

NOTE

A New Federal Role in Building the Social Safety Net for Disabled Persons

*Bryan Schwartz**

I. INTRODUCTION

II. OVERALL APPROACH

III. A REVIEW OF EXISTING PROGRAMS AND RECOMMENDATIONS FOR NEW DIRECTIONS

- A. Federal Laws Prohibiting Discrimination Against
Disabled Persons**
- B. Federal Programs that Increase Access to Existing
Programs Beneficial to Disabled Persons**
- C. Classic National Shared-Cost Programs: Canada
Assistance Plan and VDRA**
- D. A Set of Bilateral Deals Between the Provinces and
the Federal Government**
- E. Tax Deductions and Credits**
- F. Guaranteed Annual Income**
- G. Long Term Disability Insurance**
- H. Consolidation of Decision-making Tribunals**
- I. Labour Market Training**

IV. CONCLUSION

I. INTRODUCTION

THE FEDERAL GOVERNMENT, UNDER the aegis of the Minister of Human Resources, is currently (mid-1994) conducting a comprehensive review of its role in supporting the "social safety net."

* Faculty of Law, University of Manitoba. This paper is based on a presentation made in May, 1994 to a seminar in Winnipeg sponsored by the Manitoba League of the Physically Handicapped and the Canadian Paraplegic Association. The author wishes to thank the Legal Research Institute of the University of Manitoba for its support and Ali Lamont for her assistance with research.

Under present arrangements, the federal government has a substantial role in redistributing wealth to social welfare programs through the taxation system and federal subsidies. The federal government also plays a major role in income stability programs; it has exclusive jurisdiction over unemployment insurance, and an expressly-recognized role with respect to old age pensions, albeit one that is subordinate to conflicting provincial laws.

The context for the review includes two main points: the federal government has a massive debt and continues to run up huge annual deficits, and there continues to be a strong separatist movement in Quebec. In that context, the federal government must simultaneously seek to promote a variety of goals that do not sit easily together.

The federal government must try to spend less money on social programs. It must ensure the most effective use of the remaining funds. Social welfare spending must go to the neediest, and human investment programs, such as labour market training, must produce the greatest returns. The effort to target programs more effectively must somehow be accomplished without offending Quebec nationalists, who are sceptical or resentful of any effort from Ottawa to dictate programs that involve provincial jurisdiction.

At the same time, the federal government must try to show moderate Quebec nationalists, and indeed all Canadians, that the federal government can be a humanitarian but efficient leader in maintaining a Canadian social safety net. The Charlottetown Accord,¹ the latest effort at revamping Canada's formal constitution, included a recognition that Canada is a "social union." The existence of a coherent social safety net, led by the federal government, may be crucial to Canada's ability to maintain any sense of national community. Several of the older symbols of national identity, such as the Queen, have lost their relevance to many Canadians. The dream of defining and uniting Canadians through widespread personal bilingualism is apparently not going to be achieved. In the global information age, in which Canadians are as "plugged in" as anyone — to satellite and cable television, computer networks, imported books, magazines, music cassettes and software — it is clearer than ever that Canadians do not have a cultural identity that is sharply distinct from that of the United States.

This paper attempts to address the larger issues connected with the review of the social safety net by focusing on one particular aspect of

¹ Canada, *Consensus Report on the Constitution, Charlottetown, August 28, 1992*, Final Text (Ottawa: Government of Canada, 1992).

it: programs for disabled persons. Persons with mental and physical handicaps can be profoundly affected by state policies concerning social assistance, non-discrimination and investment in human resources.

When the federal government produced an "issues paper" on the review of the social safety net, it made only passing reference to the needs of disabled persons.² The scant mention lent special urgency to an effort by various advocacy organizations for the disabled to hold a conference on the review of the social safety net, in order to prepare and present a co-ordinated position to the federal government. This paper is the outgrowth of a paper that was invited to and presented at that conference.

II. OVERALL APPROACH

THE OVERALL PHILOSOPHY BEHIND this note has already been stated in part: that a crucial part of nation-building is a continuing federal role in defining and underwriting the social safety net.

Another principle driving the recommendations to follow is that government should be open to the "re-inventing government" philosophy. As defined in the highly influential book by Osborne and Gaebler,³ that philosophy calls for government to define important social objectives, but to be flexible and market-oriented in how it achieves them. Harnessing private ingenuity and incentives to the pursuit of public goals may be the most efficient way of achieving them. Furthermore, providing space for individual imagination and initiative is a good in itself.

A traditional approach to pollution would be for the government to enact minute regulations on how much of a noxious gas any particular plant can release into the environment. A "re-inventing government" approach might put a tax on the release of the pollutant, and leave it to private operators to find the most effective trade-offs between paying for emissions and eliminating them. Another "re-inventing government" approach would be for government to define the annual amount of the pollutant that is tolerable, and sell "pollution rights" to individual operators. The rights will be purchased by those operators who can, with a given amount of emissions, produce the most profits

² *A Study on the Modernization and Restructuring of Canada's Social Security System: A Focus Paper for Phase One of the Consultation Process* at 3.

³ David Osborne & Ted Gaebler, *Reinventing Government*, (Reading, Mass.: Addison-Wesley, 1992).

— which will often be accompanied by job growth and higher tax revenues.

A disabled person may be a better judge of what kind of retraining she needs than a government bureaucrat. Governments might give disabled persons money or vouchers to buy training from private operators, consistent with the “re-inventing government” philosophy, rather than operating government agencies that determine who will be given access to training, and in what area. Those who deliver retraining programs will have market incentives to do an effective job.

With respect to disabled persons, the “re-inventing government” philosophy should be consistent with another principle: that programs for disabled persons should maximize the freedom and choice that is possible for the beneficiaries.

Some promising experiments have already been conducted giving disabled persons more power in the market, rather than being subject to bureaucratic discretion. Under these experiments, the disabled person is given a budget to spend on a particular form of personal assistant, and authorized to hire, supervise and, if necessary, dismiss the person themselves. Anecdotal evidence is that disabled persons feel more in control, and the personal assistants treat them with greater respect.

Having outlined the general approach to issues involving disabled persons, it may be useful to preview the particular recommendations that will be presented in this paper:

- (a) The federal government should have a more direct and visible role in directing money to the support of disabled persons. The enhanced profile would give federal politicians more electoral and psychic incentives for funding various programs. It would help to strengthen national unity by giving the federal government a clearly-defined, nation-wide and humanitarian role in the area. The lines of political and democratic accountability would be clearer than under many federal-provincial shared-cost programs. Among federal and provincial politicians, there will be less “passing of the buck” (as opposed to passing the bucks).
- (b) The federal government should develop some programs that have a “free market” orientation. The individual disabled person would be given spending options, and would be enabled to make his or her own decisions, rather than being subordinate to a bureaucrat’s assessment of his or her situation. The disabled person would be able to garner economic rewards for making prudent decisions.

