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## Dilemmas of Solidarity

Rethinking Redistribution in the  
Canadian Federation

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## Introduction: Exploring the Dilemmas of Solidarity

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Since the rise of the Canadian welfare state in the aftermath of the Second World War, the politics of social policy and fiscal federalism have been at the centre of federal-provincial relations and constitute a perennial topic of academic study. Recent events have given impetus for scholars to re-examine and interrogate some basic aspects of the institutions and policies of the 'Social Union,' a term coined by Keith Banting and others to emphasize that the Canadian welfare state had to adapt to the reality of federalism.

The immediate impetus for this volume was the publication of the report of Quebec's Commission on Fiscal Imbalance, chaired by Yves Séguin, in 2002 (the Séguin Commission).<sup>1</sup> The commission argued that because of demographic pressures, the provinces face growing expenditures in areas of provincial jurisdiction, such as health care and education, but lack access to sufficient sources of revenue to meet these needs. The federal government, by contrast, will enjoy surpluses for years to come. The commission suggested that the disjunction between revenue-raising capacity and expenditures involving different orders of government – vertical fiscal imbalance – poses a number of serious problems. Unless steps are taken to ensure that provinces have adequate fiscal means to match their areas of policy responsibility, provincial autonomy will be severely undermined. And federal transfers that close the fiscal gap undermine provincial autonomy if they impose conditions, are changed arbitrarily, or do not take into account actual levels of demand for public services. The concept of vertical fiscal imbalance was quickly seized upon by all provinces to frame their arguments and make common cause against the federal government. The Health Accord of September 2004 can be viewed as one policy file

where the provinces successfully deployed arguments regarding vertical fiscal balance to increase the levels of federal transfers to the provinces.

The Séguin Commission conceptualized the problem of fiscal federalism as the realignment of revenue-raising and taxing powers between the federal and provincial governments, either through a direct transfer of taxing authority, or through transfer payments to offset any such misalignment. But the recent debate surrounding Canada's equalization program suggests that this is not the only way to approach the issue. The formula used for equalization claws back from equalization payments a significant proportion of revenues from non-renewable resources. Nova Scotia and Newfoundland argued that the formula created the equivalent of a welfare trap for the provinces, and they successfully demanded that they receive 100 per cent of resource revenues without any decline in equalization payments. Not surprisingly, other provinces that receive equalization (Saskatchewan and New Brunswick) immediately indicated that they too would be seeking enhanced equalization payments.

But far more surprising and significant is Ontario's response, which has been highly critical of these new arrangements. Ontario makes an argument that has hitherto not been made by the 'have' provinces: that since the equalization program is financed principally by taxpayers in Ontario, enrichments to equalization come at Ontario's expense. Indeed, Ontario has gone further and has launched a campaign to reduce the \$23 billion gap between federal tax revenue raised from Ontario and federal expenditures in that province. Ontario's lurking fear is, in essence, to become a 'have-not' province, a fear that is being fuelled by a recent report of the Ontario Chamber of Commerce.<sup>2</sup> These arguments about the level of vertical fiscal imbalance have been joined by another – that inter-regional transfers largely funded by Ontario have been ineffective in reducing disparities in economic performance between have and have-not provinces.<sup>3</sup>

To complicate the debate even further, Alberta's huge budgetary surpluses and unsurpassed revenue-raising capacities have recently been characterized by Tom Courchene as posing a potential threat to Canadian unity unless that province agrees to share its surpluses and the revenues it gets from its natural resources.<sup>4</sup> The crux of Courchene's argument is that Alberta's wealth, if it were not shared, could be used to produce a combination of extremely high-quality public services (e.g., in the areas of health care and higher education) and low taxation

rates, which would irremediably undermine the competitiveness of other provinces by eroding their capacity to retain their most productive and dynamic citizens. Predictably, the Alberta government has refused to subscribe to this thesis.<sup>5</sup> In doing so, Alberta was supported by the government of Quebec, a province which, while much poorer than Alberta, understands that, as a producer of energy – in its case hydroelectricity – any logic of 'compelled sharing' would also apply to what it perceives as its own and exclusive resources.

As a result of these debates, Canada must now juggle the following variables: both have and have-not provinces want a better alignment between expenditures incurred and revenue-raising capacities; some have-not provinces (Newfoundland and Nova Scotia) want to reap the entire and exclusive benefit from new sources of revenues without losing their status as 'have-not' provinces under the equalization program; one have province (Ontario) increasingly sees a nexus between its contribution to the federation and what it perceives to be its concomitant impoverishment; another have province (Alberta) is adamantly opposed to sharing its ever-increasing wealth beyond the contribution it makes to the equalization program; and, last but not least, a relatively wealthy federal government has yet to show any thirst for fully examining any principled and structural solution to the problem of redistribution.

At their very core, these debates are about redistribution within the Canadian federation. But as our brief description makes clear, there are fundamentally different ways of conceptualizing what the appropriate character and scope of redistribution should be.<sup>6</sup> And disagreement over these basic questions of principle generates disagreement on particulars. Thus, while the mantra of vertical fiscal imbalance allowed the provinces to maintain a united front against the federal government, debates over equalization illustrated how provincial interests in redesigning redistribution are not aligned. Clearly, horizontal fiscal imbalance is as much on the policy agenda as vertical fiscal imbalance. And at a deeper level, these debates turn on different visions of the type of political community Canada is. Indeed, the dilemmas of solidarity raised by redistribution within the federation are, in the end, dilemmas about Canada itself.

Thus, although this volume was prompted by the publication of the report of the Séguin Commission, our goal is to stand back from the particulars of these policy debates and to enable the contributors to reflect on basic juridical, political, economic, and philosophical ques-

tions regarding redistribution. It is hoped that this volume will inform a more nuanced and wide-ranging debate among both academics and policy practitioners than has occurred in the past. In order for this forward-looking debate to commence, however, it is necessary to better understand how fiscal federalism in Canada has evolved.

Fiscal federalism is said to be the glue that binds Canadian social policy.<sup>7</sup> It comprises the network of taxation, expenditures, and transfers that characterizes the fiscal relationships between the federal and provincial governments in Canada.<sup>8</sup> Major programs in health care, education, and social assistance have all come about through often complex fiscal arrangements between the different levels of government. While fiscal federalism helped provinces support growing social programs in the years after the Second World War, federal involvement in the provision of social services has always been controversial. The Constitution Act, 1867 gives the federal government the capacity to generate revenues for spending but is widely thought to give the legislative authority for the development and distribution of social services to the provinces. At Confederation, this division of powers had little practical effect because government involvement in health, education, and welfare was minimal.<sup>9</sup> However, as social programs grew and became more central to political agendas, this division of powers became unworkable. Tensions began to mount between the federal and provincial governments over social service policy and delivery.

