

THE FEDERAL SPENDING POWER IN CANADA: NATION-BUILDING OR NATION-DESTROYING?¹

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Introduction

In 1972, Walker Connor published a provocative article in the influential journal *World Politics*, entitled "Nation-building or Nation-destroying?"² Connor suggested that the failure of academics and political leaders to distinguish between nation and state created assimilationist pressures on minorities. Indeed, he argued that many social theorists in the 1950s and 1960s assumed that ethnic identity would "wither away" with "modernization" (1972, p.321). In short, "[s]ince most of the less developed states [and many of the developed states] contain a number of nations, and since the transfer of primary allegiance from these nations to the state is generally considered the *sine qua non* of successful integration, the true goal is not 'nation-building' but 'nation-destroying'" (1972, p.336). Efforts at state-building thus quickly clashed with minority nationalities, leading to many secessionist crises and conflicts.

This paper will argue that the federal spending power has helped to build the modern Canadian state, but it will also be suggested that the spending power has precipitated a process of nation-destroying. The spending power has undoubtedly contributed to the rise of the modern welfare state in Canada. Furthermore, many of the social programs established by the spending

power, especially medicare, have become part of the 'national' identity of Canadians, at least outside Québec. In this sense, the spending power has been an instrument of *nation-building* in Canada. The federal spending power, however, has been the object of considerable resentment in Québec. Successive governments of Québec have objected strenuously to the use of the federal spending power and the concomitant encroachment into areas of provincial jurisdiction. Indeed, the federal spending power may have contributed to the rise of a strong separatist party in Québec. In this sense, the federal spending power might be viewed as a weapon of *nation-destroying*.

This paper will first examine the constitutionality of the spending power. The second section of the paper will consider the judicial interpretations of the federal spending power. In the third section of the paper, the spending power will be assessed against the federal principle. The fourth section of the paper will illustrate that the government of Canada explicitly developed the spending power as an instrumentality of 'nation-building.' The fifth part of the paper will briefly examine some of the attempts to limit the use of the spending power. All of these attempts -- the Victoria Charter, the Meech Lake Accord, and the Charlottetown Accord -- ended in failure. The final section of the paper will consider the conflict of values and identity between the Québécois and Canadians outside Québec. The paper will conclude that reconciliation is unlikely, and that the federal spending power may lead to the separation of Québec from Canada.

The Federal Spending Power and the Constitution

The federal government has defined the "spending power" as "the power of parliament to make payments to people or institutions or governments for purposes on which it (parliament) does not necessarily have the power

¹ The author would like to thank Stephen Bornstein, Tom McIntosh, and Ronald L. Watts for their helpful comments.

² Walker Connor, "Nation-building or Nation-destroying?" *World Politics*, 24:3, April 1972: p. 319-355.

to legislate" (GOC 1969a, p.4).³ How can the federal government spend money outside its areas of legislative competence? Peter Hogg, Canada's leading constitutional authority, has suggested that the federal spending power, "*a power which is nowhere explicit in the Constitution Act of 1867,*" may be "*inferred from the powers to levy taxes (s.91(3)), to legislate in relation to 'public property' (s.91(1a)), and to appropriate federal funds (s.106)*" (1985, p.124; emphasis added). Section 102, the consolidated revenue fund, has also been cited as part of the basis for the federal spending power (Watts 1999, p.1). Hogg notes further, "[p]lainly the Parliament must have the power to spend the money which its taxes yield and to dispose of its own property. But of course the issue is whether this spending power authorizes payments for objects which are *outside federal legislative competence*" (Hogg 1985, p.124; emphasis added).

The specific wording of these clauses does little to clarify the issue. Section 91 (1a) and 91 (3) gives the federal government the power to make laws in relation to "public debt and property" and "the raising of money by any mode or system of taxation," in as much as these laws do not affect matters "coming within the classes of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces" (emphasis added). Section 102 stipulates,

All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia before and at the Union had and have Power of Appropriation, *except such Portions thereof as are by this Act reserved to the respective Legislatures of*

³ The federal government's position was outlined in three documents published by the Government of Canada: Lester Pearson (GOC 1968) *Federalism for the Future*, Pierre Trudeau (GOC 1969a) *Federal-Provincial Grants and the Spending Power of Parliament*, and E. J. Benson (GOC 1969b) *The Taxing Powers and the Constitution of Canada*.

the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided (emphasis added).