The distribution of "training vouchers" to disabled persons, as well as to other unemployed individuals, might give the federal government a direct and positive role in labour market training. A voucher-holder would be able to use it to purchase training from the program of his or her choice, without seeking permission from federal or provincial bureaucrats. There would be almost no federal interference with the provincial or private administration of the training programs themselves.

If appropriately structured, market incentives can sometimes maximize individual choice and dignity, reduce the costs and oppression of bureaucratic decision-making, and achieve governmental objectives at the least cost to everyone involved.

- (c) It may be useful to consider options that are middle-sized in ambition and focused specifically on disabled persons, rather than focusing only on radical and comprehensive ones. Large-scale, across-the-board reforms may appear to politicians to be too risky, too expensive, or too difficult to properly plan and implement. But some creative new programs of moderate ambition might be seen as stepping stones to more comprehensive reforms later on. For example, a refundable tax credit for disabled persons might be seen as a first and experimental step that might be part of a national Guaranteed Income Program later on.
- (d) Integrating disabled persons into the mainstream is undoubtedly a primary goal of governmental policy. It does not necessarily follow that assistance to disabled persons must be delivered through universal programs. There may be advantages to having some separate programs, or distinct aspects of larger programs. If government reform of the social safety net takes place incrementally, through a variety of pilot projects and experiments, it may be good strategy to recommend that some of these new projects focus on the needs of disabled persons.
- (e) A single, comprehensive program to deal with all aspects of disability compensation — Autopac, workers' compensation, private insurance and so on — cannot be legislated unilaterally by the federal level of government. The provinces have exclusive jurisdiction over issues such as private and public insurance and tort reform, and primary jurisdiction over matters such as old age pensions. A comprehensive program could only be achieved by consensus of all the provinces and the federal

government, a prospect which (history shows) is extremely unlikely. In any event, while program fragmentation is a serious problem, there are advantages to having a "dozen flowers bloom." Provinces and federal governments can experiment with different programs, and apply lessons from the successful ones to other programs.

- (f) At the same time, the federal level of government has the constitutional authority to delegate administrative authority to provincial bodies. So a single agency in each province could, for example, assess the level of an individual's disability for all purposes — auto insurance claims, income tax deductions and so on. The consolidation of the court system has successfully streamlined the administration of justice in several areas, such as family law, where there are a variety of federal and provincial legal regimes in force. It may be that constitutional requirements associated with the position of the Superior Courts would require that the "one-stop" decision-making body be presided over by a federally-appointed superior court judge.
- (g) The federal government could also participate in programs whose primary objective is to facilitate access to the network of programs that do exist. One recently extinguished program is the Court Challenges program, which underwrote the costs of bringing equality claims under the *Canadian Charter of Rights and Freedoms*,⁴ Federal and provincial governments could set up a quasi-independent "access agency" in each province to help disabled persons make use of available programs. It would publish guidebooks (user-friendly books and computer software) and hire advisors who would provide assistance (in person, over the phone, or through computer mail). The ranks of advisors could be largely staffed by people who are themselves disabled. Another promising alternative would be for the federal government to fund a variety of competing access agencies. A disabled person would be able to choose which access agency provides the most helpful advice in dealing with government bureaucracies. Federal and provincial governments would subsidize the costs of serving the individual client.

The analysis that will be presented will, it is hoped, be consistent with some of the ideas that seem to recur in studies prepared on behalf of

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

disabled persons: that the social security system should be simpler, put more emphasis on individual choice, and place a strong focus on enabling disabled persons to find satisfying and remunerative employment. The approach is also intended to be consistent with the "Re-inventing Government" philosophy, which includes harnessing market forces to the pursuit of governmental objectives.

III. A REVIEW OF EXISTING PROGRAMS AND RECOMMENDATIONS FOR NEW DIRECTIONS

A. Federal Laws Prohibiting Discrimination Against Disabled Persons

In the United States, governmental practice and court approval has allowed the federal government an almost unlimited role in outlawing discrimination against disabled persons. The federal government of the United States is able to use its power under the 14th amendment to enact laws that apply to almost all economic actors in the United States.

In Canada, there is no special head of federal or provincial power with respect to "discrimination." The level of government that has jurisdiction over a sphere of activity will have jurisdiction over discrimination in that sphere.

Provinces have jurisdiction over local trade and commerce, and it is provincial human rights statutes that apply to most economic activities. The *Manitoba Human Rights Act*⁵ applies to most private-sector economic transactions in this province, including renting accommodations, and hiring employees in most businesses.

The federal government has authority over discrimination in the federal public sector (federal public servants, Crown employees, Indian governments). There is also federal authority over discrimination in the "federal private sector" — private enterprises whose economic activities come under federal authority (such as railways, airlines, telephones, maritime shipping, radio and television). The *Canadian Human Rights Act*⁶ directly prohibits discrimination against disabled persons in the federal public and private sectors. Public agencies will investigate, and if necessary, punish those who do not comply.

The federal government is sometimes able to influence policies in areas it cannot directly regulate. It does so through its powers to tax

⁵ S.M. 1987-88, c. 45, C.C.S.M. c. H175.

⁶ R.S.C. 1985, c. H-6.

and spend. It makes it a condition of obtaining a federal grant or contract that an individual or enterprise complies with certain federal policies.

The federal *Employment Equity Act*⁷ is based on "contract compliance." Employers are not required *per se* to comply with the Act, but must do so if they want to do business with the federal government. So far, no one has challenged the constitutional authority of the federal government to influence the personnel policies of private sector employees in this way. It is not absolutely certain that such a challenge would fail. The case law does suggest that at some point, the use of federal spending power amounts to regulating an area that is supposed to be under provincial jurisdiction. The Courts have not made it clear where they will "draw the line." Here is some speculation on the factors the Courts might consider:

- (a) Whether the federal government has any jurisdictional legs to stand on, apart from its spending power. If the federal government is contracting in an area of federal jurisdiction (building airports as opposed to funding universities), it is more likely that the Courts would tolerate the imposition of heavy federal conditions.
- (b) The intrusiveness of the conditions. Does the federal government encourage a fundamental reshaping of the behaviour of an organization, as opposed to mildly redirecting it? The more intrusive the legislation, the less likely it will be upheld.
- (c) The level of detail in the regulations. Does the federal government insist only on a few general conditions, or does it require compliance with a detailed code of conduct? The more the detail, the less likely the federal legislation will be upheld.
- (d) The onerousness of the legislation. It may be that the Courts will be more sympathetic to upholding legislation in which there is a reasonable correspondence between the demands made on private sector individuals and the positive rewards provided. When the federal government is providing ample "carrots," the Courts may be inclined to view legislation as a "spending" program. When the federal government is trying to impose burdens and costs on private sector actors, without supplying positive incentives, the Courts might be more inclined to view the program as an unconstitutional attempt to "regulate" an activity.

⁷ R.S.C. 1985, c. 23 (2nd Supp.).