It is important to emphasize that not every dimension of fiscal federalism is equally problematic. Indeed, since a significant number of the most important social programs that fiscal federalism serves to fund lie within provincial jurisdiction, it is not so much the legal grounds upon which provinces can exercise their power in areas covered by fiscal federalism as their actual capacity to deliver services in areas over which they have jurisdiction that is at stake in contemporary debates.

The situation is different with respect to the federal government's ability to influence social programs that normally fall within provincial jurisdiction – a central feature of fiscal federalism since the creation of the Canadian welfare state. This ability rests on several constitutional sources, all of which have been, and still are, controversial. The first source is the federal power to legislate over matters affecting 'the peace, order and good government of Canada.' The second source is the federal spending power. The third source is the constitutional provision governing equalization. Each will be briefly discussed in turn.

First, the federal government's involvement in pan-Canadian social programs can be supported by its power to legislate for the peace, order, and good government of Canada (POGG) under section 91 of the Constitution Act, 1867. Parliament may use this power to adopt temporary legislation if a national emergency arises.<sup>10</sup> However, this hardly provides the federal government with a foundation strong enough to establish long-lasting, pan-Canadian programs. Parliament can also act under this power to regulate matters that concern the federation as a whole. In *R. v. Crown Zellerbach*, the Supreme Court of Canada confirmed the test for determining when the POGG power would justify federal legislation when a concern has attained a 'national dimension.'<sup>11</sup> For a policy area to meet this test, it must obviously transcend merely local and private concerns. Moreover, the item regulated 'must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of effect on provincial legislation that is reconcilable with the fundamental distribution of legislative power under the Constitution.' The Court further suggested that 'in determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.'<sup>12</sup> Sujit Choudhry has argued that the national dimensions test actually encompasses two different sets of situations: a situation of extra-provincial externalities, where the regulatory decisions of a province (e.g., lax environmental laws) impose costs on extra-provincial interests; and situations of interprovincial and federal-provincial collective action problems, in which the risk of interprovincial and federal-provincial non-cooperation leads to regulatory races to the bottom. Needless to say, such broad functionalist or efficiency-based interpretations of the POGG power are controversial.<sup>13</sup> In any event, both the difficulty of applying the test for determining whether a concern has a national dimension, as reflected in the majority and dissenting reasons in *Crown Zellerbach* itself and in subsequent cases,<sup>14</sup> as well as the impact such a determination may have on the balance of powers within the federation transform any federal impulse to base a pan-Canadian social program solely on Parliament's power to legislate for the peace, order, and good government of Canada into a hazardous enterprise.<sup>15</sup>

Second, deeper federal involvement in social services may be

achieved through the spending power. In other words, while the federal government cannot legislate how the provinces deliver social services within provincial jurisdiction, it can provide funding for such services and can impose conditions on that funding. The case of *Winterhaven Stables v. Canada*<sup>16</sup> provides the most extended discussion on the legality of the federal spending power. In that case, the applicant challenged several federal social service programs as being *ultra vires* Parliament. It complained that the federal government was collecting taxes from the provinces and then spending that money on matters that fell within provincial jurisdiction. In essence, the claim was that the federal government was using its financial powers unconstitutionally to coerce the provinces to participate in programs established and regulated by the federal government. The Alberta Court of Appeal rejected this argument and held that using the spending power to attach conditions to social programs was constitutionally valid. Parliament is entitled to spend the money it raises on any matter it so chooses. The court noted that one consequence of this may be that the federal government can pressure provinces to pass legislation that complies with federal requirements. However, the court concluded that providing funding does not mean that the federal government is intruding on provincial jurisdiction.<sup>17</sup>

Gaudreault-DesBiens has argued that the reasons of *Winterhaven Stables*, as well as most traditional defences of an absolutely unfettered federal spending power, are highly formalistic. They rely on a dubious distinction between legislation and contract as the means to create legal obligations, and fail to address, from a federative perspective, the main problem of federal constitutional spending in areas of provincial jurisdiction – that is, doing indirectly what cannot be done directly and thus tangibly ignoring the provinces' legislative and executive autonomy in these areas.<sup>18</sup> However, this case confirms the constitutionality of a practice that has not been frontally challenged in court by any provincial government since the advent of the Canadian welfare state.<sup>19</sup> In fact, it is as if the constitutionality of conditional federal spending in areas of provincial jurisdiction was something no one wanted to submit to courts of law and, ultimately, to the Supreme Court.<sup>20</sup> Maybe this is so for fear of an undesired outcome or because the relative comfort provincial governments enjoy under the current scheme induces them to accept their legal fate with some indifference, to paraphrase filmmaker Denys Arcand.<sup>21</sup> But politically the field of federal spending power undeniably remains heavily mined.

The third justification for federal involvement in fiscal federalism's redistribution game is the equalization program, which finds its source in section 36 of the Constitution Act, 1982. Under this provision, the federal government has the ability to make equalization payments 'to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.' These payments differ from other federal-provincial transfers in that they are wholly unconditional. While the purpose of the equalization program is to ensure the implementation of basic standards across the country, it also respects provincial autonomy by providing each province with the capacity to deliver comparable programs. This program relies to some extent on federal-provincial arrangements but is first and foremost a federal program, as the funds for equalization come from the federal budget, collected from individual taxpayers across the country. This means that individuals in the poorer provinces receiving equalization payments also contribute to the program, albeit not on a net basis.

Until recently, the equalization program was relatively uncontroversial, at least in respect of its main orientations. But this is rapidly changing. The recent agreements, crystallized in the 2005 federal budget, between the federal government and the provinces of Newfoundland and Labrador on one hand, and Nova Scotia on the other, reveal a significant shift in the politics of equalization. These bilateral agreements, which in practice allow these provinces to retain all the revenues stemming from off-shore energy resources without having to suffer any clawback under the equalization program, are seen as a means by which these provinces will extirpate themselves from chronic poverty. Under that view, pan-Canadian solidarity expressed through equalization payments is certainly helpful, but insufficient to allow recipient provinces to enjoy a lasting and meaningful financial autonomy. This approach thus privileges empowerment over solidarity. And since the situation of each province is different in that respect, no one-size-fits-all solution can be considered. Asymmetry now becomes the name of the game.