Finally, Section 106 indicates,

Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public service.

These sections of the Constitution Act 1867 clearly give the federal government the power to raise revenue by any mode of taxation and to spend this revenue in areas of federal jurisdiction, but it is not clear that federal government can spend monies outside its areas of jurisdiction. Andrew Petter, a professor of constitutional law and currently the Minister of Intergovernmental Relations in British Columbia, has argued that none of the constitutional arguments for the spending power are particularly convincing (1989, p.455).

The ambiguity of the Canadian constitution is evident when compared to the constitutions of India and Australia. The drafters of the Indian constitution, aware of the problems encountered in Canada with the Judicial Committee of the Privy Council in the 1930s (see below), anticipated that there might be instances when a government would wish to spend money outside its area of jurisdiction. Section 282 of the Indian constitution consequently declares that "[t]he Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may

make laws."⁴ For another example, Section 96 of the Australian Constitution permits the federal government to "grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."⁵ If the Canadian constitution was as forthright as the constitutions of India and Australia, the federal spending power in Canada would not be the subject of political uncertainty and conflict.

The Canadian constitution does not explicitly permit the government of Canada to spend monies in areas of provincial jurisdiction. The federal spending power can, at best, only be inferred from the constitution. Furthermore, the federal spending power has evolved through practice: it has not been sanctioned by the courts, and the federal government has been unable to procure a constitutional amendment to make the federal spending power explicit. The federal spending power thus sits in a vacuum of political and legal uncertainty. Justice Lambert of the British Columbia Appeal Court has described the constitutionality of the federal spending power as "fragile," and the Canadian Bar Association has described the legality of the federal spending

power as "uncertain" (1981, p.1).⁶ We must now turn our attention to the judicial interpretations of the spending power.

Judicial Interpretation of the Federal Spending Power

A *Globe and Mail* editorial declared recently that "the courts have ruled that, while Ottawa can't pass laws in areas of provincial jurisdiction, it can spend money there."⁷ Ronald Watts, a leading authority on Canadian federalism, has also asserted that the courts have interpreted the constitution to permit federal spending in areas of provincial jurisdiction (1999, p.1). While the Supreme Court has acknowledged that "the federal spending power is wider than the field of federal legislative power,"⁸ it has not determined the limits of the federal spending power. In another case, Madame Justice McLachlin wrote, "I have not considered the constitutional limits, if any, on the federal spending power. That issue was not raised before us and should, in my view, be left to another day."⁹ In short, the Supreme Court has indicated that the matter is not yet settled.¹⁰

The judicial decision that most directly considered the federal spending power remains

⁴ Section 282 of the Indian constitution is listed as the first "miscellaneous" financial provision, but it has become the subject of considerable abuse. Federal government grants to the states are supposed to follow recommendations of the constitutionally established Finance Commission. The majority of grants allocated to the states are now channelled through the Planning Commission, which was established in 1950 by executive order, and not through the Finance Commission. Thus, Section 282, which was inserted "to meet an unforeseen contingency" (Pylee 1965, p.618), has now become the primary means by which funds are allocated to the states.

⁵ From, Andrew Petter (1989) "Federalism and the Myth of the Federal Spending Power," *Canadian Bar Review*, 68, p.456.

⁶ The Canadian Bar Association Submission on Established Program Financing to the Parliamentary Task Force on the Federal and Provincial Fiscal Arrangements, Ottawa, May 14th, 1981.

⁷ "A Good Deal on Social Union," *Globe and Mail*, February 6, 1999; p.D6.

⁸ [1991] 2 S. C. R. Reference re Canada Assistance Plan (British Columbia) 525.

⁹ [1993] 1 S. C. R. Finally v Canada (Minister of Finance).