The federal *Employment Equity* legislation does not provide detailed regulations or purport to reshape the basic behaviour of private employers. On the other hand, it does have an important impact on personnel policies, and it does operate within areas (local labour relations, educational institutions, etc.) that are squarely within provincial jurisdiction. If challenged, the legislation would probably be upheld. In practical terms, the Courts would be reluctant to strike down legislation that is intended to help traditionally disadvantaged groups.

A paper by the Canadian Paraplegic Association suggests that the *Employment Equity* legislation has not had much impact on the hiring of disabled persons. As long as they show a reasonable effort, employers will be certified as being in compliance with the federal program. It may be cheaper for employers to show progress towards hiring goals on some fronts (the hiring of women and “visible minorities”) than on others. The *Employment Equity* legislation supplies no distinct financial incentives to cover the costs created by hiring disabled persons.

In some environments, the advocates for other target groups may be more numerous and well-organized than those with a strong interest in promoting the interests of disabled persons. As a result, disabled persons may be among the least preferred in any internal competition among employment equity “target groups.”

Recommendation

It appears that disabled persons do not want any special tax incentives created for disabled persons as such. They tend to believe that government incentives for hiring (as opposed to covering the employer’s actual costs of accommodating disabled persons) are demeaning and stigmatizing to the disabled person. The following options are, however, worthy of consideration:

- (a) federal tax incentives for creating employment in general (the current web of regulation and taxes tend to discourage hiring);
- (b) reviewing the *Employment Equity* program to determine whether it is of less assistance to disabled persons than it is to other targeted groups, and make appropriate revisions to counter that tendency;
- (c) publicizing the doctrine of “reasonable accommodation”⁸ under

⁸ The leading Canadian cases on “duty of reasonable accommodation” include *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 417 (S.C.C.) in which the Supreme Court of Canada overruled one of its earlier decisions,

federal human rights law, which requires that employers make modest adjustments in order to ensure that disabled persons have a fair opportunity to compete for employment and promotions;

- (d) adjusting the tax system or human rights legislation to ensure that employers are compensated for the actual expenses of accommodating disabled employees.

B. Federal Programs that Increase Access to Existing Programs Beneficial to Disabled Persons

The federal government used to run the Court Challenges Program, whereby it would subsidize the cost to individuals and groups of bringing forward legal actions under the *Canadian Charter of Rights and Freedoms*.⁹ The program was axed three years ago, and still has not been restored.

The idea of federal funding to permit access to existing programs seems to be one that is worthy of far wider extension. The discussion papers prepared for advocacy groups for disabled persons constantly emphasize the difficulty to the individual of taking advantage of programs that are already in place. There are a welter of different programs, run by different orders of government. An individual may not even be aware that the program exists, or be discouraged by the amount of time and energy needed to complete the paperwork and satisfy the appropriate bureaucrats.

The Court Challenges Program was a special case in terms of federal-provincial relations. The federal government was funding challenges to both federal and provincial laws, but under the umbrella of the Charter, a national institution that transcends the federal/provincial division of powers.

Programs for disabled persons, however, are split along federal and provincial lines, primarily through the cost-shared frameworks of the

and took a more generous approach to the duty to accommodate. Where an employer's practices have a discriminatory effect on someone because of his special needs, the employer must make adjustments to accommodate the individual, as long as doing so does not create "undue hardship." Another important decision is *Re Saskatchewan Human Rights Commission et al. and Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93, in which the Saskatchewan Court of Appeal held that a movie theatre discriminated against persons in wheelchairs by not providing them with adequate options in terms of seating. See generally M.L. Berlin, *Reasonable Accommodation: A Positive Duty to Ensure Equal Opportunity*, 1984-85 Canadian Human Rights Yearbook, 137.

⁹ *Supra* note 1.

*Canada Assistance Plan*¹⁰ and the *Vocational Rehabilitation of Disabled Persons Act*.¹¹ Suppose the federal government wanted to set up an agency to help people access both federal and provincial programs. Would there be any constitutional impediments to the federal government funding and establishing such a system? Probably not. The federal government could almost certainly use its spending power to help people make proper use of provincial, as well as federal, programs. The federal government would not be interfering with any substantive provincial rules and regulations.

On the other hand, the federal government would probably not consider it appropriate to foot the entire cost of an “access” program that opens the door to provincial programs. It would seem like an unfair sharing of fiscal burdens. It might also offend the dignity of provinces with a strong sense of “provincial rights.” Furthermore, no “access” program is going to work successfully without expertise and commitment from the provincial, as well as the federal, side.

Recommendation

Disabled persons might benefit greatly from the creation of a system that would facilitate their access to the wide, and often confusing, array of programs that exist at different levels of government.

One option would be for the federal and provincial governments to co-operate in establishing a single “one-stop” access agency in each province. The agency would be independent of government. It would issue simple, plain English (or French) guidebooks (or videos or computer software) that would help inform disabled persons about the programs available to them. There would also be a group of advisors, who could be contacted (in person, by phone or computer) for direct advice and guidance.

Another promising alternative would be for the federal government to fund a variety of competing access agencies. A disabled person would be able to choose which access agency provided the most helpful advice in dealing with government bureaucracies. Federal and provincial governments would subsidize the costs (perhaps through a voucher system) of serving the individual client.

¹⁰ R.S.C. 1985, c. C-1.

¹¹ R.S.C. 1985, c. V-3.

C. Classic National Shared-cost Programs: *Canada Assistance Plan and Vocational Rehabilitation of Disabled Persons Act*¹²

A classic national "shared-cost" program has the following features:

- (a) it operates in an area of primarily provincial jurisdiction;
- (b) the federal government picks up a percentage (usually 50%) of the actual costs of running the program;
- (c) federal funding and a few basic federal principles apply to all provinces.

The theory behind national shared-cost programs goes something like this. The federal government may not be able to regulate in provincial areas, but it does have broad authority to spend its money as it likes. The federal government can offer money to provinces or individuals, with or without "strings."

By national cost-sharing programs with the provinces, the federal government achieves the following goals:

- (a) It establishes basic national principles in a social welfare area, and thereby strengthening national unity and social justice;
- (b) It enhances the returns for given federal expenditures; the provinces end up picking up half the costs of a program;
- (c) It discourages waste; the provinces must contribute their own dollars, and so are encouraged to operate the most cost-effective programs;
- (d) If funding is distributed according to a national formula, provinces will receive money on an equitable basis. By contrast, if the federal government makes a series of bilateral deals with different provinces, the most politically powerful provinces will end up with a disproportionate share of the benefits.

Those who are critical of national shared-cost programs argue as follows:

- (a) they violate the spirit of federalism. In areas where it cannot regulate, the federal government can still effectively dictate its policy objectives by bribery;
- (b) they blur the lines of political accountability (neither the federal nor the provincial government is clearly responsible for a program);
- (c) they distort provincial spending priorities (provinces can spend "50 cent dollars" in the shared cost areas, and so are likely to divert funds from other areas);

¹² *Supra* notes 10-11.

