario, Nova Scotia, Manitoba, and British Columbia. The largest piece by far went to Quebec which "invented" its CEGEP program to gain such advantage.⁸⁸

The Hon. Claude Morin (former Quebec Minister and Deputy Minister) confirmed this, in effect, when he was asked whether the Province had organized its secondary education system and its linkage to post-secondary education to take advantage of this national funding benefit. His answer was yes, it had done so.⁸⁹ The organizational arrangement which permitted this, without compromising the Province's Section 93 control, involved the universal CEGEP years 12 and 13, which qualify the Province's secondary graduates for a choice of degree education at university, or for non-degree training in other post-secondary institutions. Any province could have carried out such a re-structuring of its secondary system. Quebec's creation of post-secondary options for all its secondary students, supported by federal funding since 1967, is in keeping with the democratization of the Provinces' educational system following its quiet revolution. The federal government has been a silent partner in this major reform (a model for democratic practice in public education) without ever receiving any public notice or credit, in spite of the hundreds of millions of dollars invested.

The CEGEP provision runs parallel to egalitarian policies and practices in public secondary education elsewhere in Canada, but not in Ontario where such a revolution or approach is yet to occur in secondary education. Federal shared post-secondary funding of Grade XIII in Ontario - which is not made known to the public - involves support only to students in the academic stream who will qualify for degree training. Students in the Province's general stream who do not obtain this qualification are limited to non-degree training options, where these can be found.

Post-secondary governance has been a federal concern from the outset because of such anomalies. Mr. Bryce recalled that "when the universities began to depend on government for their funds, we took a pragmatic view in the Department (of Finance) in the 1960's. It seemed then that the government which was really responsible was the government which could pass laws, assume a regulatory role, and so on".⁹⁰ Full constitutional jurisdiction for post-secondary education was uncertain, as it still is. In any

case, Mr. Bryce went on to say that "I think we saw it being in the spirit of the Constitution that once they (the universities) became dependent on public funds someone had to take responsibility".⁹¹ The question was responsibility for what legally? The public expenditures? The universities, which have their charters and provisions for governance accordingly?

The federal government of the day did not take steps to have such responsibility defined legally. Nor did its successors. There was no attempt to do so formally before making constitutional amendments in the Act of 1982. In the meantime, making policies or regulations which affect this or that aspect of a corporation - such as a university - is one thing, actually directing its affairs is another. This is the case for Canadian universities, whether Section 93 applies to them fully, or whether federal-provincial concurrence applies.

To date there continues to be grounds for concurrence - perhaps with provincial paramountcy. The Hon. Allan Blakeney gave this opinion when he was a Premier; he reaffirmed it as a law professor in an interview for this study. He also commented on the provinces' onerous task of trying to balance accountability for use of public funds to universities without even appearing to interfere with the principle and need for their academic freedom and autonomy.⁹²

This is a dilemma in university governance which seems to be complicated by the politics and managerial practices of executive federalism, which can effectively silence the voices of professional leadership in post-secondary policy-making. For example, it would be possible to dismantle NRC without discussing the matter with its professional experts and their university peers, if the generalist politicians and bureaucrats concerned had decided that fundamental research was too slow, too costly, too removed from fast commercial pay-off. Without similar dialogue, a province could force universities to raise fees to prohibitive levels by not contributing sufficient operating funds - as some now do.

When former CMEC Chairman, the Hon. Roland Penner, was asked about the Council's objections to a federal-provincial forum for post-secondary education policy-making, he reported the concern which had been expressed by several provincial Ministers, that active participants in such a matter be confined to the elected representatives of sovereign governments.⁹³ University representation wasn't mentioned. This leaves them and their status and role in governance uncertain, pending a clear constitutional authority on post-secondary jurisdiction.

There were similar uncertainties when post-war expansion started. As Mr. Bryce recalled, the universities weren't sure of provincial reactions to academic freedom and the reliability of provincial financing. Apart from this, large infusions of federal funds resulted in what seemed to be "too rapid" post-secondary growth and expansion. To complicate matters, the federal government wasn't differentiating in its funding of education to graduates and undergraduates. At the time, as Mr. Bryce said, "All we wanted was a financial formula". He added that, "We didn't want to get into the control of universities".⁹⁴

Of course, neither federal, provincial, or concurrent, jurisdiction for post-secondary education requires direct federal or provincial executive control of universities. As noted from the information and opinion gathered on this matter, national policy, goals, and standards to assure the practice of equable access to post-secondary education, need not conflict with university independence. Yet, as Mr. Bryce recalled, in the 1960's, universities feared they were being turned over to the hands of bureaucrats. Nonetheless, the main focus of university studies and advocacy seemed to centre on their growing financial needs.⁹⁵

A notable exception to the many economic studies done on this subject is the Rowat-Hurtubise study of the role and governance of Canadian universities.⁹⁶ In 1970 its review culminated in the Report of the Commission on the Relations Between Universities and Governments. This study was carried out on behalf of the Association of

Universities and Colleges of Canada (AUCC), the Canadian Association of University Teachers (CAUT), the Canadian Union of Students (CUS), and the Union générale d'étudiants du Québec (UGEQ). This Commission recognized that a high level of government expenditure made some government supervision unavoidable. Based on the assumption of full Section 93 jurisdiction and the fact of provincial charters for all universities (although some had other charters too), it favoured the provinces in this role. This was a position held strongly by former Professor Trudeau until he became Prime Minister. The proposal simplified the administration of education within each province. It also made provincial governments the authority for receiving federal funding for post-secondary education. The provinces welcomed this wealth and power, and so did the CMEC.

The provinces were expected to honour their Section 93 responsibilities, and to support universities from provincial funds while respecting their autonomy. This was before the politics of executive federalism in education gained its own momentum and direction, and federal funds for post-secondary education were not matched with provincial funds, as expected and as required. The CMEC did nothing to address this problem.

In 1948 Dr. A.W. Johnson was made a special advisor on the financing of post-secondary education to the Secretary of State. His report, portrayed provincial support for universities and colleges education as seriously deficient.⁹⁷ To make matters worse, the provinces' inadequate support of post-secondary education was opening a door to federal withdrawal in funding, barring some constitutional grounds for requiring its contributions. The same legitimacy is required to oblige continuity of other federal support to post-secondary education, such as student loans.

10) Canada Student Loans

After World War I, the Government of Canada provided loans to able and disabled veterans who needed financial aid to complete their education. Thousands of veterans were provided with federally-funded academic and vocational education via a special Ministry of Soldiers' Civil Re-establishment Act, with no recorded objection. Later, in 1939, the federal Youth Training Act was used to establish the Dominion-Provincial Student Aid Plan. Under this plan the federal government paid half the cost of student aid costs to participating provinces. Quebec withdrew from the plan in 1954. The others were still participating in this scheme of limited benefit in 1964, when Parliament passed the Canada Student Loans Act.

The Canada Student Loans Plan started with a single loan limit of \$1000 and a limit of \$5000 per eligible student. The Act and its regulations were amended subsequently to expand limits, coverage, and repayment procedures. The Plan has remained federal, although participating provinces are delegated authority to administer it and are paid to do so. The provinces have been free to complement the plan, and they have been free to opt out. Quebec did this at the outset and has been reimbursed since by a formula grant. Such payment also covers Quebec's administrative costs had it joined in the program directly. This is calculated on the ratio of participation for 18 to 24 year olds between participating provinces and non-participating provinces. Representatives of Quebec attend the national Canada Student Loans Plan meetings, to protect its interests.⁹⁸

Section 12 of the Canada Student Loans Act permits a province to operate its "compatible" loans program and be entitled to an alternative payment. This is to assist the province in paying the loan costs (ie., interest and losses) of its plan and the costs of any other programs or provisions related to it. In Quebec's case, from 1964 to 1984, federal financial support totalled \$223.6 million.⁹⁹

From 1964 to 1984, the total amount borrowed for Canada was \$2.47 billion. At the conclusion of the 1983/84 student loan year, almost 1.27 million full-time and almost one million part-time students had benefitted from the plan. Students defaulted on just under 7 per cent of the loans, but, as of 1984, about half of the defaulted loans had been collected - a very good result overall, given employment problems and unforeseen personal misfortunes, and a very good record for human capital investment by business standards. Total federal interest payments in support of the plan to 1984 amounted to over \$500 million.

When the Canada Student Loan Plan started, the percentage of eligible full-time post-secondary students receiving loan assistance was 26.5 per cent. By 1984, the percentage was about 40 per cent. Moreover, unlike several provincial complementary loan plans, the CSL is portable, so that Canadian students may use the plan at any post-secondary institution in Canada, because constitutionally it applies on a national basis.¹⁰⁰

The Canada Student Loan Plan has been a significant element in democratizing Canadian post-secondary education access and benefit. It has contributed to human resource development on a large scale. It has facilitated contributions in all fields of social, cultural, economic, and scientific endeavour - for the benefit of the Canadians concerned and for the development of Canada. Student fees have contributed to the operating costs of post-secondary institutions and helped to reduce provincial grant costs. No cost-benefit model or analysis could be found to describe and evaluate this federal contribution.

11) Loans for Student Housing and Auxiliary Facilities

When the Canada Mortgage and Housing Corporation was created by Act of Parliament in 1946, the way was opened for making loans to assist universities and colleges with construction of student housing and ancillary facilities, such as cafeterias,

and lounges. This was facilitated under the National Housing Act and the C.M.H.C. Act and, in some respects, the Financial Administration Act.

While such undertakings may require provincial consultation, not all of them require provincial approval, because, while such loans are available to post-secondary educational institutions, they are also available to non-profit groups such as student co-operatives. These loans, made under the same constitutional aegis as the federal spending power, have been available for up to 90 per cent of cost, with rates established by Order-in-Council rather than by market forces, and with amortizations up to 50 years.¹⁰¹

From 1961 until the program ended in 1978, CMHC arranged loans for student housing projects under Section 47 of the National Housing Act. This was apart from federal capital grants for World War II veterans' accommodation, and for related facilities through Canada Council. From 1961 to 1979, a total of 455 NHA loans were arranged for 309 new buildings (7019 units), and 46 for reconstruction of existing facilities (256 units). The numbers of hostel beds created were 66,920 new, and 2673 remodelled, for a total of 69,593. Loans for new housing totalled \$442.531 million and for existing housing \$11.403 million, for a total of \$453.934 million. All provinces participated, with total combined loan benefit as follows:¹⁰²

<u>Rank</u>	<u>Confirmed Loan (\$ million)</u>	<u>Percentage</u>
Ontario	200,607.	44.2
Quebec	94,852.	20.9
British Columbia	40,802.	9.0
Nova Scotia	34,881.	7.7
Alberta	33,192.	7.3
Saskatchewan	13,067.	2.9
Manitoba	12,519.	2.8
Newfoundland	11,492.	2.5
New Brunswick	10,472.	2.3
P.E.I.	2,043.	0.5

Post-secondary students have continued to benefit from the federal government's 1964 program in support of non-profit public housing. Under this program, the federal government provides grants, start-up funds and loans.

Again, no information could be found to determine how many students had benefited from all the federally supported housing for university students for the period 1961-1984. It was also not possible to determine how much was saved by universities and student non-profit housing through their access to federal financing rates and terms. Such assistance was, and continues to be, significant - doubly so, given shortages of suitable accommodation in many university communities.

12) Policy Objectives for Post-Secondary Education

A key element and expectation in the federal government's fiscal arrangements with the provinces for 1977-1982 was to be a policy forum on post-secondary education. Prime Minister Trudeau addressed this matter in his opening remarks to the Conference of Federal and Provincial First Ministers, June 14th, 1976. Speaking of the block funding EPF proposal (for 1977-82), he referred to a need for partnership and intergovernmental consultation at the Ministerial level to enable the two orders of government "to consider together matters of national significance". He stated the view that

In the health field excellent arrangements already exist. For post-secondary education we still need to establish an appropriate permanent forum. The establishment of such a forum, for the exchange of information and views - without compromising provincial responsibility for the field - is a matter to which the federal government, which has to answer to its own electorate for the spending of its funds, attaches a good deal of importance.¹⁰³

To emphasize the significance of education as a matter of deep national concern, he went on to say that

We are all, you and your colleagues in provincial government, my colleagues and I in the federal government, moved by the ideal of social justice. We share strong feelings that Canadians should have full opportunity to enjoy basic minimum standards of health, and full opportunity to obtain an education. We care about democracy, which entails the formation of an active and informed citizenry. Education is surely a key to this. We are conscious of the need, to be met in large measure by the provision of quality health and educational services, to ensure the capacity to maintain in Canada an independent and modern society, in which we are able to meet citizens' social and material needs and expectations out of our own human and material resources. A permanent forum for education as for health could enable us to work together to serve the community better.¹⁰⁴

The Progressive Conservative Opposition of the time shared the Government's view on the need for federal participation in post-secondary education. In the House of Commons Question Period for December 3rd, 1976, Mr. Gordon Fairweather, the Party's spokesman on post-secondary education (and former Attorney General for New Brunswick), directed a question to the Secretary of State, the Hon. John Roberts (who had been reported as having had discussions with the provincial governments on federal participation in an "education forum"). He asked

Mr. Speaker, when he gets a seat at the table, as his colleagues want him to, will he make sure that the government of Canada does not abdicate its undoubted national responsibility with regard to post-secondary education by merely giving the provinces another point or two in tax arrangement, which would be quite unsatisfactory as far as post-secondary education is concerned?¹⁰⁵

Mr. Roberts replied that

..there have been continuing discussions between myself and various ministers of education, and we have now established an arrangement in conjunction with the Council of Ministers of Education where, in a continuing way, we can discuss with the provinces matters of mutual concern in relation to education, particularly the impact of federal programs which are of concern to us. There is no intention on our part to diminish the interest we have. Indeed, these developments are a strengthening of our involvement with the provinces in mutual problems in the educational area.¹⁰⁶

The understanding was that in return for this means of national decision-making and co-ordination, the previous funding formula was to be replaced by unconditional block funding, combining health and post-secondary education. However, after the funding was provided, the forum did not materialize.

A forum would have generated some national objectives and, perhaps, standards in post-secondary education, with shared expenditure to achieve these ends. Most provincial plans did not include shared objectives or expenditures for post-secondary education. The provinces as a group did not, or could not, formulate their own proposals for national objectives in post-secondary education. The CMEC did not, or could not, influence its affiliate provinces to live up to their post-secondary funding obligations provincially, much less nationally - even though these were as implicit in current unconditional funding as they had been explicit in previous conditional funding.

Claims of full provincial jurisdiction in the field had a hollow ring. In 1978, the situation prompted the Hon. John Roberts, who was still Secretary of State to declare that

Section 93 of the B.N.A. Act does not say, as is often supposed, that all education is the responsibility of the provinces...Of course each province and territory has the responsibility for running an educational system within its area of jurisdiction... The constitution does not exclude the setting of national goals in education. It does not absolve the federal government of responsibility for educational processes inevitably carried out by instruments within federal jurisdiction... Above all, the constitution does not rule out federal-provincial co-operation in the evolution of educational policy for Canada.¹⁰⁷

Thus, given a substantial stake in the development of the country's post-secondary education system and its links to the national interest, the federal government began to devise corrective strategies.

The most tactful option seemed to be another initiative to set national objectives in education, and in post-secondary education in particular. This resulted in objectives

which relate to federal responsibilities in education *per se*, and to national and inter-governmental matters which provincial jurisdiction over education cannot reach.

The federal initiative took the form of ten objectives. These were based on the Government of Canada's perceived responsibilities constitutionally, involving mainly its established activities in Canadian post-secondary education broadly defined, and in related educational matters for which it has responsibility. In July 1982 the Federal Cabinet gave formal and specific approval to the following objectives:

1. General support objective: to help maintain and strengthen the post-secondary capacity throughout Canada required to respond to the individual learning and development aspirations of Canadians and the needs and opportunities of Canadian society.
2. Educational opportunity objective: to facilitate the access of all qualified and interested Canadians to formal learning by reducing barriers due to socioeconomic status or to membership in groups that are not fully served by the existing educational system, and to reduce financial hardship resulting from participation in the education system.
3. Mobility objective: to minimize any barriers that might prevent Canadian post-secondary students, teachers and graduates from studying, training or working wherever they wish in Canada.
4. Employability objective: to promote a post-secondary capacity, in those areas of post-secondary activity related to the provision of occupational skills required by the Canadian labour market, which is responsive in providing Canadians with the opportunity to obtain the qualification required for occupations critical to national economic growth and for occupations characterized by a high degree of inter-regional and international mobility.
5. Research objective: to encourage the development of researchers and research knowledge and capacity in the post-secondary education system, consistent with the general research and development needs of Canadian society or in order to provide solutions to problems arising in areas of national concern.
6. Official languages in education objective: to provide opportunities for Canadians to increase their knowledge of Canada's official languages through formal learning and for members of the minority official language group in each region to be educated in their own language.

7. Canadian understanding, citizenship and cultural identity objective: to increase through formal learning the knowledge and understanding Canadians have of themselves and their environment, with particular concern for the cultural diversity of Canada, and to stimulate and maintain a sense of Canadian citizenship.
8. International relations objective to promote Canada's international interests in matters relating to education including: provision of links between the education systems of Canada and of other countries; promotion of a better knowledge abroad of Canada and its people; encouragement of international studies in Canada and of international joint research and scholarly activities; and provision of policies and programs relating to foreign scholars and students in Canada.
9. Federal direct schooling objective: to develop knowledge, skills and critical capacity among groups whose education is a federal responsibility, through financing and/or management of schools and other educational establishments.
10. Needs of the federal government as an employer objective: to promote an adequate supply of personnel with skills, knowledge and capacities needed for an effective public service, including appropriate official language capabilities.

When the federal Cabinet set the above post-secondary objectives, emphases were placed on two related matters: its own particular responsibilities and: the national responsibilities it has in this field because, constitutionally, the provinces do not have extra-territorial jurisdiction.

The CMEC did not see things this way. At issue - ostensibly on constitutional grounds - were the content, authority, and procedure involved in the federal Cabinet's list of objectives for participation in post-secondary education. This list, prepared with PCO research and co-ordination, was intended to identify the various main elements in federal participation. The list wasn't prescriptive. It did not assert authority over the Section 93 jurisdiction of each province. It did however presume the constitutional power, or powers, to justify its approval by the federal Cabinet.

In an interview for this study, the Hon. Gerald Regan (who, as Secretary of State participated in these Cabinet decisions), stated that exclusive provincial jurisdiction in

post-secondary education did not make sense, given national needs, concurrent elements, and spillover benefits for the country as a whole.¹⁰⁸ In a related interview his successor as Secretary of State, the Hon. Serge Joyal, stated that the Cabinet's set of objectives for federal activities was also intended to serve as a "catalyst" for eliciting joint federal-provincial efforts, to formulate national objectives for Canadian post-secondary education.¹⁰⁹ It was held by the two Ministers, and by some senior PCO, PMO and Secretary of State Department officials who were also interviewed, that all the Cabinet had done was to state broad objectives which described post-secondary and other educational matters for which the Government of Canada had constitutional responsibilities and in which, clearly and for some time, it had been openly involved.

Such avowed federal good intentions were not taken at face value. Quebec was reported to be adamant in its opposition to direct collaboration with the federal government on education policy - almost as if a rival state was involved. Ontario also resisted such involvement, acting as if it had a role as a proxy for Canada. These two provinces (partners in the former Colony of Canada) have between them about two-thirds of the total school and post-secondary population of Canada, leaving the other eight provinces and the two territories to share the remaining third. Of this group, until recently, Alberta has been described as ideologically opposed to what it sees as federal "interventions" in its education and other affairs. This political sociology has made executive federalism in education very difficult and, at times, disappointing for the federal government.

It was not possible to ascertain whether CMEC opposition - first to the federal forum proposal and, then, to the federal objectives initiative - was unanimous, or whether it was directed by the Cabinet decisions of all provinces, or whether it was approved after debate in the respective legislatures. It was also not possible to ascertain whether formal votes were taken in these matters and, if so, how. The proceedings of

the CMEC are not public. The Ontario Charter for its incorporation does not oblige this.

Nevertheless, in a letter from the Council of September 28, 1982 to Secretary of State Gerald Regan, over the signature of Chairman Dr. Bette Stephenson, it was declared bluntly that

We cannot emphasize too strongly that, since education is a constitutional responsibility of the provinces, objectives in education must be determined at the provincial level...any discussion of objectives in education must clearly distinguish between national and federal objectives.

National objectives in education are a collectivity of provincial and institutional objectives, which enhance the quality of educational opportunities for all Canadians. The ability of the provinces and institutions to establish and pursue objectives without federal government interference must be respected.¹¹⁰

The provincial ministers were said to be prepared to meet with the federal government "to discuss its objectives"¹¹¹ - presumably to take issue with them.

It was not entirely the federal objectives *per se* which drew provincial fire. It was also what was presumed to lie behind them. To begin with, the federal government had announced that for the 1982-1987 EPF Agreement, block funding was to be abolished and federal financial support was to be split for health and post-secondary education. This meant an end to discretionary provincial diversions of federal funding for post-secondary education and a beginning of federal funding subject to national standards. This looked like check and mate.

The CMEC's counter move was the argument that the provinces' requirement of unconditional federal funding was a corollary of the provinces' full and separate constitutional power for education - including post-secondary education.¹¹² To settle the rules of the game, the federal government, or the provinces - any or all of them, but not the CMEC - could have initiated a constitutional reference to ask the Court whether the federal government has jurisdiction in post-secondary education. They did not do this.

The apparent assumption of the CMEC (itself a non-constitutional body in Canadian education), was that the federal order of government had no jurisdiction to either propose or have national objectives for its participation in post-secondary education. Moreover, it was claimed that the federal government could not participate in formulating national objectives for post-secondary education. This reasoning, however, overlooked basic constitutional matters related to education broadly defined: the direct federal responsibilities in education already described, (including certain concurrent powers); the national residual in education; and sole national sovereignty in all international matters.

To put an end to such politics, one former senior PCO official mentioned a previous federal agenda for working towards national standards in health and post-secondary education respectively, via national goals and conditional federal funding, as necessary. The order of action was described as the Canada Health Act first; post-secondary education next.¹¹³ However, the writer was not able to find any documentation to prove that, in the matter of post-secondary education, anything more than tentative planning at the bureaucratic level had occurred.

Obviously, there was disappointment about the parochialism of provincial governments in post-secondary education. There was dismay about the gaps between the provinces' rhetoric about post-secondary responsibility and their performance - especially where federal funds were involved. There was also awareness of the generally slow pace of provincial leadership and activity in post-secondary education until the federal participation after World War II.

It was a century after Confederation before the CMEC was formed, somewhat reluctantly (as described in Dr.Freeman K.Stewart's historical account of the Canadian Education Association's history, and as elaborated on in interviews for this study at CEA and the Canadian Teachers' Federation of Canada). The CMEC missed out on being a player in a century of Canadian education history. Perhaps this is why, from its

beginning, as suggested in four interviews (one academic, one federal, one provincial, and one at the CMEC Secretariat), the organization has seemed inclined to act as if the history of a broad federal involvement in education had not happened, or should not have happened - especially at the post-secondary level. Yet, until fairly recently, judging from its published reports and observer comments, the CMEC has shown an inability to reach consensus for common action in response to national concerns and problems in education. For instance, research of the 1960's on serious problems in Canadian studies education has yet to evoke substantial provincial remedies. Twenty years later, Quebec students are still taught a significantly different version of Canada's history than are their counterparts in the other provinces. Other provinces have limited provisions for Canadian history study and virtually none make provision for civics education remotely approaching the requirements for democratic citizenship, even though the majority of Canadian students will reach the voting age of eighteen before they graduate from high school. Early provincial efforts to select and co-ordinate use of some basic textbooks - to keep them Canadian and to facilitate pupil mobility - failed, as has effective CMEC involvement in remedy of illiteracy, defence of Canadian control of school publishing and computer software, and resistance to proposed new federal taxes on Canadian reading materials. Parochial habits and dislike of the federal government are hard to shake off.

In an appearance in 1981 before the Parliamentary Committee on Fiscal Federalism, former Secretary of the Cabinet and of Federal-Provincial Relations Office (FPRO), the Hon. Gordon Robertson, stated that

...in the present state of our national development, post-secondary education is an area that most requires an effective presence. I think it is also an area in which there will not be, at the provincial level, effective political pressure for the kind of thing that is required because what is involved is consideration of national requirements and national strategy.¹¹⁴

On the question of provincial resistance, in particular that in Quebec, it was added that

There are going to be certain areas of confrontation. I think the position that education is provincial and the federal government has no position in it at all, has been absurd for twenty years.¹¹⁵

Others interviewed for this study (including some federal and provincial politicians and officials, and some lawyers and academics), expressed similar views. But the principal Quebec representative interviewed, the Hon. Claude Morin, held firmly to his Province's traditional position of an absolute separation of federal and provincial powers in "education". This was a matter on which, it was held, the federal government had no constitutional power whatever to legislate with a use of the term "education" - not even in international matters.¹¹⁶

However, when the Parliamentary Committee on Fiscal Federalism prepared its report, it declared that

Post-secondary institutions - not just universities, but also colleges, research institutes, libraries, archives and the like - are part of the intellectual and cultural fabric of any society.¹¹⁷

This broad, modern view of post-secondary education covers the federal scope of involvement in these matters: gradually, to World War II, and vigorously since then. Given the social, cultural and scientific fabric now woven, it is difficult to comprehend how particular threads which might fit the provincial claim for jurisdiction could be separated from those which do not.

As shown further in Chapters VII, VIII and IX, federal participation in post-secondary education has been such that it has come to embrace both the narrow/traditional and the most open/modern definitions of post-secondary education. A broad description of post-secondary education, both formal and informal, is reflected in the 1982 set of federal objectives. An institutionalization of these objectives continues

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(ANSI and ISO TEST CHART No 2)

on federal and national bases, despite whatever CMEC or provincial opposition there may be. This appears to be happening because of amendments to federal post-secondary funding legislation, which are increasing the accountability for provincial use of federal funds, and because of related agreements and protocols resulting from executive federalism at the first ministers' level.

Summary

Antecedents for federal constitutional involvement in matters related to education began before 1867 in the areas of land grants, research and the incorporation of independent colleges and universities. The Act of 1867 made Parliament responsible for administering the territories and for the creation of new provinces, and for their provision for education in their founding constitutions. It created a federal residual power in relation to jurisdiction over education which has kept pace with social and technological change. Its Section 91 anomalies gave the federal order of government direct responsibility for education in the armed forces and the federal public service - jurisdictions which were acted on early. Action by the Federal order of government on its jurisdiction for education of Indians (and Inuit) came much later, as did that for educational training of inmates of federal penitentiaries. Education activity originated early in the concurrent jurisdiction for agriculture, because of major national scientific and economic needs. Creation of the NRC and the sequence of institutionalization ventures in science and technology were based on assumed jurisdiction which has never been disputed within the federal domain and, only belatedly, in Quebec's case, in relation to post-secondary education. The creation of new knowledge, methods, products, and human resource development were for the practical use and benefit of both the federal government and the nation. Federal entry to jurisdiction over broadcasting (and by extension to telecommunications) was aimed from the outset at protection of Canadian and national interests, including education.

Related entry into social assistance, with increasingly direct relation to education support, was greatly expanded under the shared-cost Canada Assistance Plan with its criterion of aid based on need, regardless of residence. Regional development, including first, education support and, later, research and technology transfer support, was another compensation for provinces who lacked the resources for such activities even when they had jurisdiction for them. Constitutional provisions for official bilingualism in education came about primarily in recognition of English language minority concerns in Quebec and French language minority concerns elsewhere in Canada. Related benefits followed in multicultural policy and program support for heritage cultures and languages. Preservation of the cultures and languages of the native peoples of Canada have been inadequate, with the exception of northern broadcasting. Illiterate Canadians have fared badly, federally and provincially.

Following World War II, federal post-secondary activity was extended beyond research after the precedent-setting arrangements made for education of veterans. The Massey-Levesque Report on post-secondary matters and Canadian culture and general education hastened federal participation. This extended to capital and operating grants, first to colleges and universities directly and, then, via the provinces. It included broadly accessible student loans and student housing grants and loans. Later federal participation in post-secondary education has involved efforts to co-ordinate this activity and focus it on national goals and priorities for post-secondary education which will have applications in the national interest.

END NOTES

1. Freeman K. Stewart, The Canadian Education Association, 1957-1977. Toronto, C.E.A., 1982, pp.35-40.
2. James C. Miller, National Government and Education Education in federal Democracies: Dominion of Canada. Philadelphia: published by the author, 1940, p.511.
3. Ibid, pp.512-513.
4. Review of Royal Society of Canada. Proceedings and Transactions Reports, 1883-1985.
5. Jack A. Blyth, The Canadian Social Inheritance, Toronto: The Copp Clark Publishing Company, 1972, p.291.
6. Miller, op.cit., p.33.
7. Statutes of Canada, 35 Victoria, c.23, s.22, note also Sessional Papers 36-100, Vol. XXV, No. 13, 1901, Sessional Paper No. 61 at page 1 where the federal land grants at 2 sections per township (36 sections) is translated into acres. For Manitoba the average granted is 2,277,000, and for the area which became the Provinces of Alberta and Saskatchewan, 19,200,000 acres.
8. Statutes of Canada 20-21, Geo. V, c.41, s.2, para6,
9. Hon. Daniel Johnson, Address, Proceedings of the Conference of First Ministers on Financing, Higher Education, Ottawa, October 24, 1966, p.25.
10. Interview, Hon. Claude Morin, 1988.
11. Interview, Acting D.M., MOSST. Documentation and statistics.
12. R.L. Watts, The Challenge and Opportunities Facing Post-Secondary Education in Canada. National Forum on Post-Secondary Education. Saskatoon, October 25-28, 1987, p.7.
13. Report of the Senate Special Committee on Science Policy, A Science Policy for Canada, Vol. 1: A Critical Review: Past and Present. Ottawa: Queen's Printer, pp.20-24.
14. Interview, Director General, Geological Survey of Canada. The GSC is next to the similar British and American agencies in the first of its kind in the world. See also A. Ignatieff, A Canadian Research Heritage: 75 years of Federal Government Research in Minerals, Metals and Fuels, Ottawa: D.S.S. 1981.
15. Miller, op.cit., p.452.
16. Interview, A.D.M. Research, et al., Agriculture Canada. Annual reports and statistics.
17. Ibid.
18. The Research Council Act, Statutes of Canada, 7-8 Geo.V, c.20 (1917), See Miller, op.cit., pp.466-500. See also Report of the Senate Special Committee on Science Policy, op.cit., pp.41-53.
19. Interview, Executive Director, M.R.C.C.; Annual Reports; audited financial statement for 1983/84.
20. Interviews, Science Council of Canada: Dr. S. Smith, President; the Director of Research, et al.

21. Interview, Dr. G. Orpwood, the S.C.C. officer responsible for the project's negotiations, surveys and publications. Project correspondence including that received from the Government of Quebec.
22. The Role of the Federal Government in Support of Research in Canadian Universities. Special study No. 7, prepared for the Science Council of Canada, and the Canada Council by John B. Macdonald, et al., Ottawa: Queen's Printer, 1969.
23. Review of National Science Policy: Canada. O.E.C.D. Paris: O.E.C.D., 1969.
24. A Science Policy for Canada. Report of the Senate Special Committee on Science Policy. Chairman, Hon. Maurice Lamontagne. Ottawa: Queen's Printer, 1970.
25. Interview, Executive Director, N.S.E.R.C., Annual reports and audited financial statement for 1983/84.
26. The Royal Commission is popularly known as the "Massey Commission". In this study it is referred to as the Massey-Levesque Commission in recognition of Father George-Henri Levesque's able representation of Quebec views larger than those of the Province's nationalists. This appellation is also used to allow for what Mr. Robert Bryce described as the Rt. Hon. Louis St. Laurent's "insistence" on Father Levesque's Commission membership.
27. Canada Council Act.
28. Interview, President, SSHRC. Annual reports.
29. "Computer-Aided Learning", Science Dimension, N.R.C. April, 1970.
30. Debates of the House of Commons of the Dominion of Canada, Dec. 6, 1907, p.1077.
31. Miller, op.cit., pp.294-95. Quoted from Sessional Paper No. 191d, 3 Geo. V, A. 1913.
32. See Miller op.cit., pp.294-367.
33. Blyth, op.cit., pp.294-95.
34. James N. Williams, The Plan. Memories of the British Commonwealth Air Training Plan. Stittsville: Canada's Wings, Inc., 1984.
35. Interview, Robert Bryce, 1985. Dr. J. Parizeau's comments on financing education in Confederation: One Hundred Years Later: Does It Still Work? A bilingual Seminar for CBC Radio and Television, "Citizens Forum", 1963. At page 26 he is quoted as saying "The federal government should consider establishing a general equalization and not give money specifically for the purpose of education."
36. EIC statistics. See also D.E. Glendenning, "The History of Vocational Education in Canada" in The Canadian Secondary Schools and Manpower Development, P.F. Borgen ed., Toronto: The Ryerson Press, 1966, p.23.
37. Letter, L.B. Pearson. Opening Statement, Conference on Financing Higher Education, October 24, 1966, p.9.
38. Commission to the A.U.C.C., Financing Higher Education in Canada: (Bladen Report), Toronto: University of Toronto Press, 1968, p.26. The Bladen report advocated federal funding of universities but in a way which "avoids invasion of the province's right and obligation to direct and control such education." (p.67).
39. EIC statistics from computer data bank, as per request.

40. Interview, Hon. John Munro, Ottawa.
41. J.A. Corry, "Higher Education in federal-Provincial Relations", University affairs, Vol.8, No.2, Dec., 1966, p.3.
42. Miller, op.cit., p.513.
43. Rt. Hon. R.B. Bennett quoted in F.W. Peers, The Policies of Canadian Broadcasting: 1920-1957. Toronto: University of Toronto Press, 1969, p.78.
44. Department of Communications research data.
45. Memo of Jan. 27, 1975, from CBC President Laurent Picard to CBC Vice-president, CBC documentation.
46. Interviews, CBC Director of Programs. Interviews Secretary of State Department.
47. Interview, Deputy Minister of the Department of Communications. Reports.
48. Hon. Rene Levesque, Opening Statement. First Ministers Conference, 1980.
49. Ibid.
50. John E. Osborne, "Evolution of the Canada Assistance Plan", Appendix 3. Neilsen Task Force, Canada Assistance Plan.
51. Ibid, pp.65-66. See also Hansard, House of Commons Debates, April 1966, pp.6407-6440; 6922-6925, 7198.
52. Interviews and reports, Canada Assistance Plan Program, Department of National Health and Welfare.
53. Day Care and the Canadian School System, Toronto: C.E.A., 1983, pp.21-23. Bill 77 in 1979 gave the Quebec Ministry of Education responsibility for day care services in schools with regulations applicable to all local school boards.
54. Statistics: Department of National Health and Welfare; The Canadian Welfare Council.
55. Poverty and Public Policy, A Submission to the Royal Commission on the Economic Union and Development Prospects for Canada. Prepared by the National Welfare Council. Dec., 1983, pp.7-8.
56. Canada Assistance Plan, A Study Team. Report to the Task Force on Program Review, Ottawa: D.S.S., 1986, p.19.
57. Historical Statistics on Family Allowances Program, Department of National Health and Welfare, Ottawa, Dec., 1986, pp.xii + xiii.
58. Interviews and Reports, Vocational Rehabilitation Directorate, NHW.
59. Interviews and reports, DREE, DRIE, and EIC.
60. Interviews, former Newstart officials. Reports.
61. Interview, ADM, Directors, NSERD. Reports.
62. Interview, SCRAP co-ordinator. Reports. See also Globe and Mail: 18 August, 1983, pp.1-2.

63. Secretary of State Department. Documentation and interviews: Deputy Minister, ADM for Education, et al.
64. Newsletter, Canadian Education Association, Feb., 1979, p.1.
65. CMEC/Secretary of State Department Press Release, S-12/83-67, 20 Dec., 1983.
66. Interview, Hon. Serge Joyal, Montreal, 1988.
67. Interview, Director, Court Challenges Program, Secretary of State Department. Documents. The first federal court challenge funding might be said to have occurred in 1871 when the government of Sir John A. Macdonald provided the sum of \$5,000. to aid in court costs for a case on the issue of denominational teaching in the schools of New Brunswick.
68. Documentation and interviews, Ministry of State for Multiculturalism and the Secretary of State Department.
69. Meech Lake Accord, Section (1)(b) and (3).
70. Interviews, Louis Bruyere. President, Native Council of Canada, et al., 1987; 88; 89.
71. Ibid.
72. See Chapter VII.
73. Sir John A. Macdonald, House of Commons Debates, April 16, 1883, p.631.
74. Reports, National Library of Canada. Interview, Associate Deputy Librarian, N.L.C.
75. Interview, Executive Director, S.S.H.R.C. and research reports.
76. Interviews, Deputy Head, N.M.C., et al.
77. Dr. Douglas J. Kenny, President, University of British Columbia, Submission to the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, June 3, 1981, Appendix FISC-59.
78. Interview, Robert Bryce
79. Commons Debates, Rt. Hon. P.E. Trudeau, June 16, 1981, p.10642.
80. Interview, Hon. Roland Penner, Winnipeg, 1988.
81. Commons Debates, Rt. Hon. Louis St. Laurent, June 19, 1951, p.4278.
82. Interviews, Public and Constitutional Law, Justice Department.
83. Mason Wade, The French-Canadian Outlook, Toronto: McClelland and Stewart Limited. 1964, p.82.
84. Ibid., pp.82-83.
85. Ibid., p.4.
86. Address by Hon. Serge Joyal to the Club Richelieu D'Ottawa, March 23, 1983, p.13. The matter was also commented on by Mr. Joyal in an interview for this study.

87. Mgsr.Parent, Rector of Laval, quoted by C.B. Sissons in Church and State in Canadian Education, Toronto: Ryerson Press, 1959, p.160.
88. Interview, Robert Bryce, Ottawa, 1985.
89. Interview, Hon. Claude Morin, L'ENAP, Universite de Quebec, 1988.
90. Interview, Robert Bryce.
91. Ibid.
92. Interview, Hon. Allan Blakeney, Toronto, 1988.
93. Interview, Hon. Roland Penner, Winnipeg, 1988.
94. Interview, Robert Bryce.
95. Ibid.
96. The University, Society and Government, The Commission on the Relations Between Universities and Governments, Ottawa: University of Ottawa Press, 1970.
97. Giving Greater Point and Purpose to the Federal Financing of Post-Secondary Education and Research in Canada. A report prepared for the Secretary of State of Canada by A.W. Johnson, Feb. 15, 1985.
98. Secretary of State Department information and interviews, Canada Student Loans Programs.
99. Ibid.
100. Ibid.
101. C.M.A.C. research data, annual reports and interviews.
102. Ibid.
103. Rt.Hon. P.E. Trudeau, Opening Address, Conference of First Ministers, Ottawa, 14 June, 1976.
104. Ibid.
105. Hon. Gordon Fairweather, Common Debates, December 3rd, 1976, p.1637.
106. Hon. John Roberts, op.cit., pp.1637-38.
107. Ibid.
108. Interview, Hon. Gerald Regan.
109. Interview, Hon. Serge Joyal.
110. Letter from Dr. Bette Stephenson, Chairman, C.M.E.C., of 28 September, 1982 to the Hon. Gerald Regan, Secretary of State.
111. Ibid.
112. Ibid.
113. Interviews, PCO.

114. Hon. Gordon Robertson, President, Institute for Research on Public Policy. Evidence to the Parliamentary Committee on Federal-Provincial Fiscal Arrangements, 12 June, 1981, 27:8.
115. Ibid, 27:11.
116. Interview, Hon. Claude Morin.
117. Report of Task Force on Federal-Provincial Fiscal Relations, Ottawa: D.S.S., 1981, p.121.

CHAPTER VII

DIRECT FEDERAL RESPONSIBILITY FOR EDUCATION

Direct participation in education, as it is described by the federal government, has various constitutional bases. In this Chapter it is described in ten categories which relate to: (1) territorial governance; (2) defence; (3) federal research; (4) native peoples; (5) corrections; (6) adult training; (7) public service training; (8) federal regulation; (9) federal incorporation; (10) external affairs.

Adult training is included here for three main reasons: the linkage with federal jurisdiction over unemployment insurance; its relation to the federal trade and commerce power, as this concerns human resource, or capital, development on a national basis; and the federal definition of "adults" as persons who have reached at least the statutory ages of school leaving as prescribed under Section 93 for every province. An additional consideration is that the federal spending power is only a supplementary, or quasi, constitutional justification for federal activity in adult training.¹ Moreover, it is not deemed to be a necessary factor in any of the other categories for direct federal participation in education.

Hypothesis No. 3 was used for gathering and classifying the following information and for drawing conclusions from it.

1) Territories

Each year, through a bureaucratic committee on federal-territorial financial arrangements, the federal government negotiates separate annual financial agreements with the Yukon and the Northwest Territories. In 1983/84, the membership of this committee was made up of representatives from the Department of Indian Affairs and Northern Development, Treasury Board, the Ministry of State for Social Development,

the Department of Finance and the territorial government concerned. The committee decides on the percentage increase in operating grants for the coming fiscal year by first identifying a set of base factors which show change in the previous year's operation. Education is included. Another formula is used for determining the increase in the capital grant. Both grants are included in the given territorial agreement to be approved by Parliament under the Appropriations Act.²

In 1983/84, actual Yukon expenditures for education were as follows:

Operating and Maintenance	29,089,511.
Capital	4,897,911.
<hr/> Total	<hr/> \$33,987,422.

This represented 34.1 per cent of the total federal transfer payment.³ Actual N.W.T. expenditures for education during this fiscal year were as follows:

Operating and Maintenance	\$75,242,000.
Capital	10,655,000.
<hr/> Total	<hr/> \$85,897,000.

This represented 24.8 per cent of the total federal transfer payment.⁴

These education expenditures are high chiefly because of population differences and dispersal, and transportation and related costs affected by climatic conditions. Provisions made to accommodate the various native languages and cultures are another additional cost factor. These costs would be higher still if the territories had not inherited most of the capital infrastructure for their school systems when federal authority for their administration was delegated to their respective territorial councils.

The territorial legislatures determine their educational policy and legislation subject to federal approval and change, via the advice of a federally appointed Commissioner. Superseding federal power applies over all territorial government affairs, even if it is not exercised. In education, this involves federal Section 93 power for the

Territories. With delegated federal authority, each territorial government employs its own administrative and teaching staffs, and decides its own courses of study and requirements for teacher certification. Each territory has its own educational system supervised by its Department and Minister of Education. Both provide for instruction in the native languages. Agreements are made with the federal government and the provinces for training and educational services purchased externally.

2) Defence

The Department of National Defence (DND) has a primary responsibility for military training and related human resource planning to meet its functional and professional requirements. It has a shared responsibility for military research, and its applications in military training. The Minister is responsible for the education of Canadian Forces' dependants.

Most of the Forces' individual skills training is provided for through the Canadian Forces Training System (CFTS), which is organized along command lines, with training missions to be achieved through 17 schools located on five CFTS bases, and three schools located on bases under other commands. Most of its education and training at the post-secondary level, degree and non-degree, is under direct command of national Defence Headquarters (NDHQ).

The DND system for military education and training, and related human resource planning and career development is without parallel in government or in the private sector. The same applies to the goals and standards of performance - both individual and unit - to be met and maintained by education and training, as required, and on a continuing basis. This produces a need for an institutionalized training capability. For both greater effectiveness and economy, training is integrated with work.

In the DND training situation described, it is impossible - in terms which would fit a Section 93 debate - to determine legally where jurisdiction for "education" begins

or ends, and to cost all the expenditures made. Therefore, the best one can do is to use reasonable assumptions when evaluating available data. For example, in 1984 DND reported that about 38 per cent of its person years were committed to individual training, either directly or indirectly. This was not costed. However, given the regular force strength of 83,630 as of December 31st, 1984, this estimate involved only the full salary costs of 31,779 personnel at the various rank and salary levels. Such an estimate would not include capital and operating costs related to the training programs and activities concerned. In any case, given DND's total actual expenditure for the fiscal year 1983-84 of \$7.959 billion, the actual cost of training during this period could have been, as suggested, one billion dollars plus.⁵

Such an estimate is not intended to be a distortion of DND's primary mission which is defence. Training is only a means. However, in DND's case, training is a primary concern and function - on course and on the job. Available statistics give a fragmented, incomplete picture of the commitment to military training and its direct costs. Thus, for example, in the case of CFTS only, the principal source of individual skills training, costs for 1983/84 were estimated at about \$100 million. These costs were mainly for staff salaries (ca. 4700 military personnel and ca. 3800 civilian employees) and base utilities, and maintenance for CFTS schools.⁶

In 1983/84 the student participation for CFTS individual training was 67,954 for formal courses of varying length. This was allocated as follows:

Training system	31,572
Mobile Command	10,640
Maritime Command	7,838
Air Command	11,650
Out-service	4,662
Other	1,592

There were 29,000 training system course graduates in 487 separate courses related to 17 officer classifications and 66 trades. This was exclusive of training conducted by,

and integrated with, duties in the three operational commands and some special training programs - including those at post-secondary education level under the direct command of National Defence HQ.⁷

Army. Mobile Command (FMC), whose role is to maintain combat-ready land forces, makes training an integral means of maintaining individual and unit battle skills. Its training establishments include battle schools at Canadian Forces Bases Valcartier, Petawawa, Shilo, and Wainwright; the Combat Training Centre at Canadian Forces Base (CFB) Gagetown; the Canadian Airborne Centre at CFB Edmonton. In 1984, a Command Training Aids Production Centre was established to research and develop training materials for common use.

Training is a basic factor in the militia's dual role of peacetime duties and readiness to support the regular force in times of emergency. This training is integrated with the CF Training System which, in 1984, applied to a strength of about 16,000 in 131 units and 52 bands.⁸

Navy. In 1984, Maritime Command (MARCOM) training schools served the needs on both coasts of 20 destroyers, three replenishment ships and three submarines. The emphasis was on sea training. In addition, on-shore training for both coasts was provided at Fleet School Halifax where training is provided for above-introductory-level for all trades, for computer training, and in refresher courses. In 1984, this school served about 13,000 students. Naval reserves were increased from 15 to 18 units across Canada in 1984. Some 30 minor vessels were used by these units for training purposes.⁹

Air Force. April 1st, 1984 was the 60th anniversary of the RCAF and its successor Air Command (AIRCOM), whose role is the maintenance of combat-ready air forces. Training to meet this goal is a component in each of its six air groups. As a result, Maritime Air Group (MAG) has an Aurora long-range patrol aircraft training squadron at CFB Greenwood and a Sea King helicopter training squadron at CFB

Shearwater. The 10 Tactical Air Group has a helicopter training squadron for aircrew at CFB Gagetown, and a field technical training unit for helicopter technicians and aircrew at CFB Chatham. The Air Transport Group (ATG) has a transport training squadron at CFB Trenton which provides nearly all the operational training for aircrew and the technical classifications in about 90 courses ranging from pilot conversion for the various aircraft to aero engine technician. CFB Edmonton has a Tactical Aircraft School for Hercules aircraft. The 14 Training Group, with headquarters at CFB Winnipeg, trains mainly aircrew and air support personnel to initial classification level. To do this, it has the Central Flying School, the CF School of Meteorology and the CF Aerospace and Navigation School - all at CFB Winnipeg. It also has flying schools at CFB Moose Jaw and CFB Portage la Prairie, and a survival training school at CFB Edmonton. More than 2400 students were trained by 14 Training Group during 1984. Reservists (ca. 900 in 1984) received some of their training at the Air Reserve National Training School at CFB Borden.¹⁰

CFTS Schools and Programs. In 1984, twenty schools and their various programs supported CFTS's role of training individuals in basic military skills and for the required areas of specific employment. Further training was also provided to graduates whose classifications or trades were required by a command other than the one they were initially trained to serve. The most modern of learning technologies were used, operationally and experimentally - such as simulators, and computer-assisted learning. An on-going cost-effectiveness study of computer-assisted learning is being applied to selected aircraft maintenance courses.

In 1984, existing school facilities for skills training were as follows:

CFB Borden

CF Dental Service School
 CF School of Intelligence and Security
 CF School of Physical Education and Recreation
 CF Nuclear Biological and Chemistry School

CF Leadership Academy
CF Medical Services School
CF Training Development Centre
CF Aerospace and Ordnance Engineering
CF Language School Borden
CF School of Administration and Logistics

CFB Chilliwack

CF Officer Candidate School
CF School of Military Engineering

CFB Cornwallis

CF Recruit School

CFB Kingston

CF School of Communications and Electronics

CFB Saint-Jean

CF Recruit School
CF Language School
CF Technical School

Other training facilities included:

CF School of Music Esquimalt
CF School of Traffic and Movements Edmonton
CF Language School Ottawa
CF Training Material Production Centre, Winnipeg

Language training was provided at the three schools listed, each of which gave instruction in English, French and foreign languages at basic and advanced levels.

A special Youth Training and Employment Program (YTEP), to be administered by the Canadian Forces, was announced in April, 1983, to alleviate high youth unemployment. The \$75 million funding was to be used to enrol 5000 youth between the ages of 17 and 25 for three years in the CF Supplementary Reserve. This was to

include a one-year contract for full-time basic recruit and trade training along with regular recruits. Women were eligible for this program, as well as for 91 of 136 classifications and trades in the Regular Force. As of 1984, it was reported that about half the YTEP participants had applied for or been recruited to the Regular Force. Feedback on the program was favourable - from both the military and civilian sectors who were benefiting from it. Interest in the program's continuity was reported to be high on the part of candidates for its opportunities.¹¹

Cadet Corps. The Canadian Forces are responsible for the organization and direction of Canadian cadet organizations which function on a national basis through regional commands. This organization, which has had, and can still have, affiliation with regular school programs, operates in co-operation with the Army, Navy, and Air Cadet Leagues respectively. It enrolls both male and female recruits between the ages of 12 and 19 for training and development which aims

- to develop in youth the attributes of good citizenship and leadership;
- to promote physical fitness;
- to stimulate the interest of youth in the sea, land and air activities of the CF.

Instructional staff are recruited mainly from the Reserve Force. Civilian instructors are employed as required.¹²

During the regular school year, cadet programs are conducted at cadet corps and squadrons and, in summer, at 30 or more cadet camps located on or near CF bases across Canada. In 1984, cadet membership by region was as follows:

Region	Cadet Corps and Squadrons	No. cadets
Atlantic	226	13,293
Eastern	249	18,000
Central	251	16,000
Prairie	219	9,900
Pacific	121	5,900
Northern	19	600
<hr/>		
	1085	63,693 ¹³

About 22,000 cadets participate in the summer training activities offered. According to DND training reports for 1984, this included such activities as:

- glider training, including qualification of 110 air cadets to solo standard and 7 to Department of Transport licensing;
- a new national 6-week course, "Introduction to Air Traffic Control", for senior air cadets;
- a sailing camp and Atlantic voyages aboard HMC ships;
- for 65 Northern cadets, a climb through the Chilcoat Pass and an 800-km voyage by boat down the Yukon River to Dawson City.¹⁴

Since 1970 the Canadian Forces had participated in the federal government's Summer Youth Employment Program (SYEP) which was funded outside DND's budget but integrated with its primary reserve and cadet programs. Thus summer training was funded for about 21,000 cadets in 1983 and about 22,000 in 1984.

Military Colleges. There are three colleges in what has become the Canadian Military College system. Their courses are accredited for degree purposes under the provisions for post-secondary education in the provinces where they are located:

Ontario, Quebec and British Columbia. This arrangement is a result of an integration with the degree courses and institutional services of various universities. On the federal side, it is a voluntary arrangement for both practical and political reasons, but not for constitutional reasons.

The Royal Military College (RMC) was founded in 1876 under federal charter authority. In 1959, when the college was ready to grant degrees, a potential issue of jurisdiction arose involving the federal Section 91.7 power versus the provincial Section 93 power in the Act of 1867. Queen's University and RMC had been operating on an integrated basis, including accreditation of RMC courses. The federal government, which could have acted unilaterally opted instead to seek (and obtain) Ontario legislation which would not divest RMC as a federal and military institution, but which would allow for degree granting under provincial law. Ontario obliged. In the opinion of DND's legal counsel, this arrangement did not relinquish the federal power involved over the military and military education.¹⁵

The governance of RMC and its program of military education is provided for in the Royal Military College Act, R.S. c.43 (1927). In Section 3 it states clearly that

there shall be an institution for the purpose of imparting a complete education in all branches of military tactics, fortification, engineering, and general scientific knowledge in subjects of the military profession, and for qualifying officers for combat, and for staff appointments.

Section 4 provides that

the college shall be governed and its affairs administered under and according to regulations made and to be made from time to time, and approved by the Governor in Council, and published in the Canada Gazette.

Section 5 provides for the college to be conducted under the superintendence of a military officer. Section 6 provides for a subordinate military staff.

Provincial power does not apply to any aspect of RMC's mandate and program when the federal government wishes to insist on this constitutionally, as shown by the following example.¹⁶ In a 1984 dispute at RMC which did not go to court, a degree was withheld from a cadet who had completed all course requirements with an average of 70.8 per cent. In the judgement of the commanding officer for RMC, the cadet had not satisfied the requirements of Regulation 29 made under the Act concerning officer-like qualities. The decision was appealed to the Minister of Defence and upheld. A member of the Ontario Legislature referred the matter to the Minister of Education for an opinion. So far as is known the decision (and the jurisdiction on which it was taken) remained, and the Province did not attempt to put its Section 93 power for education against the Section 91.7 power and its education anomaly for full federal jurisdiction in military education.¹⁷ In any case, as of 1984, RMC offered courses leading to four-year degrees in arts, engineering and science and, in addition, post-graduate studies in subject fields of interest to the Canadian Forces.