However, such asymmetrical access to sources of revenues is noticeably different from the side deal Quebec was able to strike with the federal government in the context of the Health Accord of September 2004, to the extent that this side agreement can really be characterized as genuinely asymmetrical.<sup>22</sup> Indeed, the Quebec deal concerns only what, arguably, is already under that province's jurisdiction. Moreover,

other provinces could have requested a similar agreement and Quebec would not have opposed such a request. Last, it hardly affects the jurisdictional and financial position of other provinces. In sum, this agreement is far more limited in nature, scope, and potential impact on third parties than those concluded about off-shore resources by Newfoundland and Nova Scotia with the federal government, especially given that government's acceptance not to impose clawbacks on equalization payments to these provinces. Indeed, to the extent that one considers that redistribution is a norm in the Canadian federation, these deals could herald a major change in the understanding and implementation of that norm.

The emergence of these two different levels of intensity of asymmetry must be acknowledged in debates about redistribution in the Canadian federation, for both are likely to frame further discussions on this issue. These discussions will surely involve the usual constitutional actors – the federal government and the provinces – but they might also implicate new actors such as the autonomous Aboriginal governments that could be created in the future.<sup>23</sup> Such an eventuality, which should become a reality if Canada takes seriously its commitment towards Aboriginal peoples, will inevitably complicate the politics of redistribution and render the dilemmas of solidarity faced by this country even more acute.

Constitutional debates surrounding fiscal federalism do not take place in the abstract. The history of fiscal federalism in Canada reflects the constitutional challenge of the federal government having the resources but not the jurisdiction to deliver social programs and the provincial governments having the jurisdiction but not sufficient ability to raise the needed resources without federal assistance.

Federal-provincial fiscal arrangements for social programs began to emerge in force after the Second World War, when Canada, like all other Western democracies, embarked on constructing a Keynesian welfare state. Before medicare, medical services were available on the market just like any other service and were subject to the vagaries of supply and demand. The amount and quality of health care services a person could access thus depended on the individual's ability to pay. In 1948 the federal government established cost-matching and block grants for provincial activities in health care. In 1951 it began transferring per capita grants to universities. Arrangements to provide social assistance to seniors and to disabled, blind, and unemployed people

soon followed. These arrangements required provincial governments to spend money in compliance with federal conditions in order to receive federal grants.

In 1957 the equalization program made its first appearance. This program entitled the federal government to make unconditional grants to the poorer provinces in order to help finance their public services.<sup>24</sup> Equalization payments are established by a legislative formula which has varied over time, both in terms of the number of provinces used to calculate the national average to which other provinces were equalized (two in 1957, ten in 1962, two in 1964, ten in 1967, and finally five in 1982) and in the components of that formula (e.g., actual revenues versus revenue-raising capacity, and the relative weightings given to different revenue sources). The current formula attempts to measure each province's revenue-raising capacity and compare it to the average per capita revenue-raising abilities of five provinces (Ontario, Quebec, British Columbia, Saskatchewan, and Manitoba). Revenue-raising capacity is determined by a province's ability to raise revenues in each of thirty-three revenue sources, which include personal income tax, corporate tax, property tax, fuel taxes, and revenues from natural resources. Equalization payments are then made to provinces with revenue-raising capacities below the average amount in order to bring their fiscal capacity up to standard. When a province's abilities to raise revenues increase, its entitlement to equalization declines accordingly.<sup>25</sup>

The year 1957 also marked the beginning of federal involvement in the health care arena, with the introduction of the Hospital Insurance and Diagnostic Services Act. The act authorized the federal government to contribute 50 per cent of the cost of provincial hospital services, as long as the provinces made insured services available on the same uniform terms and conditions to all residents. The main problem with the scheme was that non-hospital services were not covered. Saskatchewan was the first province to go beyond the requirements of the act and extend its plan to cover all medical treatment. Saskatchewan proposed its new plan in 1959, and it was to come into force in 1962. In 1960, in an attempt to prevent Saskatchewan's model of comprehensive health care coverage from spreading to the other provinces, the Canadian Medical Association (CMA) requested that the federal government study the problem of health insurance. In response to this request, Prime Minister Diefenbaker created the Royal Commission on Health Services in 1961. The

royal commission, reporting back in 1964, recommended the implementation of universal, comprehensive health insurance across Canada. This recommendation was enacted as the Medical Care Act in 1966, which provided for federal funding on a 50/50 cost-sharing basis. The act provided coverage for non-hospital care and laid down specific provincial eligibility criteria. These included operation on a non-profit basis by a public authority, reasonable access by persons across the province according to uniform terms and conditions, coverage of no less than 95 per cent of the provincial population, and portability of coverage between the provinces. These criteria were eventually incorporated into the Canada Health Act's five principles of health care.

In the 1960s the provinces, especially Quebec, began to challenge the federal government's senior position in federal-provincial arrangements. They relied on their primary constitutional authority over social welfare policy and delivery and also cited a greater competence in forming and administering social programs, based on a better understanding of their regions and electorates. The federal government accordingly entered into an agreement with Quebec, whereby it provided a tax point transfer for university funding instead of direct payments, which was regarded as more intrusive. A few years later, in response to similar provincial pressures, the federal government offered tax points in place of existing social transfers, including those targeted towards social assistance and hospital insurance. However, only Quebec accepted this offer.

The next significant change in fiscal federalism was the establishment of the Canada Assistance Plan (CAP) in 1966. The CAP collapsed previous federal-provincial welfare arrangements into one harmonized program, based on an equal sharing of costs between the two levels of government. In exchange for federal funding, provincial social assistance programs had to comply with a set of national standards, including that every 'person in need' be eligible for social assistance at a level 'that takes into account the basic requirements of that person,' that there be no residency requirement for the receipt of social assistance, that there be an administrative appeals mechanism for decisions regarding applications for social assistance, and that all of these national standards be found in provincial law.

The next major change to the architecture of shared costs programs came with the Established Programs Financing Act (EPF), introduced in 1977. The EPF provided a block grant for health care and post-

secondary education, composed of equal parts of tax points and cash grants. The cash transfer portion of the arrangement was set to increase annually according to economic and population growth. However, the EPF soon demonstrated weaknesses. The federal government found the annual increases in cash transfers unacceptably high, and maintained that the provinces were failing to keep up their spending on health care and education.

