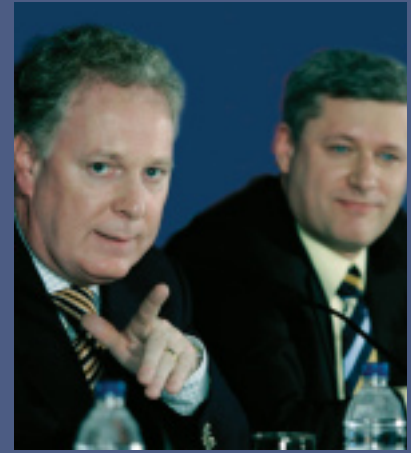


FEDERALISM AND THE SPENDING POWER: SECTION 94 TO THE RESCUE

Marc-Antoine Adam

A lot of attention has been devoted lately to fiscal federalism and Canada's social union. There is a widespread perception that while the system might have been working in the 1960s and 1970s, it is now broken. Criticisms are numerous: lack of transparency, accountability and collaboration; constant political tension; and conflicts over jurisdiction. As work to fix the fiscal imbalance is underway, Marc-Antoine Adam argues there is a fundamental flaw in Canada's social union, connected with its legal foundation, and that is the federal spending power. In its place, he suggests we should revive a provision of the 1867 Constitution, section 94, originally meant to allow greater integration among English speaking provinces.

On a beaucoup parlé ces derniers temps de fédéralisme fiscal et d'union sociale canadienne. Selon une perception largement répandue, ce système qui aurait bien fonctionné dans les années 1960 et 1970 est aujourd'hui en panne. Les critiques fusent de toutes parts : manque de transparence, de responsabilisation et de collaboration, tensions et conflits incessants autour des champs de compétence, etc. Mais tandis qu'on cherche à corriger le déséquilibre fiscal, l'union sociale reste affaiblie par une faille majeure liée à ses fondements juridiques, c'est-à-dire au pouvoir fédéral de dépenser, estime Marc-Antoine Adam. Pour remédier au problème, celui-ci propose de rétablir une disposition de la section 94 de Constitution de 1867, qui visait initialement une meilleure intégration des provinces anglophones.



Twenty-five years after its adoption, we can now appreciate how much the Canadian Charter of Rights and Freedoms has influenced Canada's constitutional evolution. Ironically, while the Charter pushed the principles of constitutionalism and the rule of law to a level never seen before in a Westminster system, these same principles were all but abandoned as regards federalism. While the idea that the Charter should set strict and enforceable limits to all aspects of government action has sunk deep in the Canadian psyche, relativism seems to have nearly completely overcome federalism, now largely left to the forces of politics. As the raging debate over the fiscal imbalance witnessed during the past decade indicates, nowhere is this truer than in the governance of Canada's social union.

Indeed, what is striking about Canada is that we try to govern our federation without the assistance of a legal framework. Specifically, with respect to federal-provincial issues, the conventional wisdom is, firstly, that our Constitution is outdated and cannot provide satisfactory answers to the needs of today and, secondly, that it cannot be amended. Hence, Canada's Constitution, as it concerns federalism, is

viewed by many as a liability, an obstacle to Canadian nation-building. Conversely, these same people are convinced that our ingenuity in skirting around the Constitution, or "muddling through," has made Canada a stronger country.

Maybe, but then again, maybe not. It has been said that federalism is a learning process of negotiation and conflict resolution and that a "certain creative tension" is inherent in the federal system. That we should constantly be negotiating is perhaps normal. That there should be no permanent agreed-upon rules to govern our negotiations is much more troublesome. But this is precisely what a constitution is meant to provide: a set of fundamental rules within which the day-to-day political process can take place. In fact, in Canada, because of our lack of agreed-upon fundamental rules, the management of what should be day-to-day matters has a tendency to mutate into quasi-constitutional negotiations, thereby locking this country into a state of permanent constitutional debate.

This article stresses the need to return to a rules-based federalism, more specifically a constitution-based federalism. Initial attention will be directed to the notion of an "unlimited" federal spending power, which is the only theoretical

construct that has been advanced so far to bridge the gap between the Constitution and Canada's social union. We will see whether this concept is really compatible with Canadian constitutional law and whether it faithfully reflects the practice on the ground, or for that matter what Canadians want. The remainder of the article looks at section 94 of the *Constitution Act, 1867* as a potentially preferable legal foundation for Canada's social union.