The Collège Militaire Royale (CMR) at Saint-Jean, Quebec was founded in 1952. In 1969 an affiliation was arranged with the Université de Sherbrooke to confer degrees earned in CMR studies, which, by 1984, included arts, science, engineering, computer science, and administration.

In 1911 the Royal Naval College of Canada was founded at Halifax, with a mandate that stated that

There shall be an institution for the purpose of imparting a complete education in all branches of naval science, tactics, and strategy.¹⁸

The college operated until 1922. When World War II started, about one-third of its 148 graduates were still serving. The Royal Canadian Navy grew 60 times its pre-war size to become the world's third largest navy - after the United States and Great Britain. In September 1939 there were about 3,000 members in the R.C.N., 6 destroyers, 4 mine-sweepers and some small craft. By 1945 there had been 106,188 enlistments; the

R.C.N. had deployed 471 ships during the War (over 200 of which were larger than minesweepers). These statistics and the training involved do not include Canada's large merchant marine volunteers and ships.¹⁹

In British Columbia, a naval training base was established in 1940, becoming the Canadian Naval College two years later. In 1948 it was made the Royal Roads Military College for tri-service use. In 1975, the Province of British Columbia, through legislation, accorded R.R.M.C. its own degree-granting status - even though its courses had been integrated with, and by, other institutions, within the Province and elsewhere in the Canadian Military College system. As of 1984, R.R.M.C. offered courses and degrees in arts, science, computer science, and administration. It also offered first year courses in engineering with a transfer to RMC for completion.

University Training Programs. DND uses two plans for officer training and qualification at the university level. One involves subsidization of the final two years of study for a baccalaureate. The other plan involves university study by selected personnel of other ranks who are commissioned on graduation. Normally, in either plan, candidates have completed their degrees at one of the CMC colleges.

Post-graduate study, administered under the CF Post-Graduate Training Program, may be approved at Canadian and foreign institutions if it relates to CF requirements in advanced technical and management fields. Post-graduate medical training, up to four years in specialties which are required by the Forces, is available to selected serving medical officers. Under the Medical Officer and Dental Training Officer Plans respectively, most of the recruits are eligible for up to five years of subsidization: four academic and one for internship.²⁰

Professional Education and Development. Non-degree post-secondary training and development under direct NDHQ command includes that provided by:

- National Defence College, Kingston;
- Canadian Forces Command and Staff College, Toronto;

- Canadian Land Forces Command and Staff College, Kingston;
- Canadian Forces Staff School, Toronto;
- Canadian Forces Management Development School, St.-Jean, Quebec.

Also included under direct NDIHQ command are defence research establishments and engineering and test establishments - all with input potential for military education and training.

The five training programs listed are organized to meet a hierarchy of line and staff performance needs. Purposes, content and participants are selected accordingly. Thus, for example, the Canadian Forces Staff School's 10-week course prepares junior officers to perform general duties at their level. The five-month Canadian Land Forces Command and Staff course in battle tactics, for participants at Captain rank, is a pre-requisite for the 10-month Canadian Forces Command and Staff College, whose participants are mainly at the rank of Major. Finally, the National Defence College (NDC) offers a 43-week program of study and travel on a global basis. It enrolls 42 candidates per course at the rank of Colonel and above, and at equivalent civilian or public service ranks. Representation is 12 CF officers, and 22 others from the federal and provincial governments, the private sector and 8 foreign participants. The interdisciplinary, national and international aspects of the NDC program are intended to prepare its participants for advancement to positions of high responsibility.²¹

CF Community College Program. Members of the Canadian Forces and their dependants are assisted to enrol for academic upgrading and/or vocational training through arrangements negotiated by DND with Ahuntsic College, Montreal and Seneca College, Toronto. Credits are permitted for military training and experience. Independent study at the learner's pace may be on campus, by correspondence, or at Independent Learning Centres (ILCs) which are located on various CF bases in Canada and overseas.²²

Canadian Forces University Program. In 1984 DND marked the 10th anniversary of its arrangement with the University of Manitoba to provide a locus for Forces members and their dependants to enrol in the University's degree courses on campus, at some CF bases, or by correspondence. The arrangement includes credits for the courses of other accredited universities.

Second Career Assistance. Another DND program, which could serve as a model for government or the private sector, is its Second Career Assistance Network (SCAN). This program is designed to prepare prospective retirees from the Forces for effective entry to other employment. It uses the community college and university programs described and the programs and services of Canada Employment and Immigration, and the various governmental and other employment data banks. The annual participation as of 1984 was about 8000.

Dependants' Education

In 1983/84, DND's school system for dependant children and youth operated in two sections under the Government of Canada's responsibility via the Minister, and under the Minister's authority via National Defence Headquarters (NDHQ). The service overseas is under full federal control. The service in Canada is in two categories. Canadian Forces base schools are regarded as private schools in Quebec. In the rest of Canada, DND has made separate arrangements with the other provinces to contract for local school board services where feasible, and to have DND's own local boards treated as provincial bodies, in order to make them eligible for provincial grants and provincial programs. Thus, in 1983/84, DND school services in Canada received \$12,688,000. In various provincial grants (excluding Quebec, which has never made such contributions), and \$63,971,000 in federal funding, for a net federal cost of \$51,283,000. As observed, these cost-saving arrangements make DND's mobile dependant school population sub-

ject to the varying and unco-ordinated provisions of the separate Section 93 jurisdictions in matters of school curricula and governance.

The decision to treat DND dependant schools in Canada as parts of the various provincial school systems is not known to have been made by the federal Cabinet, or by the Minister of National Defence who is responsible to Parliament for CF dependant education. Instead, this interpretation has been adopted by DND's Personnel Services who seem to have taken it upon themselves to manage the system, with the Minister in a token role. In an interview for this study with the Director General of Dependants Education, following the election of the Mulroney Government, references were made to the possible turnover of DND's schools in Canada to provincial control, for cost savings and educational conveniences (within the separate provincial jurisdictions).²³ However, as the writer learned from DND's own legal service, any such arrangement could not erase the federal government's constitutional obligations under Section 91(7). The certainty of a permanent transfer of federal responsibility for CF dependants' education to the provinces would require a judicial ruling, or a constitutional amendment.

DND schools overseas has developed an elementary curriculum which is a unique amalgam of the best elements of the various provincial courses. For practical reasons, however, the system's English secondary school has followed the Ontario courses, Grades 7 to 13, and its French secondary school has followed the Quebec course of studies.²⁴ In 1984, the overseas system operated on a budget of \$14,369,000 (including \$93,000 for tuition fees paid by non-military dependants).²⁵

Both parts of the DND school system provided education and education support to dependant children to the level of Ontario Grade XIII or its equivalent. This equivalent was established by DND for Canada as follows:

Newfoundland	1st year university
Nova Scotia	Grade 12
New Brunswick	1st year university
P.E.I.	1st year university
Quebec	CEGEP 2 (pre-university program only)
Ontario	Grade 13
Manitoba	Grade 12
Saskatchewan	Grade 12
Alberta	Grade 12
British Columbia	1st year university
The N.W.T.	Grade 12
The Yukon	Grade 12 26

Where education is not available at a DND school at the CF parent's place of duty, or at a local public school, the CF member can claim reimbursement at the maximum rates set, to cover lodging, board, and transportation. (These costs were included in the 1983/84 statistics cited.)

Other Dependant Education Support. An indication of the Government of Canada's commitment to the education of Canadian Forces veteran's dependants is the Canada Pension Commission's provision in the Pensions Act for educational assistance to their children. This applies to dependants ages 17 to 25 who are in full-time attendance at a post-secondary institution. Entitlement for each child is based on 13 per cent of the basic pension received by the veteran or surviving spouse. The program came into effect immediately after World War II, "to facilitate access of children of veterans to higher education by reducing financial hardship".²⁷

The Department of Veteran's Affairs administers the Children of the War Dead Assistance Act, which has provided education support since 1952/53. In 1983/84 total assistance was about \$866,000 in aid of 424 students. This sum includes a maximum of \$800 for tuition and an indexed living allowance of \$102.27 per month of attendance. Originally, the program was for orphans of war dead, but the Act's benefits were extended to dependants of veterans with 48 per cent or more disability before their death.

Later, benefits were extended to orphans of CF members who die while in peacetime service.²⁸

Under the Army Benevolent Fund Act of 1947, a non-profit organization with federal ties, the dependants of World War II Canadian Army veterans are eligible for small education grants contingent on need and satisfactory academic progress.²⁹

3) Federal Research

Research conducted by or for the federal government applies to all its responsibilities and functions. The continuum of federal research ranges from operations to the frontiers of science and technology. Given the novelty in the latter research, the work done is invariably complemented by human resource development. Much of such work is of national interest and application. Most of it is freely available for dissemination and use. All of it is considered to be within the constitutional power of the federal government. In total, the direct federal involvement in research in all fields of science and technology and its impacts on Canadian post-secondary education and research, is formidable.

Scientific and technological research in the natural and human sciences is concentrated in special federal bodies, such as NRC, Agriculture Canada's research centres, CANMET, and the Bedford Institute. Such research is also carried out in, or for, most federal departments and agencies on a mission basis to fit institutional mandates and operational requirements. This results in a complementary mix of in-house and contracted research to meet these needs. Thus, when universities are involved, they are, in effect, co-opted for these specific purposes. This two-pronged approach is carried out by departments such as Fisheries and Oceans, Environment, Communications, and National Health and Welfare. A great deal of the scholarly work produced is published for dissemination and wider application. It is also used in governmental policy-making. Research in special areas and in operations is conducted

by virtually every federal department and agency. Important examples are the Law Reform Commission of Canada, and the Canadian Radio and Television and Telecommunication Commission (CRTC).

Communities of expertise are developed in science and technology. Reciprocal benefits apply. "Program bending" - achieving goals in related programs simultaneously to save costs - was an important purpose in NRC's early efforts to build a system of laboratories which could be used for developing Canadian science and scientists.³⁰ The same thinking underlies the purpose and use of the NRC's Canada Institute for Scientific and Technical Information (CISTI).

To improve research policy-making and co-ordination, the federal government established the Science Council of Canada and, later, a Ministry of State for Science and Technology. Unlike in the United Kingdom, however, there was no apparent direct integration of science and higher education at the national Cabinet level. In Canada the research portfolio ranks low in Cabinet, but at least it is there, as needs and expenditures require.

As MOSST data show, the total picture for regular federal expenditure on science and technology programs and personnel for the fiscal year 1983/84 involved a commitment of about \$4 billion, exclusive of special expenditures.³¹ This endeavour was related to economic and social development from sea to sea, covering the full spectrum of the natural and human sciences. This work was carried out by over 35,000 federal public servants, including about 11,000 scientists and professional officers, supported by 9200 technicians in federal laboratories. This is exclusive of university scientists involved directly in federal contracted research and, indirectly, through federal core grants for post-secondary education, as the result of federal support grants and contributions to university research and researchers. In all, an estimated \$590 million was directed specifically to research in the university sector and about \$630 million was

directed to the private sector (partly in estimated tax expenditures for research and development costs).

There was no standing or special committee of the House of Commons or the Senate for science (much less for post-secondary education and science) in 1984, and this still applies. However, scientific and technological matters have been highlighted in the various committee fields of review. The Ministry of State for Science and Technology (MOSST) is the prime source, or channel, of advice to Cabinet on such matters, notwithstanding the separate influence of the Science Council, NRC and other notable federal scientific bodies which report to Parliament via MOSST.

Twenty program categories are identified as the sources of over 90 per cent of the 1983/84 total expenditure cited.³² NRC, with a 1983/84 budget of \$524.5 million (and a staff of 3520), operates 15 laboratories in specialized fields. Research activities relate to such fields as biology, biotechnology, chemistry, physics, energy, engineering, and space sciences. Of NRC's allotted 1983/84 budget, \$30.2 million was for universities. Energy, Mines and Resources (EMR), with a budget of about \$102 million (and about 2600 staff), is responsible for 10 main research centres, several of which did, or could, operate separately. It focusses on the discovery, development, and use of Canada's mineral and energy resources. Activities include geological research, surveys and mapping, remote sensing, mineral research, energy research and resource technology development. Of the \$102 million, \$8.1 million was allocated for universities in contracts and grants exclusive of the new knowledge made available to post-secondary education. Environment Canada, with a budget of \$346 million (and about 3900 staff), concentrates on conservation and improvement of Canada's renewable resources and the environment. It utilizes 10 laboratories for research activities related to the atmosphere, lands, fish, birds, inland waters, and wildlife. In 1984, \$3.2 million was allocated for universities exclusive of the benefit of knowledge for use in post-secondary education.

Agriculture Canada's program in 1983/84 had a budget of \$295 million (and a staff of about 4000). The \$5.8 million allocated for universities is exclusive of the new knowledge generated on the main aspects of agriculture. Universities also have access to the department's six national research institutes and 52 facilities, several of them world class. The Department of Fisheries and Oceans, with a budget of \$267.2 million (and a staff of about 2700), operates 11 main laboratories dealing with fisheries research, fisheries management, and ocean sciences and surveys. Its allocation of \$2.3 million to university research hardly covers the value to post-secondary education of its various scholarly research publications, joint research ventures and collaborations, including program bending to make its research ships available to post-graduate science students.

The Department of National Defence, with a science and technology budget of \$204 million (and a staff of about 2000) in 1983/84, operated 8 military research centres. About \$ 45.5 million was allocated for universities, contracts, and related matters. In 1983/84, the Department of Regional and Industrial Expansion had a science and technology budget of \$174.1 million (with a staff of 200) - exclusive of the \$2.4 billion budget for administering the "SCRAP" program - a one-time program for capital expenditures to stimulate research on renewable resources. Atomic Energy of Canada Ltd. (AECL) continued to do research on peaceful uses of atomic energy, with a budget of \$148 million (and about 2700 staff); \$1.9 million was used for university research contracts. The Department of National Health and Welfare, with \$115 million for science and technology (with a staff of about 1400), combines research with education where feasible. Research fields where this applied included food, drugs, disease control, and environmental health. Public education and availability of its research findings for use in post-secondary education were not included in a university expenditure of \$25.8 million. The Department of Communications, with a science and technology budget of about \$110 million (and a staff of 680), conducted and contracted

telecommunications and other research as described in Chapter VI. Forestry (included in Agriculture Canada) had a science and technology budget of \$67.1 million (and a staff of 990), exclusive of the Agriculture budget and staff. It operated 9 forestry research centres, and directed about \$3.5 million to universities in contracts and grants and contributions, to support development of forestry research and curricula in university schools of forestry.

Transport Canada, with a science and technology budget of about \$37 million (and a staff of 165), conducted its own research at five main research centres. These centres concentrated on technologies in marine, surface, and air transportation, as well as the safety of such systems. Only \$1.3 million was budgeted for universities.

The National Museums of Canada (described in Chapter IX) had a science and technology budget of almost \$84 million (and a staff of about 1000). Statistics Canada, which serves government and the private sector, had a (statistical) science and technology budget of \$249.5 million (and a staff of about 4600).

The Canadian International Development Agency's (CIDA's) science and technology budget of about \$62 million (and a staff of 60) allocated two-thirds of this to Canadian business and industry for feasibility studies aimed at improving economic and social conditions in underdeveloped countries. Only \$3.2 million of this was budgeted for university services. The International Development Research Centre (IDRC) had a science and technology budget of \$76.5 million (and a staff of 300).

NSERC, with a grants budget of \$275 million (and a staff of 120) in 1983/84 is described in Chapter VIII. The Medical Research Council (MRC), with a grants budget in that year of \$157.3 million (and a staff of 30) and the Social Sciences and Humanities Research Council (SSHRC), with a grants budget of \$57.3 million (and a staff of 100) as well as the Science Council of Canada, with a budget of \$5.2 million (and a staff of 70), are all more fully described in Chapter VIII. More detailed data than are reported here are collected and reported by MOSST and Statistics Canada.

NRC also keeps detailed records of its research contracts and contributions. The granting councils keep the same detailed information.³³

4) Native Peoples

Belated federal assumptions of full responsibility for the education of Indians and, later Inuit (after References Re Eskimos, SCC, 1939), have led to comprehensive provisions for education and training at federal expense. This has called for the building, equipping and staffing of schools on Indian lands and in the Territories, and the purchase of whatever additional programs and services are required for academic, vocational and post-secondary education. The federal school system which was created south of the 60° parallel is still in the process of being turned over to local band control. The federal system created later in the Yukon and N.W.T. has been delegated to territorial control for some years.

Recently, the federal government has assumed financial and other obligations for the education and training of Status Indians, whether they reside on Indian lands or not. To the government's surprise over 100,000 persons presented themselves to band councils for Indian status and benefit at the first registration. The cost implications of such numbers are magnified by demography and by the potential for judicial rules affecting the Metis, when Section 35 of the Constitution Act, 1982 respecting "aboriginal peoples" is interpreted and defined in constitutional law. Human resourcing implications and costs are also involved, first, in relation to what, ultimately, constitutional provision for self government (in education in particular) will entail and, second, what federal obligations in post-secondary education for native peoples will involve.

The Indian Act, a federal statute made under Section 91(24) of the Constitution Act, 1867, provides for a statutory right to education to age eighteen. To 1984, this age term did not limit the access of native persons to post-secondary education at federal

expense. The expanding nature of education and its institutionalization were deemed to both cover the changing educational situation and to justify native post-secondary education without quotas - doubly so because of their incidence of under-education as a group.

In the course of research at the Department of Indian and Northern Affairs, it was noted that the federal government had been funding the provinces for Indian post-secondary education twice, through 50 per cent of the EPF for post-secondary education including Indians in the provinces per capita count, plus the tuition fees for native students and the full costs of special programs for them. Estimated overpayment, for which no known provincial benefits had been produced, was estimated at somewhere between 100 and 200 million dollars per year on a continuing basis, including 1983/84. Both points were referred to LAND and answered at the ADM level. Yes, this was occurring and, yes, provincially, there had been no known reciprocal benefit in post-secondary education for native students.³⁴

Representatives of the Native Council of Canada were not aware of such post-secondary overpayment. They expressed concern that this error might be recouped by future budget cut backs in education support, especially for post-secondary education. They contended that this could not be done without a removal, wholly or in part, of the Indian education right (and corresponding federal obligation) which they believe applies constitutionally in two respects. Treaties as constitutional documents (made under the initiating authority of the Royal Proclamation of 1763) are deemed to require or imply a federal obligation for Indian education, regardless of level. Thus it is held that the statutory limit in the Indian Act to an education to age eighteen must be brought into line with this constitutional law. Therefore, the Indian Act, a federal statute, cannot be used by the federal government to evade or erase its constitutional responsibility for (and to) Indians (and Inuit) under Section 91(24) of the Constitution Act, 1867. Full federal responsibility for Indians, and their lands in Section 91(24), includes full federal

responsibility for their education. This constitutional responsibility applies until, by constitutional means, it is amended. In the meantime, the native peoples' right to education stands. As explained by the then President of the Native Council of Canada, Louis Bruyere, for native peoples the rights issue is education, not its levels.³⁵

For the federal government cost is an issue for demographic reasons, as well as any constitutional concern. In 1981, Statistics Canada estimated the total aboriginal population at about 552,000, as follows:

Status Indians (577 bands)	350,000
Non-status Indians	70,000
Inuit	27,000
Metis	100,000

The Native Council of Canada considers these statistics to be on the low side - perhaps by a factor of 10 in the case of the Metis.³⁶ The numbers only hint at the problems involved. The birth rate has declined but remains high - about twice the national rate. The native population is more youthful than the general population: about 50 per cent are under 20 years of age compared to about 30 percent for non-natives. Half as many native adults as non-natives have secondary education: ca. 20 per cent as compared to 40 per cent. About 90 per cent of Indian persons live at or near the national poverty line. The youth suicide rate is 10 times the national rate. Native people regard education as a vital means of dealing with these serious social, cultural and economic concerns, as well as preparation for the new opportunities for employment in administrative and other services which native self-governing power is expected to generate.

The Neilsen Task Force reviewed over 100 programs with total expenditure of just over \$2 billion (prorated for 1983/84, exclusive of expenditures in various other programs which also include native peoples).³⁷ There are 23 training and mobility programs, including 16 CEIC programs and 7 offered by other departments including IAND. (These are included in this Chapter's separate description of training.) Education is an aspect in some health and welfare programs. This applies moreso in cul-

tural and communications programs which are referred to in Chapter IX. Education is directly involved in three main programs under LAND administration: elementary and secondary; post-secondary; education facilities.

Elementary and Secondary Education. Elementary and secondary education services to Indian and Inuit students were provided through federal schools, band-operated schools, and provincial schools on an agreement basis. In 1983/84, the Department of Indian Affairs and Northern Development reported the situation for Indian pupils living on reserves as follows:

<u>Type of School</u>	<u>Students</u>	<u>Percentage</u>
Federal (169)	21,893	28
Band-operated (191)	16,715	21
Provincial	31,466	51
	<hr/> 78,074	

Expenditure for these students was about \$346 million for salaries, guidance and counselling services, transportation, operation and maintenance costs and contributions, student accommodation (where required), and some supplementary band funding. Capital expenditures were excluded, as were overall administrative expenditures for federal schools. Also not included in the aforesaid statistics were an estimated 22,000 students living off reserve without federal financing, and the Indian and Inuit students of the Yukon and the Northwest Territories, whose education is largely funded by the federal government via the territories.³⁸

The situation in native education at the time of the 1969 "Statement of the Indian Policy of the Government of Canada" is used as a benchmark for noting trends which resulted as the native peoples' opposition gained momentum against proposals for repeal of the Indian Act and consequent integration into provincial systems. In education, the proposed policy almost came after the fact. For nearly a decade before, it had been preceded by the vigorous bureaucratic efforts of the Department of Indian and

Northern Affairs to negotiate capital and operating agreements across Canada sufficient to effectively put the Department's school system out of business. This policy-before-the-policy was well on the way to becoming a *fait accompli* by 1969. But then a native backlash started against a perceived undermining of Indian cultures by means of an abandonment of federal constitutional responsibility for the education of Indian (and Inuit) peoples. The native peoples did not want cultural assimilation, no matter what it was called.³⁹

The first political reaction was to reverse the process of school and cultural integration with provincial schools. Since then, the main trend has been the transfer of direct management of Indian education to band governance. As a result, a principle of self government in education is evolving. Thus by 1984, of 579 bands, about 475 were reported to manage all or part of their community's education program.⁴⁰ About one-third of teachers and administrators in federal schools were of Indian descent. Over 30,000 students were estimated to be receiving some native language instruction. By 1982, there were 80 reserve schools with high school grades - compared to none in 1971. The percentage of Indian students in secondary school increased from 13.4 to 19.2 during the decade 1971-81.⁴¹ Curriculum and learning materials have been developed or adapted to include elements of native cultures.

Post-Secondary Education. Until the Mulroney Government took office in 1984, the constitutional status of Indian (and Inuit) post-secondary education was not a particular issue. To this time, with the exception of Quebec's belated claim of Section 93 primacy in native education provisions in the James Bay Agreement, the provinces were not claiming any jurisdiction for Indian education. This was evidenced (as already described) by their funding requirements, which were aimed at having the federal government pay as much as possible of the education cost of post-secondary education for Indian students, even when they had ceased to live on federal Crown lands.

To make this situation more difficult for Indian peoples, the Neilsen Task Force, without regard for treaties or the Constitution Act, 1867, stated that

The provision of post-secondary educational support for Indians and Inuit by the Department of Indian Affairs and Northern Development is a matter of government policy and not a legislative obligation.⁴²

To eliminate a claim of statutory or constitutional precedent, it was explained that

Although there were a few notably successful Indian university graduates as far back as the late 1800's, these successes were achieved with determined Indian parental support, often in the face of bureaucratic objection.⁴³

This argument is weakened by an earlier federal government initiative in the Northwest Territories to finance college attendance by Indians, and to make their enrolment a condition of federal government support. It also contradicts the account of one Indian person interviewed who described how one of his ancestors received a British university education in the early 1800's, with family encouragement and government help.

It is true that in the late 1800's the Indian Act described a "person" as someone other than an Indian. And it is, unfortunately, true that the Canada Year Book, 1921 stated that

"Indians are minors under the law, and their affairs are administered by the Department of Indian Affairs under the authority of the Indian Act."⁴⁴

This Department is the oldest government organization in Canada, dating back to 1763, from which time until 1845 it was under the command of the Military. "The aim of the Department of Indian Affairs," the report further stated, "is the advancement of the Indians in the arts of civilization".⁴⁵ Then, in the same vein as the Neilsen Report, it is declared that

the activities of the Department as guardian of the Indians, include the control of Indian education.⁴⁶

Incidentally, until Indians were given the federal franchise in 1960, one of their shortcuts to full citizenship and "civilization" was a university degree. This however, cost them their Indian status. Another way to the franchise was military service in World Wars I and II. Even so, it was not until 1945 when veterans were given post-secondary education entitlement, that native veterans could attend university without having to worry about departmental bureaucrats. Hence, as the Neilsen Report notes, the veterans' precedent helped to achieve an extension of government support to post-secondary education for Indians. The same applied, of course, to all other Canadians - but without the constitutional potential of a right to such education, costs included.

Post-secondary education expenditures for 1983/84 were reported at \$43.1 million. This enabled Indian and Inuit students to attend colleges, CEGEP's in Quebec, universities and other accredited institutions, including those which are controlled by Indians. The total enrolled was reported to be 8,064 students (or an estimated 12 percent of the entire native school population, compared to 20 per cent for the national average). Aid to these students included tuition, books, supplies, transportation, living allowances and incentive grants (\$750 for master's study and \$1500 for doctoral studies).⁴⁷

Of particular note is a two semester program for University and College Entrance Preparation, administered by the Department of Indian Affairs and Northern Development itself, to fill a significant educational need, from coast to coast. Minimums for entrance are age 20 and a full Grade XI.⁴⁸ The Ministry has also facilitated the possible beginnings of an Indian post-secondary system in Western Canada involving the full capital and operating costs for these institutions. This is because the provinces have insisted on a 100 per cent federal cost support for Indian post-secondary students who live on federal Crown lands (reserves), and who attend provincial post-

secondary institutions. Since the provinces have declined to provide Indian post-secondary students who reside off reserves with the same benefits as other provincial residents, the federal government has had to absorb these costs as well.⁴⁹ The substantial overpayments made by the federal government in support of post-secondary education for Indians could quite easily have covered all these costs, but the provincial governments insisted that only the federal government is held to be responsible for the education of Indians and thus for all associated costs.

To 1984, there were three Indian post-secondary institutions. Blue Quills and Old Sun Colleges are located in Alberta, where its students go to provincial universities for their third and fourth years of degree study. The Indian Federated College, sharing the campus of the University of Regina and offering a four-year degree program, reported 220 graduates to June, 1984. These institutions are involved in considerable research on native histories, cultures and languages to meet the requirements of their native studies curricula. They are also involved in the preparation of related learning materials for college and school use.⁵⁰

When the Assistant Deputy Minister at IAND was asked what expenditure would be required to bring native post-secondary education statistics on enrolment and outcomes into line with national standards, he cited a 1984 consulting report. To achieve such parity, it estimated, federal education expenditures would have to be tripled over a ten-year period (1984-94).

Education Facilities. Capital facilities expenditure accounts for a large share of federal costs for Indian and Inuit education. One reason for this is the practice, continued into the 1960's, of placing Indian and Inuit children in various missionary residential schools, built and operated by the churches concerned. The growing dissatisfaction of native peoples with this arrangement, and the increasing fee-for-service costs involved, precipitated a change to the policy of integration with provincial schools and education. Of course this led to the huge capital and operating cost arrangements

mentioned. Meanwhile, the few reserve day schools became safety and health hazards. This local situation, and the demands of native peoples for educational control, produced a need for major school construction on reserves, as well as the continued, but more limited, practice of buying services in provincial schools by means of joint construction expenditures and operating grants. To 1984, approximately 51 per cent of Indian students were still being educated in provincial schools with their striking lack of provisions for native languages, cultures and poverty problems.⁵¹ The same applied to a lack of program participation with the remaining Indian population through education policy, program development, instructional supervision and evaluation.

In 1983/84, expenditures for school construction were reported at \$59.3 million and related operation and maintenance costs for repairs, maintenance and maintenance staff salaries were \$30.6 million, for a total of \$89.9 million. If, however, five- or ten-year projections are made, the picture becomes more costly. For example, a proposed 10-year building plan for 1982-92 was estimated to cost as follows:

45 new schools	
10 additions	
2 renovations	\$389,600,000
Off-reserve construction	28,290,000
	<hr/>
	\$417,890,000

52

The result is a mix of major construction costs and minor curriculum development costs to accommodate the varied cultural and linguistic groups.

Other education-related federal programs and support for native peoples are described in Chapter IX. These relate to cultures, languages and communications.

5) Correctional Services of Canada

The Correctional Services of Canada,(CSC), formerly the Canadian Penitentiary Service of Canada, is responsible for administering both the sentences of the courts and the decisions of the National Parole Board for offenders sentenced to two years or more. In both cases, it is a primary objective of CSC "to prepare offenders for their return as useful citizens to the community".⁵³

Education and training are provided through 23 schools which were operated at medium and maximum security federal prisons. Each school has an academic department which provides or facilitates education - ranging from basic literacy, through the elementary and secondary curricula to non-degree and degree post-secondary education. (Inmates were expected to pay their own tuitions for college humanities courses and for academic university courses.) Each school also has a vocational department for training in the generic skills of various trades. Each school is managed by a principal who is usually an Assistant Director (Assistant Warden). Teaching services are provided by qualified CSC staff, and by teachers hired on a contractual basis. Actual operating expenditure for this education and training for a 1983/84 inmate population of about 11,000 was reported by the Neilsen Task Force as \$12.6 million - considerably less than budgeted.⁵⁴

Recidivism was estimated at about 80 per cent. Coincidentally, an equivalent percentage of inmates were classified as having education attainment levels of five years or less. Not surprisingly, elimination of basic and functional illiteracy in the public education system was cited as one obvious means of crime prevention.

6) Adult Training

The federal government has assumed and maintained a major responsibility for direct involvement in training nationally, in order to both upgrade and develop the Canadian workforce. Its overall national training program is directed at adults of both

post-school (i.e. incomplete schooling) and post-secondary status. It is a culmination of extensive antecedent federal involvement in technical and vocational education and in educational upgrading. The composite program's overall concern is to meet the demands of Canada's changing economy, and the economic and social goals created, by means of occupational training.

Provincial acceptance of federal adult training was manifest in the bilateral Federal-Provincial/Territorial Training Agreements for 1982-85. All of these agreements are based on the federal National Training Program, which is defined in the preamble of these agreements as

...the full range of training activities conducted by or on behalf of the Canada Employment and Immigration Commission (CEIC) under authority of the National Training Act and the National Training Regulations, and without restricting the generality of the foregoing, includes both institutional and industrial training activities, the provision of training allowances, and financial assistance towards increasing the capacity of facilities needed for training in occupations of national importance, or for groups of adults with special training needs.⁵⁵

It is important to note, for eligibility and program purposes, that in Section 2(1) of the National Training Act, "adult" means

...a person who is no longer required by law in the province in which he resides to attend school.

Considering the general school leaving ages in Canada, these persons include youth of 16 or 17 years of age and older. It is also important to note in the same Section that "occupational training" means

any instruction, other than university instruction, that provides a person with skills for, or improves a person's skills in, an occupation.⁵⁶

This definition has potential for the full range and levels of instruction - academic, technical or vocational - so long as it isn't provided at, or by, a university. Non-

degree college curricula aren't ruled out. Nor is basic literacy education. Meanwhile, the client, the federal government, specifies the objectives, standards and learning content involved. A province could not exercise much greater curriculum control.

The National Training Act (1982) is the Government of Canada's legislative umbrella for direct facilitation of "adult" training nationally. This legislation replaced and updates the Adult Occupational Training Act (1967). It introduced the idea of national occupations in training. It provided a new Skills Growth Fund and it revised the capacities of the Institutional and Industrial Training Programs, to make them more adaptable to Canada's changing work skill needs. The Act assumes and, in effect declares, shared responsibility with the provinces.

The National Training Program is administered by Employment and Immigration Canada (EIC) through the Canada Employment Centres. It provides two immediate training options: one institutional and school-centered; the other industrial, or employer-centered. The Act's third option is its Skills Growth Fund, which provides both for accelerating skill development and for anticipating skill needs in the longer term. In the latter case, federal capital expenditures are made to build new training facilities and to modernize older ones. Operating costs are also subsidized. In 1983/84, actual expenditures reported for the three program options and EIC approved A-base expenditures were as follows:

Institutional:	\$million
Purchases	505.8
Provincial Administration	10.3
Income Support:	
Allowances	115.8
U.I. (Section 39) exclusive of fee payers	221.4
Industrial:	
General Industrial Training	77.5
Provincial Administration (GIT)	3.2
Critical Trade Skills Training	47.9
Provincial Administration (CTST)	2.6
Skills Growth Fund	36.8
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Total	1021.3 ⁵⁷

Unemployment Insurance. Unemployment creates the acid test for training utility. It also creates a need for unemployment insurance - a matter which was placed under federal jurisdiction by constitutional amendment in 1940. As of 1984, an unemployment insurance claim produced immediate, automatic registration for employment. Yet, such status has never triggered an automatic training response. A regular linkage between unemployment and training or retraining, if required, was considered by the federal government in the 1960's. This was not pursued then, because of a perceived lack of provincial training capacity sufficient to demand. Nonetheless, by 1983/84, pursuant to the federal Unemployment Insurance Act, Section 39, a UI claimant could enrol for training and continue to receive insurance benefits in lieu of a training allowance.

Another UI subsidy of regular federal training support involved a \$122.7 million contribution in 1983/84 to the EIC job placement services conducted through 450 or more Canada Employment Centres, where counselling help is available for job placement and for selective appropriate training. In the same fiscal year, \$2.4 million was charged against the UI Insurance account for labour market information, which can be

used in making choices on jobs or training. To assist groups with severe employment difficulties the Outreach Program was established. In 1983/84 this program and its community projects, contracted with the federal government, assisted over 68,000 persons to find jobs. Counselling and training referrals were part of the services provided. Target groups included disabled persons, disadvantaged youth, women and natives, refugees, ex-offenders, and drug and alcohol dependants. In 1983/84 the UI account supplied \$19.7 million to this program (administered by EIC). Like other UI funds for training, this expenditure was integrated with UI's National Training Program activities.⁵⁸

National Institutional Training. Courses related to occupational skill development are almost entirely purchased from provincial vocational schools and community colleges. Full-time courses of up to 80 weeks (as of 1983/84) are available, as well as part-time courses. Courses may be categorized six ways:

- Language training for natives (under full DIAND funding), new immigrants, and interprovincial migrants who lack necessary fluency in English or French
- Basic Training for Skill Development - includes life skills, academic upgrading, etc., to help chronically unemployed persons and others who have been out of the employment market for an extended time
- Skill Training courses to give trainees entry-level skills, or update skills, for entry and re-entry to particular occupations
- Occupational Orientation courses for trade selection choice
- Work Adjustment Training courses to help persons whose behavioural problems hinder their work and employment chances
- Apprenticeship Training in the classroom as part of the programs for the various occupations concerned.⁵⁹

Full- and part-time attendance for all courses by province for 1983/84 was reported as follows:

	Course (Full)	Attendance (Part-time)	(Total)
Newfoundland	6,861	308	7,169
Nova Scotia	7,832	542	8,374
New Brunswick	6,335	502	6,837
P.E.I.	1,432	397	1,829
Quebec	29,042	56,873	85,915
Ontario	46,182	7,556	53,738
Manitoba	6,401	138	6,539
Saskatchewan	6,207	89	6,296
Alberta	26,516	1,574	28,090
British Columbia	24,580	213	24,793
Yukon	353	-	353
N.W.T.	1,289	-	1,289
Totals	163,030	68,192	231,222 ⁶⁰

Of the total participants, 10,049 were native persons (in addition to those enrolled in DIAND courses). Youth under 25 represented 45 per cent of full-time trainees. Women represented 30 per cent of all skill training.⁶¹

The Neilsen Task Force identified 16 programs aimed at training and job creation for native persons. Sixteen EIC programs are included in these statistics. Two are administered by the Public Service Commission. Three Native Employability Development Programs are administered and funded by the DIAND. Of these, the most significant is the Department's delivery of its own academic upgrading and basic literacy training of up to 52 weeks. In 1983/84, over 4000 native persons were assisted by the three programs, at a cost of about \$8 million.⁶²

In 1984, entry to BTSD was not permitted until two years after leaving school, yet at 1975, this program was open for those who ranged from grades 0 to 12 - from illiteracy to secondary school graduation.⁶³ The minimum grade level for entry to BTSD was raised to Grade VIII standing without exception. In 1984, about 20 per cent of institutional costs were for BTSD. This prompted the Neilsen Task Force to observe that

...the BTSD component appears to be directed at meeting worker needs which have resulted from deficiencies in provincial educational systems.⁶⁴

Meanwhile, the federal government was trying to correct its own deficiencies in native education. To 1984, the mature student status of Indian students who had not completed secondary education was estimated at about 25 per cent of all Indians entering community college, and 40 per cent of all those entering universities. To alleviate this, the DIAND designed and delivered its own 52-week version of the BDST program to retain secondary students and to salvage drop outs. It also helped to establish and fund what are called "post schools" for Indian adults who did not attend or complete secondary school. These institutions, which are directed by native peoples, serve as sources of adaptation to formal studies and to occupations. They are also a bridge to higher education opportunities. In Saskatchewan in 1984, for example, there were ten such native community colleges, including the Saskatchewan Indian College with its courses in vocational skills, business and upgrading - including literacy training - and its linkage to post-secondary education.⁶⁵

This linkage to higher learning is an exception to the rule in federal adult training legislation, programs, agreements and practice, where the connections are primarily to job creation, employment and re-employment. The priority in the National Training Program is economic, not social or academic.

National Industrial Training. The National Industrial Training Program has two dimensions. One, General Industrial Training (GIT), is aimed at assisting employers to establish or expand their own training capability, while providing persons who are unemployed or who have special needs with on-the-job training. The other, Critical Trade Skills Training (CTST), seeks to establish a continuing mechanism for responding to critical shortages in the higher skill occupations. During 1983/84, GIT was provided for 33,600 trainees and CTST was provided for 12,519. Total GIT expenditure was \$80.7 million.⁶⁶

The GIT program emphasized training and retraining workers for different occupations. It provides federal funding to employers for up to one year. As in the case of CTST, the federal government reimburses wages paid to trainees on a range of 50 per cent and up to 85 per cent for persons with special needs. In 1984, the federal government decided to offer future GIT to disadvantaged persons only. CTST continues to assist employees and trainees up to 102 weeks in higher skill occupations where there are shortages, as in the case of tool and die makers.⁶⁷

Skills Growth Fund. The federal Skills Growth Fund, introduced in 1982, pays for the capital costs of buildings, equipment and facilities, to a maximum of \$40,000 per training place created. It pays for 75 per cent of net operating expenditures for the initial operating costs of new courses. In 1983/84, its expenditures by province were as follows:

Newfoundland	\$ 660,002.
Nova Scotia	1,050,002.
New Brunswick	4,269,905.
P.E.I.	1,033,245.
Quebec	532,095.
Ontario	12,276,056.
Manitoba	2,105,628.
Saskatchewan	917,109.
Alberta	1,221,879.
British Columbia	12,383,372.
Yukon	-
N.W.T.	399,000.
<hr/>	
Total	\$ 36,848,293.

This total expenditure fell well short of the \$93.4 million budgeted for the Skills Growth Fund for that fiscal year. Nevertheless, to the end of March, 1984, the total approved projects from its inception stood at 247 with federal expenditure of \$165.3 million.⁶⁸

Some 1983/84 examples reported were:

\$974,000 to the Atlantic Region Petroleum Training Centre, Halifax, for derrickman, tool pusher and driller training facilities;

\$685,936 to Cégep de l'Amiante, Thetford Mines, Quebec, for facilities to train mechanical engineers and draftspersons;

\$2,604,000 to a consortium of seven Ontario Community Colleges for computer assisted instruction and courseware for 10 designated occupations;

\$1,999,920 to Kelsey Institute, Saskatoon, for high-technology training centre facilities;

\$2,834,000 to Westerra Institute of Technology, Edmonton, for facilities to train electronic engineering technicians;

\$1,704,000 to Thebacha College, Fort Smith, N.W.T., for facilities to train pipefitters, millwrights and welders.⁶⁹

While the fund prepared workers for employment, it also subsidized business and industry directly and substantially by providing training that they would otherwise have had to provide.

7) Public Service Training

There is no one system of Public Service training and development, in either policy, budgeting or programming. What is provided appears to be the result of a mixture of: colleges and/or courses which serve the particular occupational requirements of one or more departments; training and development units in each of the various federal departments and agencies; and a wide range of occupational and managerial courses purchased by these organizations from the Public Service Commission's partial cost-recovery training service, and from various private sector personnel companies and consultants. In addition to all this, there is training in the official languages (which is planned and budgeted separately) and some internship and exchange programs.⁷⁰

Course syllabi reflected a bias for a generic treatment of management. Management which serves private government is not distinguished from that which serves public government. Moreover, public administration which serves the separation-of-powers form of government, as in the United States, is not distinguished from that which must serve Canada's system of cabinet, or responsible, government with its emphasis on particular constitutional non-legal rules of political and administrative behaviour. Related to this was the absence of managerial and executive training to compensate for the lack of a code of conduct, or ethics, required for ensuring that public servants know the non-legal rules of the Constitution they are morally bound to serve, as in the United Kingdom. This observed bias was interpreted as a reflection of an established trend to harmonization with private sector management aims, content and methods.

As of 1984, virtually none of the managerial courses offered was required for promotion, or for confirmation of appointment, and none involved examinations. Both on and off the record, doubts were expressed by some senior managers about the usefulness of degree training in public administration. This included such opinion at the Public Service's senior level training council.

The Neilsen Task Force reported on ten human resourcing programs. In so doing, it quoted a 1984 study by the Conference Board of Canada whose research showed a wide gap in the ratio of personnel officers to employees. Thus, as the Task Force observed, if the Public Service was staffed on a 1:100 basis, as is done in municipal government and private firms with over 200 employees, the number of personnel officers could be reduced from about 11,000 to 2,250.⁷¹ It was also estimated that about one-quarter to one-third of the federal personnel officers were involved in "training". This indicates staffing from the Personnel (PE) group, although its classification standards omit provision for public administration requirements.

Colleges. Of the federal colleges established, none is more national in constitutional terms, purpose, and program than the National Police College, Ottawa. It is the result of a consensus reached at a federal-provincial conference on organized crime in 1966, which led to the federal government's approval for its establishment and funding in 1976. Since then, training costs, including travel and accommodation, have been paid by the federal government for all participants from local, provincial and RCMP forces. This is in keeping with exclusive federal jurisdiction in Section 91 of the Constitution Act, 1867 over the criminal law of Canada.⁷² This particular college is complementary to the RCMP's own staff college facilities and training programs, and its system of career development which the federal government funds and directs exclusively.

The Ministry of Transport operates the Canadian Coast Guard College, founded at Sydney, Nova Scotia, in 1965, and modelled after military colleges. It began with a degree-oriented, comprehensive, four-year academic and technical program. The purpose of the program was, and remains, the preparation of a highly trained cadre of technical, professional and managerial officers for Coast Guard Service. A plan to obtain a charter from the Province of Nova Scotia, so that the College could grant its own degree, was withdrawn in 1973. Instead, some academic training was cut in order to add more sea training, and the program was reduced to three years.⁷³

Some college-level training is obtained by purchase from provincial institutions which the federal government has funded in part. For 1983/84, this included an experimental Pilot Air Traffic Controller Training Co-operative Education Program at the Georgian College of Applied Arts and Technology, and another such program at the CEGEP Saint-Jean-sur-Richelieu.⁷⁴

In 1984 Health and Welfare Canada had a contract with Dalhousie University to deliver a 15-month program in outpost nursing for registered nurses. The program is composed of eight months of study and seven months of supervised field work. It had

been initiated by the university and was funded by it from the 1960's to 1978, at which time the federal government became involved. As of 1983/84 the cost per student was over \$20,000 per annum. The budget for the fiscal year was \$561,900 and included the Dalhousie contract, student salaries, and their travel costs.⁷⁵

In 1984, DIAND provided various management advisory services, conferences and short courses. It could, but had not to 1984, sponsored a staff college for public administration education in support of native self-government staff requirements.

The Government of Canada might have established its own public management training college, possibly for all ranks. Given direct training costs of well over \$200 million per annum, to 1984, such an institutional investment might have been preferable to a piecemeal approach to Public Service training without institutional standards and exams. These criteria and measures were not required before or after appointment or promotion, as actual conditions of appointment, or of prequalification for promotion. The basics of Constitutional law in public administration received minimal notice, if any.

8) Regulation

There are a number of ways in which Canadian education can be regulated, or subjected to regulatory effect, by federal activity.⁷⁶ The most direct cases are via federal statutes which are presumed to be *intra vires* (until shown otherwise in judicial review). This is the case in respect of the National Training Act and the Official Languages Act, where federal jurisdiction could be contested were it not for the voluntary nature of the benefits offered. Another way to exercise federal control is through regulations based on federal statutes which deal with education directly, as above; or through regulations which treat education as an aspect of other federal jurisdiction. This subordinate legislation applies under postal, customs, copyright, and incorporation laws. All forms of federal taxation have regulatory effects.

Federal authority to regulate in any form must be derived from constitutional power to do so. This can apply directly, without federal legislation. This was observed by the Glassco Commission in the case of education for Canadian Forces dependants, in Canada and overseas, where the authorities cited for action are mainly federal orders-in-council, all based on Section 91(7). The same thing happens directly and indirectly when the exclusive federal criminal law power is applied in matters related to education. The terms of the Criminal Code of Canada on libel, slander, and hate literature, have clear regulatory effect on school publications and teaching. Criminalizing of copyright matters will have the same effect. Limitations on teachers acting in loco parentis under the Code and its relevant case law are in effect regulatory too - regardless of provincial or local policies on corporal punishment.

Section 91 anomalies which give the federal government power for education (as identified in Chapter IV), also give it direct authority to regulate education for inmates of federal penitentiaries, military education, and education obligations included under the Indian Act. Such regulation is as comprehensive as any provincial counterpart. All territorial education continues to be subject to federal regulation but under federal exercise of Section 93 power, because the federal order of government must act both as a province and as the federal government until the territories become provinces. Despite their dormancy, federal regulatory powers still apply to the provinces constitutionally under subsections 3 and 4 of Section 93. In addition, all external education regulations *per se* are subject to federal jurisdiction, since none of the provinces are sovereign states. The provinces however, are not required to implement any international agreements in education made by the Government of Canada which fall within separate provincial jurisdiction.

Federal power to regulate is derived from concurrent powers, as in the case of agriculture and immigration. Labour jurisdiction was made concurrent by judicial

review. Such powers are being assumed in post-secondary education, in spite of *pro forma* statements to the contrary.

When judicial review gave Parliament exclusive jurisdiction first over broadcasting and then, over telecommunications, this led to the regulation of licences, performance standards and content in these fields on a national basis. This jurisdiction facilitated closer links between culture and education, as shown by CRTC regulations on Canadian content in broadcasting. None of CRTC's numerous regulatory amendments, as reported for 1983/84, applied directly to educational broadcasting, but Canadian content was a major concern.

Constitutional amendment may also facilitate regulation in relation to education. The 1940 amendment to make unemployment insurance a federal responsibility opened the way to ancillary law and expenditure related to training and retraining of the unemployed described in this Chapter.⁷⁷

In uses of the federal spending (and lending) power, federal regulation in education can be explicit or implicit. This applies in EPF legislation and related regulations and agreements. By 1984, the ten federal objectives for national participation in education had been provided for in EPF legislation. Federal regulation is implicit in its adult training requirements, mission research contracts to post-secondary researchers and institutions, and provisions for grants in the arts.

If the proposed Meech Lake Accord amendment 106A had become constitutional law, a regulation of national "objectives" in education might have been possible. This would have occurred to some extent via federal expenditures for new national cost-shared programs, and related compensation for opting out, provided provincial programs were comparable in goals and content. To former Premier Blakeney, the expectation of such opting out compliance seemed politically naive.⁷⁸

It should be noted that the predominant approach to federal regulation in relation to education, is to incorporate it into related federal operations and federal-provincial

transactions. There is no particular regulatory administrative body or tribunal for such matters. Disputes, when they arise, seem to be settled in extra-constitutional ways via political and executive compromise. The costs of such federal regulation in relation to education are minimal unless monitoring and remedial action are involved. The potential impacts of federal regulation in relation to education could be considerable.

9) Incorporation

Legally, the federal power of incorporation can be applied to education and related matters where the objects of function are federal or intergovernmental. To 1984 (and to date), such use of federal incorporation has been made by some non-profit organizations and by too many commercial enterprises to list.⁷⁹

The federal government itself has not used its incorporation power in the field of education. It could do so if, for example, it needed to create a national system of military colleges with degree-granting authority. The native people of Canada, who are subject in education to the federal Section 91(24) power, could themselves seek federal incorporation of organizations with national or regional objects in native languages, cultures and/or education. This hasn't been done yet, but it has been considered. A national staff college for administrative training could be created in the British or French models - including degree granting authority.

10) External Relations

The federal order of government has full and final responsibility and authority to act externally in all matters of legislative and executive power under the Canadian Constitution. During 1983/84, federal external relations in education included a wide variety of established activities.⁸⁰ As usual, External Affairs administered Canada's representations and final approvals of nominees for educational, cultural, scientific and other kinds of international meetings and transactions. Quebec continued to seek

sovereign representation in such matters related to education, and all related cultural and scientific matters. The claim was described as both geographic and tribal, because it applies to Quebec's boundaries and to Québécois francophones in particular. Non-francophones within the province, and francophones outside it, feel excluded.

Research, an important field for international relations, escaped arguments until Quebec took exception on the issue of international jurisdiction in research in post-secondary education. Prime Minister Trudeau set a record for international science and technology agreements made under federal authority. To 1976, for example, 48 of the 80 such bilateral agreements concluded since World War II had been signed.⁸¹ Canada's universities have access to the results of these arrangements.

There was no argument about federal jurisdiction for the overseas school system for DND dependants. Concerns were expressed at External Affairs and other departments who have dependants overseas, but do not have a federal system to serve them. Paradoxically, External Affairs personnel whose children had been enrolled in the Government of France's educational system did not want their children to have to attend Canadian French-language schools. In Ottawa, the preference in these cases was for enrollment at France's private school, l'École Claudel, where some course content was said to have been adapted to such Canadian matters as history. Those seeking continuity of this French education via this school wanted the Government of Canada to pay the fee costs.⁸²

It was expected that CIDA's international services, which include education both directly and indirectly in some of its external programs, would have been accepted by the provinces without argument. This was not the case. The Council of Ministers of Education attempted an intervention on the issue of jurisdiction during the period 1982/83 in regard to a particular development program for China. Because education programs and services were to be involved, the Council, via its Chairman and Secretariat Director General at the time, sent a letter to CIDA to insist on the Council's prior

clearance or approval in the matter. A CIDA Vice President who was interviewed said that the Agency's officials were surprised since what was involved was an established practice, whose objects and operation were external to Canada. The matter was referred to then Secretary of State MacEachen for reply, whereupon, it was said, the "power play" and attempt to establish a precedent contrary to international law was ended.⁸³

CIDA reports showed that, during 1983/84, international assistance was required in over 60 disasters in the developing world. An estimated 750 million people were living below the absolute poverty line, unable to provide even the basic necessities of survival. Even in the face of such conditions, a point had been reached where there were more literate than illiterate people in the world. CIDA officials were asked if Canada made literacy programs a condition of its aid. The answer was no, even though, according to a senior CIDA consultant on education, perhaps a quarter of its programs and expenditures deal with some aspect of education. CIDA's budget for 1983/84 was \$1.8 billion. Of this amount, the Internal Research and Development Centre (IRDC), a federal Crown corporation established in 1970, had a budget of \$63.7 million.⁸⁴ In 1983/84, IRDC expended \$1.4 million on its library program - the basis of its research and advisory work and a resource for use through exchange agreements with about 700 organizations involved in international development of various kinds. During the fiscal year it had over 6000 requests for information. The IRDC was referred to as a model for delivery and co-ordination of international research and development work.⁸⁵

Another aspect of CIDA's support for educational activities is the Commonwealth Scholarship Program - a reciprocal program to enable Commonwealth students at Ph.D. level to receive aid for study for up to two years. It was founded in 1959 and was administered by External Affairs until, operationally, it was assigned to CIDA. External Affairs is still responsible for program policy. An average of 800 students benefit per year. In 1984, Canada increased its awards from 300 to 500. Contributions in 1983/84 were \$3.7 million. CIDA also manages the federal government's Edu-

cational Institutions Program which had a budget of \$20.4 million in 1983/84. Financial aid is made on recommendations from Canadian post-secondary educational institutions - an action which bypasses any thought of exclusive provincial jurisdiction. The goal is to upgrade post-secondary institutions in the third world.⁸⁶

CIDA also administers a scholarship program for Canadians to do post-secondary study in three particular areas. These are: food production and distribution; energy production; and human resource development. Eighteen grants per year are made at \$1500 maximum per year, renewable for two years. From the program's inception in 1971 to 1984, 184 Canadian students participated in this program.⁸⁷

External Affairs promotes academic knowledge and understanding of Canada abroad through financial support of Canadian Studies. It manages the necessary agreements with foreign governments and educational institutions. It also provides financial support for Canadian delegates to official meetings and conferences in international education. For relations outside sovereign intergovernmental transactions, the federal government contracts the services involved to AUCC and WUSC. Universities are involved via their representatives and organizations in international matters without provincial control and direction. In 1983/84, the budget for this program was \$4.2 million. External Affairs also supports Canadian university faculties of business studies which undertake, or are undertaking, study of international trade. Aid to the centres concerned and to student fellowships amounted to \$264,000 in 1983/84. For that fiscal year five schools of business administration were involved, with 167 fellowship students. By 1984 these centres were graduating about 500 students with a specialization in the area of international business.⁸⁸

IRDC is responsible for co-operative programs involving applied research, or technology transfer which involve joint ventures between Canadian and developing nations' research institutions. The program is a result of the 1979 U.N. Conference on Science and Technology. To 1984, over 80 projects had been funded, to a total of just

over \$19 million. Researchers in thirty-three countries participated with Canadian researchers. The budget for 1983/84 was \$4.3 million. A related program, also administered by IRDC, is the Young Canadian Researchers Program. It offered 12 post-graduate research fellowships in 1984, with tenure, at a developing nation research institution. In 1983/84 the budget was \$165,000.⁸⁹

No evidence of cost benefit studies was noted. Nevertheless, it was evident in CIDA and IRDC interviews, and in the documents, that those involved were sensitive to improvements in the lives and institutions of client populations. The focus in such matters was international. No notice was taken of Canada's own "developing nation" problems, in the North and among some of its native peoples, and as a result, there was no transfer of the strategies and techniques which had proven successful in Canada's own parallel circumstances.⁹⁰ No known use was made of the native Canadian peoples in Canada's aid work for native peoples in Latin America.

