UNTANGLING THE GORDIAN KNOT: REGULATING FEDERAL TRANSFERS IN CANADA

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Conditional transfers comprise the majority of transfers received by the provinces from the federal government in Canada. The conditions attached to such transfers can afford the federal government a role in provincial matters, but there are no clear guidelines on when conditional transfers are ultra vires the federal government. This article explores the constitutionality of conditional transfers, beginning with an exploration of their past and present role in Canadian intergovernmental relations. It discusses the potential for conditional transfers to enhance federalism, and assesses the shortcomings of the current Canadian approach in facilitating intergovernmental collaboration. Finally, this article explores how courts can increase the compatibility of conditional transfers with federalism by ensuring the transfers are voluntary, consensual, unambiguous, binding, and reasonable.

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I. INTRODUCTION

The issue of intergovernmental conditional transfers has never been so present and so pressing than since the outbreak of COVID-19. In the past few years, the Canadian provinces have repeatedly asked for a steep increase in the federal government's share of healthcare

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costs.[1] But while these demands have become more visible due to the pandemic, they are part of a larger vindicative movement by which the provinces seek to close significant structural gaps in healthcare funding. Among other things, the provinces claim that a growing and aging population require sustained long-term funding.[2]

However, the federal government has long been reluctant to accede to the premiers' requests. An important point of contention comes from the federal government's wish to subject transfers to the provinces to conditions, in accordance with its own priorities. In response to the provinces' cry for help, the federal government announced that it was ready to raise healthcare investments, but that it would require the provinces to use these funds toward health workers, and increased access to family health teams and mental health services.[3]

At the beginning of 2023, the federal and most provincial governments concluded an agreement in principle with regard to healthcare funding. In exchange for additional investments, the provinces committed to allocate a portion of these new funds to specific areas and to report to the federal government on how the funds will be used.[4] The provinces expressed clear disappointment with the transfer scheme. They claimed that the promised amounts were not sufficient to meet their needs and did not address long-term sustainability challenges.[5] Quebec refused altogether to sign the agreement, stating that it intended "to retain its full autonomy with regard to planning, organization and management of its health system."[6] As health expenses and provincial discontent grow, it appears clear that conditional transfers are poised to become the Gordian knot of Canadian federalism.

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A conditional transfer is a transfer of funds that is based on the condition that the grantee (the provincial government) uses the funds according to the stipulations of the grantor (the federal government).[7] Sometimes, conditional transfers are earmarked for a broad category, such as health and education. Sometimes, they are granted according to a very precise scheme, and with very clear conditions.[8]

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1 Council of the Federation Secretariat, News Release, "Premiers Welcome Beginning of First Ministers' Discussions on Health Care Funding" (30 January 2023), online (pdf): *Canada's Premiers* [perma.cc/S3WC-AL22] (the provinces have requested that the federal government raise its share from 22 percent to 35 percent).

2 Council of the Federation Secretariat, News Release, "Health Care Costs are on the Rise in Canada and COVID-19 is a New Cost Driver" (30 October 2020), online (pdf): *Canada's Premiers* [perma.cc/AK39-URH3].

3 Health Canada, "Statement by the Honourable Jean-Yves Duclos at the Health Ministers' Meeting" (7 November 2022), online: *Government of Canada* [perma.cc/LRM6-5XEC].

4 Canada, Office of the Prime Minister, News Release, "Working Together to Improve Health Care for Canadians" (7 February 2023), online: *Office of the Prime Minister* [perma.cc/KPT9-BQ3Q].

5 Letter from Heather Stefanson to Justin Trudeau (16 February 2023), online (pdf): *Council of the Federation Secretariat* [perma.cc/6K4K-G6H3].

6 Health Canada, "FPT Communique: Federal, Provincial, Territorial Health Ministers' and Ministers Responsible for Mental Health and Addiction" (12 October 2023), online: *Government of Canada* [perma.cc/Y84L-BS5Z].

7 Peter W Hogg, *Constitutional Law of Canada*, 4th ed (looseleaf) (Scarborough, Ont: Thomson Canada, 1997) at 6–12.

8 Francesco Palermo & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford, UK: Hart, 2017) at 229.

Conditional transfers have become an unavoidable element of most federal systems.[9] In Canada, they have become deeply embedded in the federation's structure, to the point where some scholars accept the spending power as a "*fait accompli*, a precondition to the functioning of a modern federal state."[10] Even provincial and territorial governments, which were once vehemently opposed to conditional transfers, seem to have resigned themselves to their existence and now direct their objections toward the programs' specific characteristics rather than toward the conditional transfers as such.

Although much effort has been spent criticizing conditional transfers, more analysis is needed on the question of how — or even whether — they can be transformed to become consistent with federalism. This article is a modest attempt to do so. I will argue below that conditional transfers can be valuable to federalism, but that for them to be so, they must be regulated to curtail the federal government's harmful stranglehold over the provinces. In Part II, I will briefly present conditional transfers and discuss their constitutionality. In Part III, I will argue that conditional transfers are beneficial overall to the federation but present significant obstacles to collaboration. In Part IV, I will present different solutions that could be explored to regulate conditional transfers for them to be reconciled with federalism effectively.

In this article, I will address conditional transfers through the specific case of health transfers, which make up the vast majority of conditional transfers in Canada. Health transfers make a relevant case study due to the ongoing crisis, but also because they have historically been a fascinating showcase of Canadian intergovernmental relations. Indeed, as I will show in this article, various tactics have been tried in past decades to help both levels of government achieve their respective goals. Despite this article's focus on health transfers, it is worth noting that the conclusions drawn hereunder can be applied to all conditional transfers, regardless of the jurisdictional field to which they are attached.

II. CONDITIONAL TRANSFERS IN CANADA

Conditional transfers are intertwined with Canadian federalism. They have existed for most of the federation's history and they account nowadays for approximately 78 percent of all major federal transfers to the provinces.[11] For the 2023–24 fiscal year, the largest conditional transfers to the provinces were the Canada Health Transfer ($49.4 billion), the Canada Social Transfer ($16.4 billion), the Early Learning and Child Care Agreements payments ($5.6 billion), the payments regarding the various health agreements with the

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9 Ronald L Watts, *Comparing Federal Systems*, 3rd ed (Montreal: McGill-Queen's University Press, 2008) at 107 (although their relative importance varies greatly, from 6 percent of all federal transfers in Belgium to 100 percent in the United States at the time of Watt's survey).

10 Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68:3 Can Bar Rev 448 at 454.

11 The conditions attached to some transfers are stricter than others. For the purpose of this calculation, I have considered the following major transfers as being conditional: the Canada Health Transfer, the Canada Social Transfer, transfers regarding various health agreements with provinces (the transfers related to the 2023–24 bilateral agreements discussed below, the transfers supporting home and community care and mental health and addictions services that expire after 2026–27, and the transfers for long-term care that expire after 2027–28), the Early Learning and Child Care Agreements payments, and the Canada Community-Building Fund payments (Department of Finance Canada, *Budget 2024: Fairness for Every Generation*, Catalogue No 1719-7740 (Ottawa: DFC, 2024) at 371).

provinces ($4.3 billion), and the Canada Community-Building Fund payments ($2.4 billion).[12]

To properly examine conditional transfers' relation to federalism, one must first understand their significance to the federation. I will therefore discuss the Canadian history of conditional transfers before dealing with the current legal framework.