Constitutionalism and the rule of law are principles of utmost importance for everybody; they afford stability and predictability. But they are even more vital for minorities because they protect them from the arbitrariness of the power holders of the day. While in a democracy this might mean curbing the will of the majority at times, this result scarcely needs to be explained or justified as far as the Charter is concerned. However, we tend to overlook this rationale when it comes to the federal distribution of powers. As Hamish Telford has noted, because Quebec is the home of a "minority community" in this country, the distribution of powers constitutes for Quebecers a form of constitutional protection in much the same way as the Charter.

In a recent legal case in Quebec, the federal government argued that federal spending is "in no way limited by the distribution of powers." The Attorney General for Quebec responded by noting that such a power is not in the Constitution, nor has it been formally recognized by case law, despite *obiter dicta* delivered occasionally by justices of the Supreme Court of Canada. Indeed, these often short and rather vague comments are not binding because they were expressed in circumstances where the spending power, per se, was not the object of the litigation. That is, the Court did not need to address this issue to settle the cases and accordingly was not presented with all

the arguments related to it in an adversarial manner which, in our legal tradition, is a safeguard for sound case law.

In fact, the only authoritative case that dealt with the federal spending power is the 1937 decision of the Judicial Committee of the Privy Council rendered in the Unemployment Insurance Reference. In that case, the federal government was attempting to defend the validity of its legislation by construing it as taxation on one hand and disposition of federal property on the other, and then by arguing that in disposing of such property, it was not constitutional-

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ly limited to federal objects. The JPCPC, although not convinced by the federal characterization of the statute, rejected the federal claim that its power to dispose of federal property was not limited by the distribution of powers.

What is striking is the resilience of the federal claim despite that case. Clearly, what allowed the thesis to survive is the continuing and expanding practice of federal interventions in areas of provincial jurisdiction that came with the advent of the welfare state. In the

legal literature, this led to interesting intellectual gymnastics, first to skirt around the decision of the JPCPC and, second, to skirt around the distribution of powers. This is how state spending, and the legislation authorizing it, came to be differentiated from "compulsory regulation" and portrayed as a gift that could be made freely, irrespective of the assignment of responsibilities provided for in the Constitution. The result was the "unlimited spending power" thesis. To achieve it, words were read into the Constitution. Thus the distribution of powers would no longer cover all legislation relating to the matters listed, but only legislation actively regulating these matters; conditions attached to spending would not be considered as regulating; and the purpose of the spending would be ignored.

The underlying rationale provided for this thesis was that we should distinguish situations when the state acts as a "public power," i.e., in a "compulsory" manner, from when it acts as a "private actor," such as when spending, lending and contracting. In the latter cases, it was argued, the state should be no more constrained by the Constitution than would a private individual. Strangely, no one has ever seriously attempted a similar public/private distinction to argue that the Charter ought not to apply to a government spending program. Obviously, there is a double standard here.

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F.R. Scott, the renowned constitutional scholar, is one of the few Canadian legal authorities to have written on section 94 of the Constitution. In 1942, writes Marc-Antoine Adam, "Scott devoted an important article to it as he was seeking to find ways that would allow the federal government to play a leading role in building the welfare state."

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In the final analysis, however, the strongest argument in favour of the possibility of federal spending in areas of provincial jurisdiction remains the massive practice of it over the past 50 years. To be sure, this practice has been welcomed in many parts of Canada, but it also has been the source of many grievances in Quebec.

While there may be broad support for some federal involvement in

provincial matters among Canadians outside Quebec, it is, however, doubtful that this support would extend as far as to sustain the federal claim that its power to spend "is in no way limited by the distribution of powers." It is equally doubtful that this proposition is an accurate reflection of the practice. If this statement were the law, it would mean that the federal government would have the power unilaterally to cut its entire funding to the provinces for health and post-secondary education and open up its own hospitals and universities instead. Presumably this is not what Canadians want.

In fact, the ideal of an absolute, unfettered federal power to encroach upon areas of provincial jurisdiction was probably never widely supported as a sustainable proposition to guide Canadian federalism. Indeed, it is hardly compatible with the federal principle itself. This is why almost every round of constitutional negotiations has sought, in one way or another, to prescribe proper limits to the federal spending power. In retrospect, that this course was chosen instead of an outright constitutional challenge may have been a mistake, for we all know what happened with the constitutional file.