Conclusions Re: Hypothesis No. 3

Despite the province's Section 93 jurisdictions, each of the ten categories of federal participation in education has constitutional foundation. This includes federal participation in adult training. Federal activities in these diverse categories have all been of an institutionalized nature - a reflection of constitutional assumption and/or acceptance. They are all open-ended, and can thus be altered or expanded. The federal government, whether through direct or delegated authority, is responsible for both action and expenditures in the ten categories mentioned.

Territorial governance involves federal Section 93 responsibility for territorial education until provinces are created. Section 91(7) defence responsibility embraces comprehensive education and training provisions for CF members and education of dependants overseas, and is assumed to include jurisdiction for education of dependants in Canada. Research to meet federal and national needs covers all aspects of science

and technology policy, programs, and related human resource development. Section 91(24) responsibility for education of Indian (and Inuit) peoples on Indian lands is held to be exclusively federal. Education for inmates of federal penitentiaries compensates for significant deficiencies in attained level of education and in susceptibility to recidivism. Federal adult training, which is compensatory and developmental, aims at preparation for employment and re-employment on a national basis.

Public Service training, which applies to all occupations and to all levels of management, makes minimal provision for constitutional awareness in its studies. Although federal regulation *per se*, or in effect, is integrated into most federal programs, there is no special regulatory body or tribunal to help cope with the complexities involved. Federal incorporation is another program of minimal federal cost but of considerable operational impact, but it does not have particular policy direction or control. Although external affairs in education and related matters are all subject to the sovereign power of the federal government, implementation of parts of international education agreements, or protocols, which fall under the jurisdiction of a province, is dependent on provincial action.

Direct federal participation in education based on constitutional jurisdiction constitutes grounds for Ministerial direction with legislation, budget, and administration to match.

END NOTES

1. EIC Department legal opinion was that constitutional authority for federal activity in adult training is ample, starting with the Section 91(2) trade and commerce power, including federal constitutional responsibility for matters related to unemployment insurance.
2. National offices of the N.W.T. and Yukon, respectively: Annual and financial reports; interviews with senior representatives in Ottawa.
3. N.W.T. audited financial statement. Interview, NWT Office, Ottawa.
4. Yukon audited financial statement. Interview, Yukon Office, Ottawa.
5. D.N.D. Annual reports, 1983 and 1984, and supplementary accounting information.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. D.N.D. and P.S.C. reports.
12. D.N.D. reports and interviews.
13. D.N.D. Annual report, 1984.
14. Ibid.
15. D.N.D. Annual reports and archival data. Interview, Judge Advocate General's Office.
16. Legal opinion, J.A.G. Office.
17. J.A.G. Office information.
18. Naval Service Act, 1910, Section 32.
19. Interview Dr. Roger Sarty, Chief, Naval History Research, Directorate of History Canadian Forces Headquarters, Ottawa. The Armed Forces of Canada, 1867-1967..A Century of Achievement, D.J. Goodspeed, Editor, Directorate of History, CF HQ, Ottawa. Queen's Printer, Ottawa, 1967. See also G. Wm. Hines, "The Royal Naval College of Canada, 1911-22" in Swords and Covenants. Essays in Honour of the Centennial of the Royal Military College of Canada, 1876-1976. Edited by Adrian Preston and Peter Dennis. London: Croom Helm, Rowman, and Littlefield, 1976, p.186.
20. D.N.D. Annual reports and course syllabi.
21. Ibid.
22. Ibid.
23. Interview, D.N.D., Director General Education Program. Reports.

24. Ibid.
25. D.G.E.P. statistics.
26. Ibid.
27. Canada Pensions Commission information.
28. Veteran's Affairs Department Annual reports and interview, Executive Secretary.
29. Army Benevolent Fund information and interview.
30. "Program bending" involves adaptations to program planning, say in timing, to make multiple use of resources, at little or no extra cost.
31. MOSST reports and statistics, interviews.
32. Ibid.
33. Interview, Dr. L. Kerwin, President, NRC, et al. Research Project statistics. CISTI data.
34. Department of Indian and Northern Affairs (DIAND); Education Directorate Officers; ADM.
35. Interviews, Louis Bruyere, President, Native Council of Canada.
36. Ibid.
37. Improved Program Delivery: Indians and Natives, A Study team Report to the Task Force on Program Review (Nielsen Report), Ottawa, 1985, p.1.
38. Department of Indian Affairs and Northern Development statistics. Interviews.
39. N.C.C. interviews and reports.
40. DIAND statistics, 1984.
41. Ibid.
42. Neilsen Task Force, op.cit. p.395.
43. Ibid.
44. Canada Year Book, 1921.
45. Ibid.
46. Ibid.
47. DIAND reports and statistics.
48. Ibid.
49. DIAND interviews, Provincial Department of Education interviews.
50. DIAND reports and statistics.
51. Ibid.

52. Ibid.
53. Canadian Penitentiaries System operational goals. See also Report to Parliament, by The Subcommittee on the Penitentiary System in Canada, Standing Committee on Justice and Legal Affairs, Second Session of the Thirtieth Parliament, 1977, pp.492-547. Interviews, C.P.S.
54. Improved Program Delivery: Education and Research, A Study team Report to the Task Force on Program Review (Nielsen Report), Ottawa, 1985, p.184.
55. Preamble, National Training Program.
56. Ibid.
57. Department of Employment and Immigration reports and statistics, 1983/84.
58. Ibid.
59. EIC Department National Institutional Training statistics and training reports for 1983/84.
60. Ibid.
61. Ibid.
62. Ibid.
63. Ibid.
64. Service to the Public: Job Creation, training and Employment Services, (Nielsen Task Force), Ottawa, 1985, p.17.
65. IAND reports and interviews.
66. National Industrial Training Program, EIC Department, 1983/84. See also Inventory of Federal Employment and Manpower Measures in Canada, Ottawa, EIC, 1983.
67. Ibid.
68. Skills Growth Fund Program, EIC Department, 1983/84.
69. Ibid.
70. Treasury Board and PSC training reports.
71. Nielsen Task Force, op.cit.
72. National Police College of Canada: Annual reports. Interviews.
73. Ministry of Transport (MOT), Training reports and statistics. Interviews.
74. Ibid.
75. Department of National Health and Welfare annual reports, 1983/84. Interviews.
76. Interview, Law Reform Commission. Reports.
77. Interview, Department of Labour. Reports.
78. Interview, Hon. Allan Blakeney, 1988.

79. Interview and incorporation regulations, Department of Consumers and Corporate Affairs.
80. External Affairs Department reports and interviews.
81. Ibid.
82. Department of External Affairs, memo from the Under-Secretary to the President of the Treasury Board re: Foreign Service Directives No.34 (Education) of July 3, 1979.
83. CIDA Interview, Associate President.
84. CIDA Annual report and statistics, 1983/84. ORDC reports and interviews.
85. Ibid.
86. CIDA reports and statistics.
87. Ibid.
88. External Affairs Department reports and interview.
89. ORDC reports and interview.
90. CIDA and IRDC reports. Interview, Vice-President CIDA, et al.

CHAPTER VIII

FEDERAL SUPPORT TO EDUCATION

For some years, mainly in its statements and reports, the federal government has described the programs identified in this chapter as support to education. This categorization has permitted federal participation in education on a flexible policy basis with cost controls instead of on a constitutional basis with cost obligations. It has also averted politically-inspired allegations of intervening in provincial jurisdiction.

These support measures have included some spillovers from the direct federal responsibilities for education in Sections 91 and 93, and from education aspects in the exercise of Section 91 and other federal powers. The term "support" has been used in these circumstances to distinguish between an emphasis on expenditure with direct administration and control, as described in Chapter VII, and expenditure with indirect control; and between the degrees of federal administrative activity required. Federal support to education could involve a federal-provincial sharing of responsibility through concurrence: in research, as described in this chapter; or in culture, as described in Chapter IX. The use of federal power derived from judicial review over communications and telecommunications may be involved, as also described in Chapter IX. Program benefits described in this Chapter apply to individuals, groups and governments.

The support measures involved are categorized ten ways, in relation to: (1) research; (2) official languages in education and the related court challenges program; (3) post-secondary funding; (4) centres of specialization; (5) Canada student loans; (6) tax expenditures; (7) postal subsidies; (8) the Canada Assistance Plan and related programs; (9) regional development; (10) curriculum. Significant miscellaneous support

measures are also identified. Hypothesis No. 3 was used to gather and clarify this information, and for drawing conclusions on it.

Governments of Canada seem to have anticipated issues in constitutional law when initiating these programs, since reliance was not placed solely on the use of the federal spending (and lending) power. To supplement federal constitutional claims, *de facto* practice was sometimes cited as justification for federal activity and its continuity. In 1981, for example, the Hon. Gerald Regan, then Secretary of State, reminded the House of Commons of the federal government's long history of support nationally for research, the official languages, and occupational training (broadly defined). He also stated that Canada's colleges and universities are national as well as provincial.¹ (In an interview for this study later, he emphasized a conviction that nothing less than this could have been intended at Confederation.²) Human resource development, which is an economic and national concern as well as a local one, was used then as the overriding integrator of the three federal support programs cited above.³ By 1983/84, "access" of Canadians to human resource development was a criterion for federal support to education, which was to apply regardless of the individual Canadian's economic disadvantage, residence or mobility.⁴

Some federal Ministers and senior officials who were interviewed for this study expressed a conviction that, in principle and practice, a democratic form of federalism should assure all its citizens a reasonable opportunity to develop their potential for work, culture and citizenship. They felt this would not happen unless there were national education standards, including access to education. They interpreted this as a national equalization problem which, constitutionally, only the federal government has the means and resources to guarantee. Thus, giving away more federal tax points, to enable provinces to support their Section 93 responsibility to the full, was criticized on two main grounds: the first was a doubt, based on previous experience, that the revenue raised would be used for education support; the second was a need for the national

government to retain sufficient taxing capacity to support Canada's various national program requirements, including education.⁵ Some fears were expressed that, without reasonable equalization measures, socio-economic differences among the provinces and their populations would arise and become class differences unbefitting a democratic, federal nation.

Research Support

As described in Chapter VII, federal support for research spills over to both post-secondary education and the private sector from the research activities which the federal government conducts itself or contracts out. Indirect federal support occurs in cash and tax payments for post-secondary core costs, which, although mainly for instruction, also include research costs. Federal support for university research *per se*, if related to national objectives, can apply on a planned basis when federal conditional grants and contributions are made to help provinces, universities, and individuals, meet their research needs. Federal support in this case is made by the three main granting councils: NSERC, MRC and SSHRC. Two former granting bodies, NRC and the Canada Council continue to make some grants and contributions. A number of departments and agencies do so too, in cash or service. The budgets and activities of these federal organizations are described here on the basis of their program reports and interviews with senior scientists and managers.

NSERC. In 1983/84, NSERC, with a budget of about \$282 million exclusive of administrative costs, made research grants totalling nearly \$275 million as follows:

Research grants	\$160,102,505.
Research infrastructure	45,820,690.
University-industry program	3,672,080.
Developmental grants	11,083,184.
Research manpower needs	40,186,683.
	<hr/>
	\$274,620,999. ⁶

This funding was the fourth-year contribution to NSERC's five-year plan which was designed to:

1. increase the supply of highly trained Canadian researchers;
2. correct the severe obsolescence of scientific equipment in Canadian universities;
3. increase the university research effort in areas of identified national concern; and
4. maintain a strong and healthy base of free or discipline research within the university community.⁷

In its Brief to the Royal Commission on Economic Union and Development Prospects for Canada, NSERC made several recommendations, including the following two, which show how federal research and federal research support are joined with university education and research. NSERC recommended

that the Government of Canada in considering future changes in the EPF arrangements assure that the basic infrastructure for university research, and the manpower training capabilities based on it, remain intact and are strengthened;

that the universities, with the encouragement and support of both levels of government, move towards a greater differentiation of institutional roles in research across the country and a more rational distribution of research specialization.⁸

MRC. In 1983/84, the Medical Research Council of Canada's budget of about \$140 million included non-administrative expenditures as follows:

Grants and scholarships	\$ 114,427,707.
Awards	22,366,863.
Research promotion	518,416.
<hr/>	
Total	\$ 137,312,986. ⁹

MRC's grant decisions were, and have continued to be, made by peer review. In 1983/84, this involved a working membership of more than 250 active scientists and others, representing 26 medicine specialty committees. In all there were 31 committees, to allow for such matters as equipment grants and scholarships.¹⁰ Committee members represented all parts of Canada; grants were made on merit as judged against predetermined criteria of excellence. The other two granting councils function the same way, making funding decisions while at the same time identifying issues in policy and practice in the respective specialty fields.

SSHRC. The Social Sciences and Humanities Research Council started its first five-year grants plan in 1979. In 1983/84, it budgeted for \$45.6 million in university research and scholarship support out of a total research budget of \$57.3 million (and 100 personnel)¹¹. The Council is governed by 22 members representing the academic community it serves - the same size of board as for the other two granting councils, with the same national capacity for policy issue identification and recommendation.

Of the three Councils, NSERC is Canada's largest supporter of university research and development through its scholarship and fellowship programs for post-graduate studies and research, and for post doctoral research. The other two councils follow similar practices. When all spending for individual beneficiaries (by means of scholarships, bursaries, and related matters) is examined for the three main granting councils, this assistance, for 1983/84, was as follows:

NSERC	\$ 31.6 million
MRC	4.9
SSHRC1	4.0
<hr/>	
Total	\$ 50.5

When other departments and agencies were added, the total for this form of aid increased considerably as shown:

IANAD	\$ 30.5 million
DND	20.5
CIDA	8.3
Veterans Affairs	4.5
External Affairs	2.2
DRIE	4.6
Secretary of State	0.5
Others	9.8
<hr/>	
Total	\$ 80.9

The total is \$131.1 million, exclusive of Canada Student Loan interest benefits.¹²

Of particular benefit to all researchers, research groups and post-secondary education is the Canada Institute for Scientific and Technical Information (CISTI). This body is the result of a decision in 1953 to make the NRC responsible for a National Science Library while the National Library of Canada concentrated on other substantive fields. The library now has well over 1,000,000 volumes, a large number of which are on microfiche, microfilm and magnetic tape. CISTI holds over 20,000 journal titles in science and technology, from sources world wide. The library answers enquiries for scientific and technical information, and does literature searches and compiles bibliographies. CISTI serves the entire scientific and technological community in Canada. Its information is accessible through computer links and by telecommunications.

From the beginnings of its involvement in research, the Government of Canada has supported, on an expanding basis, the development of science and technology in all Canadian universities. It has made its programs, services, facilities, and personnel available at nominal or no cost - without, however, comprehensive costing or cost benefit analysis of such support. The following benefits to post-secondary research and education are derived from an analysis of the relevant program reports and interviews:

1. Scholarships and fellowships to retain and develop Canadian scientific and technological human resources, their uses and benefits to Canada.

2. Establishment of scientific laboratories, research centres and institutes in the natural and human sciences for joint use by, or benefit to, universities.
3. Employment of Canadian scientific and technological personnel graduates.
4. Scholarly publications in all fields of science and technology with particular reference to Canadian problems and requirements.
5. Scientific and technological libraries, in particular CISTI with its national computerized linkages.
6. Adjunct professor and parallel assistance.
7. Policy and planning benefits derived from peer groups formed for federal granting councils in the various fields and specialties of science and technology.
8. Creation and up-dating of knowledge and skill bases for science and technology curriculum development at secondary and post-secondary levels.
9. Focussing of scientific and technological attention on Canadian problems and needs in the natural and human sciences.
10. Resourcing sufficient to initiate large-scale scientific and technological projects and services in Canada or internationally.¹³

2) Official Languages in Education

The federal Official Languages in Education Program (OLE) is based on the terms of the Official Languages Act - a result of recommendations of the federal Royal Commission on Bilingualism and Biculturalism - which, since 1970, has facilitated federal funding to all levels of the educational system in all the provinces and the territories.

Agreements. The program's two main aims are achieved through bilateral agreements with all of the provinces and the territories. One aim is to ensure official language minorities the right to education in their mother tongue; the other is to give official language minorities the opportunity to learn the second official language. These agreements were based on federal policy and the aims of the federal Official Languages

Act, until enactment of Section 23 of the Constitution Act, 1982 created an entrenched protection of official minority rights in education nationally. This change entrenched the provinces' funding obligations in a legal rule of the Constitution. Unless the Courts rule that the federal government is similarly obligated, the provinces will have to rely on continued federal funding based on a non-legal constitutional rule, or convention, even though such a rule could not be enforced by the Court.

The provinces have been worried about continued federal funding. For example, when the 1979-80 Bilingualism in Education Agreement was renegotiated, a plan for successive reduction in federal funding was announced by the Secretary of State. It is not clear whether this "plan" was serious, or whether it was a political device for ensuring strict provincial accountability. In any case, the provinces reacted. The Chairman of the Council of Ministers of Education of Canada, Dr. Bette Stephenson represented the provinces' case, stating that

"My colleagues and I firmly believe that the new federal proposals jeopardize the government's stated intention to promote bilingualism through schools and Canadian youth. It would be irresponsible for a province to start a new program with federal assistance without the assurance that the resources needed to maintain that program would be available once it had passed the development stage."¹⁴

This was in January 1979. The signal was clear: the provinces regarded official bilingualism as a joint responsibility in education - an element built into the Constitution by amendment three years later.

Hon. Serge Joyal, then Secretary of State, described federal concerns in the matter in an address of March 23, 1983. After mention of a federal expenditure for 1983 of over \$170 million to teach the official languages "to young Canadians in the school systems of the provinces", he said

This program reached a ceiling in 1978 and, until recently, we were unable to find out how the money was being used. The provinces refused to provide that information, invoking the exclusive jurisdiction

that Section 93 of the Constitution gives them in the field. They claimed they were entitled to spend these funds without our knowing their priorities vis-à-vis French-language instruction for Francophone minorities and, of course, English-language instruction for the Anglophone minority in Quebec.¹⁵

He went on to say he had continued negotiations and that at a meeting in Victoria of January 23, 1979,

...my colleagues the provincial ministers of education and I reached an agreement on the way in which these funds are to be used.¹⁶

The result of this agreement was a 1983 "protocol" (extended to 1985 and beyond) which was signed by the federal government and the provinces, including the Council of Ministers of Education. Some compromises on issues of policy were involved. It provided for a per student contribution with funding for specific program improvement initiatives, and bursaries for teachers and students. Significantly, the arrangement required provincial accountability to verify use of federal funds as agreed. It also gave provinces a choice of funding through the basic program or through negotiation, as determined by actual expenditures. This put federal participation in official language education on a firmer, continuing basis.¹⁷ What Mr. Joyal described as a moral obligation for this support to continue was also described by him as a constitutional obligation, or convention, which had emerged from the constitutional process and decisions involved in the creation of Section 23 of the Constitution Act, 1982.¹⁸ This was a far greater obligation than *de facto* federal participation in the matter could produce. As a constitutional convention, or non-legal rule of the Constitution, its observance would depend upon the continued support of federal politicians, from one government to the next.

Regardless of any such partnership between Ottawa and the provinces in this matter, the OLE program is not on a shared-cost basis. Instead, defined federal funding is made subject to actual, verified performance, and is to be for no more than the

amounts required to provide education in the first official language and instruction in the second official language. Because of liberal Court rulings, costs for minority first official language instruction will be greater than a literal interpretation of Section 23 would have prescribed.

The Council of Ministers of Education of Canada (CMEC) administers both the official language monitor and the Summer Language Bursary programs, with a budgetary agreement between it and the Secretary of State Department. The Department also provides grants to some national and community official language groups. The large official language minorities in Quebec, Ontario, and New Brunswick receive about 45, 26 and 14 per cent, respectively, of the annual OLE funding,¹⁹ for a total of 85 per cent.

The maximum approved federal OLE funding for 1983/84 was distributed as follows:

	(\$million)
Newfoundland	2,122.
Nova Scotia	3,904.
New Brunswick	20,801.
P.E.I.	994.
Quebec	85,572.
Ontario	45,278.
Manitoba	5,822.
Saskatchewan	2,340.
Alberta	5,182.
British Columbia	5,948.
Yukon	190.
N.W.T.	180.
<hr/> Total	<hr/> \$178,331. ²⁰

In 1983, more than 156,000 students were being educated in French in schools outside Quebec. Nationally, 48 per cent of elementary students, and 37 per cent of secondary students, were learning French as a second language, and about 89,000 did so in immersion classes. In Quebec, over 137,000 students were educated in English.

About 41 per cent of the Province's elementary students and nearly 100 per cent of its secondary students were learning English as a second language. Federal post-secondary official language funding for 1983/84 in the sum of \$50.2 million reflected full federal support for official languages in formal education.²¹ It also reflected federal support for the growth in cost of the program as more students at lower levels enter it and become bilingual.

Audited Secretary of State financial data show that, to 1984, OLE expenditures were just under \$2 billion.²² While there has not been any known comprehensive cost benefit research on this expenditure, there are indicators of positive results. These include the accommodation of all Canadian official language minorities through education in their first language as a constitutional right. There has also been an expanding response across Canada to the option of instruction in the second official language. In both cases need has been created for expansion of official language courses, materials and teaching skills at the elementary, secondary and post-secondary levels. Additional benefits of a national approach to education and instruction in the two official languages are, first, the improved chances for a national consensus on the content and standards in the curricula concerned and, then, hopefully, the national will and means to achieve full literacy for both official language groups.

The Court Challenges Program. The Court Challenges Program, begun under Secretary of State Department administration to facilitate court cases which may clarify constitutional language rights including those in education, has been maintained despite the risk of adversarial conflicts between the two orders of government. The 1983/84 budget, exclusive of administration and staff, (ca. \$400,000), was \$695,000 for grants and contributions, including about \$150,000 for court challenges.²³ The strategic support of cases does not always involve significant expenditure. For example, in the New Brunswick case, Société des Acadiens v. Minority Language School Board No. 50,

which was decided in favour of the Société, there was no court cost. This dispute involved three French-speaking students who had wanted to attend a French immersion course in an English Language School. Section 3.3 of The School Act of New Brunswick did not permit this, requiring that children of one official language group should not be allowed to attend the schools of the other official language group, unless in their district there are no other schools available. The issue was whether Section 23 of the Canadian Charter of Rights and Freedoms permitted a choice of the schools under its jurisdiction, and the Court ruled that it did. In the Quebec case, Bureau des Écoles Protestantes du Grand Montréal v. Procureurs général du Québec, \$10,000 in assistance was provided. This English-speaking school board, which was facing a steadily declining immigrant school population under Bill 101 (the Quebec Charter of the French Language), challenged its prohibition of school grants for these "illegals". The Quebec Superior Court rejected the Board's application and the case was closed. In Association Canadienne-française de l'Ontario v. AG Ontario, \$18,361.44 of challenge funds was paid (exclusive of a maximum of \$25,000 committed for the trial level, and a maximum of \$30,000 for the Appeal Court level). At issue were the constitutional rights of the French Language minority in Ontario to have their children instructed in French and, in addition, to manage French language classes and institutions where numbers warrant. At issue also was the validity of Ontario's Education Act in respect of French language education.²⁴

In 1983/84 five cases were funded involving language rights other than those in education. Financial aid was also provided in four cases in which minority official language rights in education were at issue in relation to Section 23 of the Canadian Charter of Rights and Freedoms. In 1984, the Secretary of State used the program to sponsor a federal-provincial-territorial conference on human rights.²⁵ Issues of relevance to education which were discussed included: ways of combating racism; the teaching of human rights; statistical data to promote affirmative action in training and

employment; Canada's role in a ten-year international action program in aid of the disabled. Grants and contributions were used for funding workshops, seminars, and public education on human rights conducted by various organizations in this field. Also, the Red Cross was given \$70,000 for research and design of an education package for all Canadian secondary schools with a teacher's guide, and student booklets.²⁶

To 1984, the Court Challenges Program, as an arm of the Secretary of State (subject to direct Cabinet control) had continued through the Governments of Prime Ministers Trudeau, Clark and Turner. It was dispatched by the Government of Prime Minister Mulroney - beyond government and direct Cabinet connection - to the Social Development Council of Canada, a non-profit agency with no known prior interest or experience in the constitutional matters at issue. By 1985/86, it had an expanded mandate to accommodate Section 15 equality rights matters, including those related to education - with a budget of \$2 million per year for court challenges alone.²⁷⁾

3) Post-Secondary Funding

Post-secondary education programs are offered at two types of institutions: universities and colleges. According to Statistics Canada, they require at least high school graduation for admission, at least one year of full time study, and must lead to a certificate, diploma, or degree. However, for federal funding purposes, both the Federal-Provincial Fiscal Arrangements Act (1967) and its replacement, the Federal-Provincial Fiscal Arrangements and Established Programs Financing Act (1977), used a more flexible definition to set a dividing line between the secondary and post-secondary levels. This was done to accommodate the diversity there is at both levels of formal education amongst the ten provincial jurisdictions and the territories.

The federal tax abatements and cash payments made in support of post-secondary level education are directed to universities and colleges in support of their core operations only. These core costs are for instruction and related course research.²⁸

They do not apply to sponsored and contract research - two additional sources of substantial federal funding and influence in post-secondary research and education. All federal core funding for universities and colleges is made to the provinces directly, to be transferred to these institutions along with expectation of matching provincial funds.

This funding support for core operations is, of course, only part of the total federal support in expenditures for post-secondary education writ large, and for the populations concerned. The total picture involves additional and substantial federal expenditures for research, adult training, culture, and communications which embrace post-secondary level education.

In 1983/84, unconditional block funding under EPF for the federal share of post-secondary education funding (as defined for fiscal purposes) totalled about \$4.02 billion. This was composed of about \$2.07 billion in cash transfers and just under \$2 billion in tax transfers.²⁹ Included in this funding, as of 1983/84, were contributions at the post-secondary rate, to the operating costs of Ontario's Grade XIII year of secondary education and to the 12th and 13th years of Quebec's CEGEP program.³⁰

Regardless of these anomalies, for this period, the federal contribution intended to support universities and colleges amounted on national average to 77.8 per cent of the total operating grants universities and colleges received from the provinces.³¹ The fiscal relationship between the federal and provincial governments, in respect to post-secondary operating grant agreements and funding, is one of partnership, especially in Quebec's case because of its effort to match and use federal post-secondary funds as intended. This evoked comments in the Neilson Report on the development of *de facto* federal jurisdiction or power - apart from whatever uncertainties there are in constitutional law *per se*.³²

Audited data from the Secretary of State Department may be used to translate federal EPF as a per cent of total federal and provincial operating grants to post-

secondary education. For the fiscal year 1983/84, the federal percentages of these combined grants were as follows:

	%
Newfoundland	99.2
Nova Scotia	93.8
New Brunswick	101.7
P.E.I.	117.2
Quebec	59.1
Ontario	87.2
Manitoba	99.5
Saskatchewan	89.2
Alberta	73.0
British Columbia	92.0
<hr/>	
Average	77.8 ³³

These statistics represent a trend. In 1977/78, before unconditional block funding took effect, the federal share of provincial grants to universities and colleges was 68.9 per cent (on national average). Thus by 1983/84, there was an increase in the federal share of core operations expenditures of 8.9 per cent. On average, the provincial contribution had dropped from 31.1 per cent to 22.2 per cent. Moreover, as additional Secretary of State Department statistics show, with the exception of Quebec, this declining trend has continued.³⁴

When operating and capital expenditure statistics are considered over the same time period, the same trend for percentage of federal support applies - rising from 64.1 per cent to 71.8 per cent.³⁵ Even after the massive federal capital expenditures for secondary and post-secondary education facilities during the 1950's and 1960's, provincial support continued to decline. When federal support for research is considered, the federal participation in Canadian post-secondary education - including Quebec - becomes critical. Moreover, similar effects and influences apply in culture and communications, as described in Chapter IX.

When enrollment statistics for post-secondary education (as defined here) are also taken into account, the significance of federal support magnifies. For instance, as of 1984, there were about 470,000 full-time students attending Canadian universities - about 26 per cent more than in 1977. There were also about 330,000 full-time students attending Canadian colleges - an increase of about 36 per cent since 1977. During the same period, there was an increase of about 34 per cent in part-time university students, to a total of about 280,000.³⁶ This developing situation should have evoked appropriate provincial concern and action, but, generally speaking, it did not.

In interviews for this study with both federal and provincial politicians, and with several senior federal officials, there was strong criticism of the negative effects which block funding was having, after 1977, on incentives for provinces to make adequate post-secondary education investments. In a couple of cases, attention was drawn to the cost-shared approach and "co-operative federalism" which encouraged the provinces to think seriously about their responsibilities in public education - in value, policy and financing terms which would make education a priority concern in provincial government. It was also suggested, in interviews with two senior federal officials and two legal experts, that the decline in provincial financial support may also reflect a lack of will, or uncertainty, about asserting full post-secondary jurisdiction, except in Quebec's case. If so, provincial purpose in post-secondary education may be lacking and national purpose may be forgotten.³⁷ In any case, this situation of inadequate provincial effort sets the stage for federal cuts in post-secondary education support.

Meanwhile, combined government contributions to universities and colleges, as a proportion of the GNP, declined from 1.35 per cent in 1977 to 1.24 per cent in 1984. At the same time, there was a decline in combined government contributions to research and a trend to declining support for Canadian cultural development.³⁸

To correct this serious state of affairs, the federal government initiated a number of proposals and programs in the field of education, some of which did not involve sig-

nificant new expenditure, and most of which are described earlier in this chapter.

Generally speaking, as observations and interviews suggest, the provinces' responses to these federal initiatives were less than national in outlook and action. They could not agree amongst themselves about national goals, standards, programs, materials and practices in education. They did not want the federal government to decide for Canada, or for them, or with them. Hence the federal reactions recounted in Chapter VI, and a growing desire to confirm federal jurisdiction for participation in post-secondary education in the national interest - at least up to the brief Turner Government.

Speaking later as Leader of the Opposition in a House of Commons Debate on supply in May of 1985, Mr. Turner mentioned education as it applied to British Columbia and Canada. Referring to his days as Minister of Finance and the federal role in post-secondary education, he described the financial rationale which had applied (to 1977):

The idea was that 50 per cent of every dollar came from the taxpayers of Canada, as was authorized by Parliament, and 50 per cent came from the legislature of each province. The people of British Columbia, through their Government, have seen those federal funds, contributed to by the taxpayers of the country, diverted to the extent that next year, instead of the fifty-fifty relationship between the taxpayer and the province, the people of Canada will pay over 100 per cent for post-secondary education operating costs in British Columbia because the funds have been diverted from education for other purposes.³⁹

To clarify the ramifications of such extended shortfunding, reference was made to Dr. Wilfrid Brown's educational finance research for the Canadian Teachers' Federation to 1978. His data show that at that time about 45 per cent of total university costs in Canada came from the federal government through the EPF agreement. Any cut in this continuing contribution, he noted, would increase competition for education funding within each province's social services envelope.⁴⁰ Federal fiscal support for post-secondary education in Canada has long been recognized as a significant indirect

support of elementary and secondary education in the poorer provinces because of education funds which would otherwise have to be diverted to post-secondary education.⁴¹

Over the years, Parliamentary support for the development of an integrative means of building national accord in post-secondary education had been on a non-partisan basis.⁴² In Section 24 of the 1977 Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, it was made a responsibility of the Secretary of State to

Consult with the governments of the provinces with regard to the relationship between the programs and activities of the governments of Canada and of the provinces that relate to post-secondary education.⁴³

In 1984, after provincial rebuffs to such federal participation, this EPF legislation was amended to include an even greater reporting requirement. This time Parliament was to be informed on

... the results of any consultations by or on behalf of the Secretary of State with the Council of Ministers of Education, Canada, relating to the definition of national purposes to be served by post-secondary education and the means by which the governments of Canada and the provinces will achieve those purposes.⁴⁴

Federal participation in post-secondary education was being moved in the direction of a partnership with the provinces, with concurrent power based on shared ideas as national goals, which federal fiscal power and revenues could help to fund in the national interest.

This was not what some provinces wanted, in particular Quebec, where, for example, Section 23 of the Canadian Charter of Rights and Freedoms has been a focus of bitterness for nationalists and separatists, as were federal constitutional interventions through its Court Challenge Program. Moreover, these reminders of confrontation, and particular concern for Quebec's adamant positions on Section 93, may have prompted a shift in the new Mulroney government's thinking about the federal role in education,

including post-secondary education, and even its place in Canadian life and society. For example, in an interview with a senior Progressive Conservative Member of Parliament to ask about the Mulroney government's policy on adult training, this researcher was informed that a ban on circulation of this information applied on the first day the new government took office.⁴⁵ Subsequent requests for interviews, through Chiefs of Staff Officers to three Ministers, with advance written questions and offers of personal references, produced two "no's" but referrals to political aides, and one "no" reply - all spread over a period of nine months.

A significant test of the new Mulroney government's policy on post-secondary education responsibility came when the first report of the Secretary of State Department to Parliament, on federal support to post-secondary education in Canada, was made for the fiscal year 1985/86. In the report's overview statement, a constitutional basis for federal participation in Canadian post-secondary education is written off completely. Federal government support to post-secondary education is said to have "evolved as a series of pragmatic responses to shifting events and expectations which, due to their national character or sheer magnitude, could best be responded to at the national level". The explicit exclusion of provinces from jurisdiction in national and intergovernmental education in Section 93 is ignored. To place federal obligations in education, including those in post-secondary education, on no more than a basis of policy discretion, the report declares that

...post-secondary education continues to be recognized as a valued right of the provinces.⁴⁶

The Fathers of Confederation might have been surprised to learn of this, as would those university leaders of the time who opposed balkanization of universities on a provincial basis. The reference to a provincial "right" over post-secondary education is fiction. There is no constitutional right to education yet, and there never has been a provincial "right" to post-secondary jurisdiction.

In any case, the Report's revisionist prose might signal that no constitutional test of federal jurisdiction will be sought by the Mulroney Government, and also that federal post-secondary funding, including that for research support, may be cut back. Whatever the case, the report ignores obvious shared and complementary federal and provincial responsibilities for integral components of post-secondary education, such as research and culture. It ignores federal Section 93 power in territorial education and Section 91 powers in education, notably that for education for the Indian and Inuit. In reference to national post-secondary goals and objectives, approved by the federal Cabinet in 1982 and not rescinded, the report goes on to state that

The legislation under which this report is submitted to Parliament refers to "Canada's educational goals." Given the federal system of Canada, plus the fact that constitutional responsibility for education lies with the provincial governments, any discussion of such goals involving only the federal government will necessarily be incomplete. With the exception of certain specialized federal institutions such as the military colleges, Canada's post-secondary institutions exist within provincial jurisdictions, and it is to the provincial governments that one should turn first for a statement of goals and objectives related to public support of post-secondary education.⁴⁷

The main assumption here seems to be that universities are not national institutions or, if they are, this is only an incidental aspect of their *raison d'être*. The argument implied in the quotation is that universities exist solely within provincial jurisdictions territorially, and under Section 93. However, in jurisdictional terms, where a Canadian university is located territorially is less important than how it is located constitutionally.

When universities had Imperial charters - and Papal charters in Quebec - they were perceived to be more than provincial bodies. The later issuance of provincial charters did not change this perception, perhaps because Canadian universities might yet seek, or be offered, federal charters. This might evoke the argument that, constitutionally, only the provinces may charter universities. However, the federal government of Canada can create and charter universities, as do the federal governments of

India and Australia. Since Section 93 and its variants grant the provinces no constitutional responsibility or authority over education outside their respective borders, and since no jurisprudence has arisen to change this, a residual federal power has to apply for such a purpose. There is no jurisdictional vacuum which the provinces or their Council of Ministers can occupy constitutionally.

Lacking residual power to exert education power intergovernmentally and nationally, the provinces might have claimed that Section 93 applies to education fully, in and for each province - including post-secondary education - but they did not. This is still a goal in Quebec, however, for those who favour "sovereignty association" or separation. The prospects of sole constitutional responsibility for post-secondary education has been an economic worry for the provinces, especially for those who would have to rely entirely on a benevolent use of the federal spending power. If the provinces did not have concurrent jurisdiction in post-secondary education to fall back on, they might have to shoulder the full post-secondary education responsibilities of their separate Section 93 jurisdictions and the separate fiscal implications involved. Or, they might have to seek constitutional amendment to transfer part or all of their jurisdiction over post-secondary education to the federal government (as Sections 38 and 40 of the Constitution Act, 1982 could now facilitate).

Post-secondary jurisdiction continues to be uncertain because there is, as yet, no explicit constitutional law or jurisprudence to clarify the distribution of power involved. Another reason for uncertainty is that, up to the time of the Mulroney Government, both orders of government preferred this situation politically. Neither order of government has ever sought a reference case, although at any time the federal government or any province could do so. In the meantime, the government players know that if the federal government declares that it has no constitutional obligation for supporting post-secondary education fiscally and otherwise, it would not take long for one of the several poor provinces on the periphery of Ontario and Quebec to seek judicial review. Afraid

that the Court might make a similar declaration, the provinces declined to support a Quebec proposal for a hypothetical Court test of federal jurisdiction in post-secondary education. There was no such judicial reference because, reportedly, other provinces doubted that plenary provincial jurisdiction would be found, and because the issue was never pursued by Quebec itself.⁴⁸ The first reason for prudence was fiscal - the fear of losing federal support. Other reasons related to the integration of elements and processes described, which have been built on the axis of federal-provincial participation in post-secondary education.

It would not be enough to have universities and colleges totally under provincial jurisdiction and merely declare that they are national. This would put the maintenance and survival of these vital institutions in fiscal jeopardy, depending on the resources of the province in which they are located. It would also subject them to the vagaries of federal policies in claims for national support. Things would not be so bad for rich Ontario or for the expedient accommodation of Quebec politics, but it would be at great national cost. To claim - as the new federal government now does in this report - that, constitutionally, post-secondary education is a sole provincial responsibility, would make Canadian universities of no more societal benefit to Canada nationally than a foreign university would be.

It is not claimed here that the Mulroney Government wants, or intends, to eclipse the national roles and responsibilities of Canadian universities. Nor is it claimed that this government intends to translate the political rhetoric at issue into constitutional and operational reality. What is intended here is to show how *pro forma* statements on Section 93, as opposed to what actually happens under its flexible terms, can confuse and misdirect discussion and decision in matters of Canadian education.

4) Centres of Specialization

A Centres of Specialization program, to be administered by the Secretary of State Department, was announced in April of 1984. It was funded with \$25 million for a trial year and was designed to help universities develop new capabilities or improve existing ones in research and related human resource development. Federal contributions were available for:

- endowment of chairs of study on a matching basis;
- capital costs of construction or purchase of major equipment;
- operating costs related to changes made, not regular activities.⁴⁹

The program was intended to harmonize with existing programs for support of research and human resource development in science and technology administered by federal departments, agencies and granting councils. Federal funding support was to be available in all disciplines. There was no limitation on areas of activity which could be supported - e.g., research in science and technology, training, policy analysis. Multi-disciplinary ventures were eligible, including linkages with the public and/or private sectors. In all such matters, however, there was to be a primary focus on issues of national importance and the role universities can play in their resolution. The deadline for project submissions was June 30th, 1984. Universities and specialized post-secondary institutions were eligible to prepare submissions, but CEGEPs and community colleges were excluded. A sunset provision was included. About 200 project proposals were received for evaluation by a Secretary of State review committee which included selected external experts. In total, 44 projects were approved for 36 institutions. This support included 18 endowments for establishing chairs of study.⁵⁰

The program was criticized by some provincial officials as a potential source of disruption and rivalry in provincial and university budgeting and relations. It was also faulted for overlapping on existing federal grant programs. Nevertheless, the idea of establishing "centres of excellence" which had arisen during Prime Minister

Pearson's time, and was equated with "centres of specialization", was praised highly for its potential in post-secondary education on a national basis by some of the federal and provincial politicians who were interviewed. It was even suggested that some federal bodies already qualify as centres of specialization and excellence in science or technology. Why, it was asked, could the Canadian Centre for Mining and Energy Technology (CANMET), among other federal bodies, not qualify for parallel or complementary treatment? Given Agriculture Canada's long and comprehensive record of research in all fields of agriculture - much of it world class - and its related extension (education) services, in Ottawa and across Canada, it was suggested that a post-graduate school role could apply there.⁵¹

Chairs of Study. In 1983, the Cabinet decided to establish five chairs of women's studies at selected universities in the five regions of Canada. Each chair was to receive an endowment of \$500,000 to assist its activities over five years. In the end, seven universities received support, because two chairs were established jointly. When women's support groups could not raise additional funds as required, the federal government picked up the added cost. Chairs for Ethnic Study have been included on various shared-cost bases. In total to 1984, 18 federal endowments had been provided for special chairs of study in Canada.⁵²

5) Canada Student Loans

From its beginnings, the Canada Student Loans Plan has assisted students with the costs of their education. It also permits them to take advantage of the Canadian university and colleges systems with portable loans, and without fee differentials related to place of residence in Canada. The means used to provide assistance have varied, but basic principles have remained. Applicants must be Canadian citizens or permanent residents. They must be a resident of a province which participates in the program. Quebec, although officially opting out of the Canada Student Plan, must be counted as a

participant by virtue of the federal funding it receives to administer and guarantee its post-secondary student loans.

Loans are made, to the limits approved, by participating commercial lenders. The interest on these loans, during the study years and for six months after graduation, is paid by the Government of Canada. The loan ceiling, as of 1983/84, was a maximum of \$9800, after the period in which the first loan was issued. Three rates of interest are involved, including a "mixed rate" based on previous rates of interest on previous loans. In 1983/84 this rate was 15.75 per cent. In this loan year these interest payments were just under \$92.5 million.⁵³

In 1983, the Canada Student Loans Act was amended to permit loans to part-time students with immediate installment repayment. Temporary interest relief paid by the federal government was also added to the plan to assist unemployed graduates or drop-outs, and to write off the indebtedness of those who became disabled. In all, 296,838 Canadian students benefited from Canada Student Loans in 1983/84, (with a cumulative plan total of 2.1 million). In this loan year the numbers of full- and part-time Canadian students were as follows, on the basis of province or territory of origin:

Newfoundland	\$ 7,183.
Nova Scotia	11,403.
New Brunswick	9,911.
P.E.I.	1,873.
Quebec	100,684.
Ontario	104,451.
Manitoba	8,439.
Saskatchewan	7,819.
Alberta	25,589.
British Columbia	19,332.
Yukon	146.
N.W.T.	8.
<hr/>	
Total	\$ 296,838.

Total federal CSL statutory and operating funding for 1983/84 was \$190.3 million. Of this amount, federal loans expenditures were just under \$158.7 million. The total of loans actually negotiated for this loan year was \$454,881,213.⁵⁴

No quantitative analysis data could be found to describe the benefits gained through facilitating the educational development of so many Canadians, or to evaluate the spillover effects of their mobility in education, employment and citizenship.

6) Tax Expenditures

Federal tax law in Canada includes provisions to give special treatment to selected individuals and groups. These provisions may apply to income, to the uses to which income is put, or to characteristics of taxpayers themselves. These federal "selective tax measures", or expenditures, take various forms: exemptions, credits, deductions, reduced tax rates, or tax deferrals. Such federal policy applies to education and related matters.

Based on Department of Finance statistics and reports for the taxation year 1983, federal tax expenditures related to education, directly or indirectly, are estimated as follows:

<u>Personal Income Tax</u>	<u>(\$ million)</u>	<u>Number Benefiting</u>
Scientific research tax credit	(\$85 million value at personal level)	not included
Child tax credit	1,435.	5,084,487 children
Exemption - wholly dependent children (\$940 million)	(not included, although a portion of this item could be classified as education assistance.)	
Child Care expense deduction	110.	
Scholarship exemption (on first \$500 of scholarship or bursary income)	7.	ca. 190,000

\$50 per month education deduction	42.	
Deduction of tuition fees	57.	
Deduction of teachers exchange fund contributions	under 5m	
Registered Education Savings Plans	5.	ca. 150,000
Charitable donations to schools	37.	
<u>Corporate Income Tax</u>		
Allowable scientific and research deductions (ca. \$105 million)	(not included)	
Training	(unavailable)	
Donations to Canadian education and culture	(unavailable, but insignificant)	
Additional scientific and research deduction (\$60 million)	(not included)	
<u>Commodity Tax</u>		
Exemption of equipment and construction materials purchased by educational institutions	40.	
Exemptions of technical, educational and other books	75.	
<u>Culture and Recreation</u>		
Exemption for Canadian newspaper and magazine production	200.	
Exemption of cultural and religious materials	(under 5m) ⁵⁵	

The Nielsen Task Force's retrospective review of federal tax expenditures in support of Canadian cultural activities has produced some generalizations which have

serious implications for Canadian culture and education, including the widest possible access to reading materials. In regard to the Canadian publishing industry,

The study team concludes that there is no economic reason to exclude newspapers, magazines and books from federal sales tax.

The study team assessment is simply that there does not appear to be a major cultural benefit behind the sales tax exemption.⁵⁶

Again without supporting documentation, it is stated that

Virtually the same analysis applies to the issue of postal subsidies.⁵⁷

Critics see these points of view as a rationalization for a tax on reading - something which democratic countries have avoided in the interests of effective free expression, literacy development, general cultural and educational benefits, and national identity.

The federal government has, in the past, exempted books and periodicals from federal manufacturing and sales taxes. This same exemption applies, federally and provincially, to magazines sold by subscription. (Only Ontario and the Atlantic provinces levy a sales tax on news-stand sales.) To the advent of the Mulroney Government in 1984, Canada did not have a multi-stage sales tax, and none was proposed. However, such a federal tax is now a possibility.

In anticipation of this, "The Don't Tax Reading Coalition" was formed. Its arguments against the measure serve to identify benefits of federal tax policy at 1984 in support of both education, formal and informal, and Canadian cultural development - benefits which had always been taken for granted. Books are still basic tools in teaching and learning at all levels, even more so in an information age. They are also a focus and a forum for cultural expression. Thus, absence of a federal sales tax on

reading materials reflected unspoken national policy in support of literacy, scholarship, citizenship, and Canadian culture. Federal taxation policy and subsidies at 1984 demonstrated a sensitivity for the economic problems which apply in the Canadian publishing industry, with its absence of the economies of scale enjoyed by both the United States and Great Britain.

7) Postal Rate Subsidies

In 1984, the Government of Canada's subsidies, for book, periodical, and newspaper publishing in Canada, included special postal rates. These rates were also available to libraries for book shipments. These were significant measures in a nation of Canada's size and regionalism, in support of both Canadian culture and education.

Amounts estimated by Revenue Canada were paid to the Canada Postal Corporation. The subsidy was in two parts: one a cultural subsidy based on Department of Communications (DOC) criteria, and the other an infrastructure payment to the postal corporation to compensate for its handling costs. In 1982/83, an arbitrary figure of \$220 million was set and included in the DOC budget. In 1983/84, estimates and payments totalled \$233 million.⁵⁸ It might be argued that the subsidy was as much for Canada Post's benefit as anyone's.

In 1984, subsidies went to about 2090 periodicals, including those published outside Canada and shipped here for mailing. This included 644 periodicals, 416 Canadian weeklies and 143 Canadian daily newspapers. Again it might be argued that the publishers concerned were being subsidized. However, in the year following (1985), losses were reported by 47 percent of the publishers of Canada's 1100 magazines. Moreover, of 230 Canadian-owned publishing companies, 72 reported sales under \$200,000 per annum, while 98 companies reported sales of from \$200,000 to \$1 million. Although by 1985/86, 686 book titles were printed or reprinted, by 1987/88, low returns on investment and effort were still the rule. Even though the need for such a subsidy was

proven, the plan was to reduce it to \$100 million in 1986/87 and eliminate it thereafter - for a total postal subsidy from 1979-87 of about \$750 million.⁵⁹

8) Canada Assistance Plan and Related Programs

Provinces must enter into 50-50 cost-sharing with the federal government in order to benefit from its CAP programs for welfare and assistance services, including those related to education. This involves meeting the standards for the particular national program. The criterion is need, regardless of place of residence in Canada. CAP responses and costs are determined by economic and social demands, in particular unemployment and disability. In both cases, the education spillovers are significant - for the individuals concerned and for their families. Education, training and rehabilitation are fundable options, and may be essentials in the case of the disabled. Day care is included for children whose families are in receipt of welfare or are expected to require such assistance.

Day Care. In 1983/84, the federal shared-cost contribution to (non-profit) day care, which the Department of National Health and Welfare administers, was reported at \$75 million minimum.⁶⁰ Its benefits were for children in both categories described above. As for all CAP programs, federal day care support is open to shared-cost funding, provided the national criteria which apply are met. The National Day Care Information Centre researches and advises on such matters.

Vocational Rehabilitation. Under the Vocational Rehabilitation Act, Section 2, vocational rehabilitation means

...any process of restoration, training and employment placement, including services related thereto, the object of which is to enable a person to become capable of pursuing regularly a substantially gainful occupation.

Under the Act, the federal government pays half the costs incurred by all provinces except Quebec (which is compensated), to provide a comprehensive program for vocational rehabilitation. In 1983/84, reported federal expenditure for the more than 100,000 helped was \$67.6 million for all provinces and the territories.⁶¹

The Agreement terms are flexible enough to include the disabled whose workmen's compensation has expired, and veterans, as well as the physically and mentally disabled, including persons disabled by addiction. When training is considered, according to Agreement terms, it may be given on either full or part-time bases. Specialized procedures may be used - home instruction for example. Training may be given in regular vocational schools or institutes of technology; in private trade schools or business colleges accredited by the province; in special training centres established or approved by the province; in universities or in business or in industry. However, if a disabled person in the vocational rehabilitation process enrolls for a course which is provided free to all citizens of the province, the Agreement will cover only the special costs which are involved due to the trainee's disability.⁶²

To follow up on the Report of the Special Parliamentary Committee on the Disabled and Handicapped, Statistics Canada carried out the Canadian Health and Disability Survey in 1983/84. Of particular interest to educators and the federal and provincial agencies involved were the findings related to children. It was estimated, for example, that about 302,000 children under 15 years of age may be considered disabled. Impacts on the education of disabled children and youth were considered and made known nationally - for rehabilitation policy and planning, and for educational purposes.⁶³

In 1983/84, the federal share of total CAP expenditures was about \$3.7 billion, with about 80 per cent of this allocated to general assistance and 20 per cent to welfare. About 2 million Canadians received benefits, and about 500,000 received social services - all on a shared-cost basis as described. Indians and Inuit were served under parallel, fully funded federal programs.⁶⁴

As a further indication of the magnitude of poverty and low income circumstances in Canada, 5,084,487 children were claimed for Child Tax Credit benefit in 1983, under the separate taxation program administered by the Department of National Revenue. This involved 2,680,903 Canadian families.⁶⁵

The latter program is an example of the complex linkages which can apply to CAP programs. Another significant, separately funded linkage is that which has been provided by the federal family and youth allowances (and their Quebec parallels with federal funding).

Family and Youth Allowances. The national family allowance had education support implications from its start in 1945, as described in Chapter VI. The Quebec "Schooling Allowances", for school-age children and youth, were added as a supplement in 1960. This caused the federal government to add youth allowances to its national program, defining "child" as a person resident in Canada who is less than 13 years of age and who is being maintained by parents or guardians. There is no stipulation that these youth attend school. However, as noted by federal, welfare and school officials, the legislation clearly assists parents to keep their children in school longer than would otherwise be the case. Significantly, it has been federal policy, not law, that the family and youth allowances and the Child Tax Credit not be counted as income for purposes of making social assistance payments under CAP.⁶⁶ This has the effect of increasing the federal CAP contribution, which is not necessarily matched by the recipient provinces. In fact, some provinces reduce their share of the 50:50 arrangement to an amount equal to the overlap. Meanwhile, the poor, and those who are concerned for them, have opposed both the de-indexing of family and youth allowances, and ceilings on either these allowances or CAP.

Youth allowances were made a component of the Income Security and Social Assistance Program of the Department of National Health and Welfare. They were ad-

ministered by the regional federal Family Allowance Offices. Quebec, which initiated and had its own youth schooling allowance program, was reimbursed through federal tax abatements.⁶⁷

Both family and youth allowances were adjusted each year to the consumer price index for payments in the calendar year to follow. Given a high continuing rate of youth unemployment, the family support described is of additional value. True rates, which include youth never employed, run at about double the adult rate. This puts families of all income levels in supplementary welfare roles themselves, and increases family interest and support in education-related remedies.⁶⁸

During 1983/84, \$2.394 billion was expended for the federal contribution to universal (child and youth) family allowances. This involved 3,637,616 families on behalf of 6,621,965 eligible children. This is exclusive of provincial supplements, such as Quebec's schooling allowance, and the federal Child Tax Credit, which is administered through the federal income tax system by the Department of Revenue. In 1984, \$343. was payable for each eligible child.⁶⁹

In comparison, Old Age Security benefits (including \$2.5 billion in guaranteed income supplement to over 50 per cent of recipients) totalled over \$10.4 billion in 1983/84.⁷⁰ This was 4.5 times more than family allowance payments, before this ratio was corrected for allowance payments taxed back from families in the taxable bracket. Nonetheless, in future budgets for social programs for these junior and senior groups, family allowance payments will become proportionately less. This will apply even more as the percentage of children in the Canadian population declines and the percentage of seniors increases.