A. HISTORY OF CONDITIONAL TRANSFERS

The first conditional transfers to the provinces date back to 1912 and were aimed, among other things, at the creation of roads and support for technical education.[13] However, it was not until the Great Depression that they became more widely used. In 1940, the Royal Commission on Dominion-Provincial Relations was particularly suspicious of conditional transfers, noting that "[a] system which might work well, even in a federation, on a limited scale and for certain specific and clearly defined objectives, broke down completely as a means of financing a large proportion of provincial functions."[14] For these reasons, the Commissioners recommended that unconditional transfers be favoured over conditional ones.[15]

Despite these conclusions, conditional transfers would once again be on the table a few years later. In 1945, after six years of analysis and discussions, a first attempt to implement a national health insurance plan was officially studied. The idea was to make conditional grants to the provinces, covering half the costs of all major health services. Quebec was especially unenthusiastic about the idea; its Premier claimed that "legislation of this type, assigned exclusively to the central government, would inevitably lead to Federal interference in all these fields … which ought to be free of Dominion authority."[16]

While the initiative failed due to provincial opposition, it was reinstated under a different form a few years later. Indeed, in 1948, the federal government launched the Health Survey Grants program, which was considered at the time "the first stages in the development of a comprehensive health insurance plan for all Canada."[17] Provinces had to submit their spending proposals to the federal minister of Health who was to approve each of them distinctively. A commentator claims that "the grants programs thus had a catalytic effect on nation-wide health services planning and development."[18] Although the provinces ended up adhering to this arrangement, they remained outspoken critics of it.[19]

In 1957, the *Hospital Insurance and Diagnostic Services Act* was adopted. The federal government offered provinces 50 percent of the cost of eligible services delivered at general

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12 *Ibid*.
13 Jacques Dupont, "Le pouvoir de dépenser du gouvernement fédéral: 'A Dead Issue?'" (1967) UBC L Rev 69 at 76.
14 Canada, Privy Council Office, *Report of the Royal Commission on Dominion-Provincial Relations, Book II: Recommendations* (Monograph) (Ottawa: King's Printer, 1940) at 126.
15 *Ibid* at 127.
16 Malcolm G Taylor, *Health Insurance and Canadian Public Policy*, 2nd ed (Montreal: McGill-Queen's University Press, 2009) at 62–63 (citing Premier Maurice Duplessis).
17 *Ibid* at 164 (citing Prime Minister Mackenzie King).
18 *Ibid*.
19 *Ibid* at 188.

hospitals on certain conditions. They had to make insured services available to all residents of the province and supervise and licence hospitals to ensure that adequate standards were maintained.[20] Although the plan was less comprehensive than what had been envisioned in 1948, it would become the most significant example of federal-provincial co-operation in the country's history and its largest grant-in-aid. The statute was adopted after consultations with the provincial governments, some of which vehemently opposed conditional grants. However, none could afford to refuse the financial assistance and had no other option but to opt in, with Quebec joining last, in 1961.[21] Then, in 1966, the *Medical Care Act* expanded coverage to include physician services provided outside hospitals.[22]

In 1977, the *Established Programs Financing Act* was passed. According to this statute, the federal government's contributions were no longer tied to the provinces' expenses, foreshadowing a gradual decrease of the federal government's share. In exchange, the provinces had more flexibility to invest the money as they saw fit.[23]

Following the significant rise of extra-billing, the federal government adopted the *Canada Health Act* in 1984, which is still in place today. The statute establishes the conditions that the provinces have to fulfil to receive full federal transfers to which they are entitled. The criteria that they must comply with encompasses comprehensiveness, universality, public administration, portability, and accessibility.[24] In addition, the *Canada Health Act* prohibits extra-billing and charging user charges.[25] The *Canada Health Act*'s adoption ran contrary to the provinces' will and was described as a "poor example of federal-provincial cooperation."[26]

At the dawn of the new millennium, a more collaborative approach to developing the terms of conditional transfers, which had long been understood as a possible avenue to solve the conditional transfers conundrum,[27] slowly made its way in Canadian federalism. The legal draft of the *Charlottetown Agreement* required the federal government to "provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program … in an area of exclusive provincial jurisdiction."[28] The *Budget Implementation Act, 1995* provided that the federal government must invite provinces to "consult and work together to develop, through mutual consent, a set of shared principles and objectives" with respect to social programs that could underlie the Canada Health and Social Transfer.[29] A similar obligation was included in the *Social Union Framework Agreement* in 1999, which purported to implement a collaborative approach, respectful of

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20 SC 1957, c 28, s 5(2).
21 Taylor, *supra* note 16 at 232–34.
22 SC 1966, c 64.
23 Taylor, *supra* note 16 at 428.
24 *Canada Health Act*, RSC, 1985 c C-6, ss 8–12.
25 *Ibid*, ss 18–21.
26 Taylor, *supra* note 16 at 440.
27 A federal government working paper from the 1969 constitutional review suggested that the federal government could require a national consensus before moving forward with a program in an area of provincial jurisdiction; if such a consensus had been reached, provinces that did not wish to participate would not have been financially penalized: Canada, *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Queen's Printer, 1969) at 38–48.
28 Canada, First Ministers & Aboriginal and Territorial Leaders, *Draft Legal Text*, based on the *Charlottetown Accord* (9 October 1992) s 106(A)(1) [*Charlottetown Agreement*].
29 SC 1995, c 17, s 13(3).

the provinces' autonomy.[30] Then, in 2003, the provinces and the federal government took part in negotiating the *Accord on Health Care Renewal*.[31] The agreement fixed broad objectives regarding primary care, information technology, coverage for certain home care services and drugs, enhanced access to diagnostic and medical equipment, and better accountability.[32] A year later, the governments signed the *10-Year Plan to Strengthen Health Care*,[33] which set targets for governments to achieve in ten areas and was accompanied by a 6 percent yearly increase in health transfers. In 2007, the federal government of Stephen Harper included in its budget an engagement not to implement new programs within fields of provincial jurisdiction without first achieving consensus with the provinces. In 2011, the federal government announced that it had given up on imposing conditions upon the provinces in exchange for transfers.[34]

However, this co-operative approach did not last. In 2017, a few years after the *10-Year Plan to Strengthen Health Care* expired, the newly elected government bypassed the united provincial front by sealing deals with provinces separately. Specifics of performance measurement and reporting were set out in bilateral agreements, which specified that the provinces were obliged to invest the money in home and community care, as well as mental health and addictions services. To top it all off, transfers' increase was reduced from 6 percent to 3 percent per year. In parallel, while provinces' compliance had not historically been systematically monitored or enforced by the federal government,[35] there was a noticeable turnaround in recent years. In 2016, in an unprecedented move, the federal government threatened to reduce Quebec's transfers for the first time. The provincial government was accused of tolerating the practice of extra-billing by doctors.[36] Then, in 2018, the federal Minister of Health contacted the provinces to inform them of new policies, writing that "the Prime Minister [had] tasked [her] with promoting and defending the Canada Health Act and quite specifically with eliminating patient charges for services that should be publicly insured."[37] In fact, since its election in 2015, the Trudeau government has shown more aggressiveness when it came to deductions to health transfers than its predecessors. From 2016 to 2023, $187 million has been deducted from health transfers, as opposed to $5 million in the previous 20 years.[38]

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30 First Ministers' Meeting, *Agreement: A Framework to Improve the Social Union for Canadians*, Doc 800-037 (Ottawa: 4 February 1999) [*Social Union*].