¹⁰ The federal spending power was also considered in *Brown v YMHA Jewish Community Centre of Winnipeg Inc.*, [1989] 4 W. W. R. 673 (S.C.C.).

the Employment and Social Insurance Act case of 1937. In that case, the Judicial Committee of the Privy Council rejected the federal government's contention that a spending power can be inferred from the constitution. Lord Atkin wrote towards the end of his judgement, "[i]t only remains to deal with the argument...that the legislation can be supported under the enumerated heads, 1 and 3 of s.91, of the British North America Act, 1867" (1982, p.116).¹¹ Atkin allowed that the federal government may collect revenue by any mode of taxation, but, he continued,

assuming 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. It may still be legislation affecting the classes of subjects enumerated in s.92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial 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 (1982, p.117).

While this decision would seem to prohibit a federal spending power, Laskin has noted the obvious: Atkin's "statement has not had any noticeable effect upon Dominion spending" (1969, p.667).

¹¹ See, Peter Russell (ed) (1982) *Leading Constitutional Decisions*, Ottawa: Carleton University Press.

In light of the JCPC's decision, the federal government tried to defend the spending power as "gift-giving."¹² Peter Hogg suggests that there might be some merit to this position:

It seems to me that the better view of the law is that the federal government may spend or lend its funds to any government, or institution, or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan, or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects (Hogg 1985, p.126).

¹² The federal government derived the gift-giving idea from the minority judgement of Chief Justice Duff in the 1936 Employment and Social Insurance Act case. Duff wrote, "it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or accept it subject to such conditions" (quoted in GOC 1969a, p.12). The JCPC, as noted above, rejected the argument of Chief Justice Duff and upheld the majority decision of the Supreme Court.

Hogg notes that it is constitutional for the federal government to provide money to the provinces. Indeed, federal statutory subsidies to the provinces are written into the constitution. Scott has also argued forcefully that "[g]enerosity in Canada is not unconstitutional" (Scott 1977, p.297).¹³ However, as Pierre Trudeau noted long before he entered public office, "governments may give donations only within the limits of the constitution" (Trudeau 1968, p.89).¹⁴

The federal government has circumvented the constitution and the judicial interpretations of the spending power by employing a narrow definition of legislation. The federal government reasons that parliament has "the power to spend from the Consolidated Revenue Fund on any object, providing the *legislation* authorizing the expenditures does not amount to a *regulatory* scheme falling within provincial powers" (GOC 1969a, p.12; emphasis added). Peter Hogg, however, admits that "if...federal funds are granted on condition that the programme accord

with federal stipulations, then those stipulations will *effectively regulate* the programme even though it lies outside federal legislative authority" (Hogg 1985, p.123; emphasis added). And Donald Smiley has written, "[a]lthough it is not within my competence to judge the constitutionality of the various uses of this power...it appears to a layman to be the most superficial sort of quibbling to assert that when Parliament appropriates funds in aid of say, vocational training or housing, and enacts in some detail the circumstances under which such moneys are to be available that Parliament is not in fact '*legislating*' in such fields" (Smiley 1968, p.73; emphasis added). In short, the federal government has premised its spending power on very fine semantic distinctions.

The Supreme Court, however, has still not fully sanctioned the federal government's position on the spending power. On the other hand, it is not entirely clear how the courts could handle a matter of this magnitude. Andrew Petter has noted, "we live in a country that for the past four decades [actually five decades now] has structured its political system around the assumption of a federal spending power. Terminating that power would pull the rug out from under a vast array of grants, programs, and tax expenditures" (1989, p.472). He notes further that "[w]hile 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 fifty] years of political development" (1989, p.473). However, as long as the federal spending power sits in a legal vacuum, it will be surrounded by political conflict.¹⁵

¹³ Scott argues, "[a]ll public monies that fall into the Consolidated Revenue Fund of the federal and provincial governments belong to the Crown. The Crown is a person capable of making gifts or contracts like any other person, to whomsoever it chooses to benefit. The recipient may be another government, or private individuals. The only constitutional requirement for Crown gifts is that they must have the approval of Parliament or legislature. This being obtained the Prince may distribute his largesse at will. Such gifts, of course, do not need to be accepted; the donee is always as free to reject the gift as the donor to offer. Moreover, the Crown may attach conditions to the gift, failure to observe which will cause its discontinuance. These simple but significant powers exist in our constitutional law though no mention of them can be found in the BNA Acts. They derive from doctrines of the Royal Prerogative and the common law" (1977, p.296).