Meanwhile, the federal and provincial allowance payments, where these apply, are of particular help to more than 1.2 million children 14 years and under who are estimated, as of 1983/84, to be living below the poverty line. It becomes evident that

de-indexing family allowance payments, fully or partially, will have adverse educational impacts.

9) Regional Development

By 1983/84, as described in Chapter VI, regional development had become an inter-departmental federal responsibility. All activities, including education matters, continued to be carried out under the rubric of the federal economic powers. By this time, the Department of Regional Industrial Expansion (DRIE) had the main administrative role, and it continued to negotiate ten-year economic and regional development agreements (ERDA's), including education provisions as required.

When the Turner Government dissolved the Ministry of State for Economic and Regional Development in 1984, it became difficult to obtain a full picture of inter-departmental participation in regional development together with its education aspects. It was possible to glean, or infer, some of this information from the separate ERDA's. For instance, it was estimated that, from 1969 to March 31st 1983, about 133,000 new jobs had resulted from completed projects and the training benefits involved. A further 53,000 new jobs were expected to be created by programs in progress at 1983/84, for which \$205 million had been budgeted federally.⁷¹ Between 1967 and 1984, DRIE (formerly DREE) had helped to institutionalize technology transfer across Canada by means of aid for start-ups, with initial funding ranging from \$50,000 to \$1 million. By 1984 this funding amounted to about \$30 million. The resulting technology transfer centres were divided, more or less equally, between universities and provincial and private research associations. A related idea was the earlier establishment of two innovation centres: the Canadian Industrial Innovation Centre, at Waterloo University, and the Centre d'innovation industrielle, at l'École Polytechnique de Montréal. Each of these centres was given start-up funds of \$1- million per year over eight years. In addition, to promote technological innovation in Canada, inventors and companies were

given advisory assistance. Prospective entrepreneurs are sometimes given courses on technological innovation and related matters. Such content is made part of the curriculum for engineering and science students and is used in seminars, etc., for businessmen, et al.⁷²

In 1983/84, regional development programs via DRIE included some for native peoples. For example, on a 50:50 shared-cost basis, federal funding and assistance was provided in Saskatchewan for: curriculum development for northern teacher education; native employment education development; sewer and water operator training; firefighting training; northern careers development. These programs were supported by federal constitutional powers in economics and for Indian peoples in education. Other DRIE expenditures related to education and research included the signing of a general development assistance agreement with Newfoundland for contribution to the Institute of Fisheries and Marine Technology. In Nova Scotia, DRIE provided some support to the Canadian Fisheries Institute of Technology, the Atlantic Coal Institute, the International Centre for Ocean Development and the Advanced Microelectronics Institute. In New Brunswick, a \$1.6 million DRIE grant was made to the Bathurst Community College, and funding was provided for a peat research centre. Of DRIE's \$297 million expenditures in Quebec during 1983/84, it was not possible to identify particular research and training costs although these were included. The same applies to a \$121.7 million DRIE expenditure in Ontario and, in Manitoba, to the use of DRIE agreements in support of employment development for native peoples in northern Manitoba and the Winnipeg Core area.⁷³ A special agreement under the Agriculture and Rural Development Act (ARDA) was entered into in British Columbia to include provisions for the special training of native peoples. Other general DRIE expenditures related to education in 1983/84 included requirements of the Canada/Atlantic Provinces Management Training Agreement (1978-83). Under DRIE's institutional assistance programs for scholarships and studies, funding was provided through the Canadian In-

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MICROCOPY RESOLUTION TEST CHART
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STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

dustrial Review Board's Small Business Secretariat: for grants in relation to industrial and trade development to correct deficiencies in management and technical skills, to develop course materials, and to encourage post-graduate programs.⁷⁴

Of special interest was the one-time Special Recovery Capital Projects Program (SCRAP) administered by DRIE and announced by the federal government in April, 1983.⁷⁵ By March 31, 1984, 96 percent of the program's \$2.4 billion budget, and the same percentage of its projects, were committed. By this time 227 projects were under way. Of the six sectors involved in the program, 14.7 per cent, or about \$363 million, was committed to the construction or expansion of 18 research and training facilities.⁷⁶

This construction included a new Biotechnology Institute in Montreal, part of NRC, and expansion of NRC's Plant Biotechnology Institute in Saskatoon. (Biotechnology is predicted to be a multi-billion dollar industry field by 2000 A.D.) An Institute of Manufacturing Technology was to be established at Winnipeg, to facilitate research in computer-aided design, robotics, and sensor systems. A new Food Processing Research Centre was to be built at Ste. Hyacinthe, to develop new food products and to improve on existing ones. A Fluid Bed Minerals Research Centre was to be built at Chatham, New Brunswick. A Workforce Automation Research Centre was to be built at Laval, to do research and development on electronic systems design, content and software. Other construction was to include a Toxicology Research Centre at Guelph, the M. Lamontagne Fisheries Research Centre near Ste. Flavie, Quebec, the Atlantic Veterinary College at Charlottetown, the Nova Scotia Nautical Institute (with facilities for 400 students) at Port Hawkesbury, Nova Scotia. Expansion was to include the Coast Guard College at Sydney, the Pacific Forest Research Centre at Victoria, the Great Lakes Forest Research centre at Sault Ste. Marie, the Laurentian Forest Research Centre at Quebec City, the Maritime Forest Research Centre at Fredericton, and the Pulp and Paper Institute of Canada at Vancouver, on the campus of the University of

British Columbia. All the facilities cited were said to have liaison with universities, and all were considered to be part of Canada's post-secondary education establishment.⁷⁷

10) Curriculum Support

The Government of Canada, through its advisory bodies, departments, agencies, and corporations, makes direct inputs to the curricula of Canadian schools, adult education courses, and content in higher learning. The resources and advisory assistance concerned are described here in three broad categories. These are: (1) education spill-overs from research and information activities related to federal responsibilities and functions; (2) educational, cultural and scientific productions; 3) special research, and advisory services related to education in particular subject fields. Provision was made for all levels of formal and informal education.

Learning materials in the first category are byproducts of the work and missions of virtually all federal bodies. In some cases, the output is considerable and in many cases the resources produced are designed with school and school-level use in mind. Materials are available in the form of teacher guide-books, maps, charts, monographs, reports, bulletins, books and kits. Included also are broadcasts of films, videos and audio tapes, some of which are available on loan. To 1984 at least, these resources were available free, postage included, on request - from schools (public or private), and from interested individuals.⁷⁸ Virtually all subject fields are covered. A great deal of this material has been researched or cleared by subject specialists, who are usually better qualified than persons engaged in the regular production of provincial curriculum materials. For example, with expert sources, the education operations in the Department of National Health and Welfare produce school-oriented materials on such basic matters as food and nutrition, addiction, diseases, and occupational safety.⁷⁹ The Department of Fisheries and Oceans produces charts and monographs of definitive calibre for education use.⁸⁰ The Department of Indian and Northern Affairs produces historical, cultural and

linguistic charts, monographs, and booklets for its school use and to compensate for the dearth of such resources in provincial school systems.⁸¹ The Department of Energy, Mines and Resources makes mineral specimen kits available at minimal cost.⁸² Other departments and agencies, in particular the Department of the Environment and Parks Canada, produce materials on environmental and ecological topics.⁸³ The Secretary of State makes lexicons of terminology available in the two official languages, teacher guide-books for teaching human rights, and for teaching multiculturalism.⁸⁴ Materials based on the federal government's teaching of French and English as second languages are available as models, as are the advisory services of the experts involved via the Public Service Commission and the Secretary of State Department's Bureau of Translation.

In the second category, a substantial body of learning resources with Canadian orientation and content are researched and designed primarily for educational use, with degrees of difficulty to fit both multi-level and particular-level use. This includes the audio-visual productions of CBC radio and television, the National Film Board and various departments and agencies with direct education responsibilities or interests. In the latter case, the Department of Indian and Northern Affairs is a notable example. NFB's endeavours are a continuing function, sometimes on a unilateral basis and sometimes on a joint-venture basis with special interest groups, other federal government bodies, et.al. These visual and audio resources are part of the free service of the CBC and free NFB and departmental rentals, as well as purchase in both original form and related print materials. Thus for example, CBC radio regularly researches and presents world-class programs like "Ideas" at post-secondary level, for everyone. It is also the only sponsor and broadcaster in Canada of new Canadian plays. CBC television provides the same avenue for presentation of the classics and of the Canadian arts. All such curricula serve to balance the deluge of American "pop culture", in film and television in particular. Hence the considerable significance of CBC and NFB services to

Canadian education and its Canadian content. The Government of Canada has acted as a publisher, via the Public Archives of Canada, the National Museums of Canada, et al., to sponsor and produce books of quality and scholarship on topics related to Canadian history, science, and the arts. One notable example, The Atlas of Canada, produced by the Surveys and Mapping Branch at the Department of Energy, Mines and Resources (where maps of all Canada are researched and published), is the foremost book on Canadian geography.

Scholarly periodicals, monographs, and reports are produced by some federal bodies - mainly those engaged in scientific and technological activities. These materials are available free or at subsidized cost. Included are the world class scientific publications of Agriculture Canada, Fisheries and Oceans, and NRC. Advisory and information services are largely free (with the exception of some CISTI research services). Federal experts, of whom there are thousands, may be called upon, barring security requirements, for free advisory assistance, or consultant services on a cost recovery basis. Use of federal library and archival sources is free (again with the exception of CISTI). Federal scientific laboratories and other research centres are used for joint ventures, at little or no cost to post-graduate and post-doctoral researchers. These sources are available gratis for curriculum and materials design and updating, at the secondary and post-secondary levels. Several of the federal programs mentioned compile and publish national directories of experts in the respective subject or service fields, such as Fisheries and Oceans' Directory of Marine Scientists - 1983 and Health and Welfare's Directory of Senior Professionals Promoting the Health Education of Children and Youth in Canada.

The use of such information at the post-secondary level is evident, because of the collaborative research work involved, but it was difficult to learn anything about its impact on provincial departments of education and curriculum. When several scientific departments and the National Museums of Canada were questioned about referrals from

provincial education authorities, the answers were that none could be recalled. Given the effective demise or downgrading of most provincial departments of curricula, it was difficult to double check, but in two provinces where this question was asked, the answer was that such direct federal contacts weren't made. Schools and individuals, however, make direct federal contacts in great numbers.⁸⁵ A propos, one former federal Minister described the regular supply of great quantities of free learning materials to schools in her constituency. The Canadian School Trustees Association of Canada has also informed its local board representatives directly of the federal curriculum materials available for the asking. Federal institutions publish lists of materials which are free and those which are for sale.

The third category deals with special research and advisory programs and services which the federal government has developed for making changes in provincial school curricula. The provisions for official languages have been described. Programs in ethnic and Canadian studies are described in Chapter IX. The federal government also has a program, and materials, to introduce the metric system to Canadian schools. The Department of Health and Welfare designed a health and fitness curriculum (Participation) with a learning materials kit, as long ago as the 1970's.

Two exceptional national curriculum studies under the Government of Canada's auspices came to conclusion during 1983/84. These studies dealt with separate and serious deficiencies in school curricula in all Canada. One dealt with Health studies; the other reviewed and recommended on science education in Canadian elementary and secondary schools.

The Health study involved a 1982-83 survey of health knowledge for 9, 12 and 15 year olds from all 10 provinces. Questions related to such topics as: body structure and function, human growth and development, dental health, environmental health, first aid, mental health, nutrition, alcohol, smoking, and drugs. Data were scored, analyzed, and used for recommendations on curriculum and instruction. The project was conduct-

ed for National Health and Welfare (NHW), at arms length from the federal government, by the Social Program Evaluation Group of Queen's University. Findings and recommendations were used by the provinces and by the Education and Training Unit of the Health Promotion Directorate of NHW for designing curriculum models, course and materials proposals, and follow-up research.⁸⁶

The second study was the Science Council of Canada's four-year study of elementary and secondary science education in all provinces (1980-84). The aim of the study, in which all provinces agreed to participate, was renewal of Canadian Science education - in curriculum and instruction. Facts and opinions were gathered from the main players in science education: experts, educators, officials, students, parents, et al. Deficiencies in science curriculum were identified and corrective recommendations were made. Consensus was reached on fundamentals in science study in public education - for example; that it is of value and need to all students; that there is a need for continuous science study; science knowledge is needed for informed citizenship; and for adaptation to technological changes in work. Analysis of course guides, teacher training, teaching methods and technologies, revealed need for considerable upgrading. Most of the more than 30 science texts reviewed were deficient in coverage and articulation with related subject matter. There was insufficient provision for talented students. The research methodology, the findings, recommendations and strategies for change - for provincial ministers of education and others - were outlined in a series of published background studies by the principal researchers, Dr. Graham Orpwood and Dr. Jean-Pascal Soque.⁸⁷ A follow-up to deal with implementation problems completed this \$2 million venture.

Addendum

Municipal Grants. Since 1950 the Government of Canada has paid grants-in-lieu of property taxes. This involves municipal grants made in respect of federal property,

even that which has been leased to a third party. According to Department of Public Works information, grants are not given for property administered by the Government of Canada itself, Indian reserves, and urban parklands. Under the federal Municipal Grants Act, 1980, federal properties made subject to a 100 per cent grant to municipalities included the Parliament Buildings, historic parks and sites, and national libraries. Museums, art galleries, and national parks, became eligible for these municipal grants in the 1980 Act, with a phasing in at 25 per cent per year. In 1983/84, total payments were over \$222 million.⁸⁸

Conclusions Re: Hypothesis No. 3

The objective of "support" facilitates a wide variety of federal programs and activities in relation to education nationally, whether this involves funds, programs, or services. This support is rationalized by national interest, needs, and standards, even though constitutional law can legitimize it sufficiently, and judicial review could confirm it. Provincial demand and/or need for funding precludes challenges. Hence, to 1984, there was significant federal presence and influence in the matters identified. Moreover, such support appears to have become integrated, or institutionalized, to the point that federal cutbacks or withdrawals in any component would have direct, adverse effects on provincial budgeting and programming.

The matrix involved has become very complex - administratively, politically, and legally. This was true even before the Act of 1982 provided new and varied possibilities for increased federal participation in relation to education. Since then, new federal support measures can be elaborated via the judicial review which entrenched rights invite and require - with the encouragement of expanded funding for federal Court Challenges. The elaboration of Section 23 requirements, with their cost, is a case in point - one which cannot be blocked by the notwithstanding clause (Section 33) of the 1982 Act.

Against the current and potential scope for further federal support in relation to education, the Meech Lake Accord, had it been enacted into constitutional law, posed significant change. Whether or not it was used to limit Section 23 rights and implementation nationally, it would have made new federal support programs difficult to initiate. Provinces would have been able to opt out and collect the funds involved - all with doubtful means of ensuring compliance against the national objectives set. If this had happened, the federal place in education support nationally would have been more complex and less likely to expand.

Federal cuts in post-secondary funding - to fit the jurisdictional rationale in the first (1985/86) post-secondary report to Parliament - may have been a precursor of a retreat from federal support in this field. Notwithstanding constitutional bases for federal participation, including assumed concurrence in post-secondary education, federal support to education may have reached its peak in 1984 - despite the growing requirements of Canadian education in the 20th century in culture, economics, and sovereignty.

END NOTES

1. Communique, Secretary of State Dept., Nov.17, 1981 re: speech of Hon. Gerald Regan, to the House of Commons of that day.
2. Interview, Hon. Gerald Regan, Ottawa, 1984.
3. Communique, op.cit.
4. Secretary of State Department documents, reports, referrals.
5. Interviews.
6. NSERC audited financial data including 1983/84 Annual Report.
7. Interview, Executive Director. Reports.
8. NSERC brief to the Royal Commission on Economic Union and Development Prospects in Canada.
9. MRC data including 1983/84 Annual Report.
10. MRC data; Interviews, Executive Director, et al.
11. SSHRC audited financial data, including 1983/84 Annual Report. Interviews, referrals, reports.
12. Secretary of State Department. Canada Student Loans Program Reports. Statistics, interviews.
13. Multiple senior interviews, cross references.
14. Letter of 28th Sept., 1982, from Dr. Bette Stephenson, Chairman, CMEC, to Hon. Gerald Regan Secretary of State.
15. Secretary of State Department: Minister's Speech File.
16. Ibid.
17. Agreement terms, general and bilateral. Interviews, Secretary of State Department.
18. Interview, Hon. Serge Joyal, Montreal, 1987.
19. Secretary of State Department data.
20. Secretary of State Department statistics
21. Secretary of State Department data.
22. Ibid.
23. Secretary of State Department Court Challenges Program data and interview.
24. Secretary of State Department Court Challenges Program data.
25. Ibid.
26. Ibid.

27. Social Development Council of Canada. Reports and referrals. Interview.
28. Secretary of State Department, Education, Policy Division.
29. Ibid.
30. Ibid.
31. Ibid.
32. Improved Program Delivery: Education and Research. A Study Team Report to the Task Force for Program Review (Nielsen report), Nov., 1985, p.17.
33. Secretary of State audited financial statistics.
34. Secretary of State Department, Statistics Canada: interviews and reports.
35. Ibid.
36. Secretary of State and Statistics Canada data.
37. Interviews: federal and provincial.
38. Secretary of State and Statistics Canada data.
39. Commons Debates, Rt. Hon. John N. Turner, May 15, 1985, p.4780.
40. Canadian Teachers' Federation interview, Dr. W. Brown. See also reports.
41. First Ministers Conference minutes.
42. Ministerial interviews.
43. EPF Agreement, 1977, Section 24.
44. EPF Agreement, 1984 amendment.
45. This report was unavailable from P.C. Party HQ.
46. Secretary of State Department Report to House of Commons 1984/85.
47. Loc.cit.
48. Interviews: Hon. Claude Morin; Hon. R.G. Robertson.
49. Secretary of State Department, Centres of Specialization Program information.
50. Ibid.
51. Interviews, federal.
52. Secretary of State Department and Ministry of State for Multiculturalism reports.
53. Secretary of State Department, Canada Student Loans. Interviews and documentation.
54. Ibid.
55. Department of Finance interviews and documentation.

56. Economic Growth: Culture and Communications. A Study Team Report to the Task Force on Program Review, (Nielsen Report). Ottawa, 1985.
57. Ibid.
58. Tax Report Financial documentation and Secretary of State Department.
59. Ibid.
60. Department of National Health and Welfare, Day Care Information Centre reports, referrals, interviews.
61. Reports and interviews.
62. Ibid.
63. House of Commons. Special Parliamentary Committee on the Disabled and Handicapped.
64. CAP.
65. Department of Finance Notes.
66. CAP Interview.
67. Family and Youth Allowances documentation.
68. Interviews.
69. Department of Finance.
70. Department of Finance interview, referrals and reports including:
71. Department of Regional and Industrial Expansion referrals, interview, agreements documents, annual reports.
72. Ibid.
73. Ibid.
74. Ibid.
75. Ibid.
76. Ibid.
77. Ibid.
78. Information checks (Lists).
79. Department of National Health and Welfare documents, referrals, interviews.
80. Department of Fisheries and Oceans reports, referrals, interviews.
81. Department of Indian and Northern Affairs documents, referrals, interviews and reports.
82. Department of Energy Mines and Resources reports, referrals, interviews.
83. Department of Environment reports, referrals, and interviews.

84. Department of the Secretary of State, Ministry of State for Multiculturalism.
85. Reported. No statistics.
86. Interview, Dr. Gordon Mutter, NHW. Reports.
87. Interviews and documentation, Science Council of Canada, Dr. Graham Orpwood.
88. Department of Public Works reports and referrals.

CHAPTER IX

CULTURES AND COMMUNICATIONS IN CANADIAN EDUCATION

Culture, which is the foundation of education and gives it purpose and form, was not mentioned in the Constitution Act, 1867. When the term was included in Section 40 of the Constitution Act, 1982, it was used in respect to compensation, and in relation to Section 38(1), whereby, through constitutional amendment, provincial legislative powers "relating to education or other cultural matters" may be transferred from provincial legislatures to Parliament.

Politically, this provision for redistributing legislative power over education may be unlikely, but, constitutionally, it has become possible. The change puts an end to the belief that "education" must be under exclusive provincial jurisdiction to comply with the Constitution. It also challenges an ideological interpretation of federalism which calls for it to be exclusively provincial in order to accommodate provincial majority cultural and linguistic interests.

The inference was made that constitutional silence about culture until 1982 bestowed concurrent jurisdiction on Parliament. Prime Minister Trudeau made it very clear that, politically and constitutionally, the federal government would not relinquish its national responsibility for culture.¹ Previously, such responsibility had been assumed in the reports of the Massey-Levesque and the B and B Royal Commissions. They both interpreted federal cultural responsibility in the singular and plural, to embrace Canadian culture and its plural dimensions.

When judicial review gave Parliament and the Government of Canada exclusive jurisdiction over communications and, later, telecommunications, this included federal power to regulate and use these modern means of mass education with their applications to group and self-education.² At the same time, the Constitution does not preclude use

of these means for educating and transmitting the culture by either order of government. Canada's cultural heritage, and the varied kinds and means of education which reflect it, is too large and too complex for any one jurisdiction to capture. A constitution which prescribed this would be more rhetorical than real.

This chapter identifies the participation of the federal order of government in eleven dimensions of culture and communications related to education. These are: (1) national cultural institutions; (2) national broadcasting; (3) film and video; (4) communications technology in education; (5) writing and publishing; (6) the performing arts; (7) Canadian studies; (8) literacy; (9) multiculturalism and heritage languages; (10) native cultures and languages; (11) citizenship. In all cases, the fiscal year 1983/84 is the period of description, unless otherwise indicated.

Hypothesis No. 3 was used to gather and classify this information, and for drawing conclusions on it.

1) National Cultural Institutions

Twelve national cultural institutions are examined at 1983/84, to identify how federal participation in education relates to Canada's cultural heritage, including its natural heritage.

National Museums of Canada. In 1968, Parliament enacted legislation to bring four national museums under a single Crown Corporation, reporting through the Minister of Communications. These were the National Gallery of Canada (NGC) with its separate Museum of Contemporary Photography; the National Museum of Man (NMM), (later called the Museum of Civilization) which includes the separate National War Museum; the National Museum of Natural Sciences; and the National Museum of Science and Technology (NMST). For years, all of these museums have had designated education units or functions which plan and operate accordingly. All did so gratis as of 1984, with no known contingency plan to change from the open education approach

described in Chapter VIII. This was also to apply, so far as could be determined, to the three museums whose construction was finally approved during 1983/84 - a new National Gallery, a new Museum of Civilization (with ultimate costs of over \$500 million), and a new National Aviation Museum.³

In all cases, plans were for continuity of the National Museum Policy of 1972. This called for a "democratizing" of access to museum programs and services for as many Canadians as possible through its five national programs.⁴ The Museum Assistance Program, a composite of several such programs, provided grants to 21 non-federal museums designated to ensure service to all regions of Canada. Grants were given to assist non-profit museums and galleries build their collections, and to 23 designated exhibition centres across Canada to assure access in all regions. Grants were also available for start-up of local conservation and exhibiting services, and for equipment purchase and improvement. The Canadian Conservation Institute, located in Ottawa, is available to all public museums and galleries in Canada for conservation and advisory services, and for training conservators. As of 1984, all of these services were free. The Canadian Heritage Information Network uses its computer-based information system to assist about 150 museums and art galleries across Canada with management of their collections and services. The Mobile Exhibit Program introduces Canadians to national exhibits depicting Canada's natural and social history, by means of three "museumobiles" located in the North, Western Canada and the Atlantic region. An international program provides for exchanges. In 1983/84, these five national programs had expenditures of \$20.8 million (and a staff of 170). This compared with an overall 1983/84 NGC budget of \$66.2 million (and about 1000 staff). Actual grants, however, were about \$8.6 million - less than Quebec's provincial expenditure. As reported, failure to keep up with the annual inflation rate had resulted in a 50 per cent drop in NGC support in real dollars over the decade to 1984.⁵

Not included in the foregoing were the National Postal Museum under the Canada Post Corporation, and the National Currency Museum under the Bank of Canada.

The National Library of Canada. The National Library Act creates a responsibility for co-ordinating all federal libraries - ca. 200 at 1984. Accordingly, the National Library has authority to enter into agreements with library and educational institutions in Canada, and with library associations everywhere. In addition to its co-ordination and liaison roles, the Library is required by its Act to administer the legal deposit of copies of all books published in Canada, regardless of the size of edition. It researches and publishes the Canadian Union Catalogue, the authoritative source for all Canadian libraries. The Library fills gaps in retrospective Canadiana collections. It also researches collections across Canada, as in the case of its survey of over 300 Canadian native studies collections in order to register, describe, and publish this heritage information for national and international use.

The National Library, established in 1953, aims to preserve and promote Canada's literary heritage. It is not Canada's major reference library and is not mandated to be so. It does, however, have a major collection of books in those scientific and technological fields which are not provided for by NRC's separate Canadian Institute for Scientific and Technological Information (CISTI). It can, if necessary, provide a back-up service to other Canadian libraries. It is in fact, a library to Canadian libraries, by virtue of the varied quality services it provides. In 1983/84, it fulfilled such a role on a budget of \$22.6 million (and 523 staff).

During 1983/84, the National Library placed particular emphasis on achieving its goals for using new information technologies related to library and information functions. Work was continued on its 1981 network project designed to research and test the feasibility of using telecommunications to provide access to all its data bases by all Canadian libraries, thus facilitating national research.⁶

The Public Archives of Canada. Since the Public Archives Act was passed by Parliament in 1912, the Public Archives of Canada has been responsible for acquiring and preserving public and private records of national significance. Although there has never been a specific collection of national education archives, a collection of valuable Canadian historical material is available for use in research and in curriculum development at all levels of public education.

To 1984, eight heritage programs were available. Historical and Genealogical Documentation contains a reference service which contains over 100,000 titles on Canada and its history. There are about one million cartographic and architectural items in the National Map Collection, dealing mainly with the coming of Europeans and their explorations. There are over 8 million photographs dating from 1840 in the National Photography Collection. The National Film, Television and Sound Archives has more than 60,000 hours of recordings. Pictorial Documentation has about 100,000 items, including documentary drawings, prints and paintings. All such data provide excellent primary and secondary sources for research and preparation of quality curriculum and materials on the subject fields covered by Canadian studies. These national resources are under-utilized, especially by foreign producers of education materials, and by the provinces, which tend to be parochial in their approach to Canadian history and civics. The Historical Archives operated during 1983/84 on an expenditure of \$16 million (and a staff of about 300). This compared with an overall corporate budget of \$37.7 million (and about 800 staff).⁷

National Parks and Historic Sites. To 1984, Parks Canada administered about 140,000 square kilometres of park lands. As described in Section 4 of the National Parks Act (R.S. c.189),

The National Parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

In spite of the statute's use of the term "education", it has been replaced in Parks Canada reports by the word "interpretation". This, it was claimed, was intended to mean the same thing, not to imply that Canadians cannot and should not be educated by experiencing their natural heritage.⁸

To 1984, this mission involved Parks Canada in services related to 39 natural regions and 63 historical themes or sites. Among the historic sites restored and maintained were the Fortress of Louisbourg, built between 1720-45, and the last French fort erected in North America; Queenston Heights and Brock's monument where a critical battle took place in the War of 1812; Signal Hill, Newfoundland, where, in 1901, Marconi received the first trans-Atlantic wireless telegraph communication. To say, for constitutional or any reason, that Canadians visiting these places are not intended to learn, to be educated, would defeat their purpose.

Included also were four heritage rivers and nine heritage canals. Staff are involved in the full range of services -conservation and preservation of natural topography, artifacts, and structures. Recreational use of parks is generally on a non-profit fee basis. In 1984, there were an estimated 8 million visitors at the national parks and historic sites. Expenditures were \$63.7 million (with a staff of over 1100). Parks Canada was preparing for its 100th anniversary in 1985.⁹

The National Battlefields at Quebec are administered separately by a federal Crown corporation.

2) Broadcasting

Since all public and private broadcasting in Canada is in one system, under common regulation, the licensing and regulation of educational broadcasting is included, regardless of Section 93. The public part of the system is made up of three components: the Canadian Broadcasting Corporation (CBC), the Northern Native Broadcast Access Program (NNBAP), and the regulatory Canadian Radio-Television and Telecom-

munications Commission (CRTC). All three have direct involvement in education and culture.

CBC. When the CBC started, one of its primary objectives was the promotion of "education". Later, for political not constitutional reasons, the euphemism "enlightenment" was substituted. It is used in the CBC legislation in effect in 1984, the Broadcast Act of 1968. In this Act, it is also stated in Section 3(b) that

the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.¹⁰

The same things should be said about Canadian public educational institutions. Other objectives analogous with the purposes of public education in Canada were: service to all parts of Canada; service in English and French; contribution "to the development of national unity"; and provision "for a continuing expression of Canadian identity".

In 1983/84, provision for achieving such objectives was made in Parliament's capital and operating appropriation for the CBC of \$797.9 million (exclusive of almost \$175 million from advertising revenue). Comparatively, the total was less than one half the federal tobacco tax revenue for the same period. These appropriation funds, plus advertising revenue, were used to provide CBC and Radio-Canada with separate television networks; regional television stations (18 CBC and 12 R-C); am and fm radio networks; and regional radio centres (31 CBC and 15 R-C). Included also were Northern Services in radio and television in official and indigenous languages, the international shortwave service, and satellite technologies. In 1984, CBC and its affiliate television stations had estimated audiences of 48 per cent French-language and 24 per cent English-language.¹¹

NNBAP. In 1973, Inuit in northern Quebec communities informed the (CRTC) that, linguistically and culturally, CBC broadcasts via satellite were unsuitable for them. They wanted broadcasting in their own language with content related to their culture.

With funding from the Secretary of State Department, they formed Taqramiut Nipingat Inc., to build their own radio stations. Later, in 1982, the Inuit Broadcasting Corporation (IBC) was licensed and permitted to use Anik satellite relay service. Broadcasting includes educational programs in Inuktitut. In March, 1983, the federal government announced a 4-year \$40.3 million program for northern broadcasts. This program was to serve Northern Inuit, Indian, and Métis peoples. In 1983/84, the expenditure for this service (with its links to CBC facilities) included a Secretary of State contribution of about \$4.3 million. Its broadcasts in eight native languages can complement school curricula. For example, broadcasts in Inuktitut support education in this language in the schools of the Northwest Territories.¹²

CRTC. The regulation of Canadian broadcasting in all its forms, and of telecommunications, is governed by federal statute, based on the constitutional law described. The CRTC was empowered by the 1968 Broadcasting Act to regulate and supervise all aspects of Canadian broadcasting and telecommunications related to Canadian content, service charges, cable television, native broadcasting, ethnic programming. It gives licences, renews them, amends, suspends and revokes them. This power supersedes Section 93 jurisdiction in and for a province, if educational broadcasting is involved. Because of this, and regardless of Section 93, the federal government (via CRTC's enabling legislation) permits licensing of provincial educational television services only when they are handled by a provincially incorporated body which is separate from the Provincial Government and its Department of Education.¹³ There are four such bodies which must reapply for CRTC licence renewals: TV Ontario, Radio Quebec TV, Access Alberta radio and television, and British Columbia's Knowledge Network of the West Communications Authority. All such bodies are eligible for, and receive, federal operating grants. CRTC has licensed no private "education" channels yet.

To 1984, there were 747 cable television stations across Canada. Cable was the main source of television service, with availability to four out of five Canadian homes in 1984. Thirty and more signals were available to city subscribers, and over 80 per cent of Canadians had access to American channels. Canadian content was, and remains, an issue - doubly so since average viewing for all ages was estimated at 24 hours per week in 1984, with potential of over 5 million viewers for a single program. Yet CRTC did not regulate this significant means of communication (and culture) until 1982, mainly because of litigation on the issue of whether plenary federal jurisdiction over broadcasting extended to the lucrative and influential field of telecommunications.

Some provinces were determined to acquire constitutional or *de facto* power in this field, in the matter of cable television in particular. In Re Public Utilities Commission and Victoria Cablevision Ltd. (1965), the court ruled that cable television systems were an extension of broadcasting and, as such, were under federal jurisdiction. The argument continued until the Supreme Court of Canada gave its constitutional ruling to settle the matter.¹⁴ This was done in one notable 1977 case, Capital Cities Communications v. Canadian Radio-Television Commission, in which the reasoning for federal jurisdiction was as follows:

Cable television systems are undertakings which extend beyond the limits of the Province in which their antennae and distribution systems are situated within the meaning of the exception to s. 92(1)(a) of the British North America Act of 1867. Their undertaking which consists of the reception of signals which reach them across the international boundary and the re-transmission of those signals via coaxial cable to their subscribers is a single undertaking. Thus no line can be drawn between the extra-provincial signals and the operations interprovincially so as to lead to a divided constitutional jurisdiction over the undertaking of such systems.¹⁵

In a related case, the Supreme Court also rejected Quebec's claim to power over licensing cable television. Politically and legally, the way was open to CRTC regulation in such matters, including those related to education and culture.

Significantly for the future, the belated establishment of federal power over cable television regulation was used forthwith to give Canadian signals, via cable, priority over American signals. Under the 1968 Broadcasting Act, in effect in 1984, the CRTC could exclude foreign cable duplications of Canadian counterparts. Canadian licensees were also favoured in the packaging of discretionary services - those which involve satellite-to-cable broadcast programming. No provision was made for a national education channel to serve provinces not able to afford a TV Ontario-type of service, although this could have been done without any constitutional prohibition. It is possible for local and regional bodies to obtain the corporate status necessary to obtain CRTC approval for educational cable service, as do some universities, including Carleton.

By 1984, VCR's, an expanding application of communications technology and a potential means for educational and cultural use, were available in an estimated 40 per cent of Canadian homes. They were not regulated, although federal copyright laws applied and were to be revised.¹⁶

When Marshall McLuhan philosophized that the medium of communications determines the kind of message it conveys, he was also touching on modern means of education and all the content and control issues involved. For example, while one coaxial cable used for television transmission can carry 1000 voice channels, a fibre optic cable can carry ten-fold the channels or linkages. The potential for education, anywhere, anytime, for anybody, is enormous, and it is constantly expanding.

3) Film and Video

Federal support to culture and education, directly or indirectly, in film and video production, involves several organizations and programs. This includes the NFB; the CBC; the Canada Council's Film and Video Programs; the Canadian Film and Videotape Certification Office, Department of Communications; Cité du Cinéma; the

Canadian Government film and Video Centre, Supply and Services Canada; and Telefilm Canada Corporation.

The main contributor is the NFB, which, from its beginning, has produced educational and cultural films. It has done this in co-operation with Canadian organizations, groups and governments, and has supported research, innovation, and training in film-making. In 1983/84, NFB had Parliamentary funding of \$58.4 million (and a staff of 947), exclusive of use of a cost-recovery revolving fund. The CBC also makes and markets videos of its cultural and educational television programs.¹⁷ In 1983/84, the Canada Council budgeted \$2.8 million for grants to assist film and video artists in such matters as research, writing, apprenticeships, advanced film study, and contributions to the operating costs of professional, non-profit film organizations.¹⁸ In 1983, the federal government established the Canadian Broadcast Development Fund with a five-year budget projection of \$245 million and the goal of facilitating higher quality television programs by private Canadian producers. This program was not intended to supplant CBC's role as the major producer of such programs and employer of creative talent. The idea was to raise the quality of Canadian private network programming, not to raid the CBC's own work through some kind of privatization.¹⁹

The mix of funding votes, cost-recovery operations, and links to other programs, make it difficult to estimate actual expenditures related to education. For example, Cité du Cinéma is a French language film and television production centre funded by a maximum of \$7.5 million from a federal Economic Regional Development Agreement (ERDA), a matching amount from Quebec, and an undetermined contribution from the private sector.²⁰

On the whole, the federal film support measures are geared to the private sector. This includes the certification office (for full capital cost allowance clearance), the video centre - for mainly private sector contracting of government films, and Telefilm Canada's mandate for promoting the Canadian film industry, including its Broadcast

Development Fund which made funding available for children's programming and to provincial educational broadcasters. A 1984 federal film and video policy implemented the (1982) Appelbaum-Hebert Report's recommendation that most of NFB's film-making, but not production responsibility, be contracted out.²¹ The Report also recommended that NFB concentrate on advanced film and video research and training. This evoked some concern that NFB's world-class capabilities and performance in the production of educational resources might falter - if not in quality then in quantity.

4) Communications Technology in Education.

In Canada the main part of telecommunications research, and its applications to education, has taken place under federal auspices, starting with NRC computer and satellite initiatives referred to in Chapter VI. As of 1984, such work was continuing at NRC, including space technology, and the Department of Communications was conducting research at its Communications Research Centre near Ottawa. The Department was involved in a number of technologies with potential in education, for mass and individualized applications - videotex, fibre optics, radio communications and satellites. Telidon videotex and teletext were two developing forms of information technology with some potential for educational use. Office communications systems research included technological content for commercial services. Radio systems research, which has been carried out by the Department since 1969, continued to concentrate on high frequency radio for long-distance communications, also with potential application in education. Fibre optics research continued with multiple applications to communications and education.

In 1984, the Department of Communications participated in a tele-education experiment with veterinarians and students of veterinary medicine in Western Canada. In one part of the experiment, a series of programs were relayed to veterinarians in the four western provinces. In another, the relay was mainly to Saskatchewan participants.

In both cases, video programming was sent and received via an ANIK-B satellite-cable-fibre optics network. Telephones were also used to facilitate two-way communication between the source and viewers. The applications of such communication in education at all levels are extensive where distance, cost, and limited expertise are factors, as they are in many parts of Canada.²²

5) Writing and Publishing

In 1984, the federal government had twelve main programs and a budget of about \$25 million for support of Canadian writing and publishing - exclusive of the postal subsidies and sales tax exemptions described in Chapter VIII.²³

Books are a prime source of both formal study and self-education. Book publishing is categorized three ways: trade, educational, and scholarly. Educational materials include school texts, workbooks, computer software, etc. All three forms are subject to Canada's small market, and to a zero-level tariff on American imports with their lower prices due to economy of scale in production. Canada's reading market is reduced by high illiteracy and functional illiteracy rates. For such reasons, the federal government has created some programs to protect Canadian interests in the three publishing categories.

Two main federal programs support book publishing, both based on the assumption that Canada should have its own publishing industry, its own cultural press. This includes the important field of educational publishing which most provinces cannot afford to finance themselves.

One program is the Department of Communication's Book Publishing and Development Program, established in 1978 to aid any company that is 75 per cent Canadian owned, and whose main activity is book publishing. University presses and non-profit publishing companies were also eligible. Federal support included assistance to Canadian textbooks and related learning materials, research and documentation

assistance, sales and marketing assistance, etc. In 1982/83, of \$7.6 million spent to support Canadian book publishing, \$2.1 million was allocated to incentives for Canadian textbook publishing. Funding of \$8.3 million covered eight program components in 1983/84.

The second program is the Canada Council's Writing and Publishing Program which has seven components and is also directed to Canadian publishers. The Council's 1983/84 Report gives specific amounts for the Canadian publishers concerned. If the transactions are categorized as merely commercial, it could be said that the publishers were subsidized, but, since federal jurisdiction applies over national cultural matters, it could also be said that support has been provided in an exercise of that jurisdiction.

In both federal programs, most support is in the form of grants for operating capital. In the Council's case in 1983/84, block grants ranging from \$7200 to \$67,200 were provided to 108 publishers. Project grants were provided to 16 publishers whose Canadian-owned publishing houses had 4 to 11 eligible titles on their backlist. Translation grants for the official languages were provided to 60 publishers, ranging from \$110 to \$70,000. International translation grants were provided, as was assistance to publishers for the travel of translators. This aid to book publishing was exclusive of: the Council's awards program; the Social Sciences and Humanities Research Council fund of \$1.1 million to support scholarly publishing; the Secretary of State Department's programs to support multicultural writing and publishing (described in this Chapter's section on multiculturalism); and the Department of Supply and Services (formerly the Queen's Printer) co-publishing arrangements with private printers. The co-operative development and publication, between the federal and provincial governments, of school curriculum materials involves no legal complication, as would the incorporation of a national textbook publishing company. Ontario, for example, recognized federal-provincial collaboration for the production of curriculum materials in the Education Act of Ontario.²⁴

6) The Performing Arts

The performing arts in Canada involve four main categories for purposes of federal expenditures: dance, music, theatre and touring. Six main federal bodies are involved in such funding: the Canada Council, the NAC, the Department of Communications, the Secretary of State Department, the Department of External Affairs, and the National Capital Commission (NCC). The CBC and the NFB also provide aid, accounted for separately, by means of videos and films of performing arts events, histories, creators and performers.

The principal source of funding for the performing arts is the Canada Council which functions at arms length from the Government. About eighty per cent of the Council's aid is given to institutions and the remaining twenty per cent to individuals. All submissions for grants are evaluated and judged against established criteria by representative experts. From 1957, when it was established by Parliament, to 1965, it functioned on income earned from an initial endowment of \$50 million. Like a private foundation, it is governed by a Board whose members are appointed by federal Order-in-Council. The principal beneficiaries are artists, their organizations, art galleries, art administrators and tour managers. In what was described as a "tangential" connection with education, the Council provides funding annually to three particular performing arts institutions with training functions. These are the National Ballet of Canada School in Toronto, the Vancouver Playhouse Theatre Company, and the Professional School Division of the Royal Winnipeg Ballet.²⁵

For all of its programs in 1983/84, the Canada Council spent \$65.6 million, including salary costs for a staff of 230 and excluding about \$10 million additional expenditure from its endowment income. About half of this expenditure was for the performing arts as follows:

	Operating Grants (\$millions)	Performing Grants	Totals
Dance	0.3	7.4	7.7
Music	0.4	11.7	12.1
Theatre	0.4	12.9	13.3
Touring	1.2	2.7	3.9
Total	\$ 2.3	34.7	37.0

Funding for the dance program went to ballet, modern and experimental dance, to aid companies, professional schools, and choreographers. Music program grants assisted over 200 music groups, including choirs, opera companies, instrumental ensembles, and orchestras. The theatre program assisted both French and English theatre companies and organizations (180 in 1982/83, for example, with grants ranging from \$4000 to \$1.405 million). Included were advisory services and funding to artists and their managers, as well as aid to festivals and workshops.²⁶

Such aid complemented and/or supplemented other formal education and training in dance, music and theatre programs supported by the provinces and special interest groups. It facilitated cultural and career development in these areas and the cultural benefits to Canadians through performances, including tours to all parts of Canada.

The NAC 1983/84 budget was \$14.4 million (and 384 staff) less operational revenues of about \$13.4 million. Included in its costs are promotion of theatre arts in education via English and French student companies, and organization of cross-Canada tours by some professional theatre companies. Department of Communications expenditure to increase access to the performing and visual arts was \$8.8 million. The Secretary of State Department's Ethnocultural Performing and Visual Arts Program expenditure was \$1.8 million. In 1983, the Cultural Policy and Arts Promotion Divisions of the

External Affairs Department spent an estimated \$300,000 on grants for international purposes. NCC costs were for concerts.²⁷

7) Canadian Studies

The overall aim of the Canadian Studies Program, administered through the Secretary of State Department, is to help Canadians to know their country, its history, and themselves. In particular, the program has drawn on the concerns and recommendations of the Symons Report on the state of Canadian Studies.²⁸ In general, it has drawn on benchmark observations of the Massey-Levesque Report, as these relate to post-secondary education and general cultural education. In 1978, the Secretary of State Department conducted a three-year pilot project with a budget of \$1.6 million. In 1981, a national three-year program with a budget of \$3.8 million was approved.²⁹ In 1984, when Cabinet approval was again given for both the program and its budget, the sunset provision was ended, and the way cleared for annual funding. Five national objectives were approved in the process. They were set to guide federal policy-making and activity, including grants. These objectives were as follows:

1. To develop, distribute and encourage the use of Canadian Studies learning materials in a number of specific content areas considered to be underdeveloped or neglected in the field of Canadian Studies;
2. To increase the public's knowledge of Canada;
3. To encourage the work of national voluntary organizations working in the field of Canadian Studies;
4. To enhance Canadians' capacity to develop new knowledge about Canada;
5. To encourage teachers to use Canadian materials and to teach their students about Canada.³⁰

These are the kind of directions which provincial departments of education might have been expected to set down. Thus, the federal initiative had the effect of compen-

sating for deficiencies in the provinces' Section 93 practice, and for gaps in provincial jurisdiction in matters of national concern and application. The Cabinet's approval of Canadian Studies program objectives and funding suggests deliberate federal action to remedy parochial treatments of Canadian history and neglect of the national dimension of civics, or government study, including its constitutional basics. Civics is treated as a minor aspect in the history courses of nine out of ten provinces, and even then it lacks national substance.³¹

Correction of such shortcomings is reflected in the criteria for federal grants in support of Canadian Studies. For example, activities "should have a national or inter-regional application or reference". Also projects "should be conducted in both official languages when appropriate...".³²

From 1984, federal funding of the Canadian Studies Program was set at \$3.7 million per year. As a special item, \$2.4 million was to be added to the 1984/85 budget to purchase 27,500 sets of the new Canadian Encyclopaedia for distribution mainly to French immersion schools in Canada. Also, \$2.6 million was to be allotted over four years to Horizon Canada, a magazine history of Canada, to facilitate its dissemination. The continuing federal Canadian Studies Program was to be "vertical" in coverage and approach - geared to the successive levels of formal and informal Canadian Studies, and to the age groups concerned. A mandate was also assigned to the Secretary of State Department to co-ordinate federal activities in Canadian Studies.³³

Of particular note was the emphasis to be placed on developing Canadian learning materials. In 1983/84 it was decided that, for the following year, there would be a concentration on six areas of concern in content. These were to be:

- Canadian social and political studies;
- studies of the Canadian economy;
- studies of Canada as a Northern nation
- professional education Canadian case studies;
- Canadian cultural studies;

- science curriculum in a Canadian context, especially the history of Canadian science and technology and environmental studies.³⁴

These content areas were to be addressed through activities in nine sub-programs, five of which were to be given primary priority: (a) Canadian Studies writing awards, five per year, up to \$10,000 each, tenable over two years; (b) a print learning materials development program for Canadian-owned publishing companies, with up to 50 per cent of the cost; (c) a film and audio-visual learning materials development program to address "the school-aged population at any level" and have "some applicability to the general lay audience"; (d) a computer-based and computer-assisted learning materials development program for development of Canadian Studies computer software; (e) a Canadian Studies learning materials dissemination program to ensure the availability of quality Canadian learning materials to school libraries and teacher's colleges. Three sub-programs in the second-priority list included: (f) prizes of \$5,000 each for excellence in teaching about Canada at four levels (Grades 1 to 8; Grades 9 to 13; community college; university); (g) development of distance education; and (h) support for organizations involved in Canadian Studies. A third priority sub-program was to involve matching private sector support for Canadian Studies.³⁵

No criticisms about such activities, or the 1984 proposals, were mentioned in either federal or provincial interviews about these matters. However, in its retrospective review, the authors of the Neilsen Report took exception, citing provincial complaints. They found objections to the federal Canadian Studies Program initiatives on two counts. One was the funding of national organizations concerned with Canadian Studies (\$852,000 in 1983/84), which were, or might be, critical of provincial action and inaction. The second objection was described as interference in provincial curricula. Specifics were lacking but the objections may have been raised as a result of spillovers from \$659,000 in federal grants in 1983/84 for 35 projects directed at the production of Canadian Studies learning materials for national use, in schools or elsewhere. If so,

they would not have come from the smaller and poorer provinces which lack the resources and markets for producing such materials in adequate, up-to-date supply. In any case, the Neilsen Report's preferred option was to abolish the Canadian Studies Program

..... since it does not meet the study team's criteria, there is no clear justification for its continued operation. As it stands, the CSP would remain an irritant to the provinces.³⁶

The Report took no account of provincial deficiencies in Canadian Studies. No constitutional grounds were considered to justify federal remedial actions - direct or indirect. This would have raised the question of possible gaps, or flexibility, in Section 93, as well as Section 91 powers for the federal order of government to act in the national interest. It would have raised the issue of common, basic concerns in Canadian Studies education in schools as a vital national matter in Canadian culture and citizenship. This would also have drawn attention to the continuing inadequacy and bias in provincial treatment, which in some opinions has been improved only marginally, since the critical Hodgett and Johnston studies in the 1960's. Given the significance of a country's obligation to ensure that its children and newcomers know its history, its national constitutional institutions - their purposes and functions - and given the reluctance or inability of provinces to deal with these matters in their education systems, a constitutional issue may apply.

It should be noted that the Government of Canada promotes Canadian Studies abroad through the Department of External Affairs by means of services such as exhibitions via Canadian embassies and consulates. Financial support is provided for Chairs of Canadian Studies, scholarships, fellowships, exchanges and conferences. Dissemination of Canadian research and publications is both expected and appreciated at home and abroad. The constitutional validity of such promotion is not in question. However, since the 1960's, Quebec has sought co-national status to represent Quebec francophone

society and its francophones internationally. The Government of Canada has insisted on being the sole sovereign representative of all Canadians - including Quebec's anglophones and native peoples, and including all Canadian francophones outside Quebec.³⁷

8) Literacy

Federal involvement in literacy education made unemployment and unemployment the principal criteria for such economically-based, compensatory action. Most of the candidates in the former federal programs had either dropped out of regular school or had left without acquiring minimal literacy. With a grade 0-12 entry to federal "adult" training for employment or re-employment, the basic skills training and development curriculum provided was a socially acceptable entry for illiterate persons. When federal support all but ended, the problem reverted to the provinces where it had originated. In all provinces in 1984 except Quebec, full, formal "adult" education was outside Section 93 responsibilities in legislation and programs for elementary and secondary education.

Education begins in the home, but for the illiterate and poor that beginning is needlessly handicapped. For some years now, declining school enrolments - resulting in unused facilities and surplus qualified teachers - have made it feasible for the provinces to all but eliminate illiteracy in their adult and youth populations. They have no statutory obligation to do so under Section 93 unless they legislate for this, since there is still no constitutional right to at least a basic education and literacy.

In interviews for this study at the Office of the Commissioner of Official Languages, it was asked whether, in its advocacy of official bilingualism, any consideration had ever been given to illiteracy in these official languages as a focus for evaluation, report, recommendation, and remedy. The answer was no, not yet.

9) Multiculturalism

Multiculturalism is interpreted to include provision for heritage language as well as culture. In federal policy and operations, both matters are defined and treated as separate from native cultures and languages. Moreover, both are treated separately from Canadian Studies - in policy and budgeting. From its outset, the federal policy of multiculturalism has recognized the pluralism of cultural origins in Canada, but never as proxies, or replacements, for the development of Canadian culture.

In education, multiculturalism was to give parents and their children the opportunity to learn about their particular heritage. Multiculturalism, like official bilingualism, was not to be, or become, obligatory study for everyone, or for any particular ethnic groups. The knowledge and learning materials produced via various federal multicultural education funding programs have been intended for the enlightenment and enrichment of all Canadians, on a voluntary basis. The policy and its support has been expected to promote mutual tolerance. Hence, in federal grants and activities in support of multiculturalism in education, the focus is extra-curricular. This leaves the separate provinces to decide whether and how to make multicultural study curricular. If a province decides to do so, learning resources and teacher guides are available on request, for models or for use. An example is Multiculturalism Canada's manual, Cross-Cultural Awareness Education and Training for Professionals, published in 1985.

The federal Canadian Ethnic Studies Program, started in 1972, provides significant support for both extra-curricular and curricular learning. The program supports individual or group researchers whose work is aimed at promoting a better knowledge and understanding of ethnic pluralism in Canada. It endows Chairs of study, sponsors ethnic history research, and facilitates development of learning materials and methods for promoting ethnic study and cross-cultural relations. To 1985, nine Chairs of ethnic studies had been established, with eligibility for up to 50 per cent of cost in federal grants. Between 1978 and 1984 for example, 85 research grants had been made to in-

dividuals and groups for their research on particular Canadian ethnic groups - their origins, contributions to, and problems within, Canadian society. In 1983-84, \$1.2 million was used to fund various ethnic studies. In the Writing and Publications Program, financial assistance totalling \$956,000 was provided for 167 projects. One publication was Issei, Stories of Japanese Canadian Pioneers. Two publications in the "Generation Series" were From China to Canada, a history of Canadian Chinese communities, and A Heritage in Transition, a history of Ukrainians in Canada.

In the Cultural Enrichment Program, which supports heritage languages (other than the two official languages), \$3.2 million was provided in 1983/84. This was for aid to operational costs, teacher training, development of materials, and the establishment of Toronto's National Heritage Language Resource Centre. During 1983/84, an estimated 120,000 students at the elementary level received extra-curricular heritage language training involving 930 sponsoring ethnic organizations. In the Performing and Visual Arts Program, \$1.5 million was used for audio-visual productions including "From a Different Perspective: Race Relations in Canada", a nine-part series for radio. The Group Development Assistance Program spent \$2.4 million in 1983/84 to help non-profit ethnic organizations respond to, and communicate issues of concern to them, including issues in education. The Intercultural Communications Program was given \$2.6 million during the same period, to assist multicultural and multiracial voluntary groups. Another \$2.6 million was spent in the Cultural Integration Program, to help organizations which assist immigrants and refugees to prepare for all aspects of Canadian life including education. Funding was also provided to the Canadian Multicultural Council, whose interests include education. In 1984, a national conference on multiculturalism in education was held, with funding to facilitate the participation of about 700 local school trustees and educators. This meeting had the support of the Council of Ministers of Education of Canada.³⁸

10) Native Cultures and Languages

When the first Europeans "discovered" what is now Canada, they encountered a rich and varied distribution of native cultures and languages, as they learned when they explored and mapped the land - sometimes with native guides to show them the way. From the first, the native peoples were expected to acculturate, to be assimilated. In general, their cultures and languages were treated as inferior. For example, it took over two centuries after the Treaty of Paris in 1763 transferred New France to British rule for the Department of Indian Affairs to do something about native cultures and languages in its school system and curricula.