- (d) they can be of limited benefit in “have not” provinces, where the province may not be able to ante-up enough money to make optimal use of the matching federal funds.

There have been few legal tests of federal shared-cost programs. Both federal and provincial governments have preferred to settle disputes over them politically, rather than taking the risk of seeking a definitive court statement that approves or limits the federal spending power.

In the *Winterhaven Stables* case,¹³ however, an individual taxpayer challenged the validity of the entire range of national shared-cost programs, including CAP. The Alberta Court of Appeal rejected the challenge. It noted that there is a very long history of federal provincial shared cost programs; also, that s. 36 of the *Constitution Act, 1982*,¹⁴ gives the federal government a general obligation to provinces to make transfer payments in order to ensure “reasonably comparable levels of public services at reasonably comparable levels of taxation.” In addition, the Meech Lake Accord¹⁵ would have implicitly acknowledged the federal spending power.

The Alberta Court of Appeal endorsed the following conclusions:

... the legislation under review is not legislation in relation to provincial matters of health, post-secondary education and welfare but is legislation to provide financial assistance to provinces to enable them to carry out their responsibilities.

Parliament has the authority to legislate in relation to its own debt and its own property. It is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition as long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority. The federal contributions are now made in such a way that they do not control or regulate provincial use of them. As well there are opting out arrangements that are available to those provinces who choose not to participate in certain shared-cost programs.¹⁶ [emphasis added]

National “shared-cost” programs have historically included some major successes. Medicare was created and maintained largely through the

¹³ *Winterhaven Stables Ltd. v. Canada (A.G.)* (1986), 29 D.L.R. (4th) 394 (Alta. Q.B.), aff'd (1988), 53 D.L.R. (4th) 413 (C.A), leave to appeal to S.C.C. refused (1989).

¹⁴ Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

¹⁵ *Canada, Constitutional Accord, 1987* (Ottawa: Government of Canada, 1987) [may also be cited as the *Constitutional Amendment, 1987*].

¹⁶ *Ibid.* at 434.

imposition of conditions on national shared-cost programs. The *Canada Health Act, 1984*,¹⁷ established the five basic pillars of medicare (including a ban on extra-billing) and threatened any non-complying province with cut-backs in federal funding.¹⁸ Medicare is widely regarded as one of the few remaining public institutions that help to define and bolster a sense of Canadian identity (the Charlottetown Accord would have written basic medicare principles into the "Social Charter").

The Meech Lake and Charlottetown Accords both would have limited federal authority in the area of national shared-cost programs. Provinces would have had the right to opt-out of national programs. They could claim the money they would have received if they had participated in the program, as long as they operated their own programs or initiatives that were "compatible with the objectives" of the national program.

The meaning of the Meech/Charlottetown provisions was far from clear, but they arguably would have represented a significant risk to the future of national programs. Why would the federal government bother funding a program if provinces could grab the money, create their own alternative to the federal program, and get the psychological and political credit for delivering the program to the public?

Although the Meech and Charlottetown Accords were ultimately defeated, their provisions on the spending power represent a point of reference for Quebec and other decentralist provinces. Depending on the mood of the time (especially the intensity of Quebec nationalism) future federal programs may draw protests unless they allow the generous sort of "opting out" contemplated by Meech/Charlottetown.

With respect to disabled persons, the CAP and VHRPA, the shared-cost route leads to unsatisfactory programs. The total pool of money may be inadequate in a fiscally struggling province, like Manitoba, where there is not enough provincial money to make optimal use of matching federal money. Furthermore, the dispensation of funds under CAP and VHRPA is left to bureaucrats, rather than the free

¹⁷ R.S.C. 1985, c. C-6.

¹⁸ Medicare is no longer a classic "shared-cost" program like CAP. Provinces receive federal benefits according to a formula, not according to actual medicare costs. Increasingly, federal benefits take the form of "tax transfers" (the federal government lowers its taxes, and the province increases them to the same extent) rather than cash. The fact that the federal government is no longer transferring much cash may ultimately compromise its constitutional ability to insist that provinces comply with federal provisions; see Bryan Schwartz, *Opting In: Improving the 1992 Federal Constitutional Proposals* (Hull: Voyageur, 1992), at 90-91.

and informed choice of the individual. Under the “welfare” model of CAP and VHRPA, significant money may be spent on administration, as opposed to helping those in need. Furthermore, the best judge of how to use the money — be it for living expenses or retraining — will often be the individual, not a busy and detached government official.

Recommendation

Shared-cost programs have included some honourable successes, and may do so in the future. But it is probably time for the federal government to concentrate on programs that directly deliver benefits to individual Canadians. These can be implemented through unilateral federal action, rather than requiring lengthy and often contentious federal-provincial negotiations. The provinces cannot complain about distortion of their spending priorities if the federal government is paying 100% of the costs of its program, rather than levering half of the money out of the provinces. Programs can be revised more quickly if they are under federal control, rather than the ongoing subject of federal-provincial negotiation.

Direct federal payments have the additional advantage of clarifying the lines of democratic accountability. They may also be important elements of nation-building. Direct federal payments give Ottawa a way of intervening in a visible and positive way with millions of Canadians. Under the shared-cost model, by contrast, the federal government is often in the position of having to take the political heat for raising funds, but then losing out on the political benefits after passing them on to the provinces, who have the only direct contact with the citizen.

D. A Set of Bilateral Deals Between the Provinces and Federal Government

Regional economic development (R.E.D.) has traditionally proceeded on a different basis than the national social welfare programs. Money is not dispensed according to a national formula. Instead, Ottawa enters into a series of bilateral deals with the provinces (or trilateral deals involving municipalities as well). Should Ottawa conduct its social spending along similar lines?

In theory, Ottawa could enter into a series of bilateral agreements with different provinces, tailoring social spending to meet the special needs of each part of the country and the desires of its provincial and local governments.

The R.E.D. model results in highly politicized decision-making. There is no national formula to determine how much money each

province receives. The amount and direction of spending depends on the political clout of competing special interest groups. Politically strong provinces may receive a disproportionate share of the funds. Powerful private enterprises, who may need the money the least, may be the most successful in having regional economic development funnelled into their projects.

While Quebec sought, in the Charlottetown Accord, to limit federal spending in many areas, it did not attempt to eliminate the federal role in R.E.D. The reason for this level of tolerance is that Quebec governments have traditionally favoured "cut-your-own" deal federalism. They are attracted to the notion of being able to work out special deals that address the special needs of Quebec, and confident in the political clout that Quebec holds in Ottawa. The province always has the benefit of a substantial group of M.P.'s in Ottawa and the ongoing threat of separation.

By contrast, smaller provinces like Manitoba will not fare well in a "cut your own deal" regime. Some interest groups, including those concerned with the needs of disabled persons, may not fare well when success depends on a highly competitive and endless process of lobbying.