31 First Ministers' Meeting, *2003 First Ministers' Accord on Health Care Renewal*, Doc 800-039-004 (Ottawa: 4–5 February 2003).

32 Health Canada, "Canada's Health Care System," online: *Government of Canada* [perma.cc/G3W7-246X].

33 First Ministers' Meeting, *A 10-Year Plan to Strengthen Health Care,* Doc 800-042-005 (Ottawa: 13–16 September 2004).

34 Greg Marchildon, "The Future of the Federal Role in Canadian Health Care" in Katherine Fierlbeck & William Lahey, eds, *Health Care Federalism in Canada: Critical Junctures and Critical Perspectives* (Montreal: McGill-Queen's University Press, 2013) 177 at 179.

35 *Ibid* at 187–88: namely to the portability principle, without any consequences.

36 *Ibid*.

37 Letter from Minister of Health to Provinces and Territories (4 February 2019), online (pdf): *Government of Canada* [perma.cc/UW57-A28M].

38 Health Canada, *Canada Health Act Annual Report 2022–2023* (Ottawa: Health Canada, 2024): in fact, $10 million were deducted in 2016–2017, $26 million in 2017–2018, $24 million in 2018–2019, $17 million in 2019–2020, $14 million in 2020–2021, $13 million in 2021–2022, and $83 million in 2022–2023. That said, the *Canada Health Act Reimbursement Policy*, pursuant to which the federal Minister of Health can provide a reimbursement if the province or territory eliminates patient charges for insured health services, came into effect in 2018. Significant reimbursements have been made to the provinces (*ibid* at 29–32).

In February 2023, the federal government concluded an agreement in principle to increase health care transfers with all provinces except Quebec. The federal government offered to transfer over $196 billion over ten years to the provinces, which will be required to invest the funds in specific areas, and report to the federal government over how the funds will be used and progress measured.[39] The provinces that accepted the offer nonetheless expressed disappointment with the transfer scheme, stating that the funds were not sufficient to meet their needs.[40]

To sum up, while conditions used to be unilaterally imposed on provinces, this practice gave way in the late 1990s to political negotiations that were more respectful of the provinces' autonomy, up to gradual abandonment of conditions at the beginning of the 2010s. On the other hand, the election of the Trudeau government in 2015 marked a return to a managerial approach to federal transfers, with monitoring and enforcement of compliance by the federal government.

B. CONSTITUTIONALITY OF CONDITIONAL TRANSFERS

The back and forth in the federal government's approach to implementing conditional transfers is partially attributable to the lack of a constitutional framework. The federal government's capacity to spend in exclusive provincial jurisdiction areas is nowhere to be found in the *Constitution Act, 1867*. In fact, at the Quebec Conference in 1964, a preliminary attempt to divide the heads of power between the provincial and the federal governments granted to the latter the power to make laws concerning "[s]ubsidies or grants in aid of the Local Governments,"[41] but the motion was rejected. Consequently, the legal origin of federal spending power is uncertain. Some claim that it is derived from the powers to levy taxes at section 91(3), to legislate concerning "public property" at section 91(1A) and to expend federal funds at section 106 of the *Constitution Act, 1867*.[42] For others, it is justified by the Royal Prerogative.[43] For others still, it comes from section 36(1) of the *Constitution Act, 1982*.[44] Despite this controversy, the federal spending power's constitutionality in areas of exclusive provincial jurisdiction has been repeatedly confirmed by the Supreme Court of Canada.[45]

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39 Office of the Prime Minister, *supra* note 4.

40 Letter from Heather Stefanson to Justin Trudeau, *supra* note 5.

41 Joseph Pope, ed, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 23.

42 See e.g. Hogg, *supra* note 7 at 6–17.

43 Francis R Scott, "The Constitutional Background of Taxation Agreements" (1955) 2:1 McGill LJ 1 at 6 (it is the famous "gift theory").

44 See e.g. Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1996) 19:2 Dal LJ 306 at 317.

45 *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532 at 1548–49 [*YMHA*]:

> There has been some debate over the extent to which the exercise of the federal spending power can justify federal incursions into what would otherwise be areas of provincial legislative jurisdiction. In *The Allocation of Taxing Power Under the Canadian Constitution* (2nd ed. 1981), at p. 45, Dr. G. V. La Forest, now a Justice of this Court, expressed the view that the federal spending power can be exercised so long as it is not in substance legislation on a provincial matter. Thus, the federal government could spend money to create jobs in the private sector, or in areas not directly under its competence. However, while Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. Thus, a decision to provide a job creation grant to an organization such as the YMHA should not be construed, without other evidence, as an intention to remove provincial labour law jurisdiction over the project.

The constitutionality of conditional transfers, on the other hand, is much foggier. Unlike other federal countries,[46] the Canadian Constitution does not explicitly provide for conditional transfers. Nonetheless, courts have confirmed their validity. In *Canada (AG) v. Ontario (AG)*, the Privy Council suggested that the appropriation of federal property for provincial purposes could be deemed ultra vires if treated as a form of legislation.[47] Since then, Canadian tribunals have largely supported the federal government's capacity to attach conditions to its transfers in provincial jurisdictions, including under the *Canada Health Act*.[48] Indeed, as long as the transfers do not in fact "legislate,"[49] "regulate,"[50] or "invade"[51] areas of provincial jurisdiction, the Supreme Court refuses to oversee the federal government's exercise of its spending power. At present, Canadian courts have yet to develop any guidelines to determine which conditions fit these categories. This ambiguity currently favours the federal government, which has a great deal of discretion to impose whatever it believes relevant to advance its agenda.

III. RELATIONSHIP BETWEEN CONDITIONAL TRANSFERS AND FEDERALISM

As seen in Part II.A, provinces have historically been very critical of conditional transfers. But there is a minority of scholars who contend that the *Constitution Act, 1867* grants the federal government a robust and involved role in the administration of health care and other social services that exceeds the conventional view that such services are the primary responsibility of the provinces.[52]

The aim of this article is not to advocate for a specific framework of federalism that grants greater or lesser deference to the provincial or federal governments when it comes to the delivery of social services to Canadians. Rather, this article recognizes that conditional

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See also *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 567 [*Re CAP*]; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 25 [*Eldridge*]; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 16 [*Chaoulli*].