This was after 1970 when, as described in Chapter VI, the Department was ready to "integrate" these first peoples' children and youth into the provincial schools en masse. To this time, these pupils had started school in English or French, with no second language instruction, and with no preliminary use of their particular dialects - even though about 80 per cent of them knew only that language. They were thus introduced to the idea of personal failure and feelings of cultural inferiority from the first day at "school". One later improvement was preliminary instruction in English, or French, as a second language. When, in 1969/70 the federal policy of integration in education was turned down by most Indian peoples, serious efforts to deal with native cultures and languages began - with striking results in some matters and remedy too late in others.

In 1983/84, the Office of the Commissioner of Official Languages noted (in information gathered by the National Museums of Canada over the years) that in Canada there were 11 separate indigenous language families, and an estimated 53 distinct languages.³⁹ All of the language families spill over Canada's provincial borders. Except for Inuit-Aleut, all but two of them are located east of Lake Winnipeg. In Canada, concern for the study, use, and preservation of native languages is concentrated constitutionally under federal jurisdiction. This makes the Government of Canada

responsible for matters related to native cultures and languages, including their protection.

Such responsibility is not exclusive, because morally it extends to others in Canadian society - the provinces, where native people live and spill over from their federal reserves into provincial jurisdiction and schools; the universities, with their capacities in anthropology and linguistics; the native peoples themselves, and their organizations.

Six categories of language survival were defined, based on the estimated number of speakers in Canada in each case. Eight native languages with 10 or fewer speakers were rated as near extinction:

<u>Family</u>	<u>Language</u>
Algonquian	Atenaki
Athapaskan	Delaware
	Tagish
	Sarcee
	Han
Iroquoian	Tuscarora
Salishan	Sechelt
Tlingit	Southern Tsimshian

Five native languages with 10 to 100 speakers were rated as extremely endangered:

<u>Family</u>	<u>Language</u>
Iroquoian	Mondaga
	Seneca
Salishan	Squamish
	Straits
Wakashan	Nitinat

Thirteen languages, with 100 to 500 speakers, were rated as quite endangered; eleven, with 500 to 1000 speakers, were rated as endangered; thirteen, with 1000 to 5000 speakers were rated as moderately endangered. Three native languages with more than 5000 speakers were rated as having an excellent chance of survival:

<u>Family</u>	<u>Language</u>
Algonquian	Ojibway
	Cree
Inuit	Inuktitut 40

To 1984, no national institute for the study of native languages had been established although the Native Council of Canada, which is dependent on federal funding, had considered the idea. No Commission, or Commissioner for Native Languages, had been established either - such was the force of a policy of assimilation. Prior to this, linguistic study of a few scholars and missionaries had produced some native language dictionaries and orthographies. Included amongst these is a definitive Inuit lexicon produced by Duncan Pryde, a modern Canadian explorer who came from Scotland as a youth to work in the North. Included also is the ethnological and linguistic research of federal scholars such as Marius Barbeau. In the North, the Inuit had had their own orthography for some years. Even before the federal delegation of authority over education to the territorial governments, the Northern school system had moved into using the vernacular at school before teaching English. Later, in many northern schools, English and Inuktitut were made the languages of instruction for all children in attendance.

Publishing in the vernaculars has been funded by the Department of Indian Affairs and Northern Development and the Secretary of State: for books, periodicals, bulletins, monographs, school texts, histories, charts, and instructional kits. Broadcasting in the native languages was achieved late, but adequately. Nevertheless, to 1984 the languages of Canada's first peoples were still the most vulnerable of the languages spoken, read, and written in Canada. Between 1984 and 1988, four native Indian languages became extinct.

In spite of shortcomings and failures in native education under federal jurisdiction, it was stated strongly in interviews and in various published statements that, constitutionally, the Indian and Inuit peoples want and expect a continuity of federal

Section 91.24 jurisdiction until, again constitutionally, self government in education is given over to them. This turning point was expected after the Constitutional Conference in 1985. As stated by native representatives in interviews, when this self government is achieved, it will be possible to make the concentrated efforts necessary for cultural and linguistic restoration and preservation - where it is not too late.

11) Citizenship

The federal government uses training courses to prepare immigrants for Canadian citizenship. For immigrants who do not know either of the Official Languages, it does this by means of contributions via the provinces for textbooks, teachers and rental of facilities. Funding for this, and for basic instruction on the knowledge required to pass a citizenship test, is on a 50:50 basis. Additional federal funding for the second language instruction required for the children of immigrants is not provided.⁴¹ This is treated as a provincial and/or local responsibility - and is significant in places like Toronto or Montreal. The federal government has consciously provided learning and teacher resources related to Canadian studies including culture, ecology, and civics. To 1984 these resources were mainly free, including delivery.

In other federal expenditures related to Canadian citizenship, the Office of the Chief Electoral Officer described its training and polling participation activities in each federal election for about 250,000 official participants as a form of civics education.⁴² The Advisory Council on Aging was exploring continuing education as a concern for Seniors.⁴³ By 1984, the Secretary of State Department, including its granting programs in its Citizenship Directorate and Multicultural Branch were contributing about \$40 million annually to adult education related to enrichment of Canadian citizenship.⁴⁴ (This was exclusive of collaborate programs with the Department of Indian Affairs and Northern Development, and its Court Challenges Program with its constitutional significance.)

Voluntary organizations, whose invisible contributions to the economy are excluded in statistical measures of the GNP, received support from 14 or more federal departments and agencies for more than 50 programs.⁴⁵ This support may have served federal political and policy interests in some cases, however all of it was referred to by these federal departments as support for Canadian citizenship learning and action. Support to native and women's organizations was included among these programs. It was not possible to determine the number of copies, or their cost, of the printings of the Constitution Act, 1982 and its appendix of all other Constitution Acts and amendments. Suffice to say, this basic citizenship learning resource was, to 1984, available to schools, groups and individuals for the asking.

Conclusions Re: Hypothesis No. 3

Federal participation in education, as this relates to culture, is multiple and varied. It must accommodate Canadian culture writ large, the particular cultural interests of the two official language populations, the cultures of the native peoples, multiculturalism, and the sub-cultural problems in socio-economics affecting all these groupings. Authority for the various federal cultural activities in relation to education has been derived from silence in the 1867 Act, and from the linkage of education and culture in the 1982 Act.

The main instruments of the federal cultural policy related to education are its national institutions, natural and cultural; its constitutional support of official bilingualism as an entrenched right in education; its support of multicultural policy; its comprehensive support for the arts, including Canadian film-making, writing and publishing; its Cabinet authority for activity in, and support of, Canadian Studies; its support for active citizenship. While federal involvement in communications and telecommunications is based on plenary federal jurisdiction, it also fills Section 93's gap in

national jurisdiction. Thus, federal efforts in these fields have validity in law, culture, and education.

There seems to be a socio-economic bias in the extensive federal participation in education and culture which applies to language. Insufficient efforts made to protect and preserve the languages and cultures of Canada's first peoples could lead to future disputes - doubly so given the related expenditures and political expediencies involved in the funding of heritage and official languages, none of which are in remote danger of extinction.

Canada's illiteracy statistics are grim - for the individuals concerned, their families, the community, Canadian cultural development, and citizenship. That these statistics were so bad for so long, and in every province, dispels any expectation that Section 93 jurisdiction is a full and sufficient guarantee of basic education.

The result is regular post-secondary operating and capital funding in the billions for the more advantaged, and a token fund, which can be largely consumed by administrative and public relations costs, of a few million for literacy. This inaction and hypocrisy denies disadvantaged illiterate Canadians one of the most basic entitlements of a democracy - an education - to achieve literacy, cultural development, employment, and meaningful citizenship.

Hypothesis No.3 Summary

In the introduction to Chapter VI, which identified developments and milestones in federal participation, it was hypothesized that

Despite provincial jurisdiction for education in Section 93 of the Constitution Act, 1867 and its subsequent variants, federal participation in education broadly defined, has now become extensive and complex.

This hypothesis was carried through Chapters VII, VIII and IX to consider it as of 1983/84. As the Chapter data and conclusions show, federal participation now involves all aspects of education and its related matters. It is obligatory where full and direct responsibility is applied: as for Section 93 in the territories and its residuals; as for the Section 91 anomalies. It is necessary where divers support measures are involved: to permit spillover benefits from direct participation; to observe concurrence; to meet particular national needs in relation to education. It is extensive, with costs to match. These costs include substantial equalization payments to disadvantaged individuals, families, groups, and regions to facilitate their education and training. It is complex too because of the integral linkage between education and research, and between it and culture - two separate matters of obvious concurrent jurisdiction. It is also complex because of the vital linkage between education and communications, whether education is narrowly defined to what each province declares it to involve "in and for" its jurisdiction, or whether it is writ large in national terms. It is more complex still because communications and telecommunications, the modern means of mass and individualized education in the Information Age, are under exclusive federal jurisdiction.

While provincial jurisdiction for elementary and secondary education is not an issue, the Government of Canada has become a participant through federal funding of official languages in education, and the use of EPF financing for certain secondary grade programs. Federal funding assistance to Quebec's quiet revolution in education has been significant and largely unknown.

The greatest complexity occurs in post-secondary education of all kinds, and in university and college education in particular, where research, culture and human resource development responsibilities of the two orders of government are now inseparable. This complicated situation continues because of lack of political, executive and, above all, constitutional clarity and direction on the limits, or reach, of Section 93 jurisdiction to accommodate the modern concept and requirement of lifelong learning as

training and retraining - both formal and informal. All the matters concerned stand to be enlarged and complicated further if, constitutionally in Canada, education is ever made a right of all its citizens.

END NOTES

1. Interviews, P.C.O. and Secretaries of State.
2. Interviews: Dr. A. Davidson Dunton; CBC program and Secretary of State Department Officials.
3. Annual and education reports. Financial and statistical data, N.M.C. and component institutions. Interviews, institutional managers and experts.
4. Interview, Mr. Andre Dorais, Executive Director, N.M.C. Corporation. Reports and related interviews.
5. Ibid. and related N.M.C. financial statistics.
6. Interviews: Associate National Librarian, N.L.C. managers. Annual and Special Services reports.
7. Annual Report 1983/84 and interview, Director General Public Archives of Canada.
8. National Parks Act, R.S. c 189, Section 4. Interview, ADM National Parks and Historic Sites.
9. Ibid. See also W.F. Lothian, A Brief History of Canada's National Parks, Ottawa: D.S.S., 1987.
10. Broadcast Act 1968, Section 3(6)(g). Note also that Section 3(i) of this Act states that "facilities should be provided within the Canadian Broadcasting System for educational broadcasting."
11. CBC Annual Report, 1983/84. Interviews, CBC.
12. Ibid. Also Secretary of State Department interview and reports.
13. CRTC regulations. Interview, CRTC legal counsel.
14. Re Public Utilities Commission and Victoria Cablevision Ltd (1965) 52 W.W.R. 286.
15. Capital Cities Communications v. CRTC (1978) 2 S.C.R. 141.
16. CRTC Annual Report, 1983/84. Department of Communications reports.
17. NFB Annual Report 1983/84. Interview, NFB Director.
18. Canada Council Annual Report, 1983/84.
19. Department of Communications Annual and special program reports. Interviews.
20. DRIE Agreements data and interview.
21. Canada, Federal Cultural Policy Review Committee, Report of the Federal Cultural Policy Review Committee, 1982 (Appelbaum-Hébert Report). Ottawa; D.S.S., 1982.
22. Department of Communications reports. Interviews: Deputy Minister, et al.
23. Canada Council Annual and program reports. Interview.

24. Education Act of Ontario, Section 11(4).
25. Canada Council documentation and interview, Executive Assistant to the Chairman.
26. Ibid.
27. Canada Council Annual Report, 1983/84.
28. To Know Ourselves. The Report of the Commission on Canadian Studies for the A.U.C.C., T.H.B. Symons Chairman. Ottawa: A.U.C.C., 1975. See also, Reflections on the Symons Report. The State of Canadian Studies in 1980, James E. Page, Ottawa: D.S.S., 1981.
29. Secretary of State Department information. Interviews.
30. Secretary of State Department, Canadian Studies Program (CSP), Application form, 1984/85, p.1, (Objectives), Interview, CSP Director.
31. Review of provincial course outlines as of 1984. There is, however, scope for such learning via approved text sources and the teacher's discretion to be the final author of curriculum.
32. Secretary of State Department. op.cit.
33. Secretary of State Department and C.S.P. annual reports, 1983/84.
34. Secretary of State Department, Canadian Studies Program. Application form, 1984/85.
35. Secretary of State Department and C.S.P. annual reports, 1983/84.
36. Education and Research. A Study Team Report to the Task Force on Program Review, Hon. I. Nielsen, Chairman. Ottawa: D.S.S., 1986, p.209.
37. Interviews, External Affairs Department.
38. Ministry of State for Multiculturalism; annual reports and special interviews.
39. Documentation, Office of the Commissioner of Official Languages. Interviews. See also The Use of Aboriginal Languages in Canada An Analysis of 1981 Census Data, Ottawa: D.S.S., 1987. Prepared for the Secretary of State Department.
40. Ibid.
41. The requirements and costs for official language instruction are a heavy burden on local taxation. They cause increases in Official Languages costs and negative public reactions which greater federal and provincial funding would correct.
42. Interview, Deputy-Chief Electoral Officer.
43. Interview, Director, Advisory Council on Aging.
44. Secretary of State Department information. Interviews.
45. Ibid.

CHAPTER X

THE FIT BETWEEN FEDERAL PARTICIPATION AND THE CONSTITUTION

This Chapter identifies and analyzes the fit between federal participation in education and the Constitution - the composite of the legal rules which the Court will enforce, and the non-legal rules, or conventions, which the Court has not enforced. The legal rules of the Constitution take precedence over all other legal rules. Its non-legal rules depend, as they do under the British Constitution and those constitutions derived from it, on the compliance of the politicians who govern and the public servants who serve their governments and the country.

Description in this Chapter relates to two hypotheses which were used to guide the gathering of information and opinion in order that conclusions could be drawn. The first, (Hypothesis No.4), is that most federal participation in education has a constitutional basis. The second, (Hypothesis No.5), is that federal officials have a limited awareness of the constitutional bases of their educational work.

Constitutional Fit

The fit between federal participation in education and the Constitution must be considered in the two periods in constitutional statute law and judge-made law which apply: from the Constitution Act, 1867 up to the Constitution Act, 1982; and since the 1982 Act to the present. In both periods this fit includes what are termed gray areas constitutionally, in particular the federal spending (and lending) power. In both periods, it is necessary to consider relevant institutional rules which may be developing into constitutional conventions, or be transformed into legal rules of the Constitution by enactment or by judicial review. Determining constitutional fit also serves to identify

extra-constitutional, or political and/or executive actions, including *de facto* practices which remain to be challenged in judicial review.

In interviews for this study, six federal Liberal Ministers expressed conviction that all the identified federal participation in education was constitutional. Four were lawyers and one had been a provincial Premier and the Deputy Prime Minister. Two former Secretaries and two former deputy-Secretaries of Cabinet, and five other senior PCO and PMO officers were of the same opinion. One of these persons, a former Secretary to Cabinet, added some historical comments on jurisdiction for post-secondary education. His concern was that, although there were deemed to have been ample constitutional grounds for the Government of Canada's education program for veterans after World War II, there had been insufficient time to do any in-depth research on Section 93. His own opinion was that, while the Constitution Act, 1867 gives each province responsibility for education in that jurisdiction, this power applies to elementary and secondary schools only, rather than to "independent" universities.

The ten departmental heads who were interviewed declared that their educational programs were constitutional. However, one of these officials asked this researcher what jurisdiction applied; another erred in an interpretation of the terms of Sections 38 and 40 in the 1982 Act. Reliance in most of these answers seemed to be on the federal spending power - a gray area which is assumed to be constitutional until shown otherwise in judicial review. Some of these deputy heads regarded this power's inferred constitutional basis as sufficient. One thought it acceptable if not abused.

Some federal activity has been described in this study as "extra-constitutional," in the sense that the actions involved are taken without the certainty of constitutionality. They are primarily political and/or executive actions which, hopefully, are also constitutional. They could, through gradual use and development, become institutional rules, or conventions - that is, non-legal rules of the Constitution. Federal-provincial conferences on education are a possible example. The incorporated Council of

Ministers of Education of Canada (CMEC) cannot be accepted as a constitutional body, or of ever being so in relation to Section 93's limitations on provincial jurisdiction extraterritorially. Thus this body, a prime focus for challenges to the constitutionality of federal participation in education, is referred to as an extension of executive federalism in the provinces.

Sixteen federal legal officers interviewed expressed the opinion that the education-related functions for which they had advisory involvement were constitutional. These officers represented various federal departments, agencies, and the Department of Justice. Without exception, they were prepared to give opinions forthwith, citing the specific constitutional authorities deemed to apply - a service available to federal managers on request.

It was neither discreet nor possible to ask the Justice Department for its legal opinion on Section 93 jurisdiction in relation to federal participation in education. However, in an interview for this study with a senior Justice counsel in public and constitutional law, it was learned that the Department did not have a prepared advisory position on this matter for the Government, and that none was known. This suggested that no such request had ever been made by a Government of Canada. As this researcher was informed, the Justice Department is reactive. That is, its legal opinions are prepared and given on request, and then only to the Department's Minister and the Government, unless either authorizes otherwise. Justice legal opinions are treated as confidential in matters where, for the Government, litigation is possible, or where political repercussions are likely.

It was still possible, however, to request via legal counsel for the Department of Consumer and Corporate Affairs (CCA), a Justice Department opinion on the constitutionality of federal incorporations of education bodies. The written opinion given was confidential and could not be provided for use in this study. The CCA legal counsel who received it was able to describe its opinion, which was that federal incorporation of

an educational body is possible, legally, when its objects are beyond the Province's exclusive education power "in and for" that jurisdiction. This mirrors the residual in Section 93 which explicitly omits provincial jurisdiction, thereby implying that there is federal jurisdiction to act in matters whose objects in education are not provincial in the singular.¹

A constitutional fit with the various federal programs and services identified in Chapters VI to IX was claimed² at senior levels and supported in the various instances by federal and other legal counsel consulted. There was no jurisprudence to contradict this, including no clear definition of the term "education", or of its reach, to make up for the vagueness on these matters in Section 93 and its variants. It was this researcher's observation that the relevant constitutional law had been considered at the senior levels mentioned for all programs reviewed: before the fact most of the time; after the fact some of the time - particularly where reliance was being placed only on the federal spending (and lending) power.

Constitution Act, 1867. The Fathers of Confederation intended to give the central government substantial residual and corrective powers in the Constitution. Some of these powers were limited by early constitutional rulings of the Imperial Judicial Committee of the Privy Council. Nevertheless, in the case of education, as it has developed and been elaborated in practice, considerable scope for federal participation remained. This is shown by the sources of constitutional power which can, or may, apply in support of such participation, and which were cited and/or noted as constitutional authorities for the participation identified in this study. These sources are summarized as follows:

Section 93 involves (a) primary power over education in the territories;
 (b) remedial powers as specified in the Section (in subsections 3 and 4);
 (c) residual powers (assumed) because of gaps in its application to national, intergovernmental and international matters in education;

Section 92(10) (c) works and undertakings which Parliament can declare to be in the general advantage;

The P.O.G.G. clause in Section 91's preamble: for acting in emergency (including use of the War Measures Act and related regulation); for acting in the national interest as a national and intergovernmental residual; and for acting in the Section 93 residual;

Section 91 powers which as constitutional anomalies give Parliament direct responsibility for education re: (s.s. 7) militia, military and naval service, and defence; (s.s. 24) Indians, and lands reserved to Indians; (s.s. 28) the establishment, maintenance, and management of penitentiaries;

Section 91 makes Parliament responsible for the training and career development of public servants;

Section 91 powers where education is assumed to be an aspect in the exercise of the particular power (eg. as in the case of s.s. 2 re: trade and commerce for "adult" training for purposes of employment);

Section 2A re: unemployment insurance where education (as training or retraining) is assumed to be an aspect in the exercise of this federal power;

Section 91(2), the trade and commerce power, gives Parliament jurisdiction over incorporation of companies whose objects are not provincial. Also, the courts have ruled that there is a federal residual for incorporation of bodies whose objects are national, since Sec. 92(11) empowers a province to incorporate only bodies with provincial objects.

Section 91(27) re: the criminal law, which gives Parliament jurisdiction re: censorship and protection of free speech (in addition to that which is derived as a non-legal rule from the terms of the Preamble to the Constitution Act, 1867 and since included as a legal rule in the Canadian Charter of Rights and Freedoms in the Constitution Act, 1982); and re: corporal punishment, juvenile offenders, the education of all Canadian police on matters pertaining to the Criminal Code of Canada; etc.;

Concurrent powers apply for agriculture and immigration (under Section 95), and for labour (via judicial review) and involve education in each case, at the least as an aspect;

Concurrent power is assumed to apply in two separate matters omitted explicitly in the 1867 Act but related integrally to education, namely research and culture;

Parliament's power over, first, broadcasting and, then, telecommunications (as an extension of broadcasting) is derived from judicial review: first by Judicial Committee of the Privy Council ruling and, then, by reaffirmed Supreme Court of Canada rulings;

The Royal Prerogative power applies where it has not been removed by statute, and where no Parliamentary expenditure approval is involved - as for example in the case of the Government of Canada's required approval of any and all representatives of Canada to external conferences.

In addition to the aforesaid federal powers, the dormant but valid Section 91 powers of disallowance and reservation may be added. For example, this power could have been used to check Quebec's Bill 101 where it interfered with federal jurisdiction for protecting minority rights in education.

Section 91(29) provides for a federal residual for classes of subjects excepted in the Section 91 list and assigned exclusively to the provincial legislatures in Section 92. This power has never been tested in relation to education, although it might be considered in judicial review in the unlikely circumstance that a challenge is made to federal concurrent jurisdiction in research, or culture, or post-secondary education.

Allowance has to be made for the Court's distinguishing procedure in judicial review. As pointed out several times in interviews with senior federal officials, while the Court might not distinguish between education in levels, it would likely distinguish between education and related matters, such as research, culture, communications and, maybe, training or retraining. Moreover, it might distinguish between "education" and "post-secondary education", since the latter is not merely a level of instruction. None of its other principal components, notably research, culture, communications and telecommunications, is under full provincial jurisdiction. As well, it has broad, diversified application including adult training for employment, research institutes, and colleges and universities.

The federal spending (and lending) power, with its inferred constitutional bases as described in Chapter IV, has been assumed to be constitutional by successive governments of Canada - pending constitutional amendment to clear up the doubts, or judicial review to rule on the matter constitutionally. Meanwhile, it is the principal authority cited for federal grants and contributions, with or without conditions. Hence, should it

be found *ultra vires*, some substantial federal programs would be in jeopardy, unless alternative constitutional grounds were assumed or found to apply - such as concurrent jurisdiction in post-secondary education.

Section 93 has never embraced an obligatory jurisdiction for minority rights in education. The Fathers of Confederation and the Imperial Parliament showed that they were aware of the issue in respect to minority religious rights in education when they made the federal order of government the protector of these rights. Subsequently, the Court showed its awareness of this omission in the province's Section 93 power when it ruled that minority language rights in education are apart from Section 93. The minority rights residual in education is in federal jurisdiction, with common application in all of Canada.

Separation of minority rights in education from Section 93 reinforces the need for federal jurisdiction in education in these matters. This creates considerable potential for new minority rights apart from Section 93 as the result of federal obligation or initiative. When such rights are entrenched and appeal lies to the Court, there will still be a need for federal participation to ensure action. The Court cannot administer its rulings.

Constitution Act, 1982. The Act of 1982 makes some significant changes which affect education and federal participation in it, directly and indirectly. These matters are summarized here in relation to new federal participation in education which was identified in this study.

1) Section 23 established official language minority rights and privileges in education in and for all Canada, on an individual, parental-choice basis (Section 93 provides for religious minority rights in education where these have been entrenched in a province's constitution on a group basis and, also, with parental right of choice.) Section 23(1)(a) will not apply in Quebec until, as Section 59 - which was added to the 1982 Act at Quebec's insistence - is authorized by either its legislature or government.

In the meantime new citizens whose first language learned and still understood is English will not be able to have their children instructed in English in the Province's elementary and secondary schools. In the rest of Canada, new citizens whose first language learned and still understood is French will have the right to have their children instructed in French. Ostensibly, Quebec's exemption is to protect French, the first, or only, language of the Province's more than five million Quebecois. It is also a paternalistic measure which serves elite interests in Quebec politics. The measure is constitutional and legal, but it is not democratic.

The proposed Meech Lake Accord involved a major problem of fit with this provision for a national minority official language right in education. The vagueness of its aim to preserve the "existence" of the official minority languages, in Quebec and outside it, might have been used to undo Section 23's clear rights provision and cut off its national dimension and the continuing need for federal participation it implies. It recognized English-speakers and French-speakers. Its proposed Section 2(2) referred to each province's legislative role for preserving its linguistic characteristic. To its critics, this seemed very much like a prescription for unilingualism at the expense of the anglophone minority in Quebec and the francophone minority in the rest of Canada. This objective for constitutional change is still on the political agenda.

2) Section 15's Equality Rights, before and under the law without discrimination, are of importance in education. Potentially, the subsection 2 provision for affirmative action to ameliorate the conditions of disadvantaged persons or groups is of considerable national significance in education. However, Section 15 is subject to the Section 33 notwithstanding clause, whereby Parliament or any provincial legislature may exclude its provisions in their legislation, and renew such exclusions ad infinitum. Such is the lack of fit between the pre-1982 doctrine of parliamentary sovereignty which applied with few limitations, and the American-style Canadian Charter of Rights and Freedoms, with its entrenched rights which Parliament and the provincial legislatures cannot

change or challenge without constitutional amendment. (Judging from feedback on federal management training and practice, and some interview comments noted during this study, this clash of different systems of governance seems to be a major cause of confusion which the management of the Public Service has not explained to federal public servants through in-service training.)

3) Section 2's "Fundamental Freedoms," which in (s.s.6), include "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," is also subject to the Section 33 notwithstanding clause. Until 1982, these matters of vital concern to education were objects of political as well as legislative protection. This was in keeping with constitutional conventions inherited from British and Colony of Canada practice before 1867 and implicit in the terms of the Preamble to the Constitution Act, 1867. The "notwithstanding clause" upholds the doctrine of parliamentary sovereignty, which, until the 1982 Act, applied with only a few limitations from 1867. In 1982, a number of non-legal rules were raised by enactment to legal rules, but then, because of the notwithstanding clause were, in effect, made optional. Before 1982 these rules were there to be respected and accommodated, even though they would not be enforced by the Courts. As of 1982, they can be enforced if they haven't been suspended by use of the notwithstanding clause.

In the meantime, the federal Criminal Code of Canada, and a good body of its case law, apply in defence of the freedoms concerned. Moreover, these protections of freedom apply to education nationally, as in the case of the prohibition of hate propaganda. No province can delimit the Code's enactment and its national application, including its law related to education.

4) Section 25 might facilitate constitutional amendment that would grant native peoples self government over education. At the 1983 First Ministers' Conference on Aboriginal Constitutional Issues, to which representatives of the aboriginal peoples of Canada were invited, some provinces reiterated concerns about the fit between their

government powers, provincial and local, and a potential third order of sovereignty on Indian lands located within their boundaries.² The provinces did not claim any constitutional responsibility for the education of Indians (and Inuit), nor was it offered by Prime Minister Trudeau.³

Minister of Indian Affairs and Northern Development, the Hon. John Munro, when interviewed for this study in 1985, emphasized that the provinces' Section 93 jurisdictions did not override federal Section 91(24) power in respect to the education of Indians (and Inuit).⁴ As further interviews for this study were to show, this federal Executive position was supported by all federal and academic legal opinion. When Prime Minister Trudeau spoke of native self government at the 1983 meeting, he did so within the total constitutional system, declaring that

Aboriginal government, in whatever form or model, will have to fit into that system. It should fit smoothly, comfortably and effectively. The complexity of jurisdictional issues is at once obvious and formidableOn behalf of the Government and people of Canada, I reject again today, as I did in 1969, assimilation for the aboriginal peoples, as we stand at the threshold of this new constitutional process. I reject it as firmly as I reject full independence or absolute sovereignty as a basis for their relationships with any government within our federation. These two extremes lie outside the range of options that we are prepared to contemplate, in pursuit of our commitment to complete this process.⁵

Education was still in the picture at the 1984 First Ministers' Conference, with representatives of the aboriginal peoples again in attendance. The transition to native self government was to begin, as demonstrated by the federal Bill C-22, "An Act relating to self-government for Indian Nations" which was given first reading in the House of Commons, June 27, 1984. Section 17(1)(f) stated that

The government of an Indian Nation that is recognized has the following powers within the boundaries of the lands of the Indian nation:
..(f) the establishment and operation of educational facilities and the provision of educational services.⁶

This proposed legislation reflected no doubts in the Trudeau Government about the fit between Section 91(24) jurisdiction for education of Indians (and Inuit), and the transition and fit again between this constitutional power and federal statute law made under it.

A change of government during 1984 put such a statutory delegation of federal authority over education, et al., on hold. Plans (with federal all-party support) for a constitutional amendment to entrench limited self government for Indian (and Inuit) peoples in the Constitution were also delayed. When, in 1986, the Council of Ministers of Education of Canada issued a report to the OECD entitled "Multicultural Education Policies in Canada", it declared the Government of Canada to be "directly responsible for education of Canada's Native Peoples".⁷ The provinces were not looking for a fit between responsibility for the education of Indians (and the Inuit) and their various Section 93 jurisdictions.

In 1987 a change in the nature of federal commitment to native self government was reflected in a Meech Lake Accord proposal which excluded native peoples in its preparation and purposes, notwithstanding their major land and aboriginal rights' claims in Quebec and in other provinces. If legislated, it would have created a provincial veto power, to be exercised by any one province, over creation of new provinces. By extrapolation, such a veto might head off any kind of entrenched constitutional amendment to permit aboriginal self government via one entrenched procedure for all native peoples in all Canada. Although Indian nations could still negotiate separate treaties with the federal order of government which would become part of the Constitution, this is not the preferred path according to Louis Bruyere, then President of the Native Council of Canada.⁸ Meanwhile, as noted in interviews with some former federal politicians, senior federal officials and legal counsel, and representatives of the native peoples, the gap between promises related to Section 25 of such constitutional amendment and change, and its realization, has been widening since 1984.

Section 35 in Part II as amended in 1983 commits the federal and provincial governments to a constitutional conference of first ministers before the Constitution is amended in respect to Sections 25 and 35 in the 1982 Act, and Section 91(24) in the 1867 Act. Native representatives are to be invited (and were). In the meantime, Section 35 is not subject to enforcement under Section 24. Its reference to "existing rights" does not seem to be retrospective. Hence a prior extinguishment of aboriginal rights would hold, provided this had been enacted validly.

5) Although Section 27's expression of multicultural heritage seems rhetorical, it could be interpreted by the Court more substantively, and in relation to education on a national basis. If this occurs, the federal government's support measures will have helped to pave the way. Section 27 might eventually serve to establish in constitutional law a recognition of the aboriginal linkage between their lands and their cultures.

6) Section 28's guarantee of equality of the sexes "notwithstanding anything in this Charter" has basic application to education however it is defined or applied. There is anxiety in some quarters that a Meech Lake Accord proposal for further constitutional amendment could have limited this gender equality right. The problem is that Section 16 of the Accord's proposed amendment omitted rights mentioned in the 1982 Charter other than aboriginal and multicultural rights.

7) Section 29 of the Constitution Act, 1982 reaffirms Section 93 but only in respect to the rights or privileges it guarantees "in respect of denominational, separate or dissentient schools". This is done to give the religious minorities concerned a double protection against any province's unilateral action to eliminate such rights and privileges and preserves the federal protection.

Significantly, this Act did not enact any definitions or other amendments which would clear up the issues and conflicts related to Section 93, other than to link education and culture (in Section 40). Moreover, there is no indication that these matters were formally considered in the proposals stage before the Act was drafted. Since the

matter was not clarified at this point, it might be argued that the politicians accepted what had happened - *de facto* and, as indicated in this study, *de jure* too.

8) Section 36's commitment to promote equal opportunities might serve one day as a basis for constitutionalizing the current use of the federal spending power for equalization purposes in educational finance. This would settle lingering doubts about the fit between such expenditure and the Constitution. Section 36 could become the basis for a constitutional right to "equal benefit" including support of matters related to education. In addition, support of regional development, including aspects of education and education-related matters, might also be constitutionalized. If so, this would be attributed to the gap between legislative powers which the Constitution Act allocated to the provinces and the necessary funding resources. It could also be attributed to the need for national fiscal support to assure basic essential standards in education, regional development, and public services on a nation-wide basis. If these reasons were accepted, this would lay to rest claims within Canada, or elsewhere, that such national financial support constitutes subsidies. Instead it would be clear that such support was designed for the constitutional maintenance of national standards in the national interest.

Constitutional Awareness. The hypothesis that federal officials responsible for educational matters would have a limited awareness of its constitutional bases was derived partly from an FPRO study mentioned in Chapter I. This study had been conducted mainly to clarify administrative and other problems in federal relations with Quebec between 1967 and 1977. As a result, a litany of deficiencies in the constitutional knowledge and sensitivity of federal officials was cited. For example, as of 1977, three findings were that:

- a) ..initial departmental responses to the question about the constitutional basis for the activity under review indicated that the majority of federal public servants concerned did not know what the relevant authority was;

- b) ... further enquiries at subsequent meetings suggested that in many cases, if not the majority, the question of the distribution of powers had not been thoroughly considered when the activities were undertaken;
- c) ...federal public servants, particularly at the middle and senior levels, did not have a keen sense of the constitutional authorities which set the jurisdictional boundaries for the policies or programs they were designing or implementing.⁹

One former Assistant PCO Secretary who was interviewed at first questioned the validity of the FPRO study. He went on, though, to say that, in his experience, public service managers didn't know "anything" about the Constitution. This is not to say that the problem is beyond correction - through personnel research, advisory practices, in-service training, staff deployment, and merit staffing - including mandatory knowledge requirements in senior classification and selection standards. However, given the bureaucratic politics involved, the "privatizing" of the public service through private sector business values and practices may have gone too far for easy remedy.

To identify a possible reaction to the FPRO's identification of shortcomings in constitutional knowledge, the Public Service Commission (under Section 10 of its Act) made a trial use of such knowledge in some senior management staffing. This was provided for in questions via the selection profiles and standards set in staffing for 20 or 21 senior executive appointments. Of the persons so appointed, one was said to have demonstrated the necessary constitutional knowledge of what was involved, two or three exhibited some knowledge, and the others were ignorant of such matters.¹⁰ That this staffing provision was made was commendable. That it was not included routinely in PSC's executive selection standards or, better still, made a basic requirement in Treasury Board's Classification standards, is not so commendable. That appointments were made of persons ignorant of significant legal constitutional structures and rules before their appointment is doubly unfortunate, since compensatory executive training was not obligatory.

To ascertain how rooted the problem of deficiencies in constitutional knowledge might be in federal Public Service training and practice, references were made to unpublished course design and evaluation information.¹¹ For example, in lists of factors in public management training and practice, participants in PSC middle-management courses gave the lowest ratings to the knowledge factors of culture and of law. Such ratings did not evoke course remedies. Meanwhile, concerted efforts were being made in Public Service management and staffing to continue steps, initiated in the mid 1960's, to harmonize public and private sector "know-how" in management by drawing on private sector knowledge, skills and procedures. The thesis was that management is management, wherever it occurs - in the public or private sectors. This encouraged value-free perceptions and practices in management. It discouraged attention to value-oriented, non-legal rules of the Constitution which apply to public administration in the service of responsible government. In the process, the attention to constitutional basics of former years was dropped from Public Service management courses and not compensated for in on-job training and supervision. Thus, in training, knowledge of constitutional law - the chief distinguishing factor between public administration in the service of public government and generic management in the service of private government - was virtually eliminated. This situation continued to apply as of 1984, with the exception of token referrals to constitutional content in some senior management courses.¹²

To obtain a larger picture of these problems, and their possible linkages to deficiencies in essentials of constitutional knowledge for federal management practice, use was made of more formal system-wide studies. Two such studies produced findings which showed the significance of the merit principle (and the conduct it requires) in staffing for ensuring competence in job performance. These formal system-wide studies, which followed the FPRO study, dealt with intra-government management matters.

The first study, the Cabinet's D'Avignon Committee on Personnel Administration and the Merit Principle, discovered a widespread variety of improper public management practices and dysfunctions.¹⁴ Ethical procedures, which former observance of the merit principle in staffing had typified, had become subject to personalized practices and shortcuts that were rationalized as cost- and time-saving. However, the Committee's analysis did not show that alleged delays in staffing were caused by merit principle red tape *per se*. Instead, it was indicated that managers who acted on their own, without necessary personnel advice, could not produce the required job profiles for classification standards. They wanted to "manage" with unfettered discretion in personnel matters, in keeping with private sector practices. Departmental Directors of Personnel were no longer members of the deputy head's corporate management committee - as the 1967 personnel law reforms anticipated. Thus, delays were largely due to bureaucratic politics and personnel incompetence. These dysfunctions clashed with basic requirements of public administration for service to responsible government.

The second study, the Lambert Commission's Report to Parliament, reaffirmed the significance of ministerial responsibility in the federal system of management (as the Glassco Commission had also done). It noted dysfunctions in federal public management practices.¹⁵ For example, there was criticism that managers - as in the private sector - exercised a proprietorial claim on two basic matters: budget and staff. Consultants noted extraordinary losses of time, morale, and effectiveness, because of such bureaucratic politics - centered on who got what, not what was to be achieved.¹⁶

A Public Service code of ethics for public managers might compensate for such fundamental omission in classification, staffing and training. No such code exists. The effect is to leave in limbo the critical matter of public servant awareness, respect, and observance of non-legal rules of the Constitution. This vacuum permits more value-free and personalized ways of transacting federal work and its management - all in the name of flexibility or unfettered managerial discretion. Such freedom even came to include

the decision of whether or not to apply the merit principle in staffing - in effect making it merely directory, not obligatory. Indeed, the last legal counsel to be interviewed wanted this researcher to know that ignorance of law was a common observable behaviour amongst federal public service managers. Moreover, even when such knowledge did exist, it was sometimes ignored.

This problem of ignorance of the law, particularly constitutional law, was of concern to the Justice Department which conducted negotiations, department by department, to have a departmental representative from Justice act as an advisory member of each Deputy Head's departmental management committee. Before his retirement as Deputy Minister of Justice, Mr. Roger Tassé had negotiated such an accord with all departments.¹⁹ Commendable as this was, the question remained why successive Prime Ministers, who are responsible for the Public Service, had not required this earlier. It also brings up the prior questions as to why, after R.G. Robertson's FPRO study and related initiatives, the succeeding Clerks of the Privy Council had not recommended this, or why the various Chairmen of the Treasury Board had not ordered this - to ensure legal and constitutional considerations in all departmental transactions - from policy development to program implementation.²⁰

Such action was required to ensure observation of established constitutional conventions as essential institutional rules in support of responsible government. Yet, throughout the research for this study, there were indications of the absence of constitutional awareness in the management work which required constitutional sensitivity. For example, one senior education official at Indian Affairs and Northern Development gave the opinion that, in the provinces, Section 93 governed the Department's education services - a total contradiction of the Justice Department opinion, as well as that of the Privy Council Office and the representatives of the native peoples. On the other hand, legal counsel for the Department immediately provided this researcher with the complete relevant legal information in photocopies. It was there for the asking, if deemed

relevant. The same situation applied for managers in all federal departments and agencies.

Various department legal counsel mentioned that their work, like that of the Justice Department, was largely reactive, answering when asked, outlining the legal issues and relevant jurisprudence professionally - not to please or displease managers or management. They advised what was, in their opinion, or that of the Justice Department, legal. By doing so, as some officers commented, they stayed clear of bureaucratic politics.

It was observed that most managers interviewed were generalists, with the exception of qualified professionals and scientists who had been assigned management jobs. Interestingly, of 13 scientist-managers interviewed, 9 could identify specific constitutional grounds for their program responsibilities. When the researcher asked if they had taken courses to learn this, the answer was no. Generally, their attitude was that having a thorough knowledge of the subject field calls logically for knowing the fundamental as well as particular legal authorities involved. In contrast, this attitude or approach was not reflected in the replies of generalists who had come to the Public Service via the private sector not long before the interviews. When asked what the fundamental authority for their work was, two such persons replied "the boss", and one Director General cited a speech by former Prime Minister Trudeau as his program authority, until enabling legislation was passed.

Professional study of education was no guarantee of constitutional awareness either. Of nine Ph.D.'s in education, from specialist to DM in rank, only one identified the constitutional basis of the work in relation to education for which he or she had a responsibility. Of six other degreed educators with ranks of Chief to ADM, only one could do the same. Yet, in Canadian schools of educational administration, basic knowledge of constitutional law is required. Moreover, as noted in Chapter I, the classification standards for the federal Education Services Group (EDS) make such

knowledge a primary requirement - to compensate for shortcomings in training, and to head off appointments that do not meet such standards as a condition of appointment. At Employment and Immigration Canada, the reply of one senior education official with responsibility for national programs requiring constitutional knowledge and sensitivity was simply, "Ask the legal department". The incumbent could not identify the constitutional authority involved, and had apparently not bothered to request such information from the Department's legal service.

This attitude, and practice, was common, according to several Justice department lawyers who were interviewed. One counsel mentioned fait accomplis which were presented with requests to make them legal. Other counsel referred to management decisions made without essential legal inputs because they were not requested, or were avoided as inhibiting influences in so-called managerial problem-solving. The impression given in such interviews was that there is a new breed of federal managers who are accustomed to, or prefer, conditions of de-regulation. If they also regard seeking legal knowledge as placing constraints on managerial discretion, they won't be predisposed to remedial training.

Interview feedback from some managers and lawyers, plus personal observation, lead to the conclusion that the services of legal officers to operational managers had become almost peripheral. Given the primary requirement of constitutional knowledge and sensitivity in all public administration, the question arises as to why this essential was being overlooked. A change in "philosophy" of public management was suggested as one reason. Some managers who were interviewed mentioned that the slogan "let the manager manage" best expressed their own philosophy. One lawyer described such a slogan as a mindless creed which had been adopted by officials who were either unfamiliar with the legal and constitutional requirements of public administration, or who were antagonistic to them.

There did not seem to be any substitute for legal knowledge and service to prevent and correct such problems. Departmental information chiefs and officers, who were helpful without exception, did not, and could not themselves, provide constitutional information related to departmental mandates and program responsibilities. In cases where this information, or a referral, was requested, no answers were forthcoming. This, it was assumed, was because such fundamental information as statements of mandate was missing in the departmental, or deputy head, briefing books.

One final observation is that, had the Trudeau Government's mid-70's plan for a system-wide Information Group with central human resource management (classification, selection, deployment, training, and development) been realized as planned, the constitutional sensitivity and know-how at the PCO and FPRO would have extended to the work of the Information Services cadre. This would have occurred in spite of deputy head oversights or disinterest. Unfortunately, this plan gave way to pressure from deputy heads for a continuation of their own staffing and control in the matter.²¹ This cut off the source and flow of constitutional information from the centre. The problem was compounded by removal or absence of departmental legal officers from the deputy heads' corporate management committee.

To check further on the point of constitutional knowledge, a subsequent unpublished Statistics Canada survey of education activity in the federal government was reviewed to ascertain how the question which asked for program authority was answered. For 100 program or sub-program approvals, ranging from the EPF financing to Emergency Planning Courses, the variety of authorities cited by the responsible program managers was as follows:²²

Federal Acts (and regulations)	34
Treasury Board minutes	21
Cabinet orders and approvals	19
Annual appropriation vote	10
Policy	9
Agreements (federal-provincial)	6
Constitutional law	1

These results seem to indicate that the program managers who cleared this information felt obliged, or required, to look no further than the most immediate authority for action. Perhaps the managers concerned felt that it was sufficient for them to trust to the Government and its senior officials to keep the larger legal picture in mind, and to make the constitutional requirements implicit, if not explicit, in the programs to be implemented. However, this would cover the legal rules of the Constitution, but not the non-legal, institutional rules which appointed public servants and elected politicians are expected to know, observe and protect. Hence the significance of a knowledge of the basic constitutional requirements as a principal defining value in public administration in the service of responsible government. Hence also the assumption that if these requirements are known they are more likely to be observed.

Prior to the availability of the above study, 115 Public Service managers who had responsibility for federal education programs or activities were asked what they regarded as the constitutional authority for their education work. Details were not expected, only the awareness necessary to identify such authority. When no answer or comment was made, a "don't know" was recorded. When the only answer given was the federal spending power - still a moot power - this was accepted. The persons answering were not given notice of the research topic until the interview started, except in a few cases where appointments and explanations were required in advance. In all but a few cases, the question was asked after the description of the program was clarified, to allow more time for the respondent to consider the matter. There was no time for homework in the matter. Persons interviewed had to answer on what they knew at

the time - and thus, obviously, what they applied to their program responsibility related to education.

All replies are anonymous. However, results are given by rank to show at each level the number of managers, the number who were aware of the constitutional basis of their education work, and the number of federal departments and agencies involved.

<u>Rank</u>	<u>N</u>	<u>Aware</u>	<u>Percentage</u>	<u>No. Departments and Agencies</u>
DM	10	9	90	10
ADM	21	8	38	19
DG	17	7	41	14
Director	39	7	18	25
Chief	21	3	14	11
Head	7	1	14	7
<hr/>				
	115	35		30

Given the bare, minimal knowledge described, only 30 per cent of the 115 managers interviewed were aware of the constitutional basis of their educational work. As shown, constitutional awareness seems to improve with rank, but not sufficiently to meet the most minimum essential requirement for public administration qualification and performance. (The thought of the *de facto* establishment of a separation-of-powers management cadre under these circumstances is distressing, to say the least.)

The same question about the constitutional basis for their education work was asked of 31 federal management specialists - ranking to Executive level. Of these, 13 (42 percent) were aware of it. This was a higher proportion than managers from ADM rank down - all of whom, it is assumed, had had at least "management" in-service training, and appointment clearances by, or via, the Public Service Commission.

Other persons queried included: 71 federal officers (of whom 16 were lawyers); 2 territorial officers, 14 provincial and CMEC personnel (of whom 4 were lawyers); 10 university representatives (of whom 4 were law professors); 11 educational and special

interest group representatives; and 8 federal and provincial ministers (of whom 5 were lawyers).

Conclusions Re: Hypothesis No. 4

There is a constitutional basis, or a reasonable presumption of this, for all the federal participation in relation to education which this study identifies. There is no jurisprudence to the contrary yet, chiefly because of an avoidance of judicial review by the provinces. To some extent this may reflect a lack of certainty, or of will, on their part to claim, or exercise, their Section 93 jurisdiction to the full. More likely, it reflects an apprehension about unpredictable outcomes in judicial review, especially where this might affect the much-needed federal spending in education and other matters which are fully or partly under provincial jurisdiction. Hence the explicit preservation of this federal power in a proposed Meech Lake Accord amendment of the Constitution.

The constitutional bases for federal participation are many and varied. Chief among these powers are: the federal order of government's Section 93 power in the territories; the residual in Section 93 which may be assumed via the Section 91 p.o.g.g. power; the acknowledged Section 91 anomalies which apply to education; the Section 91 aspects which involve education; the royal prerogative; power acquired via judicial review; the concurrent powers related to education in the Constitution Acts, including the silences in these Acts related to research and culture. Since 1867, there has been a federal responsibility for minority rights apart from Section 93, as verified in judicial review. This was entrenched in the 1982 Act's official minority language rights in all schooling in Canada, and has been elaborated on since in successive rulings of the Supreme Court of Canada. Other national rights in education involving federal responsibilities might eventually be created via judicial review, based on the rights statements

and implications in this Act. Whether or not constitutional amendment is made to facilitate an entrenched right to self government for Indians, pre-1867 treaties and treaty-making permit the same end via the federal Section 91(24) jurisdiction. Barring possible future enactment of the requirement for the unanimous agreement of all provinces when new provinces are created, the 1982 Act permits such creation, with Section 93 jurisdiction, via the general amendment procedure of Subsection 38(1).

Conclusions Re: Hypothesis No. 5

Federal Ministers, PCO officials, deputy heads, and lawyers, showed awareness of constitutional bases for federal participation in relation to education (as of 1984). They were not necessarily as aware of the extent to which such minimal competence is lacking amongst the operational managers concerned.

The latter deficiency seems to stem from an operational dichotomy in policy-making on the one hand and policy-implementation on the other. This separation is not compatible with the fit required between these two matters in cabinet, or responsible, government. Deficiencies in implementation are attributed to effects of harmonization with first, private government, or sector, management know-how, and then with its complementary value-free practices in staffing, conduct, and work. Recorded ignorance of the primary legal rules of the Constitution was also observed to extend to ignorance of its secondary but critical non-legal or institutional rules. Such management perception and behaviour is to be expected in circumstances where managers are working for a company, not their country. It reflects a preference for de-regulation in matters of institutional rules. It is de-professionalizing. This situation reflects obvious faults in Public Service classification, staffing, training, managerial supervision, and information services. It is also attributed to insufficient leadership and control at the political and executive centre.

These criticisms assume that the principal defining quality of public administration in the service of responsible government is its constitutionality - in law and in practice; and that this must be assured by the Executive. Compatibility between ends and means is also critical in public education in and for a democracy.

END NOTES

1. Peter W. Hogg, Constitutional Law of Canada. Toronto: The Carswell Co. Ltd., 1977, p.245. Although there is no federal equivalent incorporation power to that of Section 92(11) which empowers a province to incorporate bodies with provincial objects, the Courts have ruled that the residuum for bodies with national objects is federal. That is, the residuary nature of the federal power applies. (Section 93's terms are parallel unless "education" is only possible legally and actually in separate provinces.)
2. The Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples, Ottawa, March 15-16, 1983. Agendas, papers and transcripts of proceedings. See also the Constitutional Conference of First Ministers Re: Sections 25 and 35 of the Constitution Act, 1982 agendas, papers and transcripts.
3. Interviews with Louis Bruyere, President of the Native Council of Canada, a Conference signator, and others who attended re: Aboriginal rights. Transcript review.

When the Hon. Claude Morin was interviewed for this study, he expressed the view that the federal proposal for sovereign and limited native self government would not work and was unacceptable to Quebec and other provinces. Attention was then drawn to Premier Levesque's presentation to the 1983 First Ministers' Conference, "Quebec's Answers to Proposals by the Aboriginal Peoples" (Document 800-17/032, Secretariat translation). For example:

1. Quebec recognizes that the aboriginal peoples of Quebec constitute distinct nations, entitled to their own culture, language, traditional customs as well as having the right to determine, by themselves, the development of their own identity.
6. The aboriginal nations have the right, within the framework of existing legislation, to govern themselves on the lands allocated to them.

Was this a new Quebec policy? The reply was that the then Premier had used these proposals just to embarrass the federal government. (Established Quebec law and policy on language and culture in relation to its resident native peoples contradicted these "proposals". The Province's history of disregard for aboriginal rights and land claims up to and including its unilateral James Bay development scheme also contradict these "proposals".)

4. Interview, Hon. John Munro, Ottawa, 1985.
5. Rt. Hon. P.E. Trudeau, Opening Statement, Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples, Ottawa, March 15, 1983, op.cit., p.10.
6. Bill C-22, "An Act relating to self-government for Indian Nations", first reading, House of Commons, June 27, 1984.
7. Council of Ministers of Education of Canada. Multicultural Education Policies in Canada. Report presented to the O.E.C.D.'s Centre for Educational Research and Innovation, September, 1986. Toronto: C.M.E.C., pp.i-ii.
8. Interviews, Native Council of Canada.
9. Federal Provincial Relations Office. Interim Report on Relations between the Government of Canada and the Province of Quebec, 1967-1977. Ottawa: FPRO, pp.9-10. There is no known study which measures the constitutional awareness of Quebec's highly francicized bureaucracy. ca. 99.7 per cent with 0.3 "other" at 1989.
10. Public Service Commission (P.S.C.) interview and research information.

11. Ibid.
12. P.S.C. course syllabi and evaluations. Interviews.
13. Ibid.
14. Canada. Special Committee on the Review of Personnel Management and the Merit Principle (D'Avignon Committee), Report (Sept. 1979), Ottawa: D.S.S., 1979. Initial findings (1977 -) and final report.
15. Ibid. P.S.C. personnel administration research, 1981-82.
16. Canada. Royal Commission on Financial Management and Accountability (Lambert Commission) Report. Ottawa: D.S.S., 1979.
17. P.S.C. and Bureau of Management Consultants feed back.
18. Hon. Jean Chretien, Minister of Justice, The Role of the United Kingdom in the Amendment of the Canadian Constitution. Ottawa: Publications Canada, March, 1981, p.15.
19. Justice Department: interviews and documentation.
20. Interviews, Treasury Board and P.C.O.
21. Ibid.
22. Statistics Canada and Secretary of State Department survey, 1983/84.

CHAPTER XI

CO-ORDINATION OF FEDERAL PARTICIPATION IN EDUCATION

This Chapter describes co-ordination of federal participation in education from two perspectives: within the federal government itself, (and its intra-governmental implications); between the federal government and the provinces, (with its inter-governmental executive implications). Related information and opinion were gathered in order to draw conclusions on Hypothesis No.6: that deficiencies in the co-ordination of federal participation in education have increased its extent.