¹⁴ This argument was made in his famous article, "Federal Grants to Universities," first published in *Cité Libre*, February 1957, and republished in *Federalism and the French Canadians* (1968).

¹⁵ It is somewhat curious, in fact, that the matter has not been taken up in the courts. It is possible that both sides, the federal and provincial governments, are afraid of losing a court case on the spending power and thus have preferred to negotiate a political settlement on the issue, although that has proved to be an elusive objective.

In sum, the federal parliament has declared its right to spend money in areas outside its jurisdiction, although the constitution does not provide the federal government the authority to make such a declaration.¹⁶ While the federal government has tried to avoid using the spending power unilaterally, Ottawa has frequently employed it despite objections from Québec. Stéphane Dion, the federal minister of Intergovernmental Affairs has said recently, "Mr. [Lucien] Bouchard...and his ministers can claim all they like that we [the federal government] don't respect the constitution in using the federal spending power. They can repeat it 1,000 times a day if it makes them happy, but it's wrong. It's legal, and we're completely within our rights to use it."¹⁷ However, the force of Dion's statement betrays his conviction: something that is clearly constitutional does not have to be stated so forcefully.

The Spending Power and the Federal Principle

The federal principle, following Kenneth Wheare, may be defined as "the method of dividing powers so that the general and regional governments are each, within a sphere, *co-ordinate* and *independent*" (1963, p.10; emphasis added). For Albert Dicey, federalism represents a system of government "under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states" (1959, p.143). If this division of sovereignty is to be meaningful, each order of

government requires autonomous legislative, taxing, and spending powers.¹⁸

While Wheare's definition of federalism has a venerable heritage, a number of scholars have considered his strict separation of the two orders of government to be anachronistic (Riker 1975, p.103). Anthony Birch modified Wheare's definition of federalism. He suggested that federalism is a system of government "in which there is a division of powers between one general and several regional authorities, each of which, in its own sphere, is *co-ordinate* with the others, and each of which acts directly on the people through its own administrative agencies" (1955, p.306; emphasis added). This definition of federalism stresses the co-ordination aspect of Wheare's definition, but drops the independence of the two orders of government that Wheare suggested was necessary. In short, the federal government of Canada has implicitly tended to follow Birch's

¹⁶ Section 92.10.C of the Constitution Act allows the federal government to declare certain provincial "works" to be for the "general advantage of Canada" and thus to assume responsibility for them. This clause, however, has been interpreted to mean that the federal government can assume responsibility for public infrastructure, not programs.

¹⁷ Quoted in the *Globe and Mail*, "Quebec Gains No Special Privileges by Opting Out, Dion Says," February 6, 1999; p.A10.

¹⁸ The Supreme Court of Canada has suggested that it will not circumscribe the federal spending power simply to uphold the federal principle. In the Canada Assistance Plan case from British Columbia (1991), the justices wrote, "[t]he Court should not under the 'overriding principles of federalism,' supervise the federal government's exercise of its spending power in order to protect the autonomy of the provinces. Supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the Canadian Charter of Rights and Freedoms, the courts have no jurisdiction to supervise the exercise of legislative powers." However, in the more recent Québec secession reference case, the Supreme Court affirmed that federalism is one of the fundamental characteristics of the Canadian polity, along with democracy, the rule of law, and respect for minorities. Indeed, the Court wrote, "[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" (para 57). It is thus conceivable that, if the federal spending power is referred to the Supreme Court, the justices may determine that the "overriding principles of federalism" are sufficient to place limits on the spending power.

model of federalism, while governments in Québec have advocated Wheare's understanding of federalism.