46 *Commonwealth of Australia Constitution Act 1977* (Commonwealth), 1977/84, art 96 (Austl) ("the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit"); *Constitution of the Republic of South Africa*, 1996, No 108 of 1996, art 227(1) ("[l]ocal government and each province … b) may receive other allocations from national government revenue, either conditionally or unconditionally"); *Grundgesetz* [GG] [Basic Law], translation at gesetze-im-internet.de/englisch_gg/index.html. [*German Basic Law*] (holds that the federal government may grant conditional financial assistance in specific circumstances). *Cf* US Const art I, § 8, cl 1 ("[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").

47 [1937] 1 DLR 684 at 687 (SCC) [*Employment and Social Insurance Act Reference*]:

> But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. … If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain.

48 *Eldridge*, *supra* note 45 at para 25; *Auton (Guardian* ad litem *of) v British Columbia (Attorney General)*, 2004 SCC 78, Appendix B; *Chaoulli*, *supra* note 45 at para 16.

49 *YMHA*, *supra* note 45 at 1549.

50 *Ibid*; *Re CAP*, *supra* note 45 at 567.

51 *Employment and Social Insurance Act Reference*, *supra* note 47.

52 See e.g. Colleen M Flood, William Lahey & Bryan Thomas, "Federalism and Health Care in Canada: A Troubled Romance?" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 449.

transfers are not incompatible with the spirit of federalism, regardless of the academic framework.

In Part III, I am going to analyze the compatibility between conditional transfers and federalism in Canada. First, I will briefly present how federalism is understood in Canada. Then, I will outline the main contributions of conditional transfers to federalism. Finally, I will review some barriers to their compatibility.

A. FEDERALISM IN CANADA

Federalism was defined by Kenneth Wheare as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent."[53] In Canada, the *Constitution Act, 1867* provides that the provinces and the federal government each have full control over their legislative fields.[54] Federalism also requires that federated states have the ability to make choices for themselves without interference by the central authority. To quote the Supreme Court of Canada, "[t]he principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."[55]

In multinational federations, where minorities rely on nation-building as a tool to preserve their distinctive culture, the protection of diversity is particularly important.[56] As the Supreme Court stated, "[t]he principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province."[57] This is undeniably the case in Canada, where Quebec — and some territories — are construed as a means of self-determination, while other provinces are mainly perceived as administrative divisions.[58] Asymmetrical treatment for some provinces may thus be required to create the appearance of equality between all the federated entities.[59]

B. CONDITIONAL TRANSFERS' CONTRIBUTIONS TO FEDERALISM

Conditional transfers are not incompatible with the spirit of federalism, regardless of the academic framework. In fact, conditional transfers — and the pan-Canadian programs they make possible — can enhance federalism in a way that unconditional transfers cannot by creating common citizenship, allowing for a more effective redistribution of resources across the country, and improving accountability.

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53 Kenneth Wheare, *Federal Government*, 4th ed (London: Oxford University Press, 1963) at 10.
54 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91–92.
55 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 58.
56 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1996) at 11, 27–28.
57 *Reference re Secession of Quebec*, *supra* note 55 at para 59.
58 Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001) at 102.
59 Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993) at 180.

1. COMMON CITIZENSHIP

The first advantage that flows from the adoption of pan-Canadian programs is that they create a sense of common citizenship, thereby allowing for a distinctive identity.[60] In fact, some of these programs are deeply embedded in the collective consciousness as pillars of Canadian culture. For instance, the principles set out in the *Canada Health Care Act* have even been described by the Supreme Court of Canada as "hallmarks of Canadian identity."[61] A report of the Commission on the Future of Health Care in Canada described the Canadian health care system "as a public good, a national symbol and a defining aspect of their citizenship,"[62] making it extremely perilous for any government to repeal it.[63]

Conversely, the imbalance in power that the federal government has over transfers limits this benefit. When conditional transfers are seen as a tool of leverage used by the federal government to subvert the power of the provinces, it discourages popular buy-in to provincial-federal agreements and undermines their ability to serve as a tool of unity. This is especially true when the government negotiates bilateral agreements to avoid facing a united provincial front.

2. REDISTRIBUTION OF RESOURCES

The second benefit is somewhat derived from the first one. Adopting a shared identity grounded on common foundations contributes to the feeling of solidarity across the federation. This, in turn, allows for a stronger redistribution of resources than under an unconditional transfer scheme. Canadians are more likely to support indirect equalization initiatives knowing that their compatriots from other provinces are working to achieve common goals, according to common principles, rather than using the money to take divergent paths. They are proud to contribute to creating a single but diverse people from coast to coast, who boast universally accessible healthcare. They are also aware that they will keep profiting from the same benefits if they move to other provinces.

A power imbalance related to conditional transfers between the provincial and the federal governments can create political barriers which prevent provincial governments from entering into transfer agreements with the federal government or discourage them to do so, frustrating the effective redistribution of resources.

3. DEMOCRATIC ACCOUNTABILITY

The third benefit is that, by establishing the conditions that must be followed by the recipient provinces, the tax levying entity (the federal government) keeps control over how these revenues will be used (by the provinces). This makes it easier for the taxpayer to know which elected representatives to hold accountable, as those raising the revenues are also the

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60 See Jeremy Webber, "Canadian Federalism, Canadian Allegiance, and Economic Inequality" in Carolyn Hughes Tuohy et al, eds, *Policy Transformation in Canada: Is the Past Prologue?* (Toronto: University of Toronto Press, 2019) at 117.

61 *Chaoulli*, *supra* note 45 at para 16.

62 *Building on Values: The Future of Health Care in Canada: Final Report* (Ottawa: Government of Canada, 2002) at xviii.

63 Marchildon, *supra* note 34 at 187.

ones "deciding" how it must be spent. Thus, Canadians can blame the federal government for the dubious management of funds spent by provincial governments in healthcare and call for more stringent regulation of provincial spending or tax cuts.

Additionally, if conditional transfers create the perception that the federal government has undue influence over the social programs managed by the provinces, they can obscure democratic accountability. Scholars have noted that shared jurisdiction over an area like healthcare can actually discourage co-operation amongst levels of government, because lawmakers believe that "voters fail to assign credit in a manner that accurately or fairly reflects the contributions of each government."[64] A balanced process for the terms of conditional transfers ensures that both the federal and provincial governments can be comfortable with their ability to articulate and defend the aspects of social programs for which they are — and are not — responsible.

C. CONDITIONAL TRANSFERS' CHALLENGES TO FEDERALISM

Consequently, despite conditional transfers' benefits to the federation, unrestricted transfers pose significant threats to the equilibrium between the federal and the provincial governments mainly because they constitute serious challenges to provincial autonomy, foreseeability, and funding.