Towards the end of the 1970s, the integrity of the Medical Care Act was also suffering due to extra-billing and user charges, both of which amounted to extra charges for patients. Public outcry over these direct charges led to the appointment of a special commission, led by the Honourable Emmett Hall, to review medicare coverage. In his report, delivered in 1980, Hall concluded that direct charges were undermining reasonable access to health care. The federal government's response sparked a battle that pitted the federal government against the health care profession and the provinces. The provinces resented the incursion into their jurisdiction, while the CMA considered Hall's recommendation a direct assault on its freedom. Despite these vociferous objections, the federal government adopted the Canada Health Act (CHA) in 1984. With the CHA, in order to qualify for cash contributions from the federal government, the provinces must comply with the five principles of health care: public administration, comprehensiveness, universality, portability, and accessibility.<sup>26</sup> The CHA reflected the position that health care is a national issue, not just a personal, community, or provincial one. Access to health care based on need and not the ability to pay became a defining Canadian characteristic and one of the most important aspects of Canadian social citizenship.<sup>27</sup>

But the consolidation and extension of the legislative framework for federal involvement in health care occurred alongside declining federal funding, which began in 1977, with the shift away from 50/50 cost-sharing to a block grant (the Established Programs Financing or EPF grant) consisting of a mixture of cash and tax points, with the cash component tied to an escalator based on growth in per capita gross national product (GNP). In 1982, the escalator was applied to the entire EPF entitlement, not just the cash component, making the EPF cash transfer strictly residual. The escalator was then eliminated in stages, first in 1986 (when it was reduced to GNP less 2 per cent), then in 1990 (when the EPF per capita transfer was frozen).

The reduction in federal contributions under the EPF was accompa-

nied by reductions in federal contributions under CAP. Perhaps the most famous of these was the 'cap on CAP,' whereby federal contributions to Alberta, British Columbia, and Ontario were capped in 1990, irrespective of the levels of demand for social assistance in those provinces. The sudden and severe reduction of transfers led to a provincial budgeting crisis, which put a significant strain on intergovernmental relations.

These limits on transfer payments stemmed largely from the persistent and growing federal deficit and debt. Given that the transfers represented a large portion of federal spending, reducing the transfers became part of the federal deficit reduction strategy. The provinces particularly resented the fact that they had set up their social services to conform to federal requirements, only to have the federal government unpredictably cut funding to those services.<sup>28</sup> Between 1989 and 1992 provincial deficits rose from \$1.5 billion to \$22.8 billion. British Columbia went so far as to challenge the legality of the federal government's unilateral decision to cap CAP.<sup>29</sup> While British Columbia lost its case in the Supreme Court, the action reveals the degree of animosity the provinces felt towards the federal government because of the transfer cuts.

In 1995 the federal government announced that CAP and EPF would be combined to produce the Canada Health and Social Transfer (CHST). Under the CHST, the federal government reduced funding for health, welfare, and postsecondary education from \$29.7 billion in 1995-6 to \$25.1 billion in 1997-8. The reduction in cash transfer payments was even more dramatic, falling from \$18.5 billion to \$12.5 billion. However, as a quid pro quo for reduced federal funding, the CHST also imposed fewer conditions on the provincial governments and gave them more independence in determining social policy. While national standards for health care under the CHA remained, all conditions for social assistance were removed with the exception of the prohibition on a minimum residency requirement.

Initial reaction to the CHST was overwhelmingly negative. Without the condition that provinces spend money on those most in need, and with block funds replacing matching grants, provinces had less incentive to spend money on their poorest inhabitants. Instead, they were free to fund whichever 'deserving' applicants they chose. In particular, the CHST allowed provinces to redistribute public funds away from welfare to more popular health and postsecondary education plans. Another criticism of the CHST was that it would destroy the cohesion

of Canada's national social system by giving the provinces the freedom to differentiate their social programs. Equalization payments had been designed for the purpose of ensuring that provinces were able to provide comparable services. With the prospect of greater provincial differentiation, the very reason for equalization would be undermined.<sup>30</sup> On the other hand, in a federal state, unity can hardly be synonymous with uniformity, and diversity in programs in areas which constitutionally fall under provincial jurisdiction can reasonably be seen as an inevitable incident of such a regime, even though that diversity might be deplored from a pan-Canadian nationalist perspective.

Although the limits to federal-provincial transfer payments affected all areas of social services, the concerns focused mainly on health care. In particular, it was feared that the reduction of cash grants would limit the federal government's ability to enforce the Canada Health Act. According to section 15 of the CHA, the governor in council can withhold federal transfers from provinces that fail to comply with the act's terms. With the reduction in transfer payments, the leverage the federal government had to enforce the CHA appeared weak. However, it is unclear whether the federal government had much leverage over the provinces in any event. Sujit Choudhry has noted that there is a large gap between the federal government's rhetoric supporting national health care and its enforcement of the CHA, since it is largely unaware of the degree of provincial non-compliance with the act. In cases of suspected non-compliance, the federal government's negotiations with the provinces have been kept secret.<sup>31</sup> In the auditor general's report of 1999, numerous instances of provincial non-compliance with the CHA were mentioned. Six of the cases were resolved without the use of financial penalties, while the other cases were not resolved at all. Enforcing the CHA is also discretionary. According to section 14, on finding that a provincial plan violates one of the act's five principles, the governor in council *may* direct that cash contributions to that province be reduced or withheld. This discretionary enforcement mechanism has never in fact been used.<sup>32</sup>

Nevertheless, the concerns that the federal government would be less able to uphold national standards of social services have, to some degree, been borne out. Some provinces began initiating direct patient charges in plain contravention of the CHA. Other provinces instituted more subtle changes by de-insuring previously covered health services, thus making health insurance less comprehensive. Finally, some provinces indicated less willingness to insure fully residents who



obtained services outside their home province, limiting the portability of public health insurance. These emerging disparities between provincial health care services have begun to weaken the ideal of truly national programs for the provision of social services. The recent Supreme Court decision in *Chaoulli v. Quebec*,<sup>33</sup> which struck down a provincial scheme prohibiting private insurance contracts in respect of medical services covered by the government, could further accelerate the demise of the public nature of the Canadian health care regime.<sup>34</sup>

In more recent years, the federal and provincial governments have attempted to build an effective partnership that would ensure adequate, stable, and predictable cash transfers, with less ambiguity and more transparency. Some of these sentiments were captured by the Social Union Framework Agreement (SUFA) of 1999, which was signed by all governments except Quebec.<sup>35</sup> The 1999 federal budget was advertised as a commitment to providing predictable health care funding to the provinces and introduced measures to eliminate provincial disparities.