Significant deficiencies in co-ordination of education were noted in both the above situations. There were no formal declarations of the particular and overall authorities in law to justify federal co-ordination. Classification for identifying expenditure related to education was missing for accounting, audit, and planning purposes. There was a dearth of identifiable co-ordination in federal participation, with exceptions in areas of full or partial federal jurisdiction. These exceptions included research based on conditional grants and contracts, student loans, most adult training, military education and, increasingly, official languages education support. All of these programs were in effect in 1976, when the OECD reviewed education in Canada and found it wanting in policy-making and co-ordination.

To the present, as the Deputy Auditor General and other financial officers confirm, there is no system of accounting (or the data this would provide) to describe what the federal government is actually spending in total on programs in relation to education.¹ This lack of information sets the stage, during times of austerity, for cuts in expenditure on visible programs and activities which may be of significant value, while unnoticed expenditures of lesser value survive.

In 1977, the federal government agreed to unconditional funding in the 1977-82 EPF agreement in exchange for a federal-provincial policy forum, thus giving up its leverage for improving national co-ordination in education. The aim was a partnership in post-secondary education policy matters akin to the sharing aspect in co-operative federalism. When this didn't occur, the stage was set for additional problems in co-ordination within, and between, the two orders of government. In the view of some observers, cut backs in federal funding were made more likely, if for no other reason than to make up for a loss of accountability.

Despite these problems, several federal and provincial officers held that, if the Government of Canada could show that it was able to co-ordinate its own programs in relation to education, it would be in a stronger position to win the intergovernmental co-ordination it wants, and which the national interest has required for at least the last twenty years.

Co-ordination Within the Federal Government

In the mid 1970's, in anticipation of the OECD review of education policy in Canada, the federal Cabinet approved a role for the Secretary of State Department in the co-ordination of much of the federal participation in education. Appointment of an Under-Secretary (ADM) of State was intended to give the mission status and leadership. Arrangements were made to collaborate with Statistics Canada in gathering necessary information within the Government of Canada, much of which was completed by 1984.²

The Secretary of State Department has had limited success in its efforts to establish information and policy relations with the provinces through their Council of Ministers of Education, Canada (CMEC). Although the scope of the Department's annual report to Parliament has been broadened, its coverage is not yet complete. Various parts of federal participation in education continue to be reported on separately by the departmental or agency players concerned. This will continue until a full report

is mandatory on all federal participation in relation to education. Meanwhile, a large part of this participation is covered in the ten objectives related to education which the federal cabinet approved in 1982.

In the meantime, there is now a mandate and the means for a comprehensive annual report on both federal research and federal research support, via the Ministry of State for Science and Technology. There are also the separate reports of the various federal granting bodies, departments, and agencies. In total, this is information which can facilitate system-wide co-ordination, both in these matters and in relation to post-secondary education. Of course, this would also require a co-ordinative means of integrating education and science policy and program essentials, as is done in the United Kingdom between the two national ministries responsible for these functions.

Apropos, in 1981, the Auditor General observed that a strong co-ordination function for research and development was missing in the federal government.³ MOSST had been correcting this problem, as is shown by reference to its Red Book for program identification and description, and to its Grey Book for details on the expenditures involved. Moreover, as noted, all mission research expenditures are recorded by the federal departments and agencies concerned. The data are there to be used, given the necessary executive approval.

The same situation applies in the fields of culture and communications, and in other matters in relation to education. Direct federal participation in education, for the military, native peoples, the public service, penitentiaries, matters related to the criminal law, et al. are identifiable. Federal participation in adult training is specified in training agreements. Federal cultural programs and support measures continue to be reported variously: via the Secretary of State Department, the Department of Communications, and the federal granting bodies for the arts and humanities. However, there is not yet a master co-ordination of all this policy, budgetary, and program information related to federal participation in education. There is no one operational intergovernmental locus

and set of means to provide for co-ordination of these programs and activities on a regular and continuing basis. It was learned that establishment of a bureau of education had never been considered by the PCO.⁴ There is no constitutional impediment to such an institutional and cost-saving arrangement. There is only political resistance - from some provinces, and within the senior bureaucracy, where there is already competition for the allocation of budget resources between mandated programs and their education aspects, as well as the programs related to education identified in this study. Co-ordination, with its goal-orientation and cost-consciousness, requires central executive monitoring and direction. As a former Secretary of Cabinet commented, government departments and agencies do not co-ordinate their programs voluntarily. They need central direction.

The Ministry of State for Social Development. The Ministry of State for Social Development (1981-84) would probably have met all of these requirements had the Ministry and its Secretariat not been dissolved by the brief Turner Government in 1984. This development set back the co-ordination of federal policy-making in relation to education - within the federal government and inter-governmentally. The action was taken to maintain the traditional doctrine of direct ministerial responsibility. It was not done to single out federal participation in education for limitation. It did not preclude creation of a central Ministry of State for this specific purpose. Nor did it signal a decline in the then Prime Minister's well-known interest in education, or his advocacy of a federal role in post-secondary education. Costs and bureaucratic politics may also have been involved. There is no constitutional impediment to central Ministries - like MSSD, or a federal Ministry of Education, or one of Education and Culture, or one of Science and Education.

MSSD serves still as a pilot demonstration of program integration via policy. As Figure 1 shows, its Minister was Chairman of the Cabinet Committee on Social Development.⁵ Its Secretariat, which included the Secretary of State Department,

FIGURE 1

(as of December 31, 1983)

N.B. The Deputy Prime Minister, President of the Treasury Board and Minister of Finance are *ex officio* members of the Cabinet Committee.

performed in a support role to the Minister and the Committee, and it assured an on-going liaison with the participant departments through their Ministers. Its affiliations encompassed direct knowledge of all issues and expenditures in relation to education from the various envelopes, except for science and technology (funded via the economic envelope and the Ministers responsible for it). It had formal linkages via its Minister and Secretariat with Treasury Board, the Department of Finance, the P.C.O., and the F.P.R.O. Its representations in Cabinet and with the Prime Minister were functional and both formal and informal.

Notwithstanding such means for their remedy, deficiencies in the co-ordination of federal participation in education were observed in three main categories of origin. First, they stem from omissions and errors in the co-ordination of the Government of Canada's own educational programs and services. There is as yet no total picture of all the federal programs and services designated as educational within the parameters of the Cabinet's ten objectives. There is no clear picture at all of the diverse aspects of education to be found under virtually all the heads of federal legislative and executive power. Secondly, deficiencies in the control and co-ordination of the various provincial programs which interface with federal programs magnify federal co-ordination problems. Thirdly, the overlapping of federal and provincial programs in relation to education creates problems in co-ordination related to jurisdiction. These are problems which could be accommodated by means of appropriate inter-governmental co-operation, starting with information and progressing to policy.

As observed, when co-ordination, an essential in public administration, is ignored or resisted, issues of efficiency and economy come to the fore. Yet, as subsequent examples in this Chapter show, this occurs in much of the federal government's own handling of education and related matters - within and among its departments and programs.

In several senior federal management interviews, a great deal of this difficulty was attributed to the federal policy of maintaining a low profile in order to avoid allegations of federal intervention in the provinces' Section 93 jurisdiction - especially in Quebec's case. One federal deputy minister referred to a widespread "paranoia" which had for years existed in the federal government concerning use of the term "education" - in policy, programs, services, and job titles. As a result, the gathering of information on federal participation in education was impeded, as was establishment of effective and efficient means of co-ordinating this information for purposes of policy-making, financing, planning, programming, and control. However, by 1984, this official thought that such an attitude was on the wane - at least within federal jurisdiction.

The open role assigned to the Ministry of State for Social Development reflected this point of view. Interviews conducted for this study with some of its senior and support officers, and with the Minister, Senator Jack Austin, before MSSD's closure, confirmed that information which was being collected systematically on federal participation in education, was to be used for purposes of policy analysis, program and budgetary planning advice, and for improving the co-ordination of programs and services involved.⁷ This was to have been done with central integration via Cabinet and its components, as described above.

Cabinet Co-ordination. It is important to note that, in the British tradition of government which Canada inherited, the Cabinet - whether federal or provincial - is a formidable co-ordinative device, politically, legislatively and administratively. It is so by virtue of the institutional rules of the Constitution assumed in the Preamble to the Constitution Act, 1867. This is not to say that cabinets will always perform their co-ordinative function well, or that the cabinets of the different governments in a federal state will do so in reasonable harmony. In responsible government, however, the capacity for co-ordination is built into cabinet purpose and function - for policy making and policy implementation.

In Canada's system of government, the Cabinet is the main political institution. In the federal and provincial orders of government the respective Executives are dominant over political and administrative matters. Also, the power of the courts is limited by the reluctance of cabinets in both orders of government to risk judicial outcomes in sensitive jurisdictional matters, including education. Legislatures respond largely to the Executive's agenda.

First Minister Leadership. None of these matters prevents, or has prevented, Premiers or Prime Ministers from assuming direct or indirect leadership roles and responsibilities in relation to education. The Premiers of Nova Scotia and of Ontario assumed such responsibilities until the early 1960's. Since Confederation, many Premiers have been Ministers of Education. To 1984 at least, many federal Prime Ministers have taken a particular interest in education, its governance and innovations - starting with Sir John A. Macdonald. Such Chief Executive interest has resulted in decision, then funding, then co-ordination.

In most cases, the agenda and priorities in such matters seem to have been set by Prime Ministers who had particular interests in education and related matters. King, as a former deputy minister and Minister of Labour, facilitated the initial federal involvement in technical education. Borden supported the creation of NRC and the launching of its mission of support to Canadian science and Canadian scientists. Bennett was determined that broadcasting would have an education role. St. Laurent justified use of the federal spending power to support family allowances, post-secondary education and expansion of sustained aid to Canadian cultural development. Diefenbaker's massive capital and operating support to technical and vocational education - secondary and post-secondary - had a significant impact on the advancement of composite high school education. (Canada had no community colleges in its post-secondary system until 1957, when federal capital and operating grants facilitated this expansion.) Pearson presided over reform of student loans and fiscal arrangements in support of

post-secondary education, and made the Canada Assistance Plan a major factor in educational support for the poor and the disabled. Both Diefenbaker and Pearson facilitated the large-scale expansion of post-secondary education to include non-degree vocational college education; both employed regional development as a means for compensatory education to remedy unemployment. Trudeau extended regional development to regional research support, expanded support to culture and had it equated with education in Section 40 of the Act of 1982. His government established education in the official languages nationally, and made it an entrenched right in Section 23 of this Act. Turner, had he continued as prime minister, would probably have acted on his expressed convictions that Section 93 was limited to elementary and secondary education. The Mulroney Government started off with a freeze on access to party data and Ministers connected with education.⁷ Federally, education has not been ignored in Cabinet when, in effect, its minister is the first minister.

It might be argued that this has occurred because of inherent, unavoidable national interest in the matter - something recognized by the first Prime Minister of Canada, Sir John A. Macdonald, who once stated his regret that the provinces had been given an education power in the Constitution. Parochialism has always been an obstacle to building a Canadian nation and nationality. Section 93 created division in education on a provincial basis, but there was still a federal residual capacity for national action in relation to education. Obviously, this federal residual does not extend to a constitutional power to co-ordinate, or harmonize provincial legislation.

Divided jurisdiction does not preclude national study of education, policy-making, funding of innovations, or even setting conditions for such funding. In order to keep federal participation to an efficient, economical minimum, co-ordination measures require joint agreement and co-operation - whether the jurisdiction at issue is provincial or concurrent. Co-ordination is all but impossible when federal funding is unconditional, as it was in the 1977-82 EPF agreement.

Federal Co-ordination Deficiencies. There is no excuse for co-ordination deficiencies in programs which are subject to plenary or primary federal jurisdiction. In these cases, excesses in cost and program coverage are avoidable. Yet to date, federal governments in Canada have failed to initiate, or to maintain, an effective organizational means of controlling and co-ordinating their own programs in relation to education - to assure minimum overlaps in coverage and cost. The reasons for not acting are political, not constitutional.

Since 1984, the Mulroney Government has made no mention of a central locus for co-ordination of all information, or of federal participation in relation to education. The Prime Minister's expressed interest in "value for money" in federal expenditures for education may eventually prompt such a move. Or there may be a move to downsize, delegate, and defer to the provinces in matters of education as defined in this study - to accommodate increases in their autonomy which the Meech Lake Accord, would have made constitutional law. Time will tell.

Concern for the cost of a system-wide means of co-ordination does not rule out its practical benefits. This is why some costly shortcomings in co-ordination related to education under federal auspices are hard to understand. For example, at the Department of Indian Affairs and Northern Development, it was noted and confirmed that, as described briefly in Chapter VII, the federal government was paying the provinces twice for post-secondary education service: once in per capita EPF payments for all residents of each province, and a second time in fees for native students at full cost. Although this was known to departmental and, presumably, central authorities, the excessive payment (of from \$100 to \$200 million per year) was still continuing, as of 1986.

Co-ordination can save significant expenditure by means of avoiding duplications in research and development as well as programs and services. Two examples are described. At CIDA, the writer asked whether any of the pilot programs initiated by the Department of Indian Affairs and Northern Development had been examined for

possible application to third-world needs. The answer was no. The Ministry of State for Social Development had been developing a library to complement its gathering and co-ordinating of information on all federal participation in education. However, when MSSD was dissolved in 1984 and these significant holdings were dispersed, the Association of Universities and Colleges of Canada was called in for a first selection of the post-secondary material. At the National Library of Canada, which approved this plan, it was confirmed that no thought was given to transferring these references to the Secretary of State Library, where they could have been used in its education support role. Moreover, no initiative to acquire this material was taken by the Secretary of State Department. This illustrates the importance of executive control at the centre, to assure effective co-ordination fitted to the set of education goals or objectives approved by Cabinet in 1982 (and, subsequently, incorporated in the EPF legislation). Co-ordination, with its goal-orientation as well as cost-consciousness, requires central executive monitoring and control - which a federal agency set up for this purpose would ensure. The Executive action required to assure such action would be more likely if there was a legislative basis for it.

Legislation facilitates co-ordination. Yet, over the years federal governments have tended to refrain from seeking legislation in relation to education, until the particular jurisdiction seems all but conceded - as in the case of the National Training Act. There has never been a federal Education Act, as in the case of the provinces, even to consolidate all direct federal responsibility in relation to education. Such legislation would identify co-ordination problems and promote its benefits in co-ordination, management, and costs. Such legislation would give all concerned an overview of federal priorities and programs in such matters and, in every case, make clear the bases of authority to co-ordinate. The framework for a federal system in such matters would be clear at last.

Co-ordination Between the Federal and Provincial Governments

In Canada, there has never been a national "system" of education which embraces and co-ordinates common goals, policy, programs or financing beyond those specific matters covered by conditional federal-provincial agreements. Although there is no cost analysis on the matter, it is apparent that co-ordination problems in education apply differently in each of the ten provinces. This makes federal bilateral and multi-lateral transactions with them complex and costly in such matters as negotiation, auditing, and co-ordination - doubly so where there is exclusive provincial jurisdiction over education. National standards simplify such matters and save expenditures, partly through improved co-ordination. The more difficult co-ordination is, the more federal programs and activities and their costs are expanded. This creates a false impression that there is federal interference.

From the outset, federal governments have seen the need for common national standards, to harmonize and economize. They have tried to do this in their bilateral agreements for official languages education and for adult training for employment. The Meech Lake Accord amendment proposal 106a, referred to compliance with only "national objectives" to qualify for federal grants when a province opts out of future national programs - including those in relation to education, if there are any. How compliance, including the co-ordination required, would have been achieved is not known. The Court would not have prescribed this. Parliament would not have been able to legislate anything contrary to 106a as an entrenched provision. Executive negotiations would have been required. Nonetheless, Professor Peter Hogg expressed optimism about the positive possibilities of this Section, including its implementation.⁸ Professor Allan Blakeney was skeptical. He was concerned about the more substantive matter of national standards and the means for assuring compliance.⁹

If the Accord had been made constitutional law, the Court could have been called upon to decide whether the federal order of government had the power to require

observance of the funding conditions for opting out. In any case, opting out can make programs national in name only - a problem in equity at minimum, and a co-ordination problem of the first order. If Ontario were to opt out of a school program, it would be about 62 per cent national. If Quebec opted out too, the program would be only about 38 per cent national. Meanwhile, Parliament and the national citizenry would have to live with having national programs become less than intended, and watch the diversion of the funds to other uses. Not much could be done about this if exclusive provincial jurisdiction is involved.

Hence the importance for the federal order of government to establish in constitutional law just where its powers lie in relation to education, and in particular in the case of post-secondary education. Thus the answer to Meech Lake problems via Section 106a could have been bilateral programs under, say, regional development, or a withdrawal of federal programs pending assurance of federal jurisdiction and controls, including co-ordination.

Doubts and disputes about jurisdiction over education have inhibited co-ordination necessary to achieve an acceptable level of harmonization in policy, law, and practice.¹⁰ The problem begins with information - a basic matter which is required for good management and which cannot be prohibited by jurisdiction. Yet, in the federal government itself, co-ordination is inadequate because, as described, there is only a partial picture operationally of actual federal participation, its legal bases, and cost. Moreover, there has never been one central means for ensuring co-ordination and control: for intra-operations or for interfaces with provincial operations.

Co-ordination is further complicated because, over the past twenty years or more, some provinces have been effectively withdrawing from their Section 93 responsibilities for provincial governance of education. This has occurred by means of an elimination or down-sizing of basic functions and roles of the departments of education; by extensive delegation of authority (and, in effect, responsibility in some cases) to

local bodies and their bureaucracies; and by shifts in the burden of taxation to the local level in the American pattern. Local fragmentation has been added to provincial fragmentation under Section 93.

This situation exaggerates the diversity which already exists in regional philosophies of education, as Professor C.E. Phillips observed - especially between East and West, and perhaps between Quebec's majority and the rest of Canada. It perpetuates extraordinary variations in secondary schooling where, as the OECD noted in its 1976/77 research, there has never been an agreed standard of secondary matriculation. Diversity at the post-secondary level in standards, programs and governance has been extraordinary. Meanwhile, there is, as both the Science Council of Canada and the Employment and Immigration Commission of Canada observe, a need for settling the constitutional responsibility for governance of education as a lifelong matter.

In the face of this challenge, some provinces have effectively given up on a full exercise of Section 93 legislative and executive power and responsibility. This is despite the facilitation the Information Age offers for a larger definition of culture and community. As one academic noted, this withdrawal from governance is on the same continuum as that adopted in Quebec more than a century ago, when it used Section 93's discretionary power to effectively opt out of its direct obligations in education policy, administration and financing. Then as now, it was a time of considerable socio-economic and political change and stress, when public education was a constitutional means of providing for individual, group, and community adaptation.

Co-operative Federalism. Until the advent of executive federalism, on the federal side at least, a non-partisan orientation was the rule in politics related to educational finance, the essential for facilitating programs. W.N. Toombs' research of Hansard, from 1867 to the early 1960's period of co-operative federalism, supports this point of view. Two senior provincial officials and a former provincial Minister recalled that, when co-operative federalism was the order of the day, the provinces seemed able

to hold their own with the federal government in transactions related to education. Co-ordination was built into co-operative federalism's shared-cost financing of education. Its shared-costs aspect elicited provincial policy initiatives and debate, in public and in the Legislature. Departments of education provided the expertise and co-ordination needed to support this democratic process and, afterwards, to gain optimal benefits from its results.

Information and interview opinion gathered suggest that between 1963 and 1967, the Pearson Government was on a course of co-operative federalism which aimed to achieve adequate common standards in education and access to education in all parts of Canada. This included an orientation to post-secondary education as a national system, with national as well as provincial aspects. Every province was given strong incentive to make education a top priority, including a focus for intra and federal-provincial co-ordination.

In co-operative federalism there were advantages to be gained from having a professional public service capability. This the federal government did not have. It was largely represented by officials with economic training or outlook. According to several senior interviewees - federal and provincial - the economists and the educators did not always see eye-to-eye on the social and cultural dimensions of education. The economists, who dominated federal transactions related to education in the 1950's and 60's, were on the inside, at the top. The educators were on the provincial side and in national educational lobby groups. During the Pearson term of office, political initiatives to professionalize the federal handling of educational affairs were not realized as intended. This was despite the creation of an Education Services Group in 1966, and the reported consideration of an education office, or agency, which could at least co-ordinate federal participation in education.¹¹

At 1967, co-operative federalism had demonstrated a capacity for evoking inter-governmental co-ordination in education. The EPF shared-cost agreements for 1967-77

confirm this. Canada's 100th birthday also coincided with a time of rapid province-building and the costly pressures of the post-war baby boom on all education programs. At this point the CMEC was established, with the hope of its chief sponsor, the Canadian Education Association, that it would support intergovernmental co-operation in affairs related to education.

If ever there was a time for intergovernmental goodwill in public education that was the time. The federal government wanted to participate. Its Ministers and officials were ready to co-operate without making an issue of federal jurisdiction to do so. According to federal officers interviewed, the federal government was not prepared for the sustained, adversarial relations which followed via the CMEC.

Executive federalism and the CMEC. The CMEC is not a democratic forum where each member has an equal voice and vote. In interviews, four former CMEC participants and observers commented that it is very difficult for the smaller, poorer provinces not to go along with the wishes of the dominant members in the association. Attempts at policy-formulation were described by one of these persons as tending to begin with an awareness of the need for Ontario's endorsement and, sometimes, of Quebec's price for continued membership.

Quebec insists on being treated by the Government of Canada as a national state in education matters, as if Section 93 required this constitutionally. However, Quebec and Quebecers have, and are represented in, two orders of government, not one - in education and everything else under the Constitution Act of Canada.

The politics of the Council of Ministers of Education of Canada seem primarily reactive. Its founding in 1967 seems largely a belated reaction to the extent of federal participation in virtually all aspects of education. From its beginning, the CMEC has seemed to represent an attempt to combine separate provincial responsibilities for education with national responsibility for education - power which the Fathers of Confederation made sure the provinces did not have. Notwithstanding the clear terms of Section

93 in this regard, the provinces have tried to make this body interprovincial, rather than federal-provincial. This can be counter-co-ordinating.

This has been demonstrated by CMEC's exclusion of federal representatives from its meetings, and the refusal of its members to account for the use of federal funds allocated to education - actions which make national co-ordination of Canadian education nearly impossible, and federal involvement more difficult and costly. As one critic suggested, the approach has had the "logic" of prohibiting the national government from participating in national affairs in education because they are national. Provincial concern, however, is also fiscal.

This was reflected in a published CMEC statement of 1985 entitled "Principles for Interaction: Federal-Provincial Relations and Post-Secondary Education in Canada." In this document's opening statement the CMEC declared that

Our discussion of mutual interests in post-secondary education must proceed on the basis of the firm understanding that education is a provincial jurisdiction.¹²

Then it is stated

For some time now, there has been considerable discussion between the Council of Ministers of Education, Canada and the Secretary of State regarding Established Programs Financing (EPF). The Council believes that little will be accomplished by such discussions in the area of federal-provincial relations in post-secondary education. This belief is based on the premise that EPF is a fiscal transfer to the provinces in respect of health and post-secondary education, not for health and for post-secondary education. Accordingly, no specific conditions are attached to how the provinces manage their post-secondary education systems and quite appropriately, where the core funding of post-secondary institutions is concerned, individual provinces plan and budget according to their particular needs and resources.¹³

The position taken by the CMEC here is absolute. Concurrence is dismissed, even though, as this study shows, the substance, funding, and component jurisdictions of post-secondary education are anything but watertight. The national residual power in

Section 93, which rests with Parliament, is apparently to be relinquished - as in the surrender of one sovereign state's power to another. The statement thus concludes with the announcement that

The Council of Ministers of Education, Canada, has already identified the following priorities for post-secondary education in Canada.

1. We must ensure that post-secondary education is able to continue as a key contributing force for economic, social and personal development through the provision of high quality programs in a diverse range of fields.
2. We must provide institutions with a stable basis of funding, which will enable them to address areas of high priority in both social and economic terms.
3. We must ensure that there is a solid basis for research and development activities both of a general and a directed nature in post-secondary institutions.
4. We must ensure that our institutions are able to cope with increasing levels of demand for the training and retraining of highly qualified man-power.
5. We must preserve a strong core of liberal arts and humanities programming in our universities.
6. We must make provision for the integration of new technologies within the post-secondary education sector.¹⁴

These statements are commendable in themselves. The question is why is it necessary to exclude the national government, as if such vital national, as well as local, matters were beyond its concern, or at least parts of its jurisdiction. The reader is left with the impression that the statement is unanimous, even though most provinces could not begin to afford to fund the obligations involved. There is no documentation to show that the respective Cabinets or Legislatures concurred formally - either before or after the statement. No record of public discussions or inputs from representative groups was evident. The statement seems to dismiss necessary and established federal participation in post-secondary research, post-school training, cultural institutions and

activities, communications, and financing. This sets aside the policy-making and implementation issues involved, including their co-ordination. The extra-constitutional roles played by CMEC and the provinces in matters which are national also raises concern.

In its brief to the Macdonald Royal Commission in 1983, the Canadian Teachers' Federation took strong exception to CMEC's actions.

The nature of Canada - its geography, the ethnic and linguistic characteristics of its people and the increasing interdependence of regions and individuals arising from rapid changes in economic relationships - dictates certain national goals which education should promote. It is not within the responsibility or competence of any one province to identify these goals and to exercise leadership in pursuing them. Nor does the Canadian Constitution recognize any grouping of provincial authorities such as the Council of Ministers of Education of Canada (CMEC) as a legitimate policy-making body. Clearly, the responsibility for finding a mechanism for identifying goals for education which will promote national development and the national interest belong to the Government and Parliament of Canada.¹⁵

Provincial administration of "post-secondary" education includes a broad range of programs and activities. It does not include full authority over universities, because they are not, and have never been, departments of any government. Yet, university governance is swept into the CMEC's political orbit without adequate defences for independence and academic freedom. This happens notwithstanding the arms-length governance which university charters of incorporation provide - even if these are now all provincial first (and papal, or royal, or federal, next.) The politics of executive federalism seems to bypass their independence, largely for fiscal reasons. It ignores ample indications of concurrence in jurisdiction which give the federal order of government a responsibility in the matter, not a mere "concern".

Ironically, the CMEC itself is no more than a public, non-profit corporation created under the Ontario power of incorporation for bodies with provincial objects applicable to Ontario only. As such a private organization, it can operate in secret, avoid transactions with other non-governmental bodies, and exclude the federal govern-

ment from its proceedings - as it has done. No one province, or all of them acting together, can use their respective powers under Section 93 to create a new sovereign body in education. No province, or provinces, can grant a charter of incorporation to an education body with objects which are national. Only the federal government can do this, as it would have done, had the CMEC members, Quebec and Ontario in particular, been willing to seek a federal charter for their association.

Apart from periodic federal-provincial first ministers' conferences on education, the CMEC provides the main national outlet for executive, extra-constitutional politics in education. With provincial control and co-ordination lessened, most provinces, (but not Quebec), seem to rely on the CMEC and its Secretariat in matters of mutual interest. This has included legal and/or political disagreements with the federal government - even where there is federal residual jurisdiction nationally which hasn't been asserted, but is nonetheless there. This has had the effect of bringing a third party into federal-provincial relations in education - into what are, constitutionally, two-party relations in all respects between the provincial and federal orders of government only.

Adversarial executive federalism, with ministers acting in both political and managerial roles in matters of policy and its implementation, diminishes the provinces' advantages in professional expertise. Educational statesmanship in either the national or provincial interest goes by the board, as one senior educator commented, when the object is money, not what, in policy terms, it can and should achieve in public education.

It was suggested, in three interviews with provincial observers, that such an approach to governance in education seems to be more suited to managerial generalists than to professional educators. This assumes a differentiation between managers who are process-oriented and those who are both content and process experts; between those who are mobile and those who stay put in a policy context. In educational administration, it is assumed that public education programs and their co-ordination are

best and most efficiently achieved when the officials responsible know thoroughly the content and performance standards required, and have credibility with the personnel involved. In educational administration everywhere, co-ordination calls for knowing the legal and policy authority for action, the program goals and content, the staff who are to perform the services required, and the clientele to be served. This is a tall order even for professionals.

Departments of Education. Earlier, when co-operative federalism was being applied to education, every province had a full-service Department of Education which was accustomed to professional, non-partisan service to their Minister and Governments and, through and on behalf of them, to the public, to the professional cadre, and to inter-governmental committees. The federally-sponsored peer review committees for making grants in support of post-secondary researchers and research -in science, technology and the arts - and for making grants to support cultural transmission and creativity, continue to operate in this professional way. As observed in the record and in interviews, this work continues with minimal complaint about control and co-ordination of the work done. The federal proposal for a federal-provincial policy forum, rejected by provincial executives not legislatures, was described by one federal official as being in the spirit of co-operative federalism.

On the provincial side, regret was expressed by several senior provincial education officials and other educators interviewed, that some provincial Executives, not their Legislatures, had diminished the role and responsibilities of their Departments of Education. It was suggested that, where this has happened, the significance and influence of the Legislature had been diminished too, as that Province's premiere forum for education discussion and decision in matters of Section 93 policy and law.

On the one hand, effective provincial responsibility, as well as authority, has been delegated to parochial school boards and their bureaucracies which, in turn, try to duplicate central functions and their co-ordination at a considerable cost. Co-

ordination can be in shambles in such circumstances - provincially and, even more so, inter-provincially, according to some federal and provincial senior educational officials. Funds dropped into such confusion miss the intended targets. Correction of such problems in co-ordination is hindered by a musical-chairs approach to appointment and mobility of managers and Ministers who, it was said, usually want to begin their brief sojourns with a reorganization.

In four interviews with senior provincial officials and educators, mention was made of the trend to deprofessionalize Departments of Education because of executive federalism's emphasis on a political-managerial role for Ministers. Particular reference was made to an erosion of traditional roles and relationships between Ministers of Education and their departmental staffs, and to a decline in reliance on professional expertise in education - from the deputy head down the line. It was suggested that a generalist approach to educational management complemented the emerging political and managerial role of the Minister in executive federalism, in the Province and via the CMEC - the provinces' association for extra-constitutional discussion.

When, in executive federalism applied to education, Ministers become political managers in a separation-of-powers style, means can take precedence over ends in public education, and intergovernmental relations may become partisan for the sake of being partisan. In the process, the public, the political parties, the Legislature, and the professional players may lose their roles as policy initiators through traditional political channels in responsible government.

Highly qualified professional players, considered indispensable in earlier times, become less important, and this extends to the roles they filled. As senior positions, Chief of Curriculum, Director of Teacher Training, and Chief Superintendent of Schools have been eliminated or downgraded in some provinces. At two Ministries of Education visited, deputy heads were summarily retired at 55, in spite of high qualification, and experience that would be current for many more years. The question was

whether this policy was an expedient way of clearing out knowledgeable rivals to politicians-turned-managers, or of making way for new blood.

In Canadian public education for schooling, the public does not elect its education managers, as Americans do in some circumstances. It hires them. It has them perform professional and managerial work in the service of governments, ministers, the public, and professional staffs. They advise, direct, co-ordinate accountably, and in a non-partisan way: from one election to the next; from one government to the next. In responsible government, they are adjuncts to the ministers and governments they serve, not rivals to their ministers in politics.

Departments of Education have declined as executive federalism has grown within and between the two orders of government. Professional leadership and services in schooling have been reduced by the economies of "downsizing" and delegation (and sub-delegation) of Section 93 responsibilities which, constitutionally reside in the Legislature - as a provincial board of education writ large. Significantly, curriculum has been transformed in scope from provincial to parochial, through delegation of effective power over it to local school boards and their bureaucracies. For example, in Ontario, Section 8(1)(b) of the Education Act, R.S.O., 1980, Chapter 129 states that

The Minister may prescribe the courses of study that shall be taught and the courses of study that may be taught in the primary, junior, intermediate and senior divisions;

Teacher education standards for entrance and training have been delegated to various university colleges of education, some -as in Ontario's case again - with very different entrance criteria and program standards within the same province. A province's Section 93 responsibilities may effectively be given up when its Legislature ceases to be the premiere forum for discussion, decision and control over the nature and direction of provincial education writ large.

The Government of Canada has sought information and policy study relations with the CMEC on matters of mutual concern. Changes in CMEC membership and chairmanship have made this difficult. In any case, federal officials have never achieved harmonious relations with the Council's bureaucracy. Both Secretaries of State interviewed for this study commented on difficulties experienced in trying to work with CMEC. Several federal officers of senior and middle ranks spoke of what was described as CMEC's excessive secrecy, rebuffs of federal officials, and manipulative efforts to take over some governmental functions under federal jurisdiction. Former observers and participants in CMEC affairs mentioned Quebec's particular distaste for face-to-face transactions with federal representatives at CMEC meetings, or in the federal government's proposed forum for policy-making related mainly to post-secondary education in Canada. In other interviews, attention was drawn to Quebec's political position, pending judicial review, that the federal order of government has no jurisdiction whatever over education - certainly not in Quebec. In short, problems in educational co-ordination between the two orders of government do not appear to have been improved by the creation of the CMEC, although the leadership abilities and national sensitivities of some of its chairmen were described as having been helpful.

The provinces have the same problem with each other according to some observers. This is partly because as a group they are a very unequal federal family - in population, territory, resources, and so on. The same applies to their variable capacities for employing their legislative and executive powers.

Practical benefits may be derived from the provinces' membership in the CMEC. Together they may protect their mutual Section 93 responsibilities from unwarranted federal interventions. They may engage in studies of mutual interest and exchange information on matters of common concern and use in legislating at the provincial level. Useful innovations and procedures in public education may be shared more efficiently. Ultimately, the provinces might co-ordinate efforts to enact comparable legislation on

matters of common practice. Such separate but co-ordinated enactments would be constitutional. The potential for mutual benefits is there, but the CMEC's executive federalism practices, including secret decision-making, is an inhibiting influence. In a democracy, secrecy is inappropriate for decision-making in public education. Professional educators in Canada are in agreement on this. It has long been held in North America that the administration of public education should be open and accountable to the public - not confined to any elite control - executive or otherwise. In addition, what happens in public education should be constitutional first, and managerial second.

However, when a subject as controversial as education is involved, and when, constitutionally, its terms and reach are vague, politicians acting as managers may find it hard to resist the use of executive federalism as an alternative to judicial review. As Simeon notes,

An elaborate machinery of intergovernmental negotiation and decision-making has developed outside the former Canadian constitution. Yet it is now an essential part of the effective constitutional framework. The central element is "executive federalism": a pattern of bargaining between the executives of federal and provincial governments similar in many ways to international relations.¹⁶

The Meech Lake Accord would have constitutionalized executive federalism in more ways than merely means of negotiation.

In the meantime, executive federalism roles and practices continue to facilitate political and managerial measures which avoid strict adherence to constitutional requirements, especially when, as in the case of the federal spending power, their certainty has not been confirmed in judicial review. Seeking judicial review to keep on track, constitutionally, is not a hallmark of executive federalism in Canada. Alternatives to judicial review fall into the category of extra-constitutional transactions whose co-ordination is not easily achieved because of the political or legal challenges which might arise.

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The most striking blow against federal-provincial co-ordination on all points came when the provinces reversed their decision to participate in a policy forum with the federal government for the purpose of setting national goals in post-secondary education. One political rationale for such opposition to federal participation in education was described in a 1981 speech of the Hon. David King, then the Minister of Education for Alberta, who stated that

There must be a national co-ordination of certain goals and activities. But I reject absolutely the argument that national goals can only be pursued by one national institution, that is to say, by the central government ...The Council of Ministers of Education, Canada represents, through its minister members, all 24 million Canadians. The Council of Ministers represents, through its members, the exclusive constitutional jurisdiction over education in Canada. The Council is a nascent federal and sovereign organization, one which, notwithstanding that it is federal and sovereign, is not yet part of the central government.¹⁷

While the CMEC is not a new order of sovereignty, it can engage, by political means, in *de facto* practices which usurp federal jurisdiction in relation to education, but only for so long as this is not stopped by federal legislative or legal means. The federal power concerned cannot be delegated. This would still not preclude CMEC studies, reports and policy proposals on any aspect of education or matters related to it, as long as no authoritative action was taken where federal jurisdiction applies. In parallel terms, the federal government could establish a ministry of state for education, and this would not be unconstitutional as long as this body did not take actions to override jurisdiction for education in a province. In each case there would have to be a constitutional awareness of the jurisdiction which applied before co-ordinative measures were put into practice. The relationship between jurisdiction and co-ordination is a sensitive matter.

Executive federalism may be used to facilitate *de facto* arrangements and their co-ordination. This was noted in circumstances where the Constitution is unclear or inactive, or where judicial review is avoided, or where provincial and/or federal legis-

lation does not yet apply. The reverse may also apply. The loss of co-ordination and control of funding resulting from the EPF Arrangement for 1977-82 for block funding, was referred to in several interviews as an example of a laissez-faire version of executive federalism in which co-ordination is ignored. In short, executive federalism *per se* is not a guarantee of co-ordination and control in the administration of public education.

Executive federalism does not assure sensitivity to public issues and needs. A weakening of accountability to legislatures and the public can occur as the result of bypasses on public debate and disclosure. These practices are hardly compatible with public education in and for a democracy. In this regard, provincial attempts to make CMEC a proxy for the federal residual in education was criticized by some senior federal officials and by Canadian Teachers' Federation (CTF) spokespersons in particular. At a 1981 symposium on federal-provincial relations in education, Mr. Norman Goble, who had served as CTF's Executive Secretary since 1970, described anomalies in the conduct of CMEC affairs, stating that

Anomalies there have been, and Council has in fact exerted a fair amount of *de facto* power based on the fact that its members occasionally invoke, collectively, the clout that they wield individually as provincial ministers. That they should do so is an affront to the Constitution.... Provincial autonomy is complete in educational legislation. The other side of the coin is that no Minister of Education can possibly have any power of government outside his or her own province. In other words, the Council, as a body, cannot properly make decisions regarding education, or public policy, or indeed anything except its own administration as an Ontario non-profit organization. It cannot even claim to co-ordinate, since co-ordination requires the power to make adjustments, which it does not have.¹⁸

The federal government has constitutional authority to initiate, direct, and co-ordinate matters in relation to education over which it has jurisdiction. The less it accepts this responsibility, the greater will be the extent of its participation and cost.

Conclusions Re: Hypothesis No. 6

It is concluded that the co-ordination of federal participation in education is adversely affected by deficiencies in its internal operations, and by deficiencies in the separate and collective provincial operations via federal-provincial transactions. As hypothesized, these shortcomings tend to increase federal participation through duplications, overlaps and complexities in negotiations and programming. This is perceived to result in additional program costs, from marginal to major, even though full, identified and audited federal expenditures for education are not available.

Such problems can be magnified by intervening influences in the executive relations between the two orders of government, as in some of the politics and activities of the Council of Ministers of Education. Moreover, practices in executive federalism, can involve policy-making and implementation, including the co-ordination involved, which do not fit the Constitution or decision-making on public education in a democracy. Those problems of co-ordination which apply to the federal order of government's own responsibilities in relation to education are correctable constitutionally. All that is required is the Executive will and decision to do so.

END NOTES

1. Interviews, Deputy Auditor-General (1984); et al. (1986).
2. About \$4 million was budgeted by the Secretary of State Department for this purpose.
3. Auditor-General Report, 1981.
4. In an interview Hon. R.G. Robertson stated that there had never been any PCO consideration of establishing a federal bureau of education.
5. Ministry of State for Social Development.
6. Interview with Senator Jack Austin, Minister, Ministry of State for Social Development, 1981-84: Senior managers and specialists, downsizing. MOSSD reports.
7. During the research for this study one federal source mentioned that the Mulroney government had come to office with an unspoken commitment to acquiesce to Quebec's claim for full jurisdiction over education. This matter was made a point for observation, but no evidence to this effect was found. (If this were true, Quebec would have gained a significant precedent for sovereignty-association, that is, independence.)
8. Interview, Professor Peter Hogg, Toronto, 1988.
9. Interview, Professor Allan Blakeney, Toronto, 1988.
10. Macdonald Commission research re: education, including paper "The Harmonization of School Legislation in Canada: Elementary and Secondary Levels", by Professor Terry J. Wuester, Faculty of Law, University of Victoria. See also Ronald C.C. Cuming, ed., Perspective on the Harmonization of Law in Canada. Toronto: University of Toronto Press, 1987. Interview with Professor Cuming, Faculty of Law, University of Saskatchewan, Saskatoon, 1987.
11. In 1965, Dr. R.O. Macfarlane described to the writer the anticipated establishment of a federal office, or agency, that would deal with federal participation in education. An Education Services Group (EDS) was established in 1966/67, but not the agency. It was not possible to discover the reasons for this, although there is some thought that the senior bureaucracy had as much to do with it as any provincial objections there might have been.

Dr. Macfarlane had been a Glassco Commission Director of Research re: federal participation in education. He was the founding Director of the Carleton School of Public Administration and the former Deputy Minister of Education for Manitoba.
12. Principles for Interaction: Federal-Provincial Relations and Post-Secondary Education in Canada. Adopted by the CMEC, September, 1985. Toronto: Westprint Co., 1985, p.1.
13. Ibid.
14. Ibid. p.5.
15. Canadian Teachers' Federation. Brief to the Royal Commission on the Economic Union and Development Prospects for Canada, October 31, 1983, p.22.
16. R. Simeon, "The Federal-Provincial Decision Making Process", in Intergovernmental Relations. Ontario: Ontario Economic Council, 1977, p.29.

17. Hon. David King, "Politics and Educational Policymaking", in Federal-Provincial Relations: Education Canada, editors J.W. George Ivany and Michael E. Manley-Casimir. Toronto: O.I.S.E. Press, 1981, p.109.
18. Norman Goble, "Education and the National Interest", op.cit., p.68.

CHAPTER XII

CONCLUSIONS AND RECOMMENDATIONS

This chapter describes conclusions and related recommendations for policy, practice, and research for current and future federal participation in relation to education. The legitimacy of this participation was at issue in every aspect of it identified by this study. Constitutional authority, or reasonable assumption thereof, was found in every case, despite some provinces' allegations to the contrary, and pending judicial review which they have been reluctant to initiate.

The findings indicate that in the Constitution Act, 1867 and its relevant case law, there are ample and varied constitutional grounds on which Parliament and/or the Government of Canada can act in relation to education. Entrenched provisions and a potential for their elaboration in the Constitution Act, 1982 extend these grounds significantly via judicial review. However, they do so unpredictably. The judiciary's power to make law is magnified to the extent that parliamentary sovereignty to do so is diminished. Executive federalism in education is also constrained by court power and the apprehension of its use.

Notwithstanding the fit between the Constitution and federal action, there was indication of a widespread lack of information and understanding of the nature of such law. This applies in the federal bureaucracy and extends to the public. Lack of information combined with executive federalism produces negative effects on the governance of education. Thus, what might be termed diminishing democracy appears widespread in both education policy-making and implementation, and in the preparation of school students for effective citizenship, and public servants for duty compatible with both the legal and non-legal rules of the Constitution.

The Constitution is a central, or key, concern in all such matters. Obstacles to its observance and benefit are mainly political. As such, they are correctable with the participation of a knowledgeable public. The necessary knowledge and understanding begins with an appreciation of how education, broadly defined, fits the constitutional matrix in Canadian federalism, starting with its historic bases and directions.

Education has been a consideration in Canada's constitutional law dating from the provisional Royal Proclamation of 1763, with its allowance for land grants, native treaty claims, and charters of incorporation. The Imperial Acts of 1774, 1791, and 1840 all allowed for education as a colonial function. When the Act of 1867 distributed the powers of governance between the central and local legislatures, it allocated a primary but not exclusive power over education to the provinces. Each province was limited strictly to the power to legislate in relation to education "in and for" that province. This left all extra-territorial jurisdiction in the federal residual, which the 1982 Act did not change.

The absence of a procedure for amendment in the 1867 Act reinforced the federal power in education, as in other matters not entirely of a local nature. Control was further strengthened with the power of disallowance over any provincial legislation, and control over the levers of economic powers essential to resourcing federal and provincial programs. Clearly, the Fathers of Confederation intended the new Dominion of Canada to evolve from its semi-colonial beginning in 1867 to full nationhood with a strong central government, not excluding powers related to education.

There were hopes that a new nationality would rise from the building of a new nation from sea to sea. Education was expected to contribute towards this end somehow in accommodations of both majority and minority concerns.

The problem of minority rights - national and local - was not overlooked by the Fathers of Confederation and the Imperial Parliament. In 1867 religion was a major issue in the politics of education - so much so that it seems to have been the main, if

not sole, reason for enacting Section 93. While this Section was not expressly created to protect any one province's majority language and culture, it has served this end. At the outset it was created mainly to protect the Protestant minority in Quebec and the Catholic minority in Ontario, as Section 93 subsections (1) and (2) provide for the two provinces respectively. The federal Cabinet and Parliament were given referee powers for protecting the minority religious rights in education, apart from provincial Section 93 jurisdiction. This established a precedent for federal responsibility apart from provincial jurisdiction in Section 93, in respect to future minority rights in education. A minority language right which was confirmed by the Courts, was translated into Section 23 of the Constitution Act, 1982 - probably the major reform of this constitutional amendment and in Canadian educational history.

Early judicial review by the Judicial Committee of the Privy Council, did not change the basic framework for governance of education, although it did result in severe limitations on some federal powers intended in 1867. When these judicial limitations on central power were hailed by some as furthering "provincial rights", this was a political description, not a legal one. The ultimate claim to greater provincial power was the invention of the compact theory which held that the Dominion had been infused with the sovereignty which the three uniting provinces gave up. However, they had no sovereign power to give up - not in education or anything else. This theory, which has been most evident in Quebec politics, was rejected in 1981, in fact and law, by the seven judges of the Supreme Court who ruled on the matter.

The dominant lesson in education, learned in the 20 years of limited self-government practised by the three uniting colonies before Confederation, was the political need to settle the religious issue in schooling. This brought about the eleventh-hour compromise in Section 93. If there had been no such issue, Macdonald and others would probably have had their way, and education would have been placed under primary national jurisdiction. This would have conformed with law in France and Great Britain, despite

minority language and cultural differences there of greater depth and duration than those in Canada. At 1867, notwithstanding the peak of the laissez-faire philosophy in economics and politics, there was a reluctance to give the provinces a carte blanche jurisdiction over education. This seems to have been for national reasons, as well as concern for minority (religious) rights in education.

At 1867 Canada was an experiment in colonial governance. Section 93 was an experiment also, and not a well-thought-out one, beyond its accommodation of vested interests in religion. There is no official record of serious political or legal discussions of what "education" was to mean, or what its reach was to be. The formal references to education which exist are of a cursory nature, except for the succinct provisions for separate schools and federal guarantees for minority religious rights in education.

While British practice at the time was just beginning to emphasize common public elementary schooling, (a century behind the Prussians) its secondary and university education were under a well-established tradition of private auspices and benefit. This fitted the laissez-faire conditions of the time and the English class system. Education as schooling was thus differentiated from university education in Britain and the Colony of Canada - in semantics and in governance. In both places, by 1867, schooling was to be universal, but university was to be particular and at least national in access and outlook. Certainly, if Canada's universities were to be merely local, this would have drawn attention in the debates of the Imperial Parliament leading to passage of the British North America Act.

Silence in law suggests that universities were meant to be outside Section 93's jurisdiction. If so, then, as now, universities could have been chartered under the federal residual power, the prerogative power, or the federal power of incorporation. Such factors as their limited size and function at 1867, their tradition of independence via their royal and/or papal charters, and their reliance on their own funding, with the

exception of discretionary state grants, all encouraged tact in these matters in early federal politics.

Economic depression in the 1870's, combined with enormous territorial acquisition and purchase, and nation-building efforts and costs, would have restricted federal expenditures on post-secondary education, had they then been deemed necessary. In any case, if universities at that time were considered to be merely teaching extensions of secondary school, such institutions were soon eclipsed with the advent of the modern university's emphases on research for the discovery of new knowledge and the creation of novelty, and on culture for the study of heritage and its enrichment.

It could be argued that, via the *de facto* doctrine, post-secondary jurisdiction had been made provincial as the result of doubts and hesitations about federal action on it in the first years after 1867. This would not explain the national dimension in university role and function which Section 93 expressly precludes for all provincial legislation in relation to education. It would not excuse Quebec's virtual withdrawal from direct state responsibility in education until the quiet revolution. Nor would it justify national university attendance rates noted by the Massey-Levesque study of 1950 of about four per cent of Canadian post-secondary age group. Nor could it overlook federal jurisdiction which has been eminently present in scientific research with its significant post-secondary benefits in all Canada.

There is some federal jurisdiction in education in Section 93, and a great deal apart from it. In Section 93, there is full federal jurisdiction in the territories; remedial power applicable to group separate school rights; and an untested supervisory power which could, presumably, apply to all legislation on education. Apart from provincial jurisdiction in Section 93, there is federal jurisdiction for protection of minority religious rights in education. Apart from Section 93, there are new minority official language rights in education in the 1982 Charter, where redress to the Courts is backed by federal responsibility, which would also apply to any subsequent Charter minority

rights in education when they are created. Section 93's explicit exclusion of extraterritorial provincial jurisdiction over education gives the federal order of government the residual power, via the Section 91 p.o.g.g. power. Judicial review might also grant a federal Section 93 residual power, when legislation in relation to education is not "in and for" a province in the singular. The same extraterritorial exclusion on the provincial power of incorporation gives this residual to the federal order of government. Section 91 anomalies create full federal jurisdiction in education for Indians (and Inuit), for defence, and for penitentiaries. Aspects of education, which do not fall under Section 93, apply under virtually every head of legislative power - both federal and provincial. Plenary federal power over communications and telecommunications via judicial review has created a significant national jurisdiction in relation to education. Under the 1982 Charter, other federal jurisdiction in relation to education is being created by judge-made rules, mainly in relation to Section 23.

Concurrence grants the federal order of government further significant powers in relation to education: explicitly in matters of agriculture and immigration; implicitly, by virtue of the Constitution's silence at 1867, in both research and culture. Federal power in these two fields, together with the plenary federal power over communications and telecommunications, are significant components in post-secondary education, and are substantial grounds for a federal claim of concurrent jurisdiction. The federal spending power, moot though it may be when conditional grants are involved, completes argument for a federal claim of concurrent jurisdiction in post-secondary education. A federal withdrawal from its research activity and funding linkages with post-secondary research and education would be calamitous.

Section 93(10)(c) gives the federal order of government the power to expropriate works, including educational ones, which are for the general advantage of Canada. The federal power of incorporation can be, and is, applied to incorporation of educational bodies with national objectives, including schools, colleges, institutes, and universities -

public and private. The royal prerogative gives the Crown in right of Canada power to charter its own degree-granting institutions of higher learning. These and other powers identified give the federal order of government considerable scope to legislate and to administer in relation to education, if and as it chooses.

Almost invariably the federal order of government has chosen not to act with declarations of such constitutional authority. A main reason is that such information has never been researched and made known. Another reason seems to be its preference for financial commitments on a flexible policy basis which will permit a repertoire of initiatives, cut backs, and withdrawals - rather than firm obligations in law. Another reason is its political sensitivity to charges of federal intervention in education which some provinces, and Quebec in particular, seem to regard as an unlimited provincial "right" rather than the limited responsibility it is.

Generally, when the federal record of participation in education is examined, it is found to have been anything but interventionist. For the most part, it has been a record of conservative, gradual, and sometimes begrudging involvement, when compared to the national needs and obligations at stake, and the ample constitutional grounds for federal action which apply. The delay in making an adequate response to the federal responsibility for education of Indians (and Inuit) seems inexcusable, considering the years of attrition of their cultures and languages, and the widespread poverty problems they still endure. Training measures for salvaging youth during the Great Depression were too little too late. The Massey-Levesque Report's recommendations of 1951 for substantial financial aid to universities did not evoke significant help until about 1957. National remedy for the injustices of lost francophone minority rights in education did not evoke any effective federal remedy until the Trudeau government's Official Languages Act of 1970 - eighty years after the problem had become very apparent in case law. Vocational education - at both the secondary and post-secondary levels - did not receive substantial help until the advent of the Diefenbaker government.

Social assistance for the needy in relation to day care and education was slow in coming. Significant federal efforts to remedy adult illiteracy were belated and of brief duration, even though Canada's entry to the information age with a high rate of adult illiteracy must easily rate as a matter of national interest and serious concern. The excuse that the provinces should assure literacy via their Section 93 jurisdiction for schooling is small comfort to the under-educated and unemployed post-school population involved. This sizeable population misses out on the allocations of post-secondary benefits to its age peers. This exclusion produces a widening gap between advantaged and disadvantaged youth and adults. This in turn generates socio-economic class differences which in a democratic country are unnecessary and inappropriate.

Politically, federal participation in education has been beset by a prolonged visibility, or recognition, problem - in communication and public administration. As described in the limitations to this study, there is a critical lack of institutional memory in the matter of federal participation in relation to education and the reasons for this. Remedy requires establishment of a particular archival record, the preparation of a composite history, comprehensive current reporting on all programs and costs related to education each fiscal year, and cost benefit analyses of particular programs and combinations of programs. Only then will there be the background information to match the breadth and depth of federal constitutional involvement in education as defined, and to permit appropriate federal decision-making and action.

This self-inflicted condition has made it difficult for Parliament, federal governments, and the federal bureaucracy, to formulate principles and policies, and to carry them out efficiently and effectively. These political circumstances seem also to have deterred an examination of the ample constitutional grounds present for federal participation in matters related to education. These correctable omissions inhibit federal initiatives to explain the program and constitutional issues in federal participation in relation to education to the Canadian citizenry.