1. THREAT TO PROVINCIAL AUTONOMY

From a federalist perspective, the main problem with conditional transfers is that they allow the federal government to interfere in exclusive provincial jurisdiction by "dictating" to the provinces how they should act without any clear constitutional power to this effect provided for in the federal compact. Allowing the federal government to steer the direction to be taken by the provincial governments, and to pick which sectors are to be prioritized, grants it permission to do indirectly what it cannot do directly.

Of course, the provinces remain technically free to refuse the conditions, and thus, the money. However, in practice, given the fiscal imbalance,[65] the provinces cannot viably turn down recurrent and important payments from the federal government. For some provinces, net transfers from the federal government account for more than 20 percent of their annual budget.[66] Moreover, governments who refuse to comply with the conditions penalize their

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64 Rory Gillis, "Rethinking the Division of Tax Room and Revenue in Fiscal Federalism" (2023) 73:2 UTLJ 174 at 179.

65 In Canada, fiscal imbalances between the provinces and the federal government are due to a myriad of factors, but are usually justified by the fact of the increasing role of the provinces in areas previously managed privately, like education and healthcare, has resulted in a significant gap between provincial and federal costs. While provinces have powers to raise money under the provincial heads of power that relate to the market and natural resources, the ability of provincial governments to in fact successfully raise money with these powers varies greatly from province to province. Additionally, the price of natural resource commodities like oil and gas are volatile, making it difficult for provinces to use them as reliable and consistent revenue streams: Council of the Federation Secretariat Advisory Panel on Fiscal Imbalance, "Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance" (31 March 2006), online (pdf): *Council of the Federation Secretariat* [perma.cc/Q78G-ZN6F].

66 For the 2023–24 fiscal year, federal transfers represented 21 percent of the Quebec government's revenues (31 divided by 147 equals 21 percent): See Gouvernement du Québec, *Budget 2024-2025: Budget Plan* (Québec: Gouvernement du Québec, 2024) at A.20.

own residents, who still have to bear the costs generated by these programs in other provinces through their taxes.[67] In short, refusing to comply with the conditions attached to federal transfers is more of an "artificial freedom" than an actual option.[68]

This paradigm has led commentators to believe that conditional transfers "have effected a substantial shift in the distribution of power within confederation."[69] This seriously undermines the provinces' autonomy, a crucial component of every federation. After all, one of the most important and influential decisions a government can make is elaborating its budget. Extra-jurisdictional spending in healthcare and other culturally sensitive fields is considered particularly problematic in ethnically diverse federations, where regional self-determination impediments may have more important consequences.[70] It has even been argued that, in Quebec, conditional grants have created a "perception of cultural or national subordination."[71]

2. LACK OF FORESEEABILITY

No matter how much good faith is infused in the political negotiations or how beneficial the final agreement is, provinces can still end up empty-handed. Indeed, under the status quo, even if condition transfers had previously been negotiated and put into an intergovernmental agreement, the federal government has full discretion to decrease its participation in certain initiatives or cease transfer payments.[72] In fact, that is what the federal government infamously did in the 1990s in the health and social programs transfers.[73] Therefore, while the federal government can penalize the provinces for not complying with its conditions, the provinces cannot force the federal government to fulfil its part of the contract. Unsurprisingly, in most federations, when federal spending power on matters within regional authority is stopped or withdrawn without notice, it attracts criticism.[74]

In addition, the federal government may impose vague conditions, only to liberally interpret them later as it sees fit. This makes it hard for provinces to predict the appropriate way to spend the funds they receive within the conditions. Ambiguity had led to disagreements over past agreements, namely when it came to health transfers.[75] It blocks governments' long-term planning and hurts the transfers' indirect beneficiaries.

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67 Nader, *supra* note 44 at 314.
68 GJ Brandt, "Structural Adjustments in Canadian Federalism" (1967) 2:1 RJT 75 at 83.
69 Hogg, *supra* note 7 at 6–12.
70 Palermo & Kössler, *supra* note 8 at 234.
71 Hamish Telford, "The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?" (2003) 33:1 Publius 23 at 25.
72 *Re CAP*, *supra* note 45 at 567.
73 Thomas J Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives" (2008) Institute for Research on Public Policy Working Paper No 2008-01 at 16.
74 Watts, *supra* note 9 at 101.
75 Tommy Chouinard, "Frais accessoires: des pressions sans précédent d'Ottawa," *La Presse* (19 September 2016), online: [perma.cc/AY7B-FZZE] (Quebec maintained that it was compliant with the *Canada Health Act* with regard to extra-billing, but the federal government decided to contest Quebec's interpretation many years later).

3. UNDERFUNDING

Provinces have become reliant on conditional transfers to provide essential services to their population, but the federal government's share of total expenses is becoming smaller. As previously stated, prior to 1977, each provincial dollar spent was matched by a federal dollar; after the establishment of the *Established Financing Programs*, federal contributions stopped being tied to provincial expenses. As a result,[76] whilst the federal government promised decades ago to fund 50 percent of all healthcare expenses, it now provides a meagre 22 percent. The provinces contend that the federal contribution is already too low and that health costs are expected to rise significantly in the coming years.[77]

IV. RECONCILIATION OF CONDITIONAL TRANSFERS AND FEDERALISM

In Part III.C, I argued that the federal government's unlimited power to impose conditions on transfers to the provinces is inconsistent with Canadian federalism. It jeopardizes provincial autonomy, contributes to instability, and is responsible for the underfunding of certain provincial services. In this part, I will explain why a judicial intervention is welcome, and how courts might go about reforming conditional transfers.

The most evident option to reconciliate conditional transfers with federalism and to put an end to the deadlock between the provincial and the federal governments is the promotion of joint provincial-territorial negotiations forums. However, such initiatives are unlikely to be implemented. As shown in Parts II and III, conditional transfers have become a deeply politicized tool. They are recurrently leveraged by the federal government to obtain concessions from the provincial governments and win the favour of the constituents. Moreover, governments' interests in regulating conditional transfers are variable: the federal government, as an institution, has no benefit in constraining its own power to grant condition transfers and, even among provinces, interest in doing so is not shared equally.

An alternative to the promotion of political negotiations is the creation of independent institutions, tasked with assisting in the redistribution of tax revenues. In Australia, the Grants Commission assesses fiscal capacities of the states and their costs in delivering services and provides impartial advice on the distribution of federal government grants to the states.[78] Similarly, in India, the constitutionalized Finance Commission has the duty to make recommendations to the president as to the distribution of earnings of taxes between the union and the states, which must then be presented to the houses of Parliament.[79] However, the Canadian provincial and federal governments are unlikely to confer to an independent organization more than a very limited advisory power, which is unlikely to provide an effective solution to the problematics described above.

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76 *Telford*, supra note 71 at 24.

77 David Cochrane, Kathleen Harris & Hannah Thibedeau, "Premiers put Focus on Health Care Funding in Meeting with PM," *CBC News* (10 December 2020), online: [perma.cc/V5MG-YVYG].