Recommendation

Federal social spending should not be determined through a series of bilateral deals with different provincial governments. This model does not tend to leave the federal government looking like an even-handed builder of national institutions. Success depends too much on the bargaining power of different provinces and special interest groups. In such a competitive environment, the interests of have-not provinces (like Manitoba) and financially-strapped interest groups (like disabled persons) may be ill-served.

E. Tax Deductions and Credits

The federal government has operated several tax-related programs to assist disabled persons. They include:

- (a) the Medical Expenses Tax Credit (METC): the taxpayer receives a non-refundable tax credit equal to a percentage of her actual documented medical expenses related to the disability;
- (b) the Disability Tax Credit (DTC): a disabled taxpayer receives a tax credit that recognizes the general increased costs of routine living;
- (c) a credit for a dependent disabled child over the age of 18;

- (d) a credit for the costs of a part-time attendant needed for a disabled person to work;
- (e) education and tuition-free tax credits for part-time students with disabilities who attend post-secondary institutions.¹⁹

A cogent report by a Parliamentary Committee in 1993, titled "As True as Taxes,"²⁰ pointed to some fundamental flaws in the system. They include the fact that:

- (a) there is insufficient publicity about the availability of these provisions;
- (b) there are no provisions for disabled persons to participate in the process of adjudicating whether another individual fits the criteria for the tax benefits;
- (c) disability tax credits are absolutely worthless to someone who is so poor that they have no income tax liability in any event. The tax credits are not "refundable"; that is, they do not result in a government pay-out if the credits exceed the individuals' tax liabilities.

The Parliamentary Report made a number of recommendations that appear to be very sensible, suggesting:

- (a) more publicity about the deductions;
- (b) more participation of disabled individuals in the process of determining eligibility;
- (c) the tax credits should be made refundable;
- (d) the list of deductible medical expenses should be kept up-to-date in light of new technologies that can enable disabled persons to work;
- (e) the social safety net should be generally reviewed to ensure that there are not disincentives for working;
- (f) there should be a new Disability Expenses Credit that recognizes the cost of disability;
- (g) related goods and services beyond medical items. There should be specifically favourable tax treatment of employment-related expenses.

Are there any constitutional problems with these proposals?

¹⁹ *An Act to Amend the Income Tax Act*, S.C. 1988, c. 55, s. 92, as am.

²⁰ Report of the Standing Committee on Human Rights and the Status of Disabled Persons, *As True As Taxes: Disability and the Income Tax System* (Ottawa: The Committee, 1993).

Probably not. The federal government has authority, under s. 91(3) of the *Constitution Act, 1867*, with respect to "the Raising of Money by any Mode or System of Taxation."²¹ The authority of the federal government to give tax deductions for various purposes has rarely, if ever, been challenged in the Courts. A necessary part of any reasonable income tax system is an attempt to achieve some measure of basic fairness, which would include allowing deductions or credits for people whose income and expenses are affected by their disabilities.

It might be argued that a *refundable* tax credit raises constitutional problems, because it involves giving back money, rather than "the raising of money." But if a federal taxing statute is predominantly confined to exacting money (rather than paying it out) the refundable tax credit could be constitutionally justified as a reasonable and lawful adjunct to a scheme squarely within federal jurisdiction.

Income redistribution and social justice are often goals of the income tax system. It is very likely therefore that a federal government can, under its taxing authority, append a few "negative income tax" provisions to a system that is predominantly revenue-raising.

The more extensive the "negative" features of an income tax, the more difficult the task of justifying it under the federal authority to "raise revenues" under its taxing power. A general Guaranteed Income Program using the tax system might be harder to justify under s. 91(3) (the federal taxing power) than a few refundable tax credits aimed at helping disabled persons.

Be that as it may, the federal level of government has the authority to spend as well as tax. Several cases have upheld the authority of the federal government to make direct social welfare payments to individuals.

In *Angers v. M.N.R.*,²² the Exchequer Court upheld Parliament's authority to distribute family allowances. In *Central Mortgage and Housing Corp. v. Co-operative College Residences*,²³ the Ontario Court of Appeal upheld the validity of a federal program to make low-cost loans to bodies that provide student housing. The Court agreed that housing is within provincial jurisdiction. But it ruled as follows:

"[This program] is not in pith and substance legislation in relation to housing, but rather legislation to provide financial assistance to certain specified bodies so that they

²¹ 30 & 31 Victoria, c. 3 (U.K).

²² (1957), 57 D.T.C 1103 (Ex. Ct.).

²³ (1975), 71 D.L.R. (3d) 183.

can improve student housing. It falls within the power of the Parliament of Canada under s. 91(1A) — “The Public Debt and Property.”

The Parliament of Canada has power under s. 91(1a) to legislate in relation to its own debt and property. It can spend money which it has raised through a proper exercise of its taxing power. It can impose conditions on the disposition of such funds while they are still in its hands. It has used this power to make federal grants-in-aid, which are subject to compliance with conditions that the Parliament of Canada has prescribed.”²⁴

It is true that the provinces themselves have authority in the area of social welfare. In the *Adoption Reference*,²⁵ Chief Justice Duff stated:

The responsibility of the state for the care of people in distress (including neglected children and deserted wives) and for the proper education and training of youth, rests upon the province; in all the provinces the annual public expenditure for the education and care of indigent people is of great magnitude, a magnitude which attests in a conclusive manner the deep, active, vigilant concern of the people of this country in these matters.

It appears, nonetheless, that the federal government can make direct social-welfare payments to individuals. The limit is that viewed as a whole, the federal scheme cannot amount to an intervention that is too onerous, detailed or intrusive in the way it affects activities that are under provincial jurisdiction (*e.g.*, the operation of schools or the delivery of health care).

It should be constitutionally possible, therefore, for the federal government to use its taxing and spending powers to provide a combination of deductions, non-refundable tax credits or refundable credits to the individual disabled person.

Recommendation

The system of tax breaks for disabled persons should be reformed in line with the proposals of the 1993 “As True as Taxes” report.²⁶

The target of tax breaks with respect to the disabled individual seems to be entirely aimed at the individual taxpayer. But there could be tax breaks as well for employers who hire disabled persons to the extent that the employer incurs costs in accommodating special needs. The overall tax system (including Unemployment Insurance and

²⁴ *Ibid.* at 200.

²⁵ [1938] S.C.R. 398 at 403.

²⁶ *Supra* note 21.

Canada Pension Plan premiums) should be reviewed to make it more favourable to decisions to hire employees in general.

F. Guaranteed Annual Income

This paper has presented a number of reasons for favouring more federal programs that directly deliver payments to the individual, rather than funnelling them through the provinces. A general Guaranteed Annual Income (GAI) system is a possibility worth exploring in this respect.

A GAI is an attractive proposal because even a restructured system of tax credits would be of limited benefit to disabled persons. It is true that tax credits can be used to offset the costs as the severity of disability increases along with the special needs and the requirement for medical assistance and that . But these only help disabled persons if they have enough income to take advantage of them, and this is not always the case.