Since World War II the federal government has insisted that it is not possible to maintain a division of sovereignty within the federation. In terms of legislative autonomy, the federal government has argued:

this 'either-or' approach -- either it is federal jurisdiction or it is not -- does not meet the situations so prevalent in today's society, where there is a solid national interest in certain provincial problems or policies, but not such a 'total' national interest as to call for the transfer of jurisdiction to the Parliament of Canada. It is for these 'in-between situations' that some such vehicle as federal-provincial programmes, involving on occasion the spending power, is required (GOC 1969a, p.30-2).

While all the provinces have resented this blurring of the federal principle and intrusion into their sphere of jurisdiction, the reaction in Québec has been qualitatively different. As a province with a distinct national identity, the government of Québec has regarded federal intrusions into areas of provincial jurisdiction as a violation of its sovereignty.

The federal principle also suggests that the two orders of government in a federation should maintain separate revenue pools. The tax collection agreements in Canada have amalgamated the various revenue sources into a single pool and essentially created a unitary tax system. The two orders of government in Canada are thus forced to compete for the same resources. Edgar Benson, the federal finance minister in the late 1960s, indicated that this was a satisfactory arrangement:

[t]he application in the Constitution of the 'principle of access to revenue sources'

should result in virtually *unlimited* powers of taxation being granted to both the federal and provincial governments, each within its jurisdiction. Parliament should have the power to tax all persons, incomes, property and transactions (sales and purchases) in Canada, and each province should have the same powers within the province (GOC 1969b, p.16; emphasis added).

The position of the federal government is flawed: two orders of government cannot have *unlimited* powers of taxation if they are sharing the same tax fields. Conflict is inevitable in such a system. While Québec has been able to opt out of the tax collection agreements, the structural deficiency of Canada's taxation system has remained unaltered. The federal government and the provinces are still competing for the same tax sources.

The federal spending power is frequently justified on the assumption that the provinces have insufficient sources of revenue to meet their constitutional obligations. This reasoning, however, is specious. The provinces have access to income tax, which is the largest source of revenue in the country. The problem is that the federal government has commandeered a majority of this revenue for itself. This was certainly justifiable during World War II, when the federal government initially occupied the field of income tax. Indeed, the provinces, including Québec voluntarily "rented" their income tax space to the federal government at this time. The federal government may also have been justified in retaining this revenue source during the process of post-war reconstruction. In this reconstruction phase, however, the federal government initiated programs in areas of provincial jurisdiction and we now face the peculiar problem of the federal government collecting the most lucrative source of provincial revenue to finance provincial social programs. This would seem to contradict the principles of federalism.

The federal government evidently stopped thinking federally in the late 1960s. It argued that "[t]he case for a federal spending power for the purpose of enabling Parliament to contribute toward provincial programmes in fields of provincial jurisdiction is to be found in the very nature of the modern federal state" (GOC 1969a, p.20). The government argued further that "[t]he modern industrial state is so interdependent, particularly in technological and economic terms, and its population is so mobile, that it has become quite impossible to think of government policies and programmes as affecting the people within the jurisdiction of the particular government responsible for these policies" (GOC 1969a, p.22). The federal government consequently rejected federalism as system of government with divided sovereignty:

It can be argued that the Constitution should be contrived so as to avoid any need for a spending power -- that each government ought to have the revenue sources it needs to finance its spending requirements without federal assistance, and further that where the national interest comes to attach to a certain matter within provincial jurisdiction the Constitution ought to be amended to transfer that matter to federal jurisdiction. *The difficulty with this tidy approach to federalism is that it does not accord with the realities of a Twentieth Century state* (GOC 1969a, p.30; emphasis added).

Various governments in Québec have tried repeatedly since the Second World War to have the structure of fiscal relations in Canada conform to the federal principle, as defined by Wheare. In the above passage, the federal government seems to concede to Québec separatists that federalism *does not* and *cannot* work. Many Québécois have thus abandoned the federal project in favour of independence.