After the failure of the Charlottetown Accord, the same was again attempted through the administrative route with the disappointing Social Union Framework Agreement as a result. Somehow, it seems that the incentive to find an effective and permanent mechanism that would allow the federal government to play a constructive and collaborative role in areas of provincial jurisdictions has never been sufficiently strong or shared to bear fruits. The temptations of unilateralism stirred up by the unlimited spending power thesis have always prevailed.

Yet what many Canadians seem to be seeking is, first and foremost, collaboration between the two orders of government in the management of what they perceive as pan-Canadian issues. However, the problem with satisfying this desire is twofold. First, as mentioned, often it is not equally shared by Quebecers. While there have been some instances of opting out which have succeeded in smoothing over this difficulty, these were ad hoc arrangements and only came after hard-fought political battles. And this leads to the second difficulty: the lack of a legal framework to sustain this vision of federalism in the Constitution, or so it seems. As we have seen, the unlimited spending power thesis is not very helpful here, for it essentially amounts to a huge legal vacuum at the heart of Canada's federal system. And without a sound legal

basis, the management of Canada's social union is condemned to remain in the lawless realm of raw politics.

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While the notion of an unlimited federal spending power is nowhere to be found in the Constitution, there is one provision in the chapter dealing with the distribution of powers that clearly contemplates the possibility for federal intervention in areas of exclusive provincial jurisdiction: section 94 of the *Constitution Act, 1867*. Actually, it is, for all intents and purposes, the only one.

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The scope of section 94 is very broad. It extends to all matters related to "property and civil rights," which constitute the bulk of the provincial domain and served as one of the bases on which it was determined that social insurance was a provincial jurisdiction. In fact, the juridical category of property and civil rights dates back to the *Quebec Act* of 1774 when, after the British Conquest, French law was restored in the province of Quebec in all matters but for criminal law, external trade and a few others. Thus, the notion of property and civil rights was from the beginning conceived as an inclusive category subject only to specified exceptions.

Section 94 allows the federal Parliament to legislate in relation to property and civil rights so long as the legislatures of the provinces where this federal legislation is to apply agree to it. In practice, the federal Parliament would adopt a given piece of legislation after its having been discussed and agreed upon with the relevant provincial authorities, and this statute would subsequently be adopted by the provinces who wished to and, from there on, become valid and binding federal law on their territory. The process could even be initiated by

provincial governments calling upon the federal government to intervene. Hence section 94 can be viewed, as Tom Courchene noted last September in *Policy Options*, as an opt-in formula that allows for asymmetrical federalism. Of course, the federal government could decide, for economic and political con-

siderations of its own, to make its intervention under section 94 conditional upon a certain number of provinces agreeing to endorse it. But there is no legal requirement in this respect.

Section 94 specifically refers to three provinces: Ontario, Nova Scotia and New Brunswick. It is clear that the intention of the framers of the Constitution was to exclude Quebec from its ambit on account of its distinct civil law tradition. The provinces mentioned are in fact the three common law provinces of 1867. The weight of the historical evidence and expert opinion is that section 94 would now apply to all common law provinces.

The original purpose behind section 94 is quite obvious: the framers of Confederation foresaw that despite the distribution of powers they agreed upon, there would eventually be a desire for further integration among the common law provinces. They also foresaw that this would not work well in Quebec given its specificity. Nearly 140 years later, we can only be impressed at how their predictions proved accurate.

The interesting thing about section 94 is that although it has never been used explicitly, many aspects of the underlying dynamics of Canada's social union are a reflection of the goal and the principles behind this section: the desire for greater uniformity, the need for collaboration and federal-provincial agree-

ment and the possibility for Quebec to opt out. Recent examples like the 2004 health accord with its Quebec addendum and the premiers' proposal for a federal pharmacare program excluding Quebec provide a good illustration of this.

There is very little to be found in the legal literature about section 94. In 1942, F.R. Scott devoted an important article to it as he was seeking to find ways that would allow the federal government to play a leading role in building the welfare state. In 1975, former justice Gerard La Forest also wrote about section 94. In the introduction to his paper, he noted how the interest in this area of the law had vanished and pointed at the spending power as a possible explanation. To be sure, both Scott and La Forest themselves became supporters of the unlimited spending power thesis. But maybe their first idea was the more promising one.