78 *Commonwealth Grants Commission Act 1973* (Commonwealth), 1973/54 (Austl).

79 *India Const*, arts 280, 281.

Given that the dead ends experienced by the governments in Canada are untenable and that political, as well as institutional, solutions are unlikely to prove fruitful, judicial intervention may provide an attractive solution. As seen in Part II, both the Privy Council and the Supreme Court have already suggested that there were constitutional limits to the federal government's ability to attach conditions to its transfers, but the Supreme Court has so far declined to draw the limits of the federal spending power, either stating that the issue had not been pleaded,[80] that it was unnecessary to consider it to answer the questions on appeal,[81] or that it would have to be considered in the context of the facts of a particular case.[82]

In other federal countries, the judiciary has limited the federal government's capacity to subject state transfers to conditions. The most relevant example may be the United States, where courts have a long tradition of regulating conditional transfers and have, for over 70 years, clarified, and improved their reflection on the matter.[83] However, limiting the federal government's ability to impose conditions on transfers must be done in a way that takes into account the Canadian federation's characteristics and specificities.

Below, I will suggest that governments should have the opportunity to seize the courts to solve disputes related to the use of conditional transfers. The courts' duty "to consider how different interpretations [of constitutional texts] impact the balance between federal and provincial interests"[84] arguably provides sufficient basis for the courts to rule on the validity of specific conditional transfers by taking into account their impacts on federalism. I will also examine different criteria that courts could adopt to determine whether the conditions of the negotiations of the terms of conditional transfers or the modalities of the conditional transfers themselves are compliant with federalism, namely by requiring that conditional transfers be voluntary, consensual, enforceable, unambiguous, and reasonable.

Note that the judicial avenues proposed are not meant to leave to the courts the task of setting out the precise modalities of the conditional transfers. To the contrary, the purpose of such judicial review would be to counter the imbalance between the negotiating parties, to facilitate the negotiation process, and ultimately to prioritize the will of the parties.

A. VOLUNTARY

As seen in Part III, Canadian provinces complain that under the current circumstances, they have no choice but to accept the federal government's conditions, whatever they may

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80 *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080 at 1105 (McLachlin J, dissenting) [*Finlay*].

81 *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 49.

82 *Reference re Impact Assessment Act*, 2023 SCC 23 at para 139.

83 The first conditional grant dates from 1862, but they were not squarely examined by the US Supreme Court until 1947, in the seminal case *Oklahoma v United States Civil Service Commission*, 330 US 127 (1947), where it found that the federal government "does have power to fix the terms upon which its money allotments to states shall be disbursed" (at 143), even noting that "the offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual" (at 144). In subsequent cases, the Supreme Court clarified the criteria that conditional grants must abide by to be valid: the exercise of the conditional grants must be in pursuit of "the general welfare" according to the wording of the constitutional spending power provision, the conditions must be unambiguous, they must be related to the federal interest for which the funds are expended, they must not induce states to engage in activities that are unconstitutional, and they cannot be coercive (*South Dakota v Dole*, 483 US 203 (1987) [*Dole*]).

84 *R v Comeau*, 2018 SCC 15 at para 78.

be. Remedying these bargaining power discrepancies could improve conditional transfers' viability.

Here, American case law may come in handy. According to the US Supreme Court, legislation enacted pursuant to federal spending power is comparable to a "contract"[85] and therefore it must be agreed upon voluntarily. In other words, conditional transfers imposed upon the states must not amount to "coercion."[86] Consequently, courts have determined that when the penalty for non-compliance is financially significant, the scheme is invalid. In *Dole*, the US Supreme Court confirmed that the federal government could declare that states which set a minimum drinking age lower than 21 would lose 5 percent of federal highway funds, which amounted to less than 1 percent of South Dakota's total budget.[87] In comparison, in the *National Federation of Independent Business v. Sebelius* (the Obamacare case), the US Supreme Court ruled that because roughly 10 percent of the state's overall budget was at play,[88] a financial incentive which amounted to "a gun to the head,"[89] and therefore the conditional grant was unconstitutional. However, as it had done in the past,[90] the Court refused to draw a line between persuasion and coercion, claiming that "wherever that line may be, [the] statute [was] surely beyond it."[91] Canadian courts could probably import this doctrine.[92] Like the US Supreme Court, Canadian courts often compare intergovernmental agreements to contracts.[93] To determine whether conditional transfers are valid, they could rely on the vast Canadian body of contractual case law.[94]

An assessment of a province's budget surplus or deficit could also be helpful to the courts in making this determination for health care transfers. Provinces that have large budget surpluses, as compared to budgetary deficits, have much more leverage to negotiate the conditions of health care transfers with the federal government. The courts could rework the test set out in *Dole* to provide more protections for provinces whose budgets are more restricted compared to provinces with strong budgetary surpluses in order to recognize the fact that a province's fiscal health informs the voluntariness of its entrance into health care agreements with the federal government.

Alternatively, rather than assessing the coercion by looking at the funds involved, courts could look at the nature of the conditions. Conditions that are too specific and that undermine the provinces' autonomy could be grounds for invalidation. For example, while the five *Canada Health Act* principles may be broad enough, the much more specific requirements for healthcare-related transfers that were set out by the federal government in 2023 may be

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85 *Pennhurst State School and Hospital v Halderman*, 451 US 1 (1981) at 17 [*Penhurst State*].

86 *Dole*, *supra* note 83 at 211.

87 *National Federation of Independent Business v Sebelius, Secretary of Health and Human Services*, 567 US 519 at 580 (2012) [*Obamacare*]; *Dole*, *ibid*.

88 *Obamacare*, *ibid* at 582.

89 *Ibid* at 581.

90 *Steward Machine Company v Davis, Collector of Internal Revenue*, 301 US 548 at 591 (1937).

91 *Obamacare*, *supra* note 87 at 585.

92 This would be consistent with the *Report of the Royal Commission on Dominion-Provincial Relations*, which concluded that conditional transfers may be an appropriate and efficient instrument "[w]here the amounts involved are not large" (Privy Council Office, *supra* note 14 at 127).

93 See e.g. *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373; and more recently *Canada (Attorney General) v British Columbia Investment Management Corp*, 2019 SCC 64 at para 94 [*BCIMC*].

94 For instance, unconscionability in common law or lesion in Quebec civil law.

too intrusive.[95] Moreover, courts could even consider the type of "project" that is envisioned by the agreement. Take Spain, for instance, where courts have developed a differentiated analytical grid. The conditions tied to grants may be more detailed — and thus intrusive — for matters falling under federal interests or share jurisdiction than they may be in matters of exclusive regional competence.[96] Conditions related to health, a typically provincial field, may have to be broader than conditions related to housing, for instance. While they may have the unfortunate impact of creating some uncertainty as to the validity of the agreements, these solutions would help calm the provinces' well-founded fears of encroachments on their sovereignty.