The Federal Spending Power and 'Nation-building'

The federal government has attempted to justify its spending power, and its interference in areas of provincial responsibility, as serving the 'national' interest. The federal government reasons, "because the people of Canada will properly look to a popularly elected Parliament to represent their national interests, it should play a role *with* the provinces, in achieving the best results for Canada from provincial policies and programmes whose effects extend beyond the boundaries of a province" (GOC 1969a, p.34; emphasis original). The federal government concluded, "[i]t is in the nature of federalism, in other words, for the citizen to look to Parliament for an expression of his *national* or extra-provincial interests" (GOC 1969a, p.34; emphasis added). The spending power is the "vehicle," argues the federal government, "by which the 'national interest' in the level of general provincial public services or of a particular public source can be expressed" (GOC 1969a, p.30). The idea of "national standards" for social programs is a corollary of the "national interest" justification for the spending power.

In the late 1960s, the federal government proposed that it would only introduce new conditional grants for federal-provincial programs if there was "*a broad national consensus* in favour" of the program (GOC 1969a, p.38; emphasis added). The federal government suggested that a "national consensus" would exist if three of the four Senate regions supported a particular program initiative. By this scheme, a "consensus" could conceivably exist with as few as five provinces agreeing to the initiative. If Ontario, two western provinces, and two of Nova Scotia, New Brunswick or Newfoundland supported an initiative, the federal government would conclude that "a national consensus" existed for the program. This is an extraordinarily weak consensus, and it could exist without the agreement of Québec.

The notion of a *national* consensus and *national* standards, furthermore, implies the presence of only one nation. This is problematic in a multinational society, and it has been particularly disconcerting to the government of Québec. Many Québécois find the notion of *national* standards doubly offensive. First, in political practice, national standards mean *federal standards* in areas of *provincial jurisdiction*. This, of course, is contrary to the federal principle. Second, 'national standards' are interpreted in Québec as the standards of the 'English Canadian nation.'¹⁹ They are viewed as an imposition by the majority upon a minority nationality. Claude Ryan has thus argued,

'national standards' should be governed by an agreement among the governments concerned. The concrete search for these standards must be effected in ways that *fully respect provincial sovereignty* (Ryan 1985, p.218; emphasis added).

Note how Ryan must qualify the concept of national standards with inverted commas.²⁰ While Québécois cannot speak about national standards (in a Canadian sense), Canadians outside Québec

have come to insist upon country-wide, or so-called "national," standards for social programs. In short, the development of social programs in Canada has precipitated a clash of nationalisms.

Despite the concerns expressed by the government of Québec, the federal government has appeared unfazed. Indeed, it has argued, "there seems to have been little disposition on the part either of the federal or provincial governments to seek further judicial clarification of the matter [i.e. the spending power]....*Only governments of Québec* have advanced the more general proposition that it was constitutionally improper for Parliament to use its spending power to make grants to persons or institutions or governments for purposes which fall within exclusionary provincial jurisdiction" (GOC 1969a, p.14; emphasis added). Québec's opposition to the spending power, however, is a political problem. Indeed, Québec's frustration with the fiscal arrangements in Canada has, arguably, taken the country to the brink of dissolution. The federal spending power has thus been central to the constitutional negotiations designed over the past thirty years to keep Québec in confederation.

The Federal Spending Power: The Search for a Solution

As the various governments in Canada have searched for a lasting solution to the problem of the federal spending power, a typically Canadian compromise has emerged: a temporary *ad hoc* arrangement has evolved for a chronic *ad hoc* problem. The federal government has permitted the government of Québec to "opt-out" of shared cost programs. The opting-out arrangement, however, only provides Québec an illusion of autonomy: it does not restore the province's sovereignty in areas of provincial jurisdiction. Hogg, who, as seen above, generally supports the federal spending power, admits this himself:

All of these opting out arrangements bind the opting-out province to continue

¹⁹ The idea of an 'English Canadian nation,' as the opposite partner of the Québec nation, is problematic. First, it is an undefined, amorphous entity. More seriously, it is generally not recognized by Canadians outside Québec. This may stem from the fact that the 'English Canadian nation' has no institutional expression, other than the federal government. In this paper, the term "English Canadians" will be employed synonymously with the term "Canadians outside Québec." I do not mean to imply that all Canadians outside Québec are English by origin, only that English tends to be the *lingua franca* outside Québec.