If we were to rethink Canada's social union using section 94, here are some of the potential benefits that could follow:

- We could stop pretending that public spending and legislating are two different things so that parliamentarians could reclaim their rightful place in our system.
- Federal interventions could go beyond mere spending and involve "compulsory regulation," thus allowing more effective, comprehensive and sound public policy.
- Outcomes would be legally binding and the law courts could settle potential disputes.
- The implicit acknowledgment that we are dealing with provincial jurisdiction and the constitutional requirement for provincial consent would eliminate federal unilateralism and shift the focus onto the merits of the public policy at stake rather than onto jurisdictional disputes.
- This could possibly go a long way toward easing relations with Quebec, without changing the Constitution, without giving Quebec more

powers and without even preventing other provinces, if they so wish, from opting out as well.

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The issue of financial compensation for non-participating provinces is one such question. Section 94 is silent on this. Obviously, the potential fiscal prejudice that might be incurred by non-participating provinces was not foreseen by its authors. The best evidence of this is provided by Quebec, which, as seen above, is formally excluded from any scheme under section 94. If the fiscal implications of this provision had been apparent, surely something would have been done to prevent what otherwise would lead to an unconscionable result.

In the context of today's social union, the absence of a right to compensation under section 94 would leave the door open to the same financial coercion presently associated with the unlimited spending power. This in turn would hardly be faithful to the principle of requiring individual provincial consent embedded in section 94. Hence, a right to compensation should now be inferred on equitable grounds, particularly if read together with section 36 of the *Constitution Act, 1982*.

Indeed, while the fiscal implications of the welfare state could not have been on the minds of the drafters of section 94 in 1867, they were very much on the minds of those of section 36 of the *Constitution Act, 1982*. In fact, the historical origin of this latter constitutional provision can be traced back to the Rowell-Sirois commission set up in the

late 1930s precisely to address the challenges the Welfare State posed to Canadian federalism. One such challenge was to find how the principle of equity underlying the Welfare State could be deployed in a manner consistent with the principle of diversity inherent to federalism. Hence, subsection 36(1) generally commits both the federal Parliament and government, as well as the provinces, to “promoting equal

opportunities for the well-being of Canadians” but “without altering the authority of Parliament or of the provincial legislatures.” Subsection 36(2) further commits the federal Parliament and government to make unconditional equalization payments. Now, if Ottawa has a constitutional obligation to equalize the fiscal capacity of provinces so as to compensate for existing inequalities among them, it would be strange that, meanwhile, it should be free to create between those same provinces, through section 94, fiscal inequalities of its own volition by refusing to compensate non-participating provinces making different social choices. In other words, under section 94, it is the merits of uniformity — not money — that should be the driver.

Another complex issue with section 94 is the question of reversibility once it has been used. Here, there seem to be two views: one that regards recourse to this section as a constitutional amendment with a different name and concludes that it creates permanent changes; and one that sees it as legislative inter-delegation and leaves the door open to reversibility. The controversy stems from the use of the word “unrestricted” to describe the extent of the power granted to the federal Parliament upon provincial adoption. Does it mean that this power would be unaffected by a repeal of the provincial statute which gave rise to it, or rather that once the power is granted, the

federal Parliament can amend its legislation at will without having to seek provincial approval again but only so long as the initial provincial statute remains in force?

Earlier drafts of section 94 tend to suggest the possibility of reversibility. But above and beyond these clues, practical considerations should be borne in mind here. The fear that by using section 94, provinces might be forever surrendering jurisdictional authority has often been referred to as a possible reason why this section has never been used. Did this serve Canada well? While in 1867, Canada did not have a home-based amending formula to revisit the distribution of powers, it now has one. And we know that constitutional amendments are not easy. Meanwhile, Canada still cruelly lacks a simple mechanism that would allow valid inter-delegation of legislative powers, unless section 94 was to partly provide for one.

The above-mentioned issues are just illustrative of the need for further reflection and research on section 94. Another issue would be Quebec. Admittedly, there are federal programs which suit Quebec. Could something be done then, given the language of section 94? However, it goes well beyond the ambition of this paper to provide complete answers to all of the issues involving section 94. The central point, rather, is to contend that: (1) Canada's social union must rest on law; (2) the unlimited federal spending power thesis is not law; (3) the Constitution is actually richer than we think; and (4) we should take a serious look at section 94, as it might potentially offer a more solid and consensual foundation for Canada's social union.

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