In deference to the provinces' persistent claims about the sanctity of Section 93, federal governments were reluctant to identify, or clarify, their participation in education on constitutional grounds. This reluctance was partly because of the inferior status of judicial review in Canada in constitutional cases for so long after 1867. Canada's Supreme Court had to defer to the Judicial Committee of the Privy Council, which treated the Act of 1867 as an Imperial Statute with terms that could be interpreted narrowly, rather than as the primary constitutional document of Canada. The prospects of narrow interpretation deterred a federal reference which could at least have decided the reach of Section 93. In prolonging the Imperial connection in judicial review, the provinces, which claimed protection of the federal principle as their reason for these challenges, contributed to delay in the achievement of Canada's legal sovereignty. They also delayed the liberal interpretation in constitutional law which education as a power requires.

This stand off perpetuated a misreading of Section 93 as the sole focus of constitutional power for education, and the sole preserve of the provinces. It overshadowed the constitutional fact that the explicit terms of Section 93 and its variants do not give the provinces the kind of complete legislative power over education that would make them proxies for national states. If, however, the Meech Lake Accord proposal for provincial nomination of candidates for Supreme Court judges had been made constitutional law, a confederal court could have resulted - possibly to pick up where the Privy Council left off in its tendency to rule in the provinces' favour in disputes with the central government.

This is the situation in which federal ventures in relation to education have been characterized as "interventions". It may explain the provinces' concern about local responsibilities which relate to education under Section 93, but not others, such as research, communications, culture, languages, financial support, minority rights in education, and educational matters which are not of a local nature only.

Significant federal participation, sometimes of a milestone character, is virtually unknown to the national citizenry. This serves local political ends, but it denies Canadians a sense of sharing in important achievements for Canada. These include numerous federal research ventures of world-class standard; enormous capital aid to secondary and post-secondary expansion; a successful program of official languages in education from sea to sea; a student loan fund which makes post-secondary education accessible with mobility in all Canada. The significant federal role in programs and financing in aid of Quebec's quiet revolution in education would be worthwhile for all citizens to know, especially Quebecers.

To meet the basic requirements of accountability in federal participation in education, public reports should be provided by either a federal agency or one that is federally incorporated. Facts on programs and costs, and evaluation on benefits, should be available on all federal participation without exception. This should include federal participation at all levels of schooling; the breakdown of all federal involvement in post-secondary education, broadly defined - including aid to provincial secondary education included in this category at provincial insistence; the full range of federal aid to each province's Section 93 jurisdiction.

Nature of Education

Education is probably the least watertight of subject matters for allocation of jurisdiction in a federal state. No federal form of government is without some central involvement in education. Conversely, no unitary form of government is without some local involvement. A geographic placing of jurisdiction may fit a preference in English law. It may satisfy the cultural and/or linguistic desires of a country's regional minority, but not the minorities within its jurisdiction. Making an exclusive allocation of jurisdiction over education to only one order of government in a federal country ignores its broad, dynamic nature and its national as well as local purposes. It also

ignores changing demography and population mobility. It overlooks the individual's freedom and, in effect, sovereignty in relation to education where no positive law prohibits this. No law can claim full authority over education, least of all in a democratic federal state.

In a democracy there are two basic requirements that jurisdiction for education must satisfy: political socialization through education for national maintenance and survival; and minority rights in education. Thus when, constitutionally, local control over education involves no explicit obligation to assure political socialization for common citizenship - as it does not in Section 93 - parochialism and even ethnocentrism are encouraged. Such results were noted by Hodgetts and Johnstone in the 1960's, by Symons, et al. in the 1970's, and in this study. Yet, from 1867, the national governments of Canada have expected the provinces to prepare students for Canadian culture and citizenship writ large as well as locally. Their failure has reached the point that the basics of constitutional law in Canadian federalism remain a mystery to students and graduates of provincial schools.

That this has persisted throughout Canada's interminable constitutional conflicts between the two orders of government requires explanation. It suggests unspoken provincial policy, via Section 93 control, to limit such fundamental content in the regular courses of study. If so, this would make the provinces' adversarial conflicts with the central government less susceptible to being challenged on home ground, and more amenable to being left to elite accommodation.

Canadians are said to have a predisposition for acquiescing to governmental authority. If this is so, it could be based on an ignorance of the constitutional nature of that authority. This would make the problem one of education. If provincial control of education is responsible for such results - and there is no dispute that it has permitted constitutional ignorance - federal correction is required.

It would still be argued that provincial jurisdiction over education in Section 93 precludes federal government involvement in matters of concern to national heritage, national security, and national survival. The Greeks in classical times did not accept this. Neither do modern states. A country's common achievements, myths, needs, and interests must be taught and learned. Public education is one of a state's most important responsibilities, if not its most important means of survival. A national government must have, and exercise, national responsibilities in this matter. If need be, it must protect itself from within, as well as from without.

To some extent, this is what the Trudeau Government did when, based on the federal residual power, it authorized national Canadian Studies goals and programs. The same happened when it formally approved a set of goals which describe part of the federal involvement in education. Protection and promotion of the two official languages is another matter of federal concern which has been expressed in policy, statute, and order-in-council, especially as this concerns anglophone and francophone minorities.

In Canada, citizens' minority rights in education are apart from provincial jurisdiction in Section 93. All provinces have minorities. They have long histories of minority relations involving the anglophones in Quebec; the francophones in Ontario and the west; the native peoples of Canada everywhere. When national minorities are themselves provincial majorities, the minority issue has to be dealt with in two dimensions, with a federal protection of citizens' individual rights. This explains why, from 1867, provincial jurisdiction under Section 93 has not included responsibility for minority rights in education. Besides, Canada's history tends to show that exclusive provincial jurisdiction over education can close the doors on minority rights in education, rationalized by some ideology about the rights of the majority. This is why many native peoples draw back from schooling outside their control.

The 1867 Section 93 experiment has met majority and local needs in the provinces. It has not served to meet very basic national and minority needs. Significant deficiencies apply in every province in literacy, compensatory education for the poor, a high school drop-out rate of at least 30 per cent, and preparation for active Canadian citizenship. The inadequate provisions for civics education is a longstanding concern - doubly so because most secondary students reach voting age before they graduate.

Federal participation in education has never been fully known or appreciated by the Canadian public, or even by some of its direct beneficiaries. As interviews and data reviewed for this study suggest, much of what federal governments have done in and for Canadian education nationally has probably been denigrated more than it has been praised. This has been most evident in the politics of the Council of Ministers of Education. As a result, some of the notable areas of national achievement in and for Canadian education have failed to ignite a national and future vision of education goals, policy, and action.

It is significant that, both constitutionally and in education practice, the Constitution Act, 1982 equates education and culture explicitly in Section 40. Apart from the compensation provision involved, these terms recognize the normalcy of national participation in matters of common cultural concern in relation to education. The Meech Lake Accord's elimination of this Section was rationalized on grounds that education (and education in relation to culture) would be included in all other matters in the proposed Section 106a. However, this seemed to open the way in future judicial review on the "distinct society" criterion to legal distinguishing which could make Quebec's culture and education separate from the culture and education of the rest of Canada. This could have removed the federal residual power in relation to education in Quebec. It could also have put an end to a one-Canada approach to national responsibilities in education.

In the meantime, education-related and cultural development and enrichment have been provided to and for all Canadians through:

- advancement of knowledge and creativity in science, technology, and the arts;
- technology transfers;
- human resource development in all fields;
- educational support for the poor, the culturally disadvantaged, and the disabled;
- education of the Indian and the Inuit peoples;
- fiscal promotion of equality of opportunity in post-secondary education via guarantees for post-secondary student loans and housing, and transfer payments equivalent to half the cost of college and university education;
- national broadcasting to link Canada and Canadians;
- establishment of official language education in Canada's provincial and private schools;
- protection of minority official language rights in education in all of Canada's provincial and private schools;
- services and support for Canadian cultural development.

Federalism

These matters are vital to Canada's survival - socially, culturally, and politically. They have been undertaken because, in Canadian federalism applied to education, the effective allocation of all legislative jurisdiction cannot be made to one order of government only - and was not.

To counter this perspective and its orientation to national sovereignty, Quebec has opted out of national shared-cost programs, especially in the field of education, where it claims exclusive legislative jurisdiction under Section 93. This claim is made in spite of Section 93's explicit omission of any provincial jurisdiction over education extra-territorially, and because the residual for these matters must be federal since the Constitution's exhaustive distribution of powers precludes a vacuum in law. The same provincial exclusion applies to minority rights in education even though Quebec's Bill 101 ignored this, until federally-sponsored judicial review forced correction.

The Fathers of Confederation did not frame Section 93, and the Imperial Parliament did not enact it, to be a stepping stone for an effective opting out of the Constitution or obligations to Canada. Opting out of a national dimension in education, premised on a plenary provincial jurisdiction over education, is a political position, or game. It is not constitutional law.

Minority Rights in Education

Canada's quasi-federal constitution grants the Quebecois (a minority in Canada, but a majority in Quebec) a territorial jurisdiction in Section 93 over matters in relation to education which are local. There is no provincial jurisdiction for matters in relation to education which are national. Nor is there any provincial jurisdiction in Section 93, or other provincial powers, which can override common, national minority rights in education. This does not prevent majority language claims for the "group" from being brought into conflict with individual rights. The 1982 Act confirmed these language rights in Section 23 and provided an open-ended potential for the creation of other national, entrenched minority rights in education by judicial rulings or by constitutional amendment. Other 1982 Charter rights and rhetoric may have the same growth potential.

Entrenchment of national minority rights, *ad infinitum* via judicial review, disturbs the stability of the pre-Charter distribution of legislative powers in Canadian federalism. It also drives a wedge into an arbitrary interpretation of Canadian federalism, including its application to education. Before the 1982 Act, such an interpretation could be applied at the expense of minority rights in education. In Quebec, without Section 23, that province's anglophones could effectively be reduced to a second class status unless they migrate - as over twenty per cent have done in the past decade. Without this protection, francophone minorities in the other provinces could be denied

their minority language rights in education, and be accorded the same second-class treatment - again. Neither scenario is democratic nor just.

The Supreme Court ruled to prevent such treatment in education for all citizens born in Canada. When it also rules to grant these minorities the right to administer their own schools or systems, it will do so at the expense of provincial jurisdiction via Section 93.

Cultures

To justify the language dichotomy described, the argument of two distinctive cultures is advanced - each with a need for separate philosophies and systems of education. The next steps in such logic could be separate territories for this purpose, then separate national governments. The latter step is rationalized by the metaphor of a marriage ending in divorce which ignores a history well beyond the duration of such a union and its children and its children's children. This ethnocentric thinking ignores the first peoples of Canada whose cultures were trammelled and whose languages have been permitted to perish. It ignores new Canadians of diverse origins who do not deserve to be the victims of some so-called constitutional divorce between the two former European "founding peoples" - French and English. This reads like a political soap opera. When native persons were being interviewed for this study, they invariably drew attention to the land on which all Canadians live and have lived as the starting place for any consideration of culture worth mention.

Canada's cultural heritage, which includes its natural heritage, is at the core of enculturation and acculturation of Canadians through education, because a knowledge of, and a value for, these matters is essential to Canadian identity and cultural development. Responsibility for these matters is not exclusive to one order of government. Aspects of culture may be governable but not culture itself.

Culture - to be transmitted through education, formal and informal, local and national - is larger than any institution involved, or constitutional jurisdiction. Silences and flexibilities in the Canadian constitution in relation to culture and to education reflect awareness of this situation, or anticipate it. Moreover, the Canadian federation does not lend itself - geographically, demographically, or constitutionally - to a fact or fiction of separate cultural jurisdictions. With almost a million francophones outside Quebec, and almost as many anglophones inside it, such a proposition is not rational. When allowance is also made for cultural pluralism in all of Canada, including that of the native peoples, this position is untenable. Hence separate "societies" cannot equate with separate cultures, much less with separate legislative jurisdictions - not as long as Canada's cultural and natural heritages are considered in total. When this happens, the federal order of government's constitutional roles in culture, communications and education come into play and have to be taken into account.

Section 93

Section 93 was an experiment marked by expediency. It conveyed only partial jurisdiction in relation to education to the provinces. Its terms prohibited provincial extra-territorial jurisdiction. It accommodated provincial majorities in language and culture and it omitted provincial protection of minority rights in education. Section 29 of the 1982 Act gives double protection to Section 93's provision for group religious rights in education but only where these rights are in force. It also maintains federal quasi-judicial and discretionary powers in law in Sections 93(3) and (4). In the case of Section 93(4), there seems to be an avenue for appeal to Parliament for remedy, should provinces not comply with rulings of the Court on Section 23 of the 1982 Act. There also remains in Section 93(4), an untested potential federal supervisory power over all education.

The 1982 Act does not clarify or extend the provinces' Section 93 jurisdiction. This continues to leave the issue of post-secondary jurisdiction open to the Courts to decide. In this regard, there seems to be reasonable grounds in history, law, and *de facto* practise for distinguishing between one jurisdiction for "education" as schooling and another as "post-secondary education".

Resolution of this jurisdictional issue by extra-constitutional means was not anticipated, if the record of recent constitutional discussions is a guide. This can also be inferred from the use of Sections 38 and 40 which permits transfer to Parliament, by constitutional amendment, of any provincial legislative power in relation to education. The equation of education and culture also brings federal concurrent jurisdiction in culture into play in matters related to education which are national or intergovernmental.

The discretionary nature of Section 93 has invited, and even required, compensatory *de facto* federal actions, to initiate or meet national standards in education. The 1982 Act creates a constitutional capacity for such federal participation on a *de jure* basis.

Significantly, no disagreement about provincial jurisdiction for schooling was encountered. Of equal significance is CMEC's belated formal acceptance of schooling which is under federal Section 93 as well as Section 91 powers. When no one recommended constitutional amendment to Section 93, this suggested that there were enough constitutional provisions in relation to it, and apart from it, to warrant leaving well enough alone. Section 93 seems to have been a 19th century accommodation. Its implementation in the 20th century has been inadequate, resulting in the many deficiencies described in this study. Quebec's support for Section 93 is as a political focus for claims to plenary jurisdiction in matters of Quebecois language, culture and communications.

These claims are made despite the extraordinary extent of continuing federal fiscal support - as a silent and unrecognized partner - in the Province's educational reform since the quiet revolution. Such federal participation has been comprehensive, embracing half the cost of the two CEGEP years of secondary education since 1967; official languages education support, including costs for the anglophone minority since 1970; adult training funding for programs to make up for significant under-education in the post-school population; Canada Assistance Plan shared-cost support for day care and training of the disabled; half the cost of post-secondary education, exclusive of additional research grants, services, capital expenditures for facilities and supplementary federal research contracts - all linked directly or indirectly to post-secondary education in the Province.

Post-Secondary Education. The politics of the distinctiveness and protection of Quebec's majority culture invites fears and *pro forma* statements about federal "intervention". This is understandable, even though in schooling it is not the case, except for federal responsibilities for minority rights in all provincial education. There would be no assertion of federal concurrence in the Province's post-secondary education either, if all it involved was a level of instruction only beyond secondary schooling. This was the status of the few Canadian "universities" there were at 1867. This is how, in the 1950's, Quebec's colleges classiques were categorized, much to the annoyance of the Church and the Union Nationale Government when they were excluded by the federal government from its direct post-secondary grants.

Modern post-secondary education, with its research, cultural and other components of concurrent jurisdiction, evolved after Confederation and the laissez-faire philosophy of that time. During this time, when Quebec's French-language universities had both civil and papal charters, there was no institutional or provincial position that

they were for Quebec only, because this would have ignored the francophone minority across Canada, as well as being un-Catholic.

The federal government's belated acceleration of its participation in post-secondary education after World War II proceeded in the direction of a national system of universities - of a concurrent character, including direct federal funding to universities and colleges. This trend ended, or was put on hold, by 1967, with the exception of national peer committees for granting research funds for capital and operating aid to post-secondary programs. After that date, federal funding for post-secondary education was channelled through the provincial governments. This was done to involve the provinces in shared-cost measures, not to abandon federal concurrent power in such matters.

A national approach to post-secondary education has come to evoke "nationalist" or parochial reactions in Quebec. These take the form of a philosophical opposition to all federal participation in education, even though scientific and other elements are obviously integral in modern university studies and concurrent in jurisdiction. Such politics has given rise to demands for opting out of national post-secondary initiatives, notwithstanding Ottawa's funding of half CEGEP's secondary level program because the Province classified it as post-secondary in order to obtain federal grants. The federal government could have resisted this in 1967 on grounds that it interfered with Quebec's jurisdiction for schooling under Section 93, and it can still do so. Meanwhile, this scheme continues - by Quebec's own design and insistence - contrary to its forceful claims that Section 93 must be an exclusive provincial jurisdiction, especially in education. The doublethink involved serves to illustrate that the problems of Section 93's implementation are as political as they are legal.

The provinces' record of underparticipation in post-secondary funding (less so for Quebec) has set the stage for general cut backs in federal funding. This will be to the considerable disadvantage of post-secondary education in Canada. To avoid this,

the time has perhaps come for the federal government to assert its concurrence in post-secondary education in those matters where the Section 93 residual and related federal powers apply, so that it can fund specifically and visibly for its share of these national responsibilities. It could do this by again making direct grants to universities - perhaps via a federally-incorporated body for this purpose. Verified concurrent jurisdiction could permit this, and without interference in chartered university governance - in fact or appearance.

Before federal institutions of post-secondary standard for science and technology are whittled down via executive practices more suited to a company than a country, a plan could be made for adding post-graduate research and training to the mandates of the agencies or departments concerned. This could, of course, include the various new national institutes and laboratories - the new biotechnology institute and the aerospace establishment in Montreal are examples. It could involve Canada's pre-eminent scientific and technological body - NRC - with its adjunct programs, services, laboratories, and libraries. These elements, and the considerable expertise of the federal agencies and departments concerned, would be given greater use and effective jurisdiction for adequate, continuing federal funding. The granting of post-graduate degrees in the wide range of fields involved would add new knowledge to all post-secondary education, and new expertise to the public and private sectors in Canadian science and technology. The continuous human resource training and development involved would assure staffing for research and teaching positions which immigration and regular post-secondary training cannot meet.

Because of concurrent jurisdiction, master plans and policy for scientific research and planning could involve both orders of government and all post-secondary institutions concerned, provincial and federal. In those matters on the federal side of concurrence, there would be no effective opting out by any province.

This is not to say that schooling, with the exception of that under federal jurisdiction in Sections 93 and 91, is not primarily under provincial jurisdiction. However, such a rationale does not make practical or constitutional sense in post-secondary education, because of its modern inclusions of concurrent research, cultural, communications, and fiscal components. To assure that Canada's national sovereignty applies, no opting out should be permitted of any province because of the federal -that is, national - concurrence involved. Any assumption of federal jurisdiction would be limited to delegation of authority only, with specified terms and conditions. To support this jurisdiction a reference case to the Supreme Court would be in order.

In the meantime, denial of federal concurrence in post-secondary education presupposes a country in which its national government is excluded from the vital function and responsibility of education, even at its post-secondary level. It also presupposes the contradictory proposition of two orders of sovereignty at the national level in education, research, culture, and communications. Provincial opting out of post-secondary education, with its components over which Section 93 cannot apply fully or at all, should be recognized for what it is: a *de facto* opting out of Canada - politically, socially, intellectually, and ultimately, constitutionally.

Since universities and colleges cannot do this, the case for resumption of direct federal relations and funding could be acted on where federal post-secondary education jurisdiction applies. This procedure might even elicit provincial co-operation where, via the CMEC, it has been delayed or declined. It would certainly draw public, political, and legislative attention to post-secondary matters for which the provinces have responsibility.

Research

In Canada, research has never been fitted to strict constitutional boundaries. The federal role in research has been treated as a matter of practical need - first, in knowing

and building the country, and then, in maintaining its development. Its benefits have been open to both the public and private sectors of the economy. It has also performed as a premiere source of intellectual and creative drive and achievement in science and technology. In such endeavour it has been associated directly with the country's post-secondary institutions.

The federal research roles and activities are all in keeping with silence on the matter in the terms of the Constitution - from 1867 to the present. This leaves the broad field of research open to nothing less than concurrent jurisdiction, which, from the outset, has assumed and embraced direct linkages with post-secondary education.

When Professor James C. Miller described the founding of NRC as one of the "most constructive and forward-looking policies ever adopted by any government", (op.cit., p. 565) he wasn't exaggerating. The agency's contributions in fundamental and applied research, its attention to Canadian problems in science and technology, and its development of scientific manpower through R and D, and grants involve achievements of landmark calibre. The agency is a focal point of intellectual and creative achievement in Canadian science, and is so recognized world-wide. It has created and maintained operational linkages to other research bodies and with all Canadian universities. It has produced one new scientific or technological innovation after another - in new knowledge and new modes of facilitating scientific research.

There is growing need to achieve greater value for money in research and development; to alleviate the shortage of highly qualified scientists; to deal with the growing number and complexity of scientific problems related to Canada. Given NRC's sustained effort and excellence, the time has come to involve it and other national and world-class components of federal science activity in a chartered post-graduate education role. This could be under federal jurisdiction only. It could be under concurrent jurisdiction in a system form involving the integration of particular federal and university components. As NRC's past president, Mr. Larkin Kerwin observed, the Council

already qualifies and could function in a degree-granting institute role in every respect short of classrooms. Experts who do research, or are retiring from it, could enrich their careers, their institution's roles, and Canada's post-secondary education and research in such service.

Under-education

Under-education of human potential is a major problem across Canada. It is bad for individual fulfilment, group participation, cultural transmission, work, and citizenship. It is not compatible with democratic values and their manifestation in and through public education. To date in post-secondary education writ large, the under-educated are also under-privileged. The principle of equity requires that these failures of Section 93 implementation be given a fair chance.

When federal allocation of post-secondary funding is decided in policy, attention should be paid to post-school youth and adults who require basic education including literacy and access to meaningful training. Allocations of post-secondary funds should be distributed more fairly - to help the disadvantaged who are under-educated and under-productive, as well as their more privileged peers who have achieved qualifications for entry to college or university.

Access to out-of-school learning on a national basis is part of heritage programs such as those administered by the CBC, NFB, and National Museum Corporations of Canada. Such cultural and compensatory education should not be subjected to a user-pay test of means. The same applies to possible taxes on reading materials. A great deal remains to be done via national broadcasting jurisdiction to program basic and cultural learning for all age groups in all of Canada. The same applies to the production of learning materials which reflect Canadian values and heritage.

Judicial Review

Until 1982, the power of judges to effectively legislate was limited to a few entrenched matters only, of which education was one. When the 1982 Act's entrenched rights came into force, the potential of such judicial power was significantly expanded. At the same time, the doctrine of parliamentary supremacy was greatly limited in the federal and provincial legislatures.

The change has had an Americanizing effect on the nature and exercise of judicial review in Canada. Judicial power has been politicized by the judges' expanded rule-making authority which now goes well beyond deciding the *vires* of the distribution of federal and provincial powers to legislate. Executive federalism is also limited by constitutional entrenchment, except where its governmental players can agree to engage in political and/or executive actions as alternatives to judicial review. This process is limited by the standing for litigation which Section 24 of the 1982 Act grants all citizens on new Charter rights.

The 1982 change creates what the Hon. Jacques-Yvan Morin refers to as a growth principle in law-making which is unpredictable and destabilizing in federalism. Certainly this is the case in education - a focus of concern for Quebecois who do not want education laws of common, national application which may undermine the status and maintenance of their language and culture. The 1982 Charter, however, reads like an open-ended agenda for such change. Section 23, which is outside Section 33's control, is a prime example of elaboration of rights in, or related to, education.

There is potential in the 1982 Act's Charter for entrenchment of various new minority rights in relation to education by means of judicial review. Section 15's equality rights could be elaborated in relation to education. Section 23's general rights in respect to minority official language rights in education have already been expanded significantly - in more specific terms with the force of constitutional law. Multi-cultural heritages could be lifted from rhetoric to rights in judicial review. Equality in relation

to education in Section 36 - individual, group or regional - could be entrenched by judicial ruling.

The 1982 Act, which equates education and culture in explicit terms for the first time, in Section 40, confirms in law what has long been apparent in sociology, education and politics. This opens the way for significant defences and extensions of federal action in education as a cultural matter -in general post-secondary education; in compensatory education for the poor and culturally disadvantaged; or in cultural education by and for native peoples.

Amendment of the Constitution

In addition to elaboration of the Constitution by means of judicial review as described, the 1982 Act provides in Sections 38 to 49 various procedures for constitutional amendment. In particular, Sections 38 and 40 permit a transfer of provincial legislative power in relation to education to be made to Parliament. This affirms that federal participation in such matters is not categorically forbidden in constitutional law.

Self government in education for Indian (and Inuit) peoples may be achieved in either of two ways. The first is through promised constitutional amendment which has been on hold since 1982 (or as many would agree since 1867). The second is by means of treaties negotiated under the constitutional authority via the Imperial Proclamation of 1763, and the unceded land claims at common law to which the Proclamation attests. The first process would have been affected by the veto power the provinces gained had the Meech Lake Accord become law, but not the second process.

In effect, opting out of federal programs in relation to education, has already been a *de facto* alternative to amending the Constitution. Quebec has pursued this strategy, with each withdrawal it makes serving to strengthen the application of the *de facto* doctrine in law. In the national interest, and in the interest of the provinces'

minorities, opting out of programs of national and intergovernmental application in relation to education should not be permitted.

Amendment of Section 93 no longer seems prudent, or necessary. The federal array of powers identified are ample for its participation in relation to education. However, where concurrence is deemed to apply but is not declared or recognized, judicial review seems to be in order. This is an issue in post-secondary education - in part because of components which are partly or fully under federal jurisdiction; and because the federal order of government has its own post-secondary responsibilities and jurisdiction.

The Meech Lake Accord for constitutional amendment - a product of executive federalism method and agreement - would have made significant amendments to the Constitution. To begin with, the Accord would have constitutionalized executive federalism. It would have deleted Section 40 with its terms which equate culture and education. Ostensibly, this would have been done to broaden the grounds for transfer to Parliament of matters of "exclusive" provincial jurisdiction (assuming the amendment test was met, after which the Court could decide what is "exclusive" in Section 93). Section 23 is already entrenched nationally and is outside the reach of the Section 33 notwithstanding clause. Yet, it could still have been affected in judicial review by the Accord's interpretative "distinct society" clause for Quebec.

Governance in Relation to Education

Withdrawal of provinces from effective governance of schooling in recent years - with the notable exception of Quebec - has weakened the purposes, obligations, and efforts which Section 93 jurisdiction requires "in and for" each province. Reluctance of the federal order of government to act on its ample constitutional powers in matters related to education diminishes its jurisdiction in relation to education. At the least, a federal Education Act could consolidate its law on those matters related to edu-

cation over which it has jurisdiction. This would make its authorities for action and co-ordination clear to all concerned and show the need for a supervisory body.

The current lack of visibility of such jurisdiction, and of the programmes and activities it validates, makes the Canadian public unaware of national performance and accountability due to them in these matters. Executive federalism practices - provincially and intergovernmentally - create and shield these deficiencies in governance. They do so to the detriment of policy-making and implementation appropriate to public education in a democracy.

Executive federalism in relation to education has grown in proportion to a decline in the democratic governance of education in Canada. During the short but eventful period of co-operative federalism, the provinces were able to combine strong Section 93 governance via their respective Ministries of Education with effective professional representation in negotiations and shared-cost programs related to a wide range of programs in education. Their legislatures were actively involved in policy issues; the public was informed. Universities and college governance and relations then seemed to be moving in a direction of a constitutional framework of concurrence between the two orders of government. A national post-secondary system seemed to be in the making for handling matters of common, national concern.

At this time Quebec came out of a century of dormancy in public education with a nationalist, non-secular spirit in its motivation for changing the governance of its public education. While its majority's language and culture would be protected and advanced, there was no desire to replace the paternalism of the Church with that of the federal government. Post-secondary education was perceived ethnocentrically - as a Quebecois object of responsibility and control, notwithstanding concurrent responsibilities and concerns in post-secondary education outside Section 93 jurisdiction in and for Quebec. The politics of competing Canadian and Quebec nationalisms took precedence over the constitutional law which applied then, as now, in relation to education.

Federal political concern for Quebec's strategic vote and, probably, cost concerns mentioned in some senior interviews, combined to encourage a retreat from a national university system approach, notwithstanding a national dimension of post-secondary function and jurisdiction. By 1967, the federal role in post-secondary education nationally had shifted from initiating new programs to the funding of "established" programs via the provinces. Financial negotiations became a more dominant executive priority and function with each succeeding five-year EPF Agreement.

With the emphasis in governance shifting from a focus on ends to one on means, the politics of education in and between the provinces became more executive and less democratic. This was manifest in quests for federal funds which were ostensibly for education; in mis-classification of parts of secondary education as post-secondary, all to get federal funding one way or another. If no concurrence in post-secondary education applies, a case could be made for unconditional funding. A case could also be made for cutbacks or no funding.

Coincidentally, in 1967, the Council of Ministers of Education of Canada became an immediate device in executive federalism for keeping the federal government at a distance. The CMEC, a body of no constitutional governing authority whatever, led the political attack on so-called federal "intervention" in the provinces' Section 93 jurisdictions. Co-operation in common interests was replaced by adversarial rhetoric, and relations between the two orders of government deteriorated. Federal-provincial relations in post-secondary education came to focus mainly on money *per se*, coupled with a determination on the provincial side not to be held accountable for how it was spent. National policy-making for the present, much less for the future, went by the wayside. While this was happening, basic provincial Section 93 responsibilities were downsized and delegated - leaving the fields of educational politics in both the national and provincial domains open to adversarial, elitist, undemocratic roles and behaviours largely conducted in secret. This has generated the political and executive forms of

extra-constitutional transaction described - including *de facto* assertions of national jurisdiction and/or measures which judicial review would correct.

The Meech Lake Accord proposals for elaborating on the 1982 Act were, as former Prime Minister Turner stated, a means of constitutionalizing executive federalism. The question is would, or might, it have legitimized the intergovernmental and provincial approach to educational governance described? (The answer seems to be a tentative yes, pending unlikely clarification via judicial review.)

Executive federalism, as it has developed in relation to educational governance in the provinces, has served to cut off legislative involvement in provincial debate on education policy. The same applies to effective political, party, and public participation in such matters. It has reduced the significance and use of the provinces' professional staff in policy-making and its implementation. This de-professionalizing of the capabilities of the provinces' Education Departments at the top has detrimental effects on leadership in key areas of provincial Section 93 responsibilities. School curricula, teacher education, as well as common problems such as cultural disadvantage caused by poverty, and under-education caused by illiteracy, all suffer. By expediently shifting tax burdens to local boards, the provinces have facilitated parochial and bureaucratic structures and treatment of provincial Section 93 responsibilities for schooling. Weaknesses in the implementation of Section 93 have been magnified and shielded by such executive politics and practices.

Executive federalism, via the CMEC, succeeded in blocking a post-secondary policy forum based on constitutional concurrence where it applies. This stalled federal momentum for correction in 1984 - perhaps for good - with lasting detriment to Canada's national needs in and through post-secondary education. Obviously, such approaches are inappropriate to the professional, non-partisan handling of public education. More important, they are offensive to the ends and means which public education must serve in a democratic society and state.

Constitutional Knowledge and Practice

The findings, in this study and previously, of inadequate knowledge of the legal rules of the Constitution are as hypothesized. This also implies a lack of knowledge of the non-legal rules of the Constitution which are essential to proper public administrative conduct in service to responsible government. Although non-legal rules, or conventions, of the Constitution may not be enforced by the Court, this does not make their observance optional - for elected politicians or for appointed public servants. As Professor Lederman has observed, such rules are obligatory; they are binding and ought to be obeyed. Ignorance is no excuse. Moreover, to know these conventions and not observe them is a breach of trust.

Thus, in the United Kingdom, as Professor Hogg has written, if a public official disobeys such a rule, that person's action is deemed to be an unconstitutional act. This applies even though the Court has not enforced a convention. The breach of such a rule is regarded as a moral matter calling for censure. In Canada, rebuke, much less sanctions against officials, is virtually unknown. This, it is assumed, may be because, until recent years, the federal Executive was aware of the conventions of responsible government and observed them. It may also be that until the shift of recent years to generalist managers in the public service - many with private government backgrounds and orientation - there was sufficient awareness of these institutional rules within the federal administration, as there seems to be still in its legal cadre.

The shift to generalist management of non- or a-public administration origins and approaches might be offset by a code of ethics, or conduct, which embodies the knowledge of behaviour required for observing non-legal rules of the Constitution. In the meantime, the private government perceptions and practices described have an eroding effect on public administration values and practices.

That this knowledge problem has not been corrected since it was first identified suggests that a private sector value-free approach and harmonization is developing in

the federal bureaucracy, extending from top to bottom. Surely no appointments or promotions should occur in the public services of Canada, federal or provincial, without prior assurance of reasonable constitutional awareness and respect. To engage in "executive" federalism without this is harmful to the preservation of responsible government, including its open and accountable treatment of policy-making and implementation in relation to education.

The slogan of the 1960's, "let the manager manage", was mentioned in several interviews as a rationale, or creed, for the value-free exercise of managerial discretion. This creed seems to date from the Glassco Commission Report which advocated selective use of useful practices from private government, or business. The idea was to strengthen service to responsible government, not to undermine it, hence the Report's references to the importance of the non-legal rules of ministerial responsibility. The Glassco Report was not intended to be a precursor of a private government version of "executive federalism" with its extra-constitutional orientations and practices.

An unqualified promotion of the idea and practice of "let the manager manage" - the antithesis of observing the non-legal rules of the Constitution - within a work and job classification, staffing, training, and operational milieu intended for public administration, was a disservice to the Public Service of Canada, and to its role in support of responsible government. That such error and ignorance should persist is cause for concern and correction.

Responsible government assumes and requires all policies and actions in public administration, or management, to be legal. What is legal is synonymous with what is constitutional. Thus, when a dispute arises on a significant issue of jurisdiction in relation to education, the proper constitutional procedure is to seek a test case, or reference, or an amendment to the Constitution. Since 1978, this is what the federal government has been doing through use of its Court Challenges Program.

It is still possible to govern, and to enter into intergovernmental relations, without being so strict about jurisdiction, providing none of the governmental players concerned seek judicial review. Constitutional amendment may also be avoided if those political players who are required to initiate it, do not do so. Obstacles in constitutional law, or a fear of their creation via judicial review, can be handled without ignoring or violating the law. Executive federalism, as described by Corry, Smiley, Simeon, and others, operates within public law and has respect for it. It is not value-free. Executive dealings which treat the country or province as a company are outside public government in ends as well as means. Public government, like public education, is more than a mere business.

The fundamental issue in government in a democracy, apart from constitutional provision for it, is how public policy is made - locally, provincially, and nationally. Such policy presupposes public knowledge and acceptance. This makes its implementation open to public, political, and professional support, evaluation, and improvement. In provincial executive federalism as described, Section 93 does not get the treatment in relation to education which responsible government is obliged to assure.

Section 93 exerts a fragmenting effect on national and intergovernmental relations in education. It makes decision-making and co-ordination complex in these situations. Executive federalism, via the CMEC, or between ministerial representatives of the two orders of government, adds to such difficulty. Its adversarial approach to federal-provincial relations, especially via CMEC, seems to have worked against a harmonization of policy, law, programs, and services in relation to education, even when such matters are of common need and concern. In the meantime, the legislatures, provincial and federal, are the legitimate, but dormant, alternatives to executive federalism of either public or private government forms, and their extra-constitutional methods.

If Parliament debated and decided legislatively on its direct and concurrent responsibilities for education, the provinces would be encouraged to do the same. Executive federalism would still have functions to perform, but only those best suited to it - such as when "co-operative federalism" was practised. The need for co-ordination in all aspects of education would be more evident in these circumstances, and there would be no question about its legal bases and requirements.

Co-ordination

If the constitutional powers of the two orders of government were applied actively, a legitimate framework for co-ordination would become apparent. On the federal side, this would reveal a duty to co-ordinate all the elements of law, policy, program, and process embraced by its responsibilities in relation to education. This would involve the direct responsibilities identified, the minority rights matters apart from Section 93, the national and intergovernmental residual power and responsibilities, and the concurrent power and responsibilities in the federal field of post-secondary education in particular.

In the latter case, the varied components in post-secondary education described involve problems in co-ordination which concurrence could simplify. This would assume both legitimate national and provincial voices in matters of policy. It would assure complementary entitlements for funding without which a viable system of post-secondary education cannot function adequately in the national interest. Such an arrangement would render better value for money. Concurrent jurisdiction for universities could promote federal and provincial competition for showing a mutual respect for university governance which safeguards academic freedom. Universities and colleges would be more likely to protect this role under a concurrent constitutional guarantee of financial support than they do now under uncertain circumstances constitutionally, politically, and financially.

Co-ordination should reduce duplication in programs and expenditure. This would correct the present ad hoc practices and effects - within the federal government itself; and between it and the provinces, separately and collectively. However, whether such improvement is made on grounds which are *de facto* or, preferably, *de jure*, necessary legislative legitimacy is required. This calls for relations which are federal-provincial via the legislatures and executives concerned. A non-governmental organization like the CMEC cannot perform this role because it lacks, and cannot be given, the constitutional authority necessary to act legitimately.

Recommendations

Recommendations are proposed for the clarification and improvement of federal participation in education. They are derived from concerns identified in this study. They involve initiatives of the federal order of government which the Constitution now permits. All enquiry and change involved may be undertaken by constitutional means.

1. To make the Canadian public aware of the nature and significance of federal participation in relation to education, it is recommended that the Government of Canada make annual public reports. Such reports would identify the purposes, content, costs, benefits, and legal bases of the programs involved. They would be prepared by a federal ministry or agency assigned this responsibility.
2. To ensure an equitable implementation of Section 23's provisions as elaborated by the Supreme Court of Canada in all provinces, it is recommended that the Parliament of Canada enact legislation which guarantees a national obligation in shared-cost funding for this purpose.
3. To assure that official language training of immigrant school children is not a full-cost obligation of the provinces and their local school boards, it is recommended that federal legislation be drafted to permit shared-cost funding for this purpose.
4. To preserve and protect the endangered languages of Canada's first peoples, it is recommended that a Research Institute, or Institutes, be established under federal incorporation. Such a body, or bodies, would be responsible for performing the necessary research, publication, and production of learning materials, with funding by the Government of Canada under authority of Section 91(24).

5. To facilitate literacy education of post-school youth and adults, it is recommended that illiteracy be designated as a disability eligible for conditional shared-cost federal funding under the Canada Assistance Plan in which all provinces participate.
6. To facilitate the out-of-school education of Canadians of all ages and means, it is recommended that the Government of Canada use its plenary federal jurisdiction over broadcasting to revive its previous proposal for a national educational service; such service to broadcast in the official languages and include content in Canadian Studies, science, literacy, and compensatory education.
7. To assure adequate Canadian studies in schooling, in particular that related to the Constitution of Canada, it is recommended that the use of the federal residual power be continued - to facilitate the necessary research, development and dissemination of appropriate learning materials, for direct supply to institutions and individuals.
8. When federal policy-making, including budgeting, occurs in the field of post-secondary education, it is recommended that the educational needs of post-school, disadvantaged youth and adults be taken into account for a more equitable remedy of the serial social and economic losses and costs caused by their under-education.
9. In order to clarify federal constitutional authority in relation to education, and to facilitate its administration and co-ordination, it is recommended that applicable federal law be consolidated in a federal Education Act.
10. To maintain constitutional validity in the governance of education nationally, it is recommended that transactions be between the two orders of government.
11. To clarify the nature and extent of concurrence for federal participation in post-secondary research and education, it is proposed that the Government of Canada prepare a reference case to the Supreme Court of Canada, such a case to be for the purpose of determining the *vires* of provincial opting out of national programs in post-secondary education.
12. To make the national interest and presence visible in post-secondary education, it is recommended that federal operating grants to colleges and universities again be paid directly to these institutions. This would be done on a presumption of concurrent jurisdiction, until the Supreme Court of Canada rules otherwise. It could be done in an arms-length arrangement (as between 1951-1966), or unconditionally if necessary - to assure non-interference in university governance's defence of academic freedom.
13. It is recommended that a National Institute of Science and Technology be chartered under the power of the royal prerogative with post-graduate degree-granting authority; with NRC to serve as the parent organization of an eventual system of such national institutions.
14. It is recommended that the conventions, or non-legal rules of the Constitution, which are related to public administration in the service of responsible govern-

ment, be identified; and that this information be made an essential part of a formal code of ethics for all federal public servants.

15. It is recommended that knowledge of the non-legal rules the Constitution be made standards in job classification, and in related selection standards for staffing of federal public service managers.
16. It is recommended that a thorough knowledge of the non-legal rules of the Constitution and their purposes be essential for proposed candidates for appointment as Public Service Commissioners, to the satisfaction of a Parliamentary selection review committee.
17. In order to ensure optimal effectiveness, efficiency, and economy in policy-making and implementation in matters which, constitutionally, are related to education, it is recommended that a Ministry of State for Education be established on the various constitutional authorities which apply. Such a Ministry would have a Secretariat and a Minister who is a member of the Cabinet Committees on Social Development and on Science. It would be responsible, under federal statute and Cabinet goals and priorities, for the co-ordination of all operations and budget information related to a) internal federal participation in relation to education and b) intergovernmental federal participation.

BIBLIOGRAPHY

Table of Cases

- Amendment of the Constitution of Canada, Reference Re (1981) (Nos. 1,2,3) 125 D.L.R. (3d) 1
- Anti-Inflation Act, Re (1976) 2 S.C.R. 373
- AG Canada v. the Branch Affiliate of Base Borden Collegiate (1979) 1 S.C.R. 754
- AG Canada v. AG Ontario (Labour Conventions Case) (1937) A.C. 326
- AG Canada v. St. Hubert Base Teachers' Association, et al. (1983) 1 S.C.R. 498
- AG Nova Scotia v. AG Canada, (Inter-delegation Case) (1951) S.C.R. 31; (1950) 4 D.L.R. 359
- AG Ontario v. AG Canada (Local Prohibition Case) (1896) A.C. 348
- AG Ontario v. Canada Temperance Federation (1946) A.C. 193
- AG Ontario v. AG Canada (Privy Council Appeals Reference) (1947) A.C. 127
- AG Quebec v. Blaikie and AG Quebec v. Laurier (1979) 2 S.C.R. 1016, 101 D.L.R. (3d) 394
- AG Quebec v. Blaikie, et al. (1981) 1 S.C.R. 312; (1981) 123 D.L.R. (3d) 15
- Quebec Association of Protestant School Boards et al. and AG Quebec, (No. 1) (1982) 140 D.L.R. (3d) 19
- AG Quebec v. Quebec Association of Protestant School Boards et al. (No. 2) (1984), 140 D.L.R. (3d) 321
- AG Quebec v. Régent Sioui et al. (1990) S.C.C. Transcript No. 20628
- Angers v. Minister of National Revenue (1957) Ex C.R. 83
- Barrett v. City of Winnipeg (1891) 7 M.L.R. 273 (1892) 19 S.C.R. (1892) AC 445
- Blaikie v. Attorney-General Quebec (Bill 101) (1981) 123 D.L.R. (3d) 15, and (1981) S.C.R., 312
- British Coal Corp. v. the King (1935) A.C. 500
- Brophy v. Attorney-General Manitoba (1984) A.C. 202
- Brothers of Christian Schools v. Ontario Minister of Education (1907) A.C. 69
- Brown v. Board of Education (1954) 347 U.S. 483 (Sup.Ct. U.S.)
- Capital Cities v. CRTC (1978) 2 S.C.R. 141
- Calder v. AG B.C. (1973) 34 D.L.R. (3d) 145 (S.C.C.)
- Chabot v. Les Commissaires d'Ecoles de Lamorandiere (1957) Q-B. 707 (C.A.)

Chief Robert Kanatewat et al. v. The James Bay Development Corporation and the AG Canada. Unreported, Quebec Superior Court Decision of Malouf, J., Nov. 15th, 1973. No. 05-04841-72

Citizens Insurance Co. v. Parsons (1881) 7 A.C. 96

City of Winnipeg v. Barrett (1891) 19 S.C.R. 363; (1892) A.C. 445

Commission des Ecoles Fransaskoises v. Saskatchewan (1988) 48 D.L.R. (4th) 315

Crown Grain Co. v. Day (1908) A.C. 504

Eskimos, Re (1939) S.C.R. 104; (1939) 2 D.L.R. 417

Ex Parte Gallagher (1892) 31 N.B.R. 472

Ford v. AG Quebec (1984) 2 S.C.R. 66

Fletcher v. Peck (1810) 6 Cranch 87

Greater Hull School Board et al. v. AG Quebec (1984) 6 D.L.R. (4d) 204

Greater Montreal Protestant School Board v. AG Quebec (1989) 1 S.C.R. 377

Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al. (1980) 107 D.L.R. (3d) 513 (F.C.T.D.)

Hirsch v. Protestant Board of School Commissioners of Montreal (1926) S.C.R. 246; (1928) A.C. 200

Hodge v. the Queen (1883) 9 A.C. 117

Hunter v. Southam Inc. (1985) N.R. 241

Johnson v. McIntosh (1823) 8 Wheaton 541

James Bay Development Corporation v. Chief Robert Kanatewat et al. and AG Canada. Unreported. Quebec Court of Appeal. Nov. 22nd, 1973. No. 09890-73

Jones v. A.G. Canada (1974) 45 D.C.R.(3d) 583

Lau v. Nichols (1974) 94 Supreme Court Reporter 786

Lavoie v. AG Nova Scotia (1989) 91 N.S.R. (2d) 184

Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick (1892) A.C. 437

Mahe v. Alberta (1987) 6 W.W.R. 331; (1990) S.C.C. Judgement File No. 20590

Manitoba Reference Re Amendment of the Constitution of Canada (1981) 11 Man.R. (2d) 1

Marchand v. Simcoe County Board of Education, et al. (1986) 61 O.R. (2d) 651

Marbury v. Madison (1803) 1 Cranch (5 U.S.) 137

Munro v. National Capital Commission (1966) S.C.R. 663

Ottawa Roman Catholic Separate School Trustees v. Mackell (1917) A.C. 62

Ottawa Roman Catholic Separate School Trustees v. Quebec Bank (1970) A.C. 230

P.E.I. Potato Marketing Board v. Willis (1952) 2 S.C.R. 392

Plessy v. Ferguson (1896) 163 U.S. 537

R. v. Jones (1983) 25 Alta. L.R. (2nd) 359

R. v. Keegstra (1988) Unreported Judgement of the Alberta Court of Appeal

R. v. Mercure (1988) 1 S.C.R. 234

Re AG Canada v. the Branch Affiliate of Base Borden Collegiate Institute et al. 30 O.R. 428

Reference Re An Act to Amend the Education Act (1986) 25 D.L.R. (4th) 1

Reference Re Education Act of Ontario and Minority Language Education Rights (1984) 10 D.L.R. (4th) 491

Re Gray (1918) 57 S.C.R. 150

Reference Re Minority Language Education Rights (P.E.I.) (1988) 69 Nfld. & P.E.I.R. 236; (1988) 49 D.L.R. (4th) 499

Re Regulation and Control of Radio Communications (1932) A.C. 304

Régie Des Services Public v. Dionne (1978) 2 S.C.R. 191; 83 D.L.R. (3d) 181

Renaud, Ex parte (1873) 14 N.B.R. 273

Roman Catholic Separate School Trustees for Tiny v. the King (1928) A.C. 363

Russell v. the Queen (1882) 7 A.C. 829

Saumur v. the City of Quebec and AG Quebec (1953) 2 S.C.R. 299

Simon v. the Queen, et al. (1985) 2 S.C.R. 387

Southam Inc. v. Hunter (1984) 2 S.C.R. 145

Societe des Acadiens du Nouveau-Brunswick and L'Association des Conseillers Scolaires Francophones c. Nouveau Brunswick v. Minority Language School Board No. 50 (1983) 48 N.B.R. (2nd) 361; (1986) 1 S.C.R. 549

Sparrow v. HM the Queen et al. (1990) S.C.C. Transcript. File No. 20311

St. Catharines Milling and Lumber Co. v. The Queen (1887) 13 S.C.R. 5775; (1888) 14 A.C. 46

Trustees of Dartmouth College v. Woodward (1819) 4 Wheaton 514

Wilkinson and Thomas (1928) 2 W.W.R. 700

Table of Legislation

Alberta

Alberta Act (1905), 4-5 Ed. VII, c.3

School Act, RSA, 1980, c.S-3.

British Columbia

School Act, RSBC, 1979, c. 375.

Act to Amend the Schools Act (1982), 30-31 El. II, c. 27.

Manitoba

Manitoba Act (1870), 33 Vict., c.3.

Public Schools Act (1890), 53 Vict., c.38.

Public Schools Act, RSM, 1980, c.P-250; Reg. 170-77.

Education Administration Act, RSM, 1980, c. E-10.

Newfoundland

Newfoundland Act, 1949.

School Act, RSNfld., 1970, c. 346, amended SNfld., 1983, c. 76.

New Brunswick

Grammar Schools Act, (1816), 56 Geo. III, c.21.

Act for Encouraging the Creation of Schools, (1816), 56 Geo., III, c. 23.

Grammar Schools Act, (1829), 9-10 Geo. IV, c.23.

School Act, RSNB, 1973, c.S-5, reg. 81-156.

Nova Scotia

Act Concerning Schools, (1766), 6 Geo. III, c. 6.

Act Concerning Schools, (1786), 26 Geo. III, c.1.

Northwest Territories and Yukon

School Ordinance, NWTO, 1977, c.2, amended 3-83(2).

Ontario

Act Concerning Schools (1809), 47 Geo. III, c. 6.

Separate Schools Act (1863), 26 Vict., c.5.

Education Act, RSO, 1980, c.129; Reg. 617-81.

Prince Edward Island

Schools Act, (1825), 5 Geo IV, c.5.

Education Act (1868), 31 Vict., c.1.

School Act RSPEI, 1974, c. S-2.

Act to Amend the School Act (1980), 29 El. II, c.48.

Quebec

Education Act (1903), 3 Ed. VII, c.16.

Education Act RSQ, 1977, c. I-14.

Charter of the French Language RSQ, 1977, c. C-11.

Act Respecting Public Elementary and Secondary Education, Bill 3, 1985.

Act Respecting the Ministère de l'éducation, RSQ, 1977, c. M-15.

Saskatchewan

Northwest Territories Act, RSC, 1970, c. N-22.

Education Act, RSS, 1978, c.E-0.1.

Canada Statutes and Orders-in-Council

Constitutions of Australia, India, United States, West Germany

BOOKS

Abrams, G.W.D., Prince Albert: The First Century, 1866-1966, Saskatoon: Modern Press, 1966.

Althouse, J.G., Structure and Aims of Canadian Education. Toronto: W.J. Gage and Co. Ltd., 1949.

Audet, Louis-Phillippe, Le System Scolaire de la Province de Quebec. Volumes I-IV. Quebec: Les Presses Universitaires Laval, 1951-52.

- Bargen, Peter F., The Legal Status of the Canadian Public School Pupil. Toronto: The Macmillan Company of Canada Limited, 1961.
- Beaudoin, Gerald A., Le Partage Des Pouvoirs, 2nd ed. Ottawa: University of Ottawa Press, 1982.
- Bell, Daniel, The Coming of Post-Industrial Society: A Venture in Social Forecasting. New York: Basic Books.
- Bilingual Tensions in Canada, Robert M. Laxer, editor. A joint project of the Ontario Institute for Studies in Education and the Canada Studies Foundation. Toronto: O.I.S.E.
- Birch, A.H., Federalism, Finance and Social Legislation in Canada, Australia and the United States. Oxford: Clarendon Press, 1955.
- Blyth, Jack A., The Canadian Social Inheritance. Toronto: The Copp Clark Publishing Company, 1972.
- Borden, R.L., Canadian Constitutional Studies. The Mayfleet Lectures, Toronto: University of Toronto Press, 1922.
- Bourinot, J.G., The Intellectual Development of the Canadian People. Toronto: 1881.
- Boyd, William, The History of Western Education, 6th ed., London: A and C Black Ltd., 1954.
- Brady, Alexander, Democracy in the Dominions, 3d ed., Toronto: University of Toronto Press, 1966.
- Canadian History in Documents, 1763-1966, J.M. Bliss, ed. Toronto: the Ryerson Press, 1966.
- Cameron, David M., et al., Federalism and Policy Development: The Case of Adult Occupational Training in Ontario. Toronto: University of Toronto Press, 1973.
- Careless, J.M.S., The Union of the Canadas: the Growth of Canadian Institutions, 1841-1857. Toronto: McLelland and Stewart Limited, 1967.
- Carter, Francis G., Judicial Decisions on Denominational Schools. Toronto: Ontario Separate School Trustees Association, 1962.
- Carter, George E., Canadian Conditional Grants Since World War II. Toronto: Canadian Tax Foundation, 1971.
- C.D. Howe Institute, R.Brian Woodrow et al. editors, Conflict Over Communications Policy: A Study of Federal-Provincial Relations and Public Policy. October, 1980.
- Chaison, Alf. and Neil McDonald, editors, Canadian Schools and Canadian Identity. Toronto: Gage Educational Publishing Ltd., 1977.
- Chalmers, J.W., Education Behind the Buckskin Curtain: A History of Native Education in Canada. Edmonton: University of Alberta, 1972.
- Cheffins, R.I., The Constitutional Process in Canada. Toronto: McGraw-Hill Company of Canada, 1969.
- Chretien, Jean, The Role of the United Kingdom in the Amendment of the Canadian Constitution. Ottawa: Publications Canada, 1981.
- Clark, Burton R., Educating the Expert Society. San Francisco: Chandler Publishing Co., 1962.
- Clark, S.D., The Developing Canadian Community. Toronto: University of Toronto Press, 1962.

Connell, W.F., A History of Education in the Twentieth Century. New York: Teachers College Press, Columbia University, 1980.