There appears to be an inverse relationship between disability and income. The more severe the disability, the lower income is likely to be, as well as the higher the costs of special needs and medical assistance. The 1986 Health and Activity Limitation Survey carried out by Statistics Canada indicated that the mean annual earnings of those with moderate disabilities is \$5054.65, and of those with severe disabilities \$1795.32.²⁷ Those with moderate to severe disabilities are (on average) substantially disadvantaged.²⁸ A GAI program would protect the earnings that they have, supplement their total income and provide the incentive to earn more.

What is the Guaranteed Annual Income?

The proposed Guaranteed Annual Income would be a single program run through the income tax system which would replace the present myriad of schemes to alleviate poverty in Canada. It would guarantee all Canadians a minimum annual income by making payments to all individuals whose income fell below that minimum level. Unlike present day social assistance, which discourages recipients from working by withdrawing benefits if any income is earned, it would provide incentive for people on GAI to find employment and eventually

²⁷ W. Simpson, "Profile of Persons with Disabilities in Canada," Appendix B in *Securing Our Future: Renewing Canada's Social Security System* (A Working Paper for the Canadian Paraplegic Association, June 1994) at B-7.

²⁸ *Ibid.* at B-1.

be self-supporting. It would do so by allowing people receiving GAI payments to keep any income they earned, while reducing the payment by a percentage of that income.

As an example, if a person receiving GAI worked and made an additional \$2000 in a year, their GAI payment would be reduced by (say) \$1000, but they would still be making \$1000 more than they were just from the GAI. As they earned more money, their total income would go up and the GAI payment would gradually shrink to nothing, after which point they would start paying taxes on their income. This system is considered superior to the programs in place at the moment because it is structured in this way to get people on a path back to employment

The idea of a GAI has been around since the 1960's, and various experiments with it have taken place in the U.S. as well as in Manitoba. Its advocates cover a surprisingly broad political spectrum, with those on the left wing arguing for it because they believe it would alleviate the stigma surrounding welfare payments, as well as possibly providing an *adequate* annual income. Those on the right favour it because they believe it would streamline the welfare system, making it run more efficiently. Both like the work incentive it provides to get people off government assistance and out of the welfare trap.²⁹

What are the theoretical advantages of the GAI?

A GAI is considered more efficient because it would replace several current vehicles for income support (probably the Child Tax Benefit, Old Age Security and the Guaranteed Income Supplement, and the Canada Assistance Plan) with one program, administered through the tax system. This program should be simpler and easier to run and ideally would result in considerable savings in administration costs, helped by the increasing sophistication of computer technology. This fits in with the current policy emphasis on "re-inventing government," which means incorporating market mechanisms to make government programs more effective without spending any more money and preferably spending less.

Another reason for enthusiasm over the GAI is that it would (or could) be a universal benefit, a guarantee to all Canadians. Its proponents assume there would be less stigma attached to receiving it, as there is now with social assistance. People with disabilities

²⁹ *Securing Our Future: Renewing Canada's Social Security System* (A Working Paper for the Canadian Paralegic Association, June 1994) at 58.

favour it for a similar reason; they could avoid the categorization presently involved in receiving the Disability Tax Benefit. But one of the advantages of the GAI is that it lends itself to being tailored to specific groups while keeping the administration all within one program. For instance, those people who are severely disabled and unable to work might be guaranteed a higher level of income than those who can work and bring in some income on top of the GAI.

How does the GAI work?

There are four key elements to a system of guaranteed annual income. The first is the *guaranteed level of income* for those with no other income at all. This would probably be set as some percentage of Statistics Canada's Low Income Cutoff figures (LICOs), which are calculated taking into account family size and the population of the area of residence. Because of the government's financial situation, and because of concern over the work incentive effects, the levels would likely end up somewhere between 40% and 70% of the relevant LICO figure.³⁰

The second key element is the rate at which the GAI payment would drop once the recipient started to earn money. This is known as the *negative income tax*, or the *tax back rate*, or the *benefits reduction rate*. If it was set at 50%, then for every dollar earned beyond the GAI, your GAI payment would drop by 50 cents. If the tax-back rate was set at 25%, then for every dollar you would keep 75 cents and lose a quarter from your GAI.

Together the guarantee level and the negative tax rate determine the third key element, the *break-even level*, where the recipient is making enough money to stop receiving GAI and start paying taxes on their income. The break-even level is crucial to both the work incentive and the total cost of the program. It is calculated by dividing the guarantee level by the negative tax rate.

Say a family of four was guaranteed \$15 000 per year, and the negative tax rate was 50%. In that case, the parents would have to make \$30 000 before they ceased receiving GAI payments. But if the negative tax rate was 25%, then they would have to make \$60 000 before the GAI payments stopped and they started paying tax on their income; obviously great work incentive, but at a prohibitive cost to the government. If it were 75%, then the break-even level would be at \$20

³⁰ *Supra* note 27 at A-6.

000, but the work incentive would be much less as income earners would only be able to keep \$0.25 of each extra dollar they made.

If the tax back rate is very low, the break-even level will be high and the more people who will receive GAI payments and not pay income tax. The cost of funding the GAI would be higher and the government's income tax revenues lower. For the program to be affordable, a high guaranteed level of income means a high negative tax rate would be required, creating little work incentive. But a low guaranteed income, which would allow a low negative tax rate, might be inadequate for the unemployable. In order to have a feasible program that would provide work incentive and remain affordable for the government, the guaranteed income level and the tax-back rate must be carefully balanced.³¹

Lastly, the fourth element that would affect a GAI system is the *positive tax rate* — the rate imposed on those people earning an income over the break-even level. Income taxes are at least 25% of taxable income. The break-even level would have to be coordinated with this to make it worth while to move from not being taxed, even while receiving only a small amount of GAI, to being taxed on your full income.

What GAI-type programs are there in Canada already?

Canada already has two programs that operate in the same way that a GAI would. One is the Child Tax Benefit Program, and the other is the Old Age Security Guaranteed Income Supplement. The former is clearly modelled on the GAI. It provides a universal guarantee for every household, based on the number of children in the family. If they receive no other non-transfer income, families receive the full guarantee, but as income or earnings rise, the guarantee declines at a negative tax rate of 5% till the payments cease at the break-even level. In other words the benefits are eliminated to high income families and concentrated on low income families.³²

Why is a GAI especially suitable for people with disabilities?

One of the attractions of a GAI to the disabled is that it would provide income support without categorization, but as the introduction of a

³¹ *Supra* note 29 at 61.

³² *Supra* note 27 at A-3.

universal GAI is unlikely at the moment, a pilot project for the GAI might be tried with people with disabilities as it is a system which seems particularly suited to their needs. A two-tiered GAI might be set up, with different guarantee levels; a higher one for the non-employable with a high tax back rate, and a lower one with a lower tax back to provide a work incentive for those who are employable.³³ This would replace the Disability Tax Credit, but other programs would still be necessary to cover the actual costs of disability, in order to put the disabled who are employable on a level playing field with non-disabled workers.