Within the past five years, the federal and provincial governments have examined potential solutions to the funding of health care on several occasions. For example, the First Ministers' meetings of 2003 and 2004 have produced agreements that emphasize inter-governmental partnership even though they appeared to be brought about through inter-governmental strife.

The 2003 First Ministers' Accord on Health Care Renewal saw the federal government establish the Canada Health Transfer (CHT). This is supposed to correspond to provincial health care expenditures, previously accounted for within the larger category of provincial social spending under the CHST. The stated purpose of the CHT is to enhance the transparency of and accountability for health care funding, as well as to ensure predictable annual increases in health care funding.<sup>36</sup> The social spending envelope, formerly part of the CHST envelope, would now constitute a separate Canada Social Transfer (CST).

Through the 2003 accord, the federal government pledged a \$17.3 billion increase to health care over three years. Of that money \$16 billion was to go to a five-year Health Reform Fund to transfer resources to the provinces for investment in primary health care, home care, and catastrophic drug coverage. Implicit in the creation of this fund is recognition of the positive role the federal government can play through its use of the spending power. The structure of the fund recognizes that

provinces are at different stages in the areas targeted for reform. The fund gives the provinces the flexibility to use the transferred money at their discretion, as long as the money is spent in the areas of reform the fund was established for. For its part, the federal government committed to ensuring that the level of funding provided through the Health Reform Fund will be rolled into the CHT by 2008.

In September 2004, in the face of continuing federal surpluses, provincial deficits, and health expenses far outpacing economic growth, the federal and provincial governments came to another accord to strengthen health care. The federal government committed to providing \$41 billion over ten years for health care through the CHT. By 2009–10, the cash portion of the CHT is projected to be 45 per cent above current levels.<sup>37</sup>

Both the 2003 and 2004 accords were characterized by the federal government's attempt to set broader conditions for transfers while at the same time giving the provinces greater discretion in setting up and administering their health care programs. As noted, the 2004 accord also recognizes a form of asymmetrical federalism and Quebec's desire to retain its jurisdiction over health care. Under the agreement between Ottawa and Quebec City, Quebec may use transfer funds to implement its own plan for renewing the Quebec health care system.<sup>38</sup> Most importantly, these recent agreements reveal the relative effectiveness of the dynamic of interprovincialism that has characterized relations between provinces since the creation of the Council of the Federation in 2003 at the instigation of the government of Quebec. This new spirit of interprovincialism seeks to maximize the influence of provinces over the evolution of federalism in spite of their often divergent interests.<sup>39</sup>

The budget plan for 2004–5 also brought alterations to the equalization program. Changing economic and fiscal circumstances in the short term frequently led to volatility in equalization payments from one year to the next. For example, when Ontario's economy was growing rapidly relative to other provinces in the late 1990s, standard average raising-revenue capacity increased, causing equalization entitlements to increase. Similarly, when the Ontario economy is growing less rapidly, revenue-raising capacity gaps between high- and low-income provinces decreases, which leads to lower equalization payments. In order to make equalization payments more stable and predictable, the 2004 budget proposed to make payments based on a three-year moving average. Equalization entitlements for each fiscal year are thus

made on the basis of average entitlements for the three years preceding the fiscal year.

In view of the above, it is easy to conclude that the social, political, and economic model that has prevailed in Canada in the past half-century or so is undeniably shaken and is probably bound to be substantially transformed. Although this is surely a source of concern for a good number of Canadians, it could also be envisaged as an opportunity to reinvent the country on a new, but possibly more solid, basis. Such an endeavour might imply sacrificing some sacred cows and breaking a few taboos, but we should not forget that states are contingent entities, as are their structures and methods of functioning. And to the extent that the plausibility of a significant, if not radical, transformation of the Canadian federation is acknowledged, then Canadians should strive to be proactive rather than merely reactive to the changes to come and the manner in which they may be implemented.

This book on the problems raised by redistribution within the Canadian federation is a report of past conversations. It is also a new conversation and an invitation to further discussions. It originated in a conference, held at the Faculty of Law, University of Toronto, to which David Boothe, Andrée Lajoie, and Richard Simeon contributed the principal papers. Most of what appear in this volume as comments on those papers were presented at the conference. The book is thus partially a record of the conference. Other comments were solicited afterwards. In that respect, the book is a fuller conversation than ever occurred in the flesh. The complexity of the problems under consideration could not be satisfactorily addressed through the lens of a single discipline. One merit of the book's format – principal papers each followed by several comments – is that it facilitates a common discussion by contributors from various intellectual fields. The interdisciplinary dialogue is focused by people from different backgrounds speaking to the same paper. The fields of origin of the contributors to this volume's conversation all usefully inform and deepen our reflection on the dilemmas of solidarity in the Canadian federation.

Part one of this volume addresses the politics of redistribution, and opens with Richard Simeon's paper, 'Social Justice: Does Federalism Make a Difference?' Simeon explores the connection between federalism and social justice, and notes that this connection has traditionally been examined from two perspectives, one that focuses on the needs of individual citizens independent of their place of residence, and the

other that seeks to protect the freedom of provinces to set their policies on redistribution. Simeon dispels several myths about the relationship between federalism and distributive justice, and concludes that this relationship is, at best, slightly negative. Indeed, he shows that federalism only marginally influences the welfare performance of a state, and that the commitment to equality instead depends on other cultural, economic, and political forces. Simeon closes by reflecting on the current debate on fiscal imbalance. Observing that neither order of government has constitutional grounds for claiming exclusive jurisdiction over social citizenship, he argues that it is best to recognize social citizenship as a value that must underpin the programs and policies of all governments.

Sujit Choudhry explores Simeon's focus on federalism and social justice in the context of the recent debate over vertical fiscal imbalance. He notes that, until recently, the debate over vertical fiscal imbalance had obscured the fact of horizontal fiscal imbalance – that is, that redistribution occurs on a net basis from the residents of some provinces to those of others. Choudhry examines whether the conception of Canada as a sharing community, entailing transfers of wealth between residents of different provinces, is threatened by emerging political trends. One threat lies in federal policies that would loosen the conditions imposed on recipient provinces. The elimination of national standards could undermine the political motivation of wealthier provinces to maintain their own commitment to pan-Canadian retributive policies. Two trends could accelerate this process. The first one is the 'cities agenda,' which seeks recognition on the part of upper governments of the particular responsibilities and challenges faced by Canada's urban centres. Since Canada's major urban centres have been principally viewed as places to redistribute from, the question is whether the cities' agenda will lead urban Canada to challenge the arrangements of fiscal federalism. The second trend is the ethno-cultural diversification of these centres. Choudhry suggests that ethnic immigrants feel little or no loyalty towards traditional conceptions of Canadian federalism, and tend to be concerned with redistribution in their own urban communities rather than on a pan-Canadian scale.