B. CONSENSUAL

Developing the terms of the transfers in partnership with the provinces renders conditional transfers more compliant with federalism. It allows provinces to take part in developing solutions that fit their needs, thereby preserving their autonomy. In fact, although the Quebec Premier, as chair of the Council of the Federation, repeatedly criticized the federal government's attempt to introduce new pan-Canadian norms, he nonetheless left the door open to adding conditions consistent with the provinces' ambitions. He then referred to the 2017 agreements, where the provinces agreed to devote the funds received from the federal government to specific areas, where they "would have spent the money anyway."[97] Moreover, collaborative approaches leave room for asymmetric federalism and recourse to distinctive treatments, from which Quebec has repeatedly benefitted in the past, namely with the *10-Year Plan to Strengthen Health Care*.[98]

In other federal countries, the federal government must consult the provinces before amending conditional transfer schemes or adopting a new one. For instance, the Swiss Constitution provides that "[the Confederation] shall consult the Cantons where their interests are affected."[99] The German Constitution more explicitly states that conditional transfers may only be implemented if the federal government obtains the approval of the Bundesrat — the upper House, which ensures fair representation of all *Länder* — or concludes an intergovernmental agreement. Both options imply that the *Länder* must consent in some way.[100] A similar requirement was also contemplated in Canada. The *Social Union Framework Agreement* provided that the federal government must collaborate with all provincial and territorial governments to identify Canada-wide priorities and objectives when resorting to its spending power as well as enable governments to determine the detailed program design best suited to their needs to meet the agreed-upon objectives.[101] Moreover,

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95 Office of the Prime Minister, *supra* note 4.

96 Palermo & Kössler, *supra* note 8 at 235; Carles Viver, "Centralisation and Decentralization Trends in Spain: An Assessment of the Present Allocation of Competences Between the State and the Autonomous Communities" in Government of Catalonia, ed, *Decentralizing and Re-centralizing Trends in the Distribution of Powers within Federal Countries* (Barcelona: Government of Catalonia, 2010) 155 at 169.

97 Olivier Bossé, "Transferts en santé: Legault déçu du refus de négocier de Trudeau, mais ouvre la porte à des conditions," *Le Soleil* (10 Décembre 2020), online: [perma.cc/5UC2-TB7Y] [translated by author].

98 See the separate press release: Canadian Intergovernmental Conference Secretariat, News Release, "Asymetrical Federalism that Respects Quebec's Jurisdiction" (15 September 2004), online (pdf): *Canadian Intergovernmental Conference Secretariat* [perma.cc/MDX9-HZ96].

99 *Constitution Fédérale* [Cst] [Constitution] 18 April 1999, RO 101, s 45(2).

100 *German Basic Law*, *supra* note 46 at s 104(b).

101 *Social Union*, *supra* note 30, s 4.

the federal government committed to restraining from introducing new initiatives without the agreement of a majority of provincial governments.[102] It must be noted that the *Social Union Framework Agreement* has no constitutional value, and has had no significant impact on the evolution of health policies.[103]

However, imposing a duty to consult on Parliament before amending the *Canada Health Act* or other similar statutes would be inconsistent with the current state of the law. Courts have established that due to parliamentary sovereignty there can be no obligation on Parliament to consult before legislating.[104] In addition, the Supreme Court of Canada held that Parliament has no duty to try to reach an agreement with the provinces before using the powers it can legally exercise under the Constitution.[105] Nonetheless, whether or not there is a duty requiring the federal government to find consensus or majority support amongst the provinces or simply requiring that any individual province agree to the conditions that accompany its transfers, courts could require members of the federal executive to consult provinces or even obtain their approval before amending federal *regulations* (as opposed to legislation). In fact, the *Canada Health Act* already requires that provinces be consulted before regulations related to the duty to report and recognize federal contributions are adopted. The *Canda Health Act* even requires the federal government to obtain the provinces' approval before adopting regulations setting out the services that must be included in the health care insurance plan.[106] To develop the scope of the duty to consult, courts could draw on Canadian case law, which already recognizes that Indigenous peoples, in certain circumstances, have a right to be consulted and accommodated.[107]

C. UNAMBIGUOUS

As explained in Part III, the imposition of vaguely formulated conditions has led to disagreements over the years. Ensuring that provinces have a good understanding of where they can invest the funds that they receive would allow them to avoid being penalized while enabling the federal government to meet its objectives. Clarifying the deal's terms would also make it easier for Canadian voters to evaluate the suitability of the conditions the federal sets and consequently hold it accountable.

Once again, Canadian courts could gain inspiration from how conditional transfers are regulated across the border. In the US, the legitimacy of Congress' power to use conditional transfers relies on whether the States voluntarily accept the terms of said "contract."[108] Thus,

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102 *Ibid*, s 5.

103 See e.g. Katherine Fierlbeck, "The Political Dynamics of Health Care Federalism" in Katherine Fierlbeck & William Lahey, eds, *Health Care Federalism in Canada: Critical Junctures and Critical Perspectives* (Montreal: McGill-Queen's University Press, 2013) 45 at 50.

104 See *Re CAP*, *supra* note 45 at 557–64 and more recently *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

105 *Reference Re Anti-Inflation Act*, *supra* note 93 at 421: "No doubt, federal-provincial co-operation along the lines suggested might have been attempted, but it does not follow that the federal policy that was adopted is vulnerable because a co-operative scheme on a legislative power basis was not tried first. Co-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it." See also *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 19–21.

106 *Supra* note 24, ss 22(2), 22(4).

107 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

108 *Penhurst State*, *supra* note 85 and accompanying text.

the Supreme Court held that the conditions set out by the federal government must be unambiguous, in order to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[109]

Requiring the federal government to set very univocal guidelines may not necessarily be appropriate in the Canadian context because it would undermine provincial autonomy. Broad guidelines, just like the five principles set out in the *Canada Health Act*, would grant provinces more leeway to make choices that are consistent with their priorities. However, in determining whether provinces have a right to receive the funds they were promised, courts should give the conditions a broad meaning, in a way that favours the provinces. In fact, this is what the Supreme Court of Canada seems to have done in *Finlay v. Canada (Minister of Finance)*, where it wrote that the conditions included in the *Canada Assistance Plan* were "not designed to dictate the precise terms of the provincial legislation," but to "promote [provincial] legislation which achieves substantial compliance with the objectives [of the federal scheme]."[110] For instance, when interpreting whether provinces comply with the "comprehensiveness" principle, they should show deference toward the provinces' choices to offer some borderline services and not others.

The most recent bilateral agreements between the federal government and the provinces over health care transfers required the provinces to spend the funds in four specific areas: "[F]amily health care; health workforce and backlogs; mental health and substance use; and modernizing the health care system with standardized information and digital tools."[111] Absent specific language in the bilateral agreements to the contrary, courts should allow the provinces to decide which services fall under these four areas, and which areas to prioritize. Courts must interpret these four priorities as broadly as possible and in favour of provincial spending decisions that further them.