These changes would end the varying tax treatment of disability benefits and simplify the present day system of income replacement, benefits and supplements. Most importantly they would provide horizontal equity and treat like cases alike. Adequate income would no longer depend on having accumulated personal wealth, or on the cause or timing or location of the injury or disability. Persons with disabilities are more likely to live in low income families, and the more severe the disability, the more likely that income will be low, and that the expenses of disability will increase.³⁴ The combination of a GAI with a refundable tax credit for those expenses would significantly improve the lot of the disabled.

The analysis in the previous section suggests an overall GAI system would be harder to justify under the federal taxing power alone than the current tax system. The reason is that a GAI statute would be used for pay-outs, and not just raising revenues. In view of the federal government's spending power, however, it is probable that a GAI system would be constitutional.

Recommendation

The GAI is a promising idea which has been long advocated but rarely put into practice. Although politicians may not be ready at present to institute a full scale GAI, the reform of the social system offers a great opportunity to experiment nationally with a limited group in a test case that would not prove too expensive, that would improve the lot of disabled persons and that would provide valuable feedback on the potential of an eventual universal GAI.

³³ *Ibid.*

³⁴ *Ibid.* at A-4.

G. Long Term Disability Insurance

Harry Beatty's thorough and incisive report, "*The Case for Comprehensive Disability Income Reform*,"³⁵ discusses long term disability insurance (LTD) as one of the means of ensuring adequate income for disabled persons. LTD is provided by employers or directly purchased by individuals.

LTD's have some appeal from the policy standpoint. They do not put a burden on the treasuries of government, and may in fact, provide relief for governments. They are privately administered, and so do not impose extensive administrative costs on government. Competition among insurance-providers provides some opportunity for choice among employees (in collaboration with their employers) and individuals.

LTD's are currently limited in their coverage in a number of ways. They usually do not cover existing disabilities. They are not indexed to inflation. A person who cannot find full-time employment will not have the benefit of an employer plan, and many individuals may not have the money or sophistication to buy private plans.

It would be possible for provincial governments to make LTD's a larger part of the system of assisting disabled persons, and to regulate private insurers in order to provide better safeguards (e.g., minimal levels of benefits).

Could the federal government make LTD's part of a national strategy for addressing the needs of disabled persons?

In this case, the constitutional division of powers would be a major hurdle. One of the few constants in the case law on the division of powers is that the federal government always loses insurance cases. The federal government was repeatedly rebuffed in its attempts to directly regulate the insurance industry.

The federal power to spend does not, apparently, include the right to operate schemes, like insurance, where the pool of money to be spent is established by contributions by the beneficiaries, as opposed to general taxation. It took constitutional amendments to establish federal authority over Unemployment Insurance and Old Age pensions.

It appears then, that there are sharp limits to what can be accomplished in the LTD area, short of a federal-provincial consensus.

³⁵ A Report Prepared for Mainstream 1992 (August, 1992).

History teaches that wide scale agreements on complex areas are not easily attained.

H. Consolidation of Decision-making Tribunals

The simultaneous presence in an area of both federal and provincial programs and regulations can cause much confusion and expense. Part of the federal government's strategy during the *Charlottetown Accord* round of negotiations was to promote the virtues of eliminating "overlap and duplication" between the provinces and the federal government.

In theory, a single, nation-wide system operated by the federal government should often produce the simplest, most streamlined system.

In view of the decentralist thrust of Quebec's constitutional demands, however, the federal government consistently recommended the same solution: federal-provincial agreements whereby the federal government would eliminate its own spending in an area (housing, tourism, recreation, mining, forestry) and turn the money it would otherwise have spent in the area over to the province.

An alternative to asking one order of government to withdraw from an area is to consolidate the administration of the ensemble of federal and provincial programs. In the area of family law, for example, a number of provinces (including Manitoba), have moved to a single agency — the Unified Family Court — to administer the array of applicable federal and provincial laws.

This approach could be extended to other areas, including the adjudication of issues arising out of a wide variety of federal and provincial programs that make special provisions for disabled persons. It might be possible for a single tribunal to act as the adjudicative body under a number of different regulatory regimes, both federal and provincial. The issue of the degree of a person's disability, or the cause of it, might arise under many different statutory schemes. A single agency might be charged with making these determinations.

From the point of view of the federal/provincial division of powers, there is no problem with having a single agency act as an adjudicator for both levels of government. Parliament has the authority to require provincial agencies to administer federal laws. Provincial courts are the most-used forum for adjudicating issues arising out of the federal Criminal Code. Provincial product-marketing agencies are often charged with acting as the federal agency for the province as well. (The provincial agency has authority over intraprovincial commerce, the federal agency over interprovincial and international business).

To the extent that there might be any constitutional difficulty with "one stop adjudication," it has to do with the special position of the Superior Courts. The Constitution guarantees that Superior Court judges will be appointed by the federal government, and that the independence of Superior Court judges will be secure. The case law has inferred from these specific provisions that there is a special and enduring role for the Superior Court judges in our constitutional system. Federal and provincial governments cannot eliminate that role by stripping the Superior Courts of their jurisdiction, and re-assigning the traditional authority of Superior Court judges to other agencies. In constitutional jargon, the issues are discussed under the heading of "the s. 96 problem," a reference to the provision of the *Constitution Act, 1867*,³⁶ which provides for federal appointment of Superior and County Court judges.

Suppose that the federal and provincial governments created one tribunal, the Disability Board, that would make determinations arising out of a disparate set of different statutes and provisions of the common law. One tribunal might, for example, decide the basic questions of:

- (a) Who or what caused a person's injuries?
- (b) What is the degree of their injury?
- (c) What statutory benefits are owing?
- (d) Is any private insurer liable to compensate the injured person?
- (e) Is anyone obliged to compensate the injured person under tort law?

These questions may be considered regardless of whether a person is seeking benefits under Autopac, Workers Compensation, a private insurance policy, or a federal statute, or any combination of them.

The courts have long recognized that administrative tribunals, composed of persons who are not federally-appointed superior court judges, may decide the broad range of adjudicative questions that arise under statutory benefit schemes, like Worker's Compensation. Making decisions under statutory benefit schemes was not part of the traditional (that is, Confederation-times) role of the Superior courts.

An arguable challenge to the Disability Board might arise insofar as it decides contractual disputes between an insured person and his insurer, or tort liability. It might be possible to argue, at least in some provinces, that such functions were traditionally exercised only by Superior Courts.

³⁶ *Supra* note 7.