Alain Noël starts his analysis where Simeon leaves off, with the conclusion that federalism is more or less neutral towards redistribution. Noël extends the logic of Simeon's position and contends that distributive justice turns more on politics than on institutions. The key factor for Noël is 'the politics of justice itself, the enduring conflict between

political and social actors of the left and of the right over the meaning of equality in a liberal society.' He opines that the most important changes that have taken place in Canada have concerned the scope and delivery modes of social programs rather than the commitment to redistribution itself. He thus argues that little empirical evidence supports Choudhry's contention that the cities agenda, coupled with new Canadians' disaffection or frustration toward federalism, have eroded the widespread support the Canadian redistributive model still enjoys. Moreover, emerging concerns for a greater solidarity of proximity and a concomitant adherence to a broader, pan-Canadian, solidarity should not be seen as contradictory. The main factor undermining the status quo remains the growing vertical fiscal imbalance in the federation, which 'undermines the capacity of provincial governments to maintain and develop the social programs for which they are responsible.' This fiscal imbalance is first and foremost a power imbalance that is amplified by the absence of clear and consensual rules governing federal-provincial transfers.

Part Two is intended to highlight differing perspectives on the use of the tax system to effect redistribution, from normative questions of distributive justice to political questions of provincial asymmetry to economic questions of optimal equilibrium. By shifting the focus from federal-provincial transfers to the progressive income tax, this section highlights the complexity of redistribution and the tensions between vertical and horizontal equity.

The principal paper for this part is Paul Boothe and Katherine Boothe's 'Personal Income Tax and Redistribution in the Canadian Federation.' In Boothe and Boothe's rich analysis of the progressive income tax (PIT), redistribution lies at the heart of the nexus between politics and markets in Canada. These authors' contribution to our knowledge about the extent and effect of redistribution through the progressive income tax system is noteworthy in at least two respects. First, they confirm that progressivity is not always what it seems in terms of redistributing income: in other words, steeper and steeper progressivity does not necessarily equal greater redistribution. Second, they highlight provincial disparities in vertical equity in Canada. Both observations have important implications for the nature and future of federalism in Canada.

The comments on this paper address both the arguments advanced by Boothe and Boothe and the arguments they choose not to advance. David Duff raises the issue of whether the redistributive effect of the personal income tax should serve as an instrument for distributive jus-

tice, and if so, whether this suggests a greater provincial or federal role in redistribution. Duff concludes that the answer as to how the PIT should redistribute is certainly not settled, and those who consider the progressive income tax to be an instrument for distributive justice are likely to be less sanguine than Boothe and Boothe about the direction of PIT reform in Canada over the last decade. Duff also discusses how the dynamics of constitutionalism interact with tax principles in the sphere of redistribution.

While Duff examines Boothe and Boothe's analysis on its own terms, Lorne Sossin challenges their premises from a different perspective. Sossin emphasizes the political dimension of vertical equity and questions the desirability of provincial convergence on redistributive strategies. He also questions whether the normative foundation of Canadian federalism can encompass concerns for equity and asymmetry. Sossin asserts that because the tax system is either unintelligible or unhinged from widely accessible norms of fairness and justice, Canadians lack a political vocabulary with which to make claims about why one degree of vertical equity is preferable over another. Consequently, arguments about the desired degree of vertical equity are more likely to be settled on economic grounds of the kind Boothe and Boothe advance. Sossin concludes that viewing the tax system through a political and not exclusively an economic lens will allow debates around redistribution to occupy the prominence thus far reserved for a contested view of 'tax competitiveness.' The search for a defensible and principled optimal degree of vertical equity, according to Sossin, should reflect a deeply political question – it is a challenge to the normative foundations of federalism.

Finally, François Vaillancourt highlights the link between the tax system and how the federal government spends its tax revenues. He argues that the federal government, flushed with surpluses, has abused its spending power and should be reined in by a new distribution of the progressive income tax field between provinces and the federal government which, coupled with more generous equalization, will make provinces responsible for raising the highest possible share of the monies they spend. Vaillancourt contends that the tendency since 2000 to see increases in federal transfers to provinces as the appropriate way to fund provincial spending, particularly in the health sector, has led first to the weakening of provincial autonomy in fields of provincial responsibility (by making it easier for the federal government to require more or less binding constraints) and second to the weakening of the interest of provinces in ensuring the proper management of public funds. This may be desired by those who believe that the federal

government should be more present in these areas of public policy, but Vaillancourt asks whether the proper route to achieve this goal would not be to modify the constitutional division of powers.

The third part of this volume marks a shift from redistribution through the raising of revenue to redistribution through federal expenditures. This section revisits long-standing debates surrounding the constitutionality of federal expenditures in areas of provincial jurisdiction, through the so-called federal spending power. In the principal paper, entitled 'The Federal Spending Power and Fiscal Imbalance in Canada,' Andrée Lajoie argues that the constitutionality of the federal spending power is tenuous at best. She situates her discussion against the backdrop of a narrative of constitutional centralization, in which she argues that the principal culprit is the Supreme Court of Canada and the legal doctrines of modern federalism. Juxtaposed against this narrative of centralization, her point is that federalist scholars who have argued for the constitutionality of the spending power implicitly derive support for their interpretive project by drawing upon this larger body of jurisprudence. Lajoie's response, based on a careful reading of the case law, is that federal expenditures in areas of provincial jurisdiction are likely unconstitutional. The implication of this legal conclusion for the debate on vertical fiscal imbalance is as follows: that since one manifestation of that imbalance are federal expenditures in areas of provincial responsibility, removing the legal basis of those expenditures can in turn be used to redress fiscal imbalance.