D. BINDING

As explained in Part III, nothing legally prevents the federal government from unilaterally amending the terms of their deals with the provinces or eliminating them. Therefore, binding intergovernmental agreements that endorse the terms of the conditional transfer could improve their relationship with federalism. Such legal modifications have already been considered. A provision from the *Charlottetown Accord* would have established that, once a legislature incorporates an intergovernmental agreement, the latter cannot be "amend[ed], revoke[ed] or otherwise supersede[d]" for the following five years.[112]

However, it is currently well settled that intergovernmental agreements cannot prevent a legislature from subsequently adopting laws inconsistent with the agreement.[113] When asked

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109 *Ibid* at 17.
110 *Supra* note 80 at 1123–24.
111 Office of the Prime Minister, *supra* note 4.
112 *Charlottetown Agreement*, *supra* note 28 s 126A(1).
113 *Re CAP*, *supra* note 45 at 548–49, which Johanne Poirier described as "l'une de ses décisions les plus imperméables à la réalité du fédéralisme canadien" (Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales" (2009) 1 Revue québécoise de droit constitutionnel 1 at 21); *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 59, 62–71; *BCIMC*, *supra* note 93 at para 92.

to examine the enforceability of such agreements, courts have repeatedly refused to override parliamentary sovereignty.[114]

While it is clear that parliamentary sovereignty is a paramount principle of Canadian constitutional law, courts have also reminded us that intergovernmental agreements can nevertheless engage governmental responsibility. In other words, provinces could be allowed to sue the federal government for breaching the agreement. In *Reference Re Anti-Inflation Act*, the Supreme Court of Canada, comparing intergovernmental agreements to international treaties, stated that the mere conclusion of intergovernmental agreements is not sufficient to change internal law, but added that "the contract may be binding upon it or that it may sue the other contracting party on the contract."[115] This was reiterated in subsequent cases.[116] It remains to be seen whether courts would award damages to provinces for breaching binding intergovernmental agreements,[117] but doing so could partly mitigate the inequity between the parties.

This principle is particularly important in the context of health care transfers. When there is a change in government after an election, the new executive often has new health care priorities and promises made during the election that are not just different from, but possibly contradictory to, those of the previous government. It is important for the stability of Canada's health care system that the provinces can engage in stable, predictable, and long-term planning of their administration of health care systems. Constantly changing goalposts and priorities imposed on them by the federal government following the election of a new executive jeopardizes their ability to do this. Having some sort of legal recourse to recuperate funds for broken agreements with the federal government has the potential to greatly mitigate against this risk.

E. REASONABLE

In addition to the conditions that are imposed upon them, the provinces' allocated budget has also been deemed problematic in itself. As shown in Part III, provinces accused the federal government of providing them with too few resources to compensate for rising healthcare costs. Guaranteeing provinces revenues that are reasonable in light of their responsibilities under the division of powers could alleviate pressure on their respective budgets. Indeed, if provinces are assured that they will receive a reasonable baseline of federal financial support for the services they deliver, that will likely facilitate negotiations surrounding the reasonableness of the conditions the federal government may wish to attach to their transfers.

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114 Poirier, *ibid* at 21–23.

115 *Supra* note 93 at 433. Chief Justice Laskin also added: "I agree, of course, that the Executive or a Minister authorized by it may be the proper signatory to an agreement to which the Government of Ontario is a party. That, however, is merely the formality of execution; and even if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting parties but yet be without domestic force, that would not make the agreement part of the law of Ontario binding upon persons purportedly affected by it" (*ibid* at 433).

116 See *BCIMC*, *supra* note 93 at para 94.

117 Note that in *Re CAP*, *supra* note 45 (where the Supreme Court found that Parliament was allowed to limit the growth of federal payments made to financially stronger provinces, "the payment formula was left out of the Agreement and placed in the statute where it was, by virtue of s. 42, subject to amendment" at 549). Courts may have enough leeway to rule otherwise were payment formulas set out in the agreements themselves.

Both South Africa and Spain's constitutions provide that states are entitled to revenues that allow them to properly exercise their constitutional powers.[118] Similarly, some Canadian scholars read section 36(1) of the *Constitution Act, 1982*, which stipulates that both levels of government commit to "providing essential public services of reasonable quality to all Canadians,"[119] as imposing a constitutional obligation on the federal government to provide enough money to the provinces through conditional transfers.[120] However, others believe that section 36 is "too vague, and too political, to be justiciable."[121]

In general, Canadian courts tend to refuse to engage in political debates that have important financial implications for the government. Courts are ill-equipped to decide what constitutes a "reasonable" amount of money for a specific purpose. They also lack the democratic legitimacy that is required for the allocation of public funds. Moreover, given that imposing to the federal government a minimum amount to be transferred to the provinces in a specific area has more to do with imposing specific outcomes than facilitating intergovernmental dialogue, it raises serious questions as to its combability with co-operative federalism. For these reasons, despite its potential to compensate for bargaining power discrepancies, it is debatable whether a judicial intervention forcing the federal government to increase health transfers is possible or even desirable.

V. CONCLUSION

In Canada, the power to resort to conditional transfers knows virtually no limitation. This is a serious impediment to the flourishment of federalism, especially in a multinational federation.

Although solving the conditional transfers puzzle seems like an unachievable task, every constitutional dead end awaits its Supreme Court decision, as Canadians know so well. By restricting the federal government's ability to craft and manage conditional transfers unilaterally pursuant to one or some of the methods outlined in this article, the judiciary could rehabilitate conditional transfers as a valuable addition to Canadian federalism.

However, courts alone will not be able to solve the problem once and for all. As demonstrated above, due to some judicial precedents, they do not have the flexibility to include all the desired changes in Canadian law without triggering an avalanche in the constitutional landscape. In addition, they may lack the legitimacy to unilaterally solve a century-old war that has taken a deeply political turn. As Professor Andrew Petter wrote on the federal spending power: "While the authority wielded by judges may enable them to strike down particular programs, it does not permit them to dismantle the structure of modern government. It is simply beyond the capacity of the courts to undo forty [now seventy] years of political development."[122]

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118 *Constitution of the Republic of South Africa*, *supra* note 46, s 227(1a); *Constitución Española*, BOE n 311, 29 December 1978, s 156(1) (Spain).
119 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
120 Nader, *supra* note 44.
121 Hogg, *supra* note 7 at 6–10 (though referring to equalization payments).
122 Petter, *supra* note 10 at 472.

While courts should establish certain safeguards and spark discussion, to be successful in the long run, the development of the new conditional transfers framework must involve the provinces in a fashion that preserves Canadian co-operative federalism's cordiality. None of the above proposed measures would change or subvert the primary role of political negotiations between the federal and provincial governments. Rather, they would promote reasonable and predictable frameworks under which those negotiations occurred, ensuring a healthier balance between federal initiatives and provincial autonomy.

There is no room for honed swords in the Canadian constitutional framework. Governments will need to set aside their differences as they did in the previous decades to set new boundaries themselves. A new era in Canadian fiscal relations looms, and to welcome it, Canadian courts and governments will be required to do their part to slowly but surely untangle the Gordian knot.

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