Cole, Taylor, The Canadian Bureaucracy and Federalism, 1947-1966. Denver: University of Denver Press, 1966.

Cook, Ramsay, Canada and the French-Canadian Question. Toronto: Macmillan Co., 1966.

Copp, Terry, The Anatomy of Poverty: The Condition of the Working Class in Montreal, 1897-1929. Toronto: McLelland and Stewart Limited, 1974.

Corry, J.A. (ed.) et al., Legal Essays in Honour of Arthur Moxon. Toronto: University of Toronto Press, 1953.

_____, and J.E. Hodgetts, Democratic Government and Politics. 3rd edition. Toronto: University of Toronto Press, 1959.

Corry, J.A., The Changing Conditions of Politics. Toronto: University of Toronto Press, 1963.

Daniels, Harry W., We Are the New Nation; The Metis and National Native Policy. Ottawa: Native Council of Canada, 1979.

Drouin, Marie-Josée and B. Bruce-Briggs, Hudson Institute, Canada Has a Future. Toronto: McClelland and Stewart Limited, 1978.

Easton, David, A System Analysis of Political Life. New York: John Wiley, 1965.

Education of Immigrant Students: Issues and Answers, Aaron Wolfgang, ed. Toronto: the Ontario Institute for Studies in Education, 1975.

Encyclopaedia of the Laws of England: with Forms and Precedents, 2nd ed., Vol. 5, Toronto: the Canada Law Book Company, 1907.

Enns, Frederick, The Legal Status of the Canadian School Board. Toronto: The Macmillan Company of Canada, 1963.

Fletcher, C. Scott, ed., Education for Public Responsibility. New York: W.W. Norton & Co., Inc., 1961.

Francis, Daniel, A History of the Native Peoples of Quebec, 1760 - 1867. Ottawa: Department of Indian Affairs and Northern Development, December, 1983.

Friedrich, Carl J., Trends of Federalism Theory and Practice. New York: Praeger, 1968.

Ginsberg, Morris, On Justice in Society. Harmondsworth: Penguin Books, 1965.

Hanson, Eric and Peter J. Atherton, Some Economic and Social Effects of Education. Mimeographed. Edmonton, 1970.

Harris, Robin S., A History of Higher Education in Canada 1663-1960. Toronto: University of Toronto Press, 1976.

Hodgetts, A.B., What Language? What Culture? Toronto: OISE, 1968.

Hogg, Peter W., Constitutional Law of Canada. Toronto: The Carswell Co. Ltd., 1977.

_____. Canada Act, 1982, Annotated. Toronto: The Carswell Company Limited, 1982.

Holdaway, Don, The Foundations of Literacy, Gosford N.S.W.: Ashton Scholastic, 1979.

Hutchins, Robert M., The Learning Society. New York: Frederick A. Praeger, 1968.

Ignatieff, A., A Canadian Research Heritage: 75 Years of Federal Government Research in Minerals, Metals and Fuels. Ottawa: D.S.S., 1981.

Illich, Ivan, Deschooling Society. New York: Harper and Row Publishers, 1971.

Jennings, W.I., The Law and the Constitution 5th ed., London: University of London Press, 1959.

Johnson, F. Henry, A Brief History of Canadian Education. Toronto: McGraw-Hill Co. of Canada Ltd., 1968.

King, Richard, Education. London: Longmans, Green and Co. Ltd., 1969.

Kirby, Michael J., Reflections on the Management of Government in the '80s, The 1980 Alan B. Plaunt Memorial Lecture, Carleton University, Ottawa, April 10, 11, 1980.

LaForest, Gerald V., Natural Resources and Public Property Under the Canadian Constitution. Toronto: University of Toronto Press, 1969.

_____. Disallowance and Reservations of Provincial Legislation. Ottawa: Department of Justice, 1955.

_____. The Allocation of Taxing Power Under the Canadian Constitution. Toronto: Canadian Tax Foundation, April, 1967.

Lambert, Richard S., School Broadcasting in Canada. Toronto: University of Toronto Press, 1963.

Language Rights in Canada, Michel Bastarache, editor. Montreal: Les Editions Yvon Blais Inc., 1987.

Laskin, Bora, Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power. 2nd ed., Toronto: The Carswell Company Limited, 1960.

_____. The British tradition in Canadian Law. London: Stevens and Sons, 1969.

Lloyd, W.S., The Role of Government in Canadian Education. Toronto: W.J. Gage Co., 1959.

Lodge, R.C., Plato's Theory of Education. London: Routledge and Kegan Paul, 1947.

Martin, Wilfred B.W. and Allan J. Macdonell, Canadian Education: A Sociological Analysis. Scarborough: Prentice Hall of Canada, Ltd., 1978.

Massey, Vincent, On Being Canadian. Toronto: J.M. Dent & Sons (Canada) Ltd., 1948.

Matchup, Fritz, The Production and Distribution of Knowledge in the United States. Princeton, New Jersey: Princeton University Press, 1962.

McCurdy, Shelbourne G., The Legal Status of the Canadian Teacher. Toronto: Edmond-Montgomery Publications Ltd., 1984.

McDonald, David C., Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources. Toronto: Carswell Company Limited, 1982.

Meech Lake Reconsidered, Lorne Ingle, ed. Hull: Voyageur Publishing, 1989.

Miller, J.C., National Government and Education in Federal Democracies: Dominion of Canada. Philadelphia, 1940.

Monahan, Patrick, Politics and the Constitution: the Charter, Federalism and the Supreme Court. Toronto: Carswell, 1987.

Morin, Claude, Le Combat Quebecois. Montreal: Boreal, 1973.

Morin, Jacques-Yvan, Le Federalisme: Theorie et Critique. Montreal: Universite de Montreal, 1963.

Mulroney, Brian, Where I Stand. Toronto: McClelland and Stewart, 1983.

Munroe, David, The Organization and Administration of Education in Canada. Ottawa: D.S.S., 1976.

Oliver, M.K., Social Purpose for Canada. Toronto: University of Toronto Press, 1961.

Ostry, Bernard, The Cultural Connection: An Essay on Culture and Government Policy in Canada. Toronto: McLelland and Stewart, 1978.

Ostry, Sylvia, and Mahmoud A. Zaidi, Labour Economics in Canada, 2nd ed. Toronto: McMillan of Canada, 1975.

Parizeau, Jacques, Economic Policy in a Federation. Montreal: Ecole des Hautes Etudes Commerciales, 1964.

Pearson, Lester B., Words & Occasions. Toronto: University of Toronto Press, 1970.

Peers, Frank W., The Politics of Canadian Broadcasting, 1920-1951. Toronto: University of Toronto Press, 1969.

Percival, W.P., Across the Years: A Century of Education in the Province of Quebec. Montreal: Gazette Publishing Company Limited, 1946.

Phillips, Charles E., The Development of Education in Canada. Toronto: W.J. Gage and Co. Ltd., 1957.

Plato, The Laws. Book I, revised. Translated by B. Jowett. London: Oxford University Press, 1953.

Poirier, Donald, et al., Education Rights of Exceptional Children in Canada. Toronto: Carswell, 1988.

Pope, Joseph (ed), Confederation Documents: A Series of Hitherto Unpublished Documents Bearing on the British North America Act. Toronto: The Carswell Publishing Company, 1895.

Porter, John, Bernard Blisshen, et al., Towards 2000: The Future of Post Secondary Education in Ontario. Toronto: McClelland and Stewart, 1971.

Prentice, Alison, The School Promoters: Education and Social Class in Mid-Nineteenth Century Upper Canada. Toronto: McClelland and Stewart Limited, 1977.

Riker, W., Federalism: Origin, Operation, Significance. Boston: Little, Brown & Co., 1964.
Russell, Peter (ed), Nationalism in Canada. Toronto: McGraw-Hill Co., 1966.

Rusk, Robert, The Doctrines of the Great Educators. New York: Macmillan and Co., 1962.

Sawer, Geoffrey, Modern Federalism. London: C.A. Watts and Co. Ltd., 1969.

Scott, F.R., Civil Liberties and Canadian Federalism. Toronto: University of Toronto Press, 1959.

- _____. Quebec States Her Case. Toronto: Macmillan Publishing Co., 1964
- _____. Essays on the Constitution: Aspects of Canadian Law and Politics. Toronto: University of Toronto Press, 1977.
- Sharma, B.M., Federal Polity. Lucknow: The Upper India Publishing House, 1931.
- Simeon, Richard, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada. Toronto: University of Toronto Press, 1972.
- Sissons, C.B., Church and State in Canadian Education: A Historical Study. Toronto: The Ryerson Press, 1959.
- Smiley, D.V., Canada in Question: Federalism in the Seventies. Toronto: McGraw-Hill Ltd., 1972.
- _____. Conditional Grants and Canadian Federalism. Toronto: Canadian Tax Foundation, 1963.
- Smith, Derek G., editor, Canadian Indians and the Law: Selected Documents, 1663-1972. Toronto: McClelland and Stewart Limited, 1975.
- Stevenson, Hugh A. et al., The Best of Times The Worst of Times: Contemporary Issues in Canadian Education. Toronto: Holt, Rinehart and Winston of Canada, Limited, 1972.
- Stewart, Freeman K., The Canadian Education Association, 1957 - 1977. Toronto: C.E.A., 1982.
- Strayer, Barry L., Judicial Review of Legislation in Canada. Toronto: University of Toronto Press, 1968.
- The Canadian Charter of Rights: Annotated, John B. Laskin, editor. Aurora, Ont.: Canada Law Book Inc., 1984.
- The Canadian Charter of Rights and Freedoms: Commentary, Walter S. Tamopolsky, editor. Toronto: The Carswell Company Limited, 1982.
- Thomson, Dale C., Jean Lesage & the Quiet Revolution. Toronto: Macmillan of Canada, 1984.
- Trudel, Marcel, Introduction to New France. Toronto: Holt, Rinehart and Winston of Canada, Limited, 1968.
- Turner, John N., Politics of Purpose. Toronto: McClelland and Stewart Limited, 1968.
- Wade, Mason, The French-Canadian Outlook. Carleton Library, No. 14. Toronto: McClelland and Stewart Ltd., 1964.
- Waite, P.B., The Life and Times of Confederation: 1864-1867. Toronto: University of Toronto Press, 1962.
- Watts, R.L., New Federations: Experiments in the Commonwealth. Oxford: Clarendon Press, 1966.
- Wheare, K.C., What Federal Government Is. London: Macmillan & Co., 1941.
- _____. Modern Constitutions. London: Oxford University Press, 1962.
- _____. Federal Government, 4th ed. London: Oxford University Press, 1963.
- Wilson, Donald J. et al. editors, Canadian Education: A History. Toronto: Prentice-Hall of Canada Ltd., 1970.

Williams, James N., The Plan: Memories of the British Commonwealth Air Training Plan. Stittsville: Canada's Wings, Inc., 1984.

Wittenberg, Alexander I., The Prime Imperative. Toronto: Clark, Irwin and Co. Ltd., 1968.

ARTICLES

Abella, Rosalie, "Public Policy and Canada's Judges: the Impact of the Charter of Rights and Freedoms", Gazette: the Law Society of Upper Canada, Vol. XXI, 1986, p.218.

Bargen, P.F., "The Legal Basis of Administrative Decisions", Vol. 15, No. 4, pp.40-60.

Bell, T.H., "The Federal Role in Education", Harvard Educational Review, Vol. 52, 1982.

Bergen, John J., "Perceptions of the Council of Ministers of Education", Canadian Administrator 14, No. 8, (May 1977), pp.1-6.

_____, "Canada's Council of Ministers of Education", ATA Magazine, 60, No. 1 (November 1979), pp.44-45.

Bowker, W.F., "Basic Rights and Freedoms: What Are They?" The Canadian Bar Review, Vol. XXXVII.

Bruner, J.S., "After John Dewey, What?" in Selected Educational Heresies: Some Unorthodox Views Concerning the Nature and Purpose of Contemporary Education. Wm. F. O'Neill, ed. Glenview, Illinois: Scott Foresman and Co., 1969.

Cairns, Allan C., "The Other Crisis of Canadian Federalism," Canadian Public Administration, Vol. No. 19.

Chaiton, A., "Attempts to Establish a National Bureau of Education, 1892-1926", in Canadian Schools and Canadian Identity, A. Chaiton, ed. Toronto: Gage Educational Publishing Ltd., 1977.

Coleman, James L., "The Children Have Outgrown the Schools," Psychology Today, Vol. 3, No. 9, 1972.

"Computer-Aided Learning," Science Dimension, NRC, April, 1970.

Corry, J.A., "Higher Education in federal-Provincial Relations," in University Affairs. Vol. 8, No. 2, 1985.

Cruikshank, David, "Human Rights and Charter Rights in Special Education" an Address to Canadian Special Education Legal Issues in Education Conference, 1982.

Delisle, R.J., "Treaty-making Power in Canada", G-1, in Ontario Advisory Committee on Confederation: Background Papers and Reports op.cit. April, 1967.

Dicey, A.V., "Federal Government," Law Quarterly Review. 1. pp.80-99, Jan., 1885.

Foley, E.J., "Officials and the Public", Public Administration: the Journal of the Institute of Public Administration, Vol. IX. No. 1, Jan., 1931, pp.15-36.

Forsey, Eugene, "The British North America Act and Biculturalism", The Queen's Quarterly, Vol. LXXI, No. 2, Summer 1964, pp.141-49.

_____. "The Constitutional Bill", Queen's Quarterly, Vol. LXXXIV, No.4, 1980, pp.566-569.

_____. "The Legislatures and Executives of the Federation", A-1 in Ontario Advisory Committee on Confederation: Background Papers and Reports, op.cit. April, 1967.

Gardner, A.J., "Co-ordination of the Government: A Summing Up". Public Administration, Australia, Vol. 26, 1967.

Glendenning, D.E., "The History of Vocational Education in Canada", in The Canadian Secondary Schools and Manpower Development, P.E. Bargen, editor, Toronto: the Ryerson Press, 1966.

Guindon, Hubert, "Social Unrest, Social Class and Quebec's Bureaucratic Revolution", The Queen's Quarterly, Vol. LXXI, No. 2, Summer 1964, pp.150-62.

Gullick, Luther, "The Division and Co-ordination of Work". D.C. Rowat, ed., Basic Issues in Public Administration, New York: Macmillan, 1961.

Hawkins, John N., "The People's Republic of China: Educational Policy and National Minorities: the Politics of Intergroup Relations" in Politics and Education: Cases from Eleven Nations. R. Murray Thomas ed., New York: Pergamon Press, 1983.

Henchey, Norman, "Revolution and Education in Quebec", in The Failure of Educational Reform in Canada, ed. Douglas Meyers, Toronto: OISE, 1968.

Hines, G. Wm., "The Royal Naval College of Canada, 1911 - 22" in Swords and Covenants. Essays in Honour of the Centennial of the Royal Military College of Canada, 1876-1976. Adrian Preston and Peter Dennis, eds. London: Croom Helm, Rowman and Littlefield, 1976.

Hodgson, E.D., "A Politician Me?" in The Organization and Administration of Education in Canada: A Collection of Readings. E.D. Hodgson, ed. Edmonton: University of Alberta, 1976.

Jennings, Sir Ivor, "Problems of Federalism". Executive, 7, pp.40-43, Dec., 1965.

Keeler, B.T., "The Secretary Reports: the OECD Examiner's Report IV: Governance and Policy", reprinted in E.D. Hodgson et al. eds. The Organization of Education in Canada, rev. ed. (Edmonton: Department of Educational Administration, University of Alberta, July (1980), p.51.

King, Hon. David, "Politics and Educational Policymaking," in Federal-Provincial Relations, Education Canada. J.W. George Ivany and Michael E. Manley-Casimir, eds. Toronto: O.I.S.E., 1981.

Kravitz, Nathan, "The United States of America: The Languages of Education: New Ethnicity and the Drive to Power" in Politics and Education R. Murray Thomas, ed. op.cit.

Labreche, Julianne, "NRC: Where Science Fiction Often Comes True", in Canadian Geographic Journal, Vol. 100, No. 4, Aug./Sept., 1980., pp.24-33.

Laskin, Bora, "The Provinces and International Agreements", E-1, in Ontario Advisory Committee on Confederation: Background Papers and Reports, op.cit., April, 1967.

Lederman, W.R., "The Concurrent Operations of Federal and Provincial Laws in Canada", McGill Law Journal 9, pp.185-99, (1962-63).

_____. "Classification of Laws and the British North America Act" in The Courts and the Canadian Constitution. W.R. Lederman, ed. Toronto: McClelland and Stewart, 1964.

"Literacy: The Medium and the Message", C.B.C. Ideas Transcript, Feb. 1, 1988.

Livingstone, W.S., "A Note on Federalism as a Juridical Concept". Political Science Quarterly, 67, pp.81-85, March, 1952.

Macdonald, A.A., "Notes on the Quebec Conference, 1865" Canadian Historical Review, Vol. 1, March, 1920, pp.26-47.

Mackenzie, N.A.M. and D.C. Rowat, "The Federal Government and Higher Education in Canada", in Canadian Journal of Economics and Political Science, Vol. XVI, Nov. 1950, pp.353-70.

Magnet, Joseph E., "Minority-Language Educational Rights" Supreme Court Law Review, 4, pp.195-216.

_____. "The Canadian Constitution: Legal Implications for Educational Administration", address, CSE Legal Issues in Education Conference, 1982.

McLuhan, Marshall, "Education in the Electronic Age" in The Best of Times the Worst of Times: Contemporary Issues in Canadian Education, op.cit.

_____. "Classroom Without Walls", in Selected Educational Heresies, William F. O'Neill, ed., Glenview, Illinois: Scott, Foresman and Company, 1969.

Mead, Margaret, "A Redefinition of Education", in Education for Public Responsibility, C. Scott Fletcher, ed. New York: W.W. Norton and Co., 1961.

Morin, Jacques-Yvan, "Constitutional Court for Canada". Canadian Bar Review, 43, pp.545-52, (Dec., 1965).

_____. "Treaty-Making Power - the Position of the Government of Quebec." Canadian Bar Review, 45, p.160, (March, 1967).

_____. "The Council of Ministers of Education Should Remain a Strictly Interprovincial Body," Megnews, 15, (March, 1977), 5.

Munroe, David, The Organization and Administration of Education in Canada. Ottawa: D.S.S., 1976.

Mussio, J.J., "The School Curriculum: A National concern?", Education Canada, 20, (Spring 1980), p.11.

Pike, Robert M., "Education, Class and Power in Canada" in Richard J. Ossenberg, ed., Power and Change in Canada (Toronto: McClelland and Stewart, 1980), p.142.

Regenstreif, Peter, "Some Social and Political Obstacles to Canadian National Consciousness", in National Consciousness and the Curriculum: the Canadian Case, Geoffrey Milburn and John Herbert, editors, Toronto: O.I.S.E., 1974.

Remillard, Gil, "Ottawa Cannot Impose Its National Standards" Le Devoir, June 1, 1984.

Rocher, Guy, "The Right to Education", Paper presented at the Canadian Conference on Social Welfare, Skyline Hotel, Ottawa, 1986.

Russell, Peter H., "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts", Canadian Public Administration, Vol. 25, No. 1.

Scott, F.R., "The Privy Council and Minority Rights", Queen's Quarterly, 37, pp.668-78, October, 1930.

_____. "The Consequences of the Privy Council Decisions", Canadian Bar Review, 15, pp.485-94, June, 1937.

Sissons, C.B., "Section 93", Royal Society of Canada, Transactions, (1961) 3d. Series. 55: 1-7.

Stevens, J.C., "Moral Standards", Chapter XI, Managing Complexity: Work, Technology, and Human Relations, (Washington: the University Press of Washington, D.C., 1970).

Thomas, R. Murray, "Strategies for Using Education to Achieve Political Ends". op.cit.

Tobin, Judith, "The Canadian High Technology Industry and Education". TV Ontario: Office of Developmental Research. Mimeographed. Ottawa, 1983.

Watts, R.L., "Survival or Disintegration" in Must Canada Fail? Richard Simeon ed. Montreal: McGill-Queen's University Press, 1977.

Wilson, V. Seymour, "Federal Perspectives on Education: Social, Political, and Economic Policies", in Precepts, Policy and Process: Perspectives on Contemporary Canadian Education (London, Ont.: Alexander, Blake Associates, 1977), pp.38 and 55, note no. 2.

THESES

Daniels, E.R., "The Legal Context of Indian Education in Canada". Edmonton: University of Alberta. Unpublished Ph.D. thesis, 1973.

Toombs, W.N., "An Analysis of Parliamentary Debates on Federal Participation in Education 1867-1960". Edmonton: University of Alberta. Unpublished Ph.D. thesis, 1963.

DOCUMENTS

A. Government of Canada

A Study Team Report to the Task Force on Program Review (Nielsen Report). Economic Growth: Agriculture. Ottawa: D.S.S., February, 1985.

_____. Service to the Public: Canada Assistance Plan. Ottawa: D.S.S., June, 1985.

_____. Improved Program Delivery: Citizenship, Labour and Immigration. Ottawa: D.S.S., 1985.

_____. Economic Growth: Culture and Communications. Ottawa: D.S.S., August, 1985.

_____. Improved Program Delivery: Education and Research. Ottawa: D.S.S., November, 1985.

_____. Improved Program Delivery: Indians and Natives. Ottawa: D.S.S., April, 1985.

_____. Service to the Public: Job Creations, Training and Employment Services. Ottawa: D.S.S., March, 1985.

_____. Management of Government: Regulatory Agencies. Ottawa: D.S.S., August, 1985.

Access to Education in a Multicultural Society. Ministry of State for Multiculturalism. Ottawa: D.S.S., 1988.

Accessibility to Postsecondary Education in Canada: A Review of the Literature. Prepared by Paul Anisef, et al. Ottawa: Education, Support Branch, Department of the Secretary of State, 1985.

Account of the List of Selective Tax Measures. Department of Finance, Ottawa, August, 1985.

A Submission to the Federal Cultural Policy Review Committee by the Canada Council, March 9, 1981.

Biotechnology: A Development Plan for Canada. Report of the Task Force on Biotechnology to the Minister of State for Science and Technology. Ottawa: D.S.S., 1981.

Canada Council. A Submission to the Federal Cultural Policy Review Committee, March 9, 1981.

Canada Year Book.

CBC. The Strategy of the CBC. Broadcasting Policy Plans of the Board of Directors of the CBC, 1983.

Canadian Police College, Ottawa: R.C.M.P., 1984.

Commission of Official Languages Annual Reports.

Communications for the Twenty-First Century: Media and Messages in the Information Age. Ottawa: D.S.S., 1987.

Corry, J.A., The Growth of Government Activities Since Confederation. A Study Prepared for the Royal Commission on Dominion-Provincial Relations. Study No. 2, Ottawa: King's Printer, 1939.

_____. Difficulties of Divided Jurisdiction. Ottawa: King's Printer, 1940.

Cross-Cultural Awareness Education and Training for Professionals: a Manual. Ministry of State for Multiculturalism, Ottawa: D.S.S., 1985.

C.R.T.C. Decision: Renewal of the Canadian Broadcasting Corporation's Television and Radio Network Licences. 30 April, 1979.

Culture and Communications: Key Elements in Canada's Economic Future. A Brief submitted by the Hon. Francis Fox, Minister of Communications, to the Royal Commission on the Economic Union and Development Prospects for Canada, Ottawa: D.S.S., 1983.

Cultures Canada. Newsletter of the Multiculturalism Directorate, Department of the Secretary of State.

Delisle, Jean. Bridging the Language Solitudes: Translation Bureau 1934-84. Ottawa: D.S.S., 1984.

Economic Council of Canada, Annual Reports.

Education: Cultural and Linguistic Pluralism in Canada. Commissioned by the Ministry of Multiculturalism for OECD's Country Survey, Ottawa: D.S.S., 1985.

Education in Canada. Annual Reports to the International Conference on Education; Part I prepared by the CMEC; Part II prepared by the Department of the Secretary of State of Canada; Part III prepared by the Departments of Education of the N.W.T. and the Yukon Territory.

Federal and Provincial Support to Post-Secondary Education in Canada. A Report to Parliament, 1984-1985. Benoit Boucard, Secretary of State, Ottawa: D.S.S., 1985.

Federal-Provincial Grants and the Spending Power of Parliament. Rt. Hon. P.E. Trudeau. Ottawa: Queen's Printer, 1969.

Federal-Provincial Programs and Activities. Ottawa, F.P.R.O.

Federalism and International Relations. Hon. Paul Martin, Secretary of State for External Affairs, Ottawa: Queen's Printer, 1968.

First Ministers Conferences on Rights of Aboriginal Peoples: March, 1983; March 1984; March 1985; March 1987. Agendas. Opening Statements. Documents.

F.P.R.O., Interim Report on Relations Between the Government of Canada and the Province of Quebec, 1967-1977. Ottawa, 1977.

Francis, Daniel, A History of the Native Peoples of Quebec, 1760-1867. Ottawa: I.A.N.D., Dec. 1983.

Giving Greater Point and Purpose to the Federal Financing of Post-Secondary Education and Research in Canada. A Report prepared for the Secretary of State of Canada by A.W. Johnson. Feb., 1985.

Guide to Federal Sources of Financial Aid for Canadian Post-Secondary Students, 1984/85, Ottawa, Secretary of State Dept., 1983.

Historical Statistics on Family Allowances Program. Department of National Health and Welfare, Ottawa, 1986.

House of Commons, Report of the Task Force on Federal-Provincial Fiscal Relations. Ottawa: D.S.S., 1981.

_____. Indian Self Government in Canada: Report of the Special Committee.
Housing A Nation: 40 Years of Achievement. Central Mortgage and Housing Corporation, 1986.

Immigration Statistics, 1983, Department of Employment and Immigration Canada.

Instant World: A Report on Telecommunications in Canada. Telecommunications Committee. Allan Gottlieb, Chairman. Ottawa: Information Canada, 1971.

Inuktitut Magazine. Published quarterly by the Department of Indian and Northern Affairs, Ottawa.

James Bay and Northern Quebec Agreement. Quebec: Editeur Official du Quebec, 1976.

Johnson, A.W., Giving Greater Point and Purpose to the Federal Financing of Post-Secondary Education and Research in Canada. A Report prepared for the Secretary of State, Feb. 15, 1985.

Johnstone, John C. Young People's Images of Canadian Society. Royal Commission on Bilingualism and Biculturalism Study No. 2. Ottawa: Queen's Printer, 1969.

Lalonde, Hon. Marc, and Hon. Ron Basford. The Canadian Constitution and Constitutional Amendment. Ottawa: Federal-Provincial Relations Office, 1978.

Language and Society. The Quarterly Review of Canada's Commission of Official Languages.

Learning for Life: Overcoming the Separation of Work and Learning, the Report of the National Advisory Panel on Skill Development Leave to the Minister of Employment and Immigration, Minister of Supply and Services, March 5, 1984.

Leslie, John and Ron Maguire, The Historical Development of the Indian Act. 2nd ed. Ottawa: Indian Affairs and Northern Development Department, 1978.

Lists of Scholarships and Grants in Aid of Research: N.R.C., N.S.E.R.C., M.R.C., S.S.H.R.C.

Lothian, W.F., A Brief History of Canada's National Parks and Historic Sites. Ottawa: D.S.S. 1987.

McGowan, J. Wm., Education for the Masses in the New Scientific and Technological Environment of the 1980's. Ottawa: N.M.S.T., 1984.

Multiculturalism and the Government of Canada, Ministry of State for Multiculturalism, Ottawa: D.S.S., 1984.

Munroe, David and Guy Rocher, The Development of Education in Quebec. Research Report for the Royal Commission on Bilingualism and Biculturalism. Ottawa, 1966.

National Forum on Post-Secondary Education, Saskatoon, October 25-28, 1987. Proceedings and Papers. The Institute for Research on Public Policy. (An undertaking to sponsor such a governmental and non-governmental meeting was given in the Throne Speech of the Parliament of Canada, October 1st, 1986. The proposal was then considered and accepted on behalf of the provincial and territorial governments by the Council of Ministers of Education, Canada. A joint communique was released March 30, 1987, by the Secretary of State of Canada and the Chairman of CMEC.)

Northland Open University Letters Patent, 1976.

Nunavut Constitutional Forum, Building Nunavut: A Working Document with a Proposal of an Arctic Constitution. Ottawa, 1983.

Orpwood, Graham and Jean Pascal Souque, Science Education in Canadian Schools. Ottawa: Science Council of Canada, 1984.

Orpwood, Graham et al., Science Education in Canadian Schools, Volumes I, II and III. Ottawa: Science Council of Canada, 1984.

Osborne, John E., "Evolution of the Canada Assistance Plan", Appendix 3, Canada Assistance Plan. Task Force on Program Review (Nielsen Report).

Personnel Administration in the Public Service, Civil Service Commission of Canada. Ottawa, Dec., 1958.

Perspectives on the Harmonization of Law in Canada, Research Report No. 55. Prepared for the Royal Commission on the Economic Union and Development Prospects for Canada. Chairman, Ronald C.C. Cuming. Toronto: University of Toronto Press, 1985.

Poverty in Canada, A Report of the Special Senate Committee, Senator David A. Croll, Chairman. Ottawa: D.S.S., 1976.

Proceedings of the Federal-Provincial Conferences.

Programs in Support of Multicultural Education Activities, Ministry of State for Multiculturalism, Ottawa: D.S.S., 1984.

R.C.M.P. Training and Development Branch, Annual Report, 1983/1984.

Report by the National Museum of Science and Technology, Education for the Masses in the New Scientific and Technological Environment of the 1980's. Ottawa, N.M.S.T., 1984.

Report of the Special Committee on the Review of Personnel Management and the Merit Principle, Ottawa, September, 1979. (The D'Avignon Report).

Rocher, Guy, and David Munroe, The Development of Education in Quebec. Research Study, Royal Commission on Bilingualism and Biculturalism.

Royal Commission on Economic Union and Development Prospects for Canada: Challenges and Choices. Ottawa: D.S.S., 1984.

Royal Commission on Industrial Training and Technical Education, Report, Ottawa: King's Printer, 1913.

Royal Commission on National Development in the Arts, Letters and Sciences, Report, Ottawa, King's Printer, 1950.

Science Council of Canada, Annual Reports.

Science for Every Student; Educating Canadians for Tomorrow's World, Ottawa: Science Council of Canada, 1984.

Secretary of State Department of Canada Annual Reports.

Sheppard, Claude-Armand, The Law of Languages in Canada. Royal Commission on Bilingualism and Biculturalism No. 10. Ottawa: Information Canada, 1971.

Statement of the Government of Canada on Indian Policy, 1969. Presented to the 28th Parliament by the Hon. Jean Chretien, Minister of Indian Affairs and Northern Development. Ottawa: Queen's Printer, 1969.

Summary of Briefs and Hearings, Federal Cultural Policy Review Committee. Ottawa: D.S.S., 1982 (The Appelbaum-Hebert Report).

Support to Education by the Government of Canada, Ottawa, Secretary of State Dept., 1983-

Task Force on Canadian Unity (Pepin-Robarts Report) A Future Together: Observations and Recommendations, Ottawa, 1979.

Task Force on Canadian Unity (Pepin-Robarts Report), Coming to Terms: The Words of the Debate, Ottawa, 1979.

Telecommunications and Canada, Report of the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty. Ottawa: D.S.S., 1979.

The Canadian Charter of Rights and Freedoms: A Guide for Students, The Public Legal Education Society: The People's Law School, Vancouver, B.C. Published by D.S.S., Ottawa, 1985.

The Canadian Constitution and Constitutional Amendment, Hon. Marc Lalonde, Minister of State for Federal-Provincial Relations. Ottawa: Canadian Unity Information Office, 1978.

Watts, Ronald L., Multicultural Societies and Federalism. Royal Commission on Bilingualism and Biculturalism No. 8. Ottawa: Information Canada, 1970.

B. The Provincial Governments

Cairns, John C., Adult Literacy in Canada, Toronto: CMEC, 1988.

Changing Economic Circumstances: the Challenge for Postsecondary Education and Manpower Training, Statement of the Council of Ministers of Education, Canada, October, 1985.

Corry, J.A. and L.P. Bonneau, Quest for the Optimum: Research Policy in the Universities of Canada, an A.U.C.C. Commission to Study the Rationalization of University Research, Vol. 1, Ottawa: A.U.C.C., 1972.

Council of Ministers of Education, Annual Reports.

Courses of Studies, the Provinces; the Territories.

Financing Post Secondary Education in Canada. A Study Commissioned by the CMEC. Prepared by Stephen G. Peitchinis, Calgary, 1972.

McRuer, J.C. and W.R. Lederman, Report No. 2: Ontario Royal Commission Inquiry Into Civil Rights. Vol. 4. Toronto: Queen's University Press.

Multicultural Education Policies in Canada. Report presented to the OECD's Centre for Educational research and Innovation, September, 1986.

Multiculturalism in the Schools. A tri-annual magazine published by the Canadian Council for Multiculturalism and Intercultural Education, Faculty of Education, University of Toronto.

Ontario Advisory Committee on Confederation, Background Papers and Reports. Toronto: The Queen's Printer of Ontario, 1967.

Ontario Economic Council, Intergovernmental Relations: Issues and Alternatives 1977. Toronto: O.E.C., 1977.

Principles for Interaction: Federal-Provincial Relations and Post-Secondary Education in Canada, Council of Ministers of Education, Canada. Toronto: CMEC, 1985.

Protestant Education in Quebec. Report of the Quebec Protestant Education Survey. W.A.F. Hepburn, Chairman of the Survey Committee, 1938.

Report of the Quebec Protestant Education Survey, W.A.F. Hepburn, Chairman of the Survey Committee, 1938.

Royal Commission of Inquiry on Constitutional Problems (The Tremblay Report), Quebec, 1956.

Royal Commission of Inquiry on Education in the Province of Quebec, (The Parent Report), Quebec, 1963.

Royal Commission of Inquiry into Civil Rights, Volumes 1,2 and 3. Toronto: Queen's Printer, 1968. (The McRuer Commission.)

Royal Commission on Book Publishing: Background Papers. Government of Ontario, Toronto: Queen's Printer, 1972.

The Report of the Commission on Private Schools in Ontario, Bernard J. Shapiro, Commissioner, Ontario, 1985.

C. Other

Adult Illiteracy in Canada: A Challenge, U.N.E.S.C.O. Occasional Paper No. 42, Ottawa, 1983.

A Statement of Claim Based on Aboriginal Title of Metis and Non-Status Indians. Native Council of Canada. Ottawa: N.C.C., Feb., 1980.

A Summary of Federal Direct and Indirect Involvement in Canadian Education, Ottawa: Canadian Teachers' Federation, 1973.

British Sessional Papers, House of Commons, 1867, Vol. XLVII. Microfiche, National Library of Canada.

Broken Words: Why Five Million Canadians Are Illiterate, Southam Literacy Study. Toronto: McLaren, Morris and Todd Ltd., 1988, p. 633-34.

Brown, J., The Impact of Federal Financial Support on Elementary and Secondary Education in Canada (Ottawa: Canadian Teachers' Federation, 1974), p.276.

Canadian Association for Adult Education, A Submission to the Royal Commission on the Economic Union and Development Prospects for Canada, 1983.

Canadian Bar Association, Submission to the Special Joint Committee on the 1987 Constitutional Accord. Mimeographed.

Canadian Council on Children and Youth, Annual Reports.

Canadian Ethnocultural Council, Brief to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord. Minutes Proceedings and Evidence, No.7, August 13, 1987.

Canadian Federation of Students/Ontario Federation of Students, Submission to the Royal Commission on the Economic Union and Development Prospects for Canada, November, 1983.

Commission to the A.U.C.C., Financing Higher Education in Canada. Toronto: University of Toronto Press, 1968 (The Bladen Report).

Commission to the A.U.C.C. et al., The University, Society and Government: the Report of the Relations Between Universities and Governments, Ottawa: The University of Ottawa Press, 1970. (The Rowat-Hurtubise Report).

Commission to the A.U.C.C., Quest for the Optimum: Research Policy in the Universities of Canada, Ottawa: Mutual Press, 1972 (The Bonneau-Corry Report).

Commission to the C.A.U.T. and the A.U.C.C., University Government in Canada. Toronto: University of Toronto Press, 1966 (The Duff-Berdahl Report).

Council of National Ethno-Cultural Organizations of Canada, Submission to the Royal Commission on Economic Union and Development Prospects for Canada. October, 1983.

Creery, Ian, The Inuit of Canada, Report No. 60, for Minority Rights Group Ltd. London, England, 1983.

Day Care and the Canadian School System, Toronto: C.E.A., 1983.

"Federal Aid to Education with Particular Reference to Higher Communication." Mimeographed. A.U.C.C. Library File 4022, p. 7.

Financing Canadian Universities: For Whom and By Whom?, David M. Nowlan and Richard Bellaire, editors, for the Institute for Policy Analysis, University of Toronto, and the Canadian Association of University teachers.

Forsey, Eugene, Submission to the Special Joint Committee on the 1987 Constitutional Accord, July, 1987. Mimeographed.

L'Association canadienne d'éducation de langue française, Submission to the First Ministers concerning Section 93 interpretation.

McMillan, Binch, Don't Tax Reading. A Statement on the Cultural and Economic Costs of a National Tax on Reading.

Michaud, Denise, "The Development of the British North America Act Clause 93: A Documentary History". Unpublished research report, Ottawa: A.U.C.C., 1981.

National Welfare Council of Canada, Poverty and Public Policy. A Submission to the Royal Commission on the Economic Union and Development Prospects for Canada, 1983.

Noor, Abdeen, Education and Basic Human Needs. World Bank Staff Working Papers, No. 450. Washington, D.C.: The World Bank, 1981.

O.E.C.D., Reviews of National Policies for Education: Canada. Paris: O.E.C.D., 1976.

Royal Society of Canada, Proceedings and Transactions, Reports, 1883-1985.

Starblanket, Noel V., The National Indian Brotherhood Presentation to the Task Force on National Unity. Ottawa, March 2, 1978.

U.N., Human Rights: A Compilation of International Instruments. New York: United Nations Publications, 1978.

CORRESPONDENCE

Beaty, Stuart. Memo and attachments to Commissioner M. Yalden, Office of the Commissioner of Official Languages. Re: A Reference to the Court of Appeal pursuant to the Constitutional Questions Act, R.S.O. 1980, Chapter 86, by Order-in-Council 2154/83, respecting the Education Act, R.S.O. 1980 Chapter 129 and Minority Language Educational Rights. File 1136-8, Ottawa, 28 June, 1984.

Gordon to Cardwell, Confidential Dispatch of Sept. 22, 1964. P.A.C. 188/14/ Reference RG76.8B. Vol.63. pp. 11-20.

Chretien, Hon. Jean, Memo Re: Consultation and Negotiation Indian Policy Proposals to National Indian Brotherhood, Provincial and Regional Native Associations, Band Chiefs, Departmental Proposals. Ottawa, 26 Sept., 1969.

John A. Macdonald Papers, Vol. 46. P.A.C. microfilm C-1503.

Joyal, Hon. Serge, Letter to Dr. Bette Stephenson, Chairman, Council of Ministers of Education, Canada, Re: EPF Legislation. Ottawa, 18 October, 1984.

Macdonald, Sir John A. Letter to Dr. Egerton Ryerson. Ottawa, March 25, 1872.

Monck Papers, P.A.C. microfilm, MG271B1.

Roberts, Hon. John, Notes for an address to the Conference, the Humanities Society: Towards a New Coalition. Secretary of State Department, 22 Nov., 1978.

Stephenson, Dr. Bette, Chairperson, Council of Ministers of Education, Re: EPF for Postsecondary Education. Letter to Hon. Serge Joyal, Secretary of state, Toronto, 5 October, 1982.

Stephenson, Dr. Bette, Chairperson, Council of Ministers of Education, Canada. Letter to Hon. Gerald Regan, Secretary of State, Re: Postsecondary Support and Objectives. 28 September, 1982.

Picard, Laurent, President C.B.C. Memo to Lister Sinclair, Vice-President, Program Policy and Development; Donald MacPherson, Vice-President and General Manager, ESD; Raymond David, Vice-President et Directeur General de la Radiodiffusion française, DSF. Re: Canadian School Broadcasts. January 27, 1975.

Picard, Laurent, President, C.B.C. Letter to Hon. Thomas L. Wells. Chairman, Council of Ministers of Education, Canada. 6 January, 1975.

Payne, Finlay. Memo to Vice-President et al., C.B.C. Re: Negotiations re: Canadian School Broadcasts. January 10, 1975.

Wells, Hon. Thomas L., Chairman, Council of Ministers of Education, Canada. Letter to Laurent Picard, President, Canadian Broadcasting Corporation. Re: possibilities of co-operation between the C.B.C. and the CMEC re: Canadian School Broadcasts. December 19, 1974.

INTERVIEWS AND/OR INFORMATION SOURCES

Abugov, Lorne
 Adams, M.P.
 Adamson, R.
 Albagli, Michelle
 Allen, Phyllis
 Andrews, Sally
 Anstey, T.H.
 Austin, Hon. J.
 Barbeau, Victor
 Barker, G.
 Barnabe, C.M.
 Barr, James
 Barrados, Maria
 Barton, T.S.
 Battle, Ken
 Beatty, Stuart
 Beaulieu, M.
 Beckman, H.
 Bedard, Michelle
 Belanger, Roger
 Benoit, Paul
 Berger, R.
 Berry, Ian
 Bisson, P.
 Blakeney, Hon. Allan
 Bogarty, J.
 Bouchard, Charles
 Bourgault, L.
 Bowker, M.
 Brisson-Norreau, Lise
 Brown, Evan
 Brown, Wilfrid
 Bryce, R.
 Bruyere, Louis
 Burke, Catherine
 Burke, Roger
 Buser, F.W.
 Bussieres, Col. F.A.

Cairns, J.
Cameron, David R.
Campbell, Duncan R.
Campbell, N.K.
Carlson, L.
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Chauvet, Raymond
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Cochrane, Janice
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Crowley, Ron
Cuming, R.C.
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Davidson, W.J.
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Fuller, P.
Fulton, J.
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Gauthier, J.
Gauthier, M.
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Gilmore, Jas.
Gillis, G.
Glossop, Robt.
Godin, V.J.
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Gould, R.A.

Graham, David
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Greenberg, Jeff
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Hall, D.W.
Harvey, Jocelyn
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Hawkes, James
Hawley, Carolyn
Henderson, D.W.
Hicks, Peter
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Hogg, Peter N.
Holmes, Louise
Homulus, Peter
Hopkins, E.Y.
Hoy, Douglas
Hubel, Jack
Hubley, G.E.
Hudson, Richard
Hunan, Margaret
Hunsley, Terrence
Hurley, J.R.
Isabelle, Laurin
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McMullen, Michael
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McWhinney, Wm.
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Savard, Hon. Serge
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APPENDICES

- A. Schedule to the Constitution Act, 1982, Modernization of the Constitution.
- B. Section 93, Constitution Act, 1867.
- C. Section 93 Variants.
- D. Section 23, Constitution Act, 1982.
- E. Procedure for Amending the Constitution of Canada.
- F. Aboriginal Rights.
- G. The Meech Lake Political Accord.

APPENDIX A

SCHEDULE TO THE CONSTITUTION ACT, 1982

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the <i>Constitution Act, 1867</i> ." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Gov- ernment of the Province of Manito- ba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: " <i>Manitoba Act, 1870</i> " (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870		Rupert's Land and North-West- ern Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the <i>Constitution Act, 1871</i> "	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	Order of Her Majesty in Council admitting all British possessions and		Adjacent Territories Order

SCHEDULE I

to the

CONSTITUTION ACT, 1981—*Continued*

Item	Column I Act Affected	Column II Amendment	Column III New Name
	Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880		
9	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the <i>Constitution Act, 1886</i> ."	Constitution Act, 1886
10	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12	The Alberta Act, 1905, 4-5 Edw VII, c. 3 (Can.)		Alberta Act
13	The Saskatchewan Act, 1905, 4-5 Edw VII, c. 42 (Can.)		Saskatchewan Act
14	British North America Act, 1907, 7 Edw VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the <i>Constitution Act, 1907</i> ."	Constitution Act, 1907
15	British North America Act, 1915, 5-6 Geo V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the <i>Constitution Act, 1915</i> ."	Constitution Act, 1915
16	British North America Act, 1930, 20-21 Geo V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the <i>Constitution Act, 1930</i> ."	Constitution Act, 1930
17	Statute of Westminster, 1931, 22 Geo V, c. 4 (U.K.)	In so far as they apply to Canada, (a) section 4 is repealed; and (b) subsection 7(1) is repealed.	Statute of Westminster, 1931

SCHEDULE I

to the

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CONSTITUTION ACT, 1981—Continued

Item	Column I Act Affected	Column II Amendment	Column III New Name
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the <i>Constitution Act, 1940</i> ."	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the <i>Newfoundland Act</i> ."	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the <i>Constitution Act, 1960</i> ."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the <i>Constitution Act, 1964</i> ."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the <i>Constitution Act, 1965</i> ."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the fol- lowing substituted therefor: "3. This Part may be cited as the <i>Constitution Act, 1974</i> ."	Constitution Act, 1974

SCHEDULE I
to the
CONSTITUTION ACT, 1981—Concluded

Item	Column I Act Affected	Column II Amendment	Column III New Name
29	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following sub- stituted therefor: "3. This Part may be cited as the <i>Constitution Act (No. 1)</i> , 1975."	Constitution Act (No. 1), 1975
30	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the <i>Constitution Act (No. 2)</i> , 1975."	Constitution Act (No. 2), 1975

APPENDIX B

SECTION 93, CONSTITUTION ACT, 1867

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

Education
Education
Education

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
- (3) Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
- (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section

SECTION 93 VARIANTS

Altered for Manitoba by section 22 of the *Manitoba Act*, 33 Vict., c. 3 (Canada), (confirmed by the *British North America Act*, 1871), which reads as follows

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions —

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education

(3) In case any such Provincial Law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section

Altered for Alberta by section 17 of *The Alberta Act*, 4-5 Edw. VII, c. 3 which reads as follows

17. Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph —

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29

3. Where the expression "by law" is employed in paragraph 3 of the said section 93 it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force

Altered for Saskatchewan by section 17 of *The Saskatchewan Act*, 4-5 Edw. VII, c. 42, which reads as follows

17. Section 93 of the British North America Act, 1867 shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph —

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29

3. Where the expression "by law" is employed in paragraph (1) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force

Altered by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *British North America Act*, 1949, 12-13 Geo. VI, c. 22 (U.K.)), which reads as follows

17. In lieu of section ninety-three of the British North America Act, 1867 the following term shall apply in respect of the Province of Newfoundland

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools or denominational colleges that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature, and

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis

SECTION 23. CONSTITUTION ACT, 1982*Minority Language Educational Rights*

Language of
instruction

23. (1) Citizens of Canada
 (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
 (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,
 have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of
language
instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application
where numbers
warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
 (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
 (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

APPENDIX E

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada	<p>38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by</p> <p>(a) resolutions of the Senate and House of Commons; and</p> <p>(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.</p>
Majority of members	<p>(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).</p>
Expression of dissent	<p>(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.</p>
Revocation of dissent	<p>(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.</p>
Restriction on proclamation	<p>39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent</p>
Idem	<p>(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.</p>

- Compensation** 40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.
- Amendment by unanimous consent** 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
 - (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
 - (c) subject to section 43, the use of the English or the French language;
 - (d) the composition of the Supreme Court of Canada; and
 - (e) an amendment to this Part.
- Amendment by general procedure** 42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
- (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
 - (b) the powers of the Senate and the method of selecting Senators;
 - (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
 - (d) subject to paragraph 41(d), the Supreme Court of Canada;
 - (e) the extension of existing provinces into the territories; and
 - (f) notwithstanding any other law or practice, the establishment of new provinces.
- Exception** (2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).
- Amendment of provisions relating to some but not all provinces** 43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
- (a) any alteration to boundaries between provinces, and
 - (b) any amendment to any provision that relates to the use of the English or the French language within a province,
- may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments
by Parliament	44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.
Amendments
by provincial
legislatures	45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.
Initiation of
amendment
procedures	46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.
Revocation of
authorization	(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it
Amendments
without Senate
resolution	47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.
Computation of
period	(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).
Advice to issue
proclamation	48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.
Constitutional
conference	49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

APPENDIX F

ABORIGINAL RIGHTS

PART I***General***

Aboriginal rights
and freedoms not
affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763, and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.(1)

(1) Paragraph 25(b) was repealed and the present paragraph 25(b) was substituted by the Constitution Amendment Proclamation, 1983

PART II
**RIGHTS OF THE ABORIGINAL
PEOPLES OF CANADA**

Recognition of ex-
isting aboriginal
and treaty rights

35. (1) The existing abo-
riginal and treaty rights of
the aboriginal peoples of
Canada are hereby recog-
nized and affirmed.

Definition of abo-
riginal peoples of
Canada

(2) In this Act, "abo-
riginal peoples of Canada"
includes the Indian, Inuit
and Metis peoples of Can-
ada.

Land claims agree-
ments

(3) For greater certainty,
in subsection (1) "treaty
rights" includes rights that
now exist by way of land
claims agreements or may
be so acquired

Aboriginal and
treaty rights are
guaranteed equally
to both sexes

(4) Notwithstanding any
other provision of this Act,
the aboriginal and treaty
rights referred to in subsec-
tion (1) are guaranteed
equally to male and female
persons **(2)**

Commitment to
participation in
constitutional con-
ference

35.1 The government of
Canada and the provincial
governments are commit-
ted to the principle that, be-
fore any amendment is
made to Class 24 of section
91 of the "*Constitution Act,
1867*", to section 25 of this
Act or to this Part.

(a) a constitutional con-
ference that includes in
its agenda an item relat-
ing to the proposed
amendment, composed
of the Prime Minister of
Canada and the first min-
isters of the provinces,
will be convened by the
Prime Minister of Can-
ada; and

(b) the Prime Minister of
Canada will invite repre-
sentatives of the aborigi-
nal peoples of Canada to
participate in the discus-
sions on that item. **(3)**

(2) Subsections (3) and (4) of s. 35 were added by the Constitution Amendment Proclamation, 1983.

(3) Section 35.1 was added by the Constitution Amendment Proclamation, 1983.

PART IV

CONSTITUTIONAL CONFERENCE

Constitutional conference

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

Participation of aboriginal peoples

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

Participation of territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Constitutional conferences

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

Participation of aboriginal peoples

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

Participation of territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Subsection 35(1) not affected

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1). (4)

(4) Part IV.1, consisting of s. 37.1, was added by the Constitution Amendment Proclamation, 1983

(COMPLETE TEXT)

OF APRIL 30, 1987

At their meeting today at Meech Lake, the Prime Minister and the ten Premiers agreed to ask officials to transform into a constitutional text the agreement in principle found in the attached document.

First Ministers also agreed to hold a constitutional conference within weeks to approve a formal text intended to allow Quebec to resume its place as a full participant in Canada's constitutional development.

QUEBEC'S DISTINCT SOCIETY

(1) The Constitution of Canada shall be interpreted in a manner consistent with

- a) the recognition that the existence of French-speaking Canada, centered in but not limited to Quebec, and English-speaking Canada, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
- b) the recognition that Quebec constitutes within Canada a distinct society.

(2) Parliament and the provincial legislatures, in the exercise of their respective powers, are committed to preserving the fundamental characteristic of Canada referred to in paragraph (1)(a).

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

IMMIGRATION

- Provide under the Constitution that the Government of Canada shall negotiate an immigration agreement appropriate to the needs and circumstances of a province that so requests and that, once concluded, the agreement may be entrenched at the request of the province;

- Such agreements must recognize the federal government's power to set national standards and objectives relating to immigration, such as the ability to determine general categories of immigrants, to establish overall levels of immigration and prescribe categories of inadmissible persons;

- under the foregoing provisions, conclude in the first instance an agreement with Quebec that would:

- incorporate the principles of the Cullen-Couture agreement on the selection abroad and in Canada of independent immigrants, visitors for medical treatment, students and temporary workers, and on the selection of refugees abroad and economic criteria for family reunification and assist relatives.
- guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by 5% for demographic reasons; and
- provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation;

- nothing in the foregoing should be construed as preventing the negotiation of similar agreements with other provinces

SUPREME COURT OF CANADA

- Entrench the Supreme Court and the requirement that at least three of the nine justices appointed be from the civil bar;

- provide that, where there is a vacancy on the supreme Court, the federal government shall appoint a person from a list of candidates proposed by the provinces and who is acceptable to the federal government.

SPENDING POWER

- Stipulate that Canada must provide reasonable compensation to any province that does not participate in a future national shared-cost program in an area of exclusive provincial jurisdiction if that province undertakes its own initiative on programs compatible with national objectives.

AMENDING FORMULA

- Maintain the current general amending formula set out in section 38, which requires the consent of Parliament and at least two-thirds of the provinces representing at least fifty percent of the population;

- guarantee reasonable compensation in all cases where a province opts out of an amendment transferring provincial jurisdiction to parliament,

- because opting out of constitutional amendments to matters set out in section 42 of the *Constitution Act, 1982* is not possible, require the consent of Parliament and all the provinces for such amendments

SECOND ROUND

- Require that a First Ministers' Conference on the Constitution be held not less than once per year and that the first be held within twelve months of proclamation of this amendment but not later than the end of 1988;

- entrench in the Constitution the following items on the agenda:

- 1) Senate reform including:
 - the functions and role of the Senate;
 - the powers of the Senate;
 - the method of selection of Senators;
 - the distribution of Senate seats;
- 2) fisheries roles and responsibilities; and
- 3) other agreed upon matters;

- entrench in the Constitution the annual First Ministers' Conference on the Economy now held under the terms of the February 1985 Memorandum of the Agreement.

- until constitutional amendments regarding the Senate are accomplished the federal government shall appoint persons from lists of candidates provided by provinces where vacancies occur and who are acceptable to the federal government

END

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FIN