Daniel Weinstock picks up on Lajoie's disclaimer that she is not interested in the question of whether conditional federal spending in areas of provincial jurisdiction complies with normative theories of federalism. He argues that Lajoie in fact views the federal spending power as inconsistent with the federal principle. His question is whether federalism condemns this practice. He argues that the answer to this question depends on which conception of federalism one holds. In particular, he suggests that overlapping federalism, which countenances overlapping jurisdiction, is both more normatively attractive and more receptive to federal expenditures in areas of provincial jurisdiction. By contrast, side-by-side federalism, which argues for mutually exclusive spheres of jurisdiction, and which is hostile to the federal spending power, is not as normatively attractive.

Peter Russell also challenges Lajoie's thesis, but does so on doctrinal rather than normative grounds. He questions, in particular, her reading of a Privy Council precedent on the federal spending power, the

*Unemployment Insurance Reference*.<sup>40</sup> He favours a narrow reading of that case, on the basis that it involved compulsory schemes of contributory social insurance which clearly invaded provincial jurisdiction over employment contracts, and therefore did not rule upon non-contributory social insurance. Moreover, he argues that a stronger constitutional basis for federal social insurance programs would be Parliament's power to legislate for the peace, order, and good government of Canada, which was construed narrowly in the time of the Privy Council, but whose interpretation has been broadened by the modern Supreme Court. Finally, he argues that vertical fiscal imbalance is unavoidable in federations, because of the impossibility of designing constitutions in advance to align perfectly revenue-raising capacities with new areas of federal expenditure.

Rejecting Manichean approaches to the federal spending power, Jean-François Gaudreault-DesBiens also challenges Lajoie on the constitutionality of this power, but does so in a more nuanced fashion. He argues that this issue must be examined through the lens of a normative legal theory of federalism, with the following components: inter-provincial and federal-provincial loyalty; the relative autonomy and equality of federal actors vis-à-vis each other; solidarity between parties to the federal pact; and federative arbitration to resolve disputes over the division of powers and intergovernmental relations in the courts. His argument is that conditional federal spending in areas of provincial jurisdiction is sometimes constitutional because it is mandated by the principle of federal solidarity. Direct grants to private parties provide an example of such a constitutional use of the spending power. However, given the impact that it may have on provincial autonomy, he suggests the adoption of the following conflict rule: when an order of government spends, through direct grants to private parties, in a field that is constitutionally allocated to the other, that spending should be constitutionally allowed so long as it does not substantially undermine a policy or program promulgated by the order of government which does possess primary constitutional jurisdiction over the matter, or conflicts with its purpose.

Federalism and redistribution represent the two dominant narratives of the Canadian polity and yet the relationship between these two ideas remains largely unexplored. Together, the three parts which make up this volume attempt to both broaden and deepen the debate over redistribution in the Canadian federation. The principal papers

and comments address this debate through different disciplinary prisms but with a shared conviction that Canada's future will be determined by how the dilemmas of solidarity are resolved.

## NOTES

- 1 Commission on Fiscal Imbalance (Yves Séguin, chair), *A New Division of Canada's Financial Resources. Report* (Quebec: Bibliothèque nationale du Québec, 2002).
  - 2 Ontario Chamber of Commerce, *Fairness in Confederation. Fiscal Imbalance: Driving Ontario to 'Have-Not' Status* (Toronto: Ontario Chamber of Commerce, 2005).
  - 3 Institute for Competitiveness and Prosperity, *Fixing Fiscal Federalism* (Toronto: Institute for Competitiveness and Prosperity, 2005).
  - 4 Thomas J. Courchene, *Resource Revenues and Equalization* (Montreal: IRPP Working Paper Series no. 2005-04, 2005).
  - 5 Jason Markusoff, 'Hands off, Klein Warns,' *National Post*, 26 August 2005.
  - 6 As a result, any attempt at reforming redistribution policies and mechanisms will be fraught with difficulties. For example, even if the provincial and federal governments unanimously agreed on the appropriateness of sharing provincial revenues flowing from natural resources – a rather unlikely scenario – they would still have to define what exactly would be shared. Gross or net resource revenues? And through what type of mechanism? For a reflection on this, see Courchene, *Resource Revenues*, 20–3. Economist Pierre Fortin's approach to the problem of redistribution is even bolder than Courchene's. Examining the case of Alberta, Fortin first notes that all provinces benefit, or will eventually benefit, from the oil boom in Alberta. Given the small size of that province, it has to rely on workers and businesses from other provinces. Inevitably, he argues, this will help create jobs not only in Alberta but elsewhere as well. However, should a lasting oil crisis erupt and the price of oil dramatically increase, a major recession would probably hit oil-dependent provinces such as Ontario, Quebec, and British Columbia. Fortin is of the view that such a situation could force the federal government to intervene, even if it meant imposing upon Alberta a revamped version of the much-hated National Energy Program. Fortin observes in this respect that the rest of Canada helped Alberta when it experienced a crisis in the 1930s. Absent a show of goodwill on the part of Alberta, some form of 'compelled solidarity' could be inevitable. However, this would very likely provoke a new constitutional crisis. But there is
- more. Returning to the criteria to be used in determining the amount of resource revenues to share, Fortin observes that although Alberta is four times less populous than Ontario, it has released 221 million tons of greenhouse gases in 2002, compared to 203 million for Ontario and 91 million for Quebec. The gases released by Alberta in exploiting the very resource that makes it wealthy thus impact on Canada's global environment. These emissions also largely explain Canada's performance as one of the worst of all industrialized countries under the Kyoto Protocol. Fortin concludes that this situation could legitimize a federal intervention, which would, again inevitably, provoke a major backlash in Alberta. See Pierre Fortin, 'Tout à l'Alberta, rien pour les autres?' *L'Actualité* 30, no. 15 (1 October 2005), 50, 51–2. This begs at least two questions. First, can, or should, the extra-provincial externalities caused by a province's exploitation of a resource provide a rationale for redistributing the wealth flowing from this resource? Second, do the general costs imposed on other provinces as a result of the pollution caused by this exploitation as well as the specific cost Canada incurs as a result of not being able to meet its international obligations under the Kyoto Protocol constitute sufficient grounds for warranting a federal intervention under the national concern branch of Parliament's power to legislate for the peace, order, and good government of Canada?
- 7 Paul Barker, 'Disentangling the Federation: Social Policy and Fiscal Federalism,' in Martin Westmacott and Hugh Mellon, eds., *Challenges to Canadian Federalism* (Scarborough, ON: Prentice-Hall Canada, 1998), 144.
  - 8 Douglas M. Brown, 'Fiscal Federalism: The New Equilibrium between Equity and Efficiency,' in Herman Bakvis and Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, ON: Oxford University Press, 2002), 59.
  - 9 Barker, 'Disentangling the Federation,' 144–5.
  - 10 *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.
  - 11 *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. The test was initially elaborated by Justice Jean Beetz in his opinion in *Reference Re Anti-Inflation Act*.
  - 12 *R. v. Crown Zellerbach*, at 431–2.
  - 13 For a vigorous critique of such approaches, see Jean Leclair, 'The Elusive Quest for the Quintessential "National Interest,"' *University of British Columbia Law Review* 38 (2005), 353.
  - 14 Indeed, the Supreme Court has shown itself to be rather lukewarm about an expansive use of the national concern branch of the POGG power as expounded in *R. v. Crown Zellerbach*. See *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Quebec*, [1997] 3