Even if the historical analogy can be demonstrated however, governments might be able to fend off a constitutional challenge on the basis of a "institutional context" argument. The Supreme Court of Canada has said that a non-section 96 tribunal may be able to exercise a traditional Superior Court function in the course of its larger and constitutionally valid duties. Issuing injunctions, for example, is a traditional section 96 function, but in the *Tomko* case,³⁷ the Supreme Court of Canada said that labour boards can issue them in the course of discharging their overall duties. In the *Sobey* case,³⁸ the Supreme Court of Canada said that a tribunal could be authorized to determine whether an employee was unjustly dismissed and order his reinstatement (traditional Superior court functions) in the context of the tribunal's general mandate to provide for the expeditious and low-cost resolution of disputes involving labour standards.

In considering a "section 96" challenge to the contractual or tort aspects of the Disability Board's jurisdiction, the courts might agree that it is reasonable for the legislatures to try to provide a one-stop forum for resolving all the disputes that arise in connection with a particular disability. In most cases, one of the central issues will be entitlement to benefits under various statutory schemes — social assistance, income tax, Worker's Compensation, Autopac. If the Disability Board's jurisdiction only extends to cases where one of the major issues is a statutory benefits scheme, the jurisdiction of the Disability Board will more likely survive any section 96 challenges.

The jurisdiction of the hypothetical Disability Board would be more vulnerable to section 96 challenges if it extended to cases where there are no immediate statutory issues to be decided, and only tort or contractual liability is at stake. In defence of the Board, however, it might be argued that whatever the immediate issue, questions such as the degree of a person's injury will almost inevitably arise in other contexts (such as income tax breaks for disabled persons) and it makes sense to allow the Disability Board to perform its adjudicatory function right from the beginning of a series of possible disputes.

In assessing section 96 challenges, the courts should be willing to look at another aspect of the "institutional setting" in which decisions are met: the extent to which the tribunal's decisions can be appealed

³⁷ *Tomko v. Nova Scotia (Labour Relations Board)*, [1977] 1 S.C.R. 112.

³⁸ *Sobey's Stores Ltd. v. Yeomans* (1989), 57 D.L.R.(4th) 1.

to Superior Courts.³⁹ The purposes of sections 96 to 99 of the Constitution should be understood as guaranteeing a role of the Superior Courts for two reasons. The lesser one is preserving the practical value of the federal power of appointing the judges. The far more important one is securing for citizens of Canada access to judges whose level of expertise and independence is constitutionally guaranteed. Given this perspective, there should be less constitutional concern about the mandate of an administrative tribunal if its decisions can be appealed to a Superior Court. To the extent that questions of law arising from a Disability Board can be appealed to the courts, section 96 challenges should be less persuasive.

In constituting all-purpose Disability Boards, legislatures might consider providing for a credible balance of perspective and experience. The rota of appointees to the Board might include persons with expertise in law, medicine, workplace safety, business management, union activities. Among the, or among the members appointed from the general public, there could be a number of persons who have the direct personal experience of living with a serious disability. A Chief Administrator of the Disability Board would have the authority to appoint a panel that was appropriate to the issues raised by a particular case.

Recommendation

It is worth exploring the idea of creating "one-stop" tribunals that would decide issues connected with disability under a variety of federal and provincial statutes and common law rules. Such administrative simplification might overcome much of the confusion and expense that is created by the existence of a variety of different federal, provincial and private programs.

Within federal and provincial bureaucracies there could be established a single central agency that would establish the initial contact with a person needing services, and take responsibility for

³⁹ The case law to date has made it clear that a legislature cannot render a provincial tribunal immune from all judicial review. At the very least, the Superior Courts always retain their authority to determine whether the tribunal exceeded its legislative authority; *Crevier, Farrah*. On the other hand, the case law does suggest that the mere fact that the decision of a tribunal can be appealed does not necessarily insulate it from "section 96" challenge; *Sobey's, supra* note 38 at 29: "mere absence of a privative clause does not by itself validate an inferior tribunal." The position advanced that the more a Superior Court is able to reconsider a tribunal's jurisdiction, the less cause there is for a constitutional objection that the Superior Courts are being denied their proper role in our legal system.

managing his or her case. The central agency would be responsible for ensuring that the person obtaining the benefits of available programs, and would take responsibility for overcoming bureaucratic delays and fights between different agencies over who is responsible for what.

I. Labour Market Training

Acquiring exclusive control over labour market training is very high on the agenda of Quebec governments. In the Charlottetown Accord, the federal government promised that it would enter into bilateral deals on labour-market training with any province that wanted one. Under these deals, the federal government would withdraw partially or completely from "any program or activity" related to labour market training, and provide the province with the money it ordinarily would have spent.

Another provision of the Charlottetown Accord allowed Parliament to legislate "objectives" in the area of labour market funding. Any province that entered into a bilateral deal would be committed to operating an ensemble of "labour market development programs and activities" that would be "compatible" with national objectives.⁴⁰

Some senior organizations representing both management and labour were critical of the federal retreat contemplated by the Charlottetown Accord. There are some strong arguments for a powerful federal role in the labour market area. The national government is responsible for the national economy, and labour market training is commonly believed to be one of the keys to prosperity in the decades ahead. Canada has a mobile labour force, and the failure by one province to invest in training may adversely affect the economies of other provinces. A positive role in labour market training, moreover, is one way in which a federal government could show itself to be an active and creative player in building a national community.

Recommendation

In labour market training, as in other areas, the federal government might usefully consider enhancing its direct contacts with citizens, rather than funnelling money through provincial agencies. In this area, like others, a direct federal government-to-citizen link would help to enhance the credibility of the national government as an agent of nation-building.

⁴⁰ *Supra* note 1.

A promising idea would be for the federal government to distribute retraining vouchers. The individual citizen — whether newly entering the labour force, unemployed, or disabled — would be able to spend the voucher on any retraining program that he saw fit. The citizen would have the freedom and practical ability to choose the private or provincially-operated program that best suits his individual needs. Provinces would not have much cause for complaint; the federal government would be enhancing access to programs within provincial jurisdiction, not interfering with their administration.

IV. CONCLUSION

CANADA'S MASSIVE NATIONAL DEBT has put great pressure on the social safety net. Reduced federal resources need not mean, however, that the federal government must abandon its role in making policy in the social spending area, and using the network of programs to promote national unity.

The federal government should instead use its diminished resources in more effective and visible ways. The federal government should establish programs that provide direct benefits to individuals, such as negative income taxes, student loans and training vouchers.

Provinces would no longer be able to complain that the federal government, through conditional grants, is commandeering provincial resources to federal ends. The federal government would not be in the frustrating position of having to raise taxes for programs over which the provinces exercise primary administrative control and gain the principal political credit.

The reduced availability of resources for bureaucracies should result in more reliance on market-oriented means of service delivery. Individuals may benefit from their own choices and the existence of a wider range of options due to competitive pressures within the private sector.

Severely disabled persons are disproportionately liable to be poor, to be victims of discrimination, and to be vulnerable to even further deprivations as the social safety net is changed. Their concerns should be at the forefront of any reforms that purport to be enlightened, or even minimally decent.