- S.C.R. 213. In *RJR-Macdonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 and *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, the court declined to address arguments based on the national concern branch of the POGG power and found that the federal power to legislate over criminal law provided a more specific constitutional basis for the federal laws impugned in these cases.
- 15 The concerns that the application of the national dimensions branch of the POGG power raises in respect of the 'scale of effect on provincial legislation' (to quote from *Crown Zellerbach*) of federal measures defended on that basis could possibly be partly alleviated if Parliament's second house, the Senate, was a truly federal chamber where provincial delegates would participate in the federal legislative process. This is notably the case in Germany, with the Bundesrat. This would obviously imply amending the constitution to reform the Senate, a quasi-impossible task as past experiences have shown.
  - 16 *Winterhaven Stables Ltd. v. Canada (Attorney-General)* (1988), 53 D.L.R. (4th) 394 (Alta. C.A.), leave to appeal to SCC refused (1989), 55 D.L.R. (4th) viii.
  - 17 *Winterhaven Stables*, at 416, 432-5.
  - 18 Jean-François Gaudreault-DesBiens, 'The Canadian Federal Experiment, or Legalism without Federalism? Toward a Legal Theory of Federalism,' in Manuel Calvo-García and William Felstiner, eds., *Federalismo/Federalism* (Madrid: Dyckinson, 2004), 81.
  - 19 This points to the de-juridification of federalism-related disputes over the past decades or so in Canada.
  - 20 Sujit Choudhry, 'Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy,' *University of Toronto Law Journal* 52 (2002), 163, 198-200.
  - 21 Denys Arcand, *Le confort et l'indifférence* (Jean Dansereau and Roger Frappier, producers, National Film Board of Canada, 1981).
  - 22 It is asymmetrical in the sense that only Quebec signed such a deal. However, this deal merely reflects an acceptance by the federal government to not exercise its spending power conditionally in a field that is already constitutionally devolved to provinces.
  - 23 On this, see Michael J. Prince and France Abele, 'Funding an Aboriginal Order of Government in Canada: Recent Developments in Self-Government and Fiscal Relations,' in Harvey Lazar, ed., *Toward a New Mission Statement for Canadian Fiscal Federalism* (Montreal and Kingston: Institute of Intergovernmental Relations, 2000), 337.
  - 24 For a brief overview of the history of the equalization program, see Tom J. Courchene, *Renegotiating Equalization: National Polity, Federal State, International Economy* (Toronto: C.D. Howe Institute, 1998).
  - 25 'The Budget Plan 2004, Annex 6: Renewing Equalization and Territorial Formula Financing,' online: Department of Finance, <<http://www.fin.gc.ca/budget04/pdf/bp2004e.pdf>>
  - 26 David Cameron and Jennifer McRae-Logie, 'Cooperation and Dispute Resolution in Canadian Health Care,' in Harvey Lazar and France St-Hilaire, eds., *Money, Politics and Health Care: Reconstructing the Federal-Provincial Partnership* (Montreal: Institute for Research on Public Policy and Institute of Intergovernmental Relations, 2004), 79-134; Harvey Lazar, Keith Banting, Robin Boadway, David Cameron, and France St.-Hilaire, 'Federal-Provincial Fiscal Relations and Health Care: Reconstructing the Partnership,' in *ibid.*, 251-88.
  - 27 Although a public, needs-based, health care regime has indeed become part of the dominant Canadian identity narrative, notably as a means to distinguish Canada from the United States, this is less true in Quebec, where support for that regime is arguably not rooted in a particular conception of Canadian identity but rather in the social-democratic leanings of Quebec's political culture.
  - 28 Antonia Maioni, 'Health Care in the New Millennium,' in Bavkis and Skogstad, eds., *Canadian Federalism*; 87, 95.
  - 29 *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.
  - 30 Barker, 'Disentangling the Federation,' 152, 149.
  - 31 Sujit Choudhry, 'Bill 11, the *Canada Health Act* and the Social Union: The Need for Institutions,' *Osgoode Hall Law Journal* 38 (2000), 39, 53.
  - 32 *Ibid.*, 52.
  - 33 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.
  - 34 For a variety of perspectives on the *Chaoulli* case, see Colleen M. Flood, Kent Roach, and Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance* (Toronto: University of Toronto Press, 2005).
  - 35 In line with its traditional policy, the government of Quebec did not want to legitimize in any way federal claims about the validity of conditional spending in areas of provincial jurisdiction or the legitimacy of federal monitoring of the delivery of programs under provincial jurisdiction. For Quebec perspectives on the SUFA, see Alain Gagnon and Hugh Segal, eds., *The Canadian Social Union without Quebec: 8 Critical Analyses* (Montreal: IRPP, 2000).
  - 36 '2003 First Ministers' Health Accord,' online: Health Canada at [http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2003accord/fs-if\\_1\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2003accord/fs-if_1_e.html).
  - 37 'New Federal Investments on Health Commitments on 10-Year Action Plan on Health,' online: Health Canada at [http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2004-fmm-rpm/bg-fi\\_inv\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2004-fmm-rpm/bg-fi_inv_e.html).

38 'Asymmetrical Federalism that respects Quebec's Jurisdiction,' online: Health Canada at [http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2004-fmm-rpm/bg-fi\\_quebec\\_e.html](http://www.hc-sc.gc.ca/hcs-sss/medi-assur/fptcollab/2004-fmm-rpm/bg-fi_quebec_e.html).

39 On the Council of the Federation and on the possibilities and limits of inter-provincialism, see Jean-François Gaudreault-DesBiens, 'La transformation du fédéralisme canadien sous l'impulsion du Conseil de la Fédération?' *Revue belge de droit constitutionnel* 2 (2004), 243.

40 *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 355.

## PART ONE

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### Social Justice and the Politics of Redistribution