²⁰ Louis Balthazar expands upon this point when he writes, "[t]he very tendency to use the word 'national' to refer to a federal government reflects a trend toward a kind of federation in which federated states are hardly more than junior governments or administrative units" (Balthazar 1998, p.108).

established programmes without significant change, or in the case of new programmes to establish or continue comparable provincial programmes. All that opting out really involves is a transfer of administrative responsibility to the province. It does not give the province the freedom to deploy resources which would otherwise be committed to the programme into other programmes. *The province gains little more than the trappings of autonomy: the federal government 'compensation' to an opting-out province is really just as conditional as the federal contribution to participating provinces* (Hogg 1985, p.123; emphasis added).²¹

The fact that the federal government has allowed Québec to opt-out of certain fiscal arrangements and social programs could be interpreted as a tacit admission that the spending power is unconstitutional and a violation of the federal principle.

The opting-out arrangements were first developed with the establishment of the Canadian and Québec pension plans in 1964 (see, Simeon 1972), although arguably the precedent was established when the government of Québec opted not to participate in the first post-war tax rental agreement in 1947.²² A constitutional solution for

the spending power has thus been sought since the mid-1960s. The first attempt to limit the federal spending power constitutionally occurred with the Victoria Charter in 1971. At this time, the federal government attempted to add "family, youth, and occupational training allowances" to the realm of concurrent jurisdiction in Section 94A.²³ While Premier Bourassa of Québec was willing to share constitutional jurisdiction for these items, he was determined to ensure that provincial supremacy was maintained in these areas, as Jean Lesage had done with pensions in 1964. Pierre Trudeau responded by saying that "the constitutional change proposed by Québec would, over the years, lead to an erosion of federal income security programmes and their replacement by purely provincial plans" (quoted in Forget 1986, p.124). When he was unable to obtain the assurances he desired on this matter, Bourassa withdrew his support for the agreement.²⁴ When René Lévesque and the Parti Québécois were elected in 1976, separatism dominated the political agenda until Bourassa made a triumphant return to power in the mid-1980s. In the ensuing two episodes of megaconstitutional politics, Bourassa tried again to circumscribe the federal spending power.

tax abatement for post-secondary education.

²¹ The opting-out provision makes a mockery of the gift-giving justification for the federal spending power cited above. Even if the gift giving argument could be shown to be constitutional, there can be no justification for forcing a donee who *declines* a gift to abide by the conditions attached to the gift as if the donee had accepted the gift.

²² The government of Ontario also elected not to participate in the 1947 tax rental agreement, although it participated in the next agreement in 1952. Hogg actually locates the origins of the opting-out provisions in 1959, when the federal government provided the government of Québec an increased corporate income

²³ Article 44 of the Victoria Charter proposed that Section 94A of the BNA Act be amended with the italicized words: "The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits including survivors' and disability benefits irrespective of age, *and in relation to family, youth, and occupational training allowances*, but no such law shall affect the operation of any law present or future of a Provincial Legislature in relation to any such matter."

²⁴ Claude Forget argues that "Québec was not attempting to deny the existence of the federal spending authority, but rather to restrict the exercise of this authority in such a way as to make social allowances paid to citizens by the federal government consistent with provincial social policies" (1986, p.125).

The Meech Lake Accord proposed to insert a new Section 106A to the Constitution Act of 1867. The new clause was to read:

(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives. (2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

Although the Meech Lake Accord only institutionalized the status quo, Premier Bourassa was pleased with the spending power provisions in the Accord. He told the National Assembly,

[w]ith respect to the federal spending power, we have obtained the best possible framework for its exercise through a guarantee of flexibility and respect for provincial areas of jurisdiction. The exercise of the federal spending power has for the past 30 years been a zone of constant friction between the federal government and the provinces. Québec has always vigorously denounced the unilateral exercise of this spending power, which has been the equivalent of actual constitutional amendments made *de facto* to the division of areas of legislative jurisdiction (quoted in Trudeau 1988, p.139).

Bourassa explained, "[t]he new section 106(A) is drafted so that it speaks solely of the right to opt out, without either recognition or defining the federal spending power...So Québec keeps the right to contest before the courts any

unconstitutional use of the spending power" (quoted in Trudeau 1988, p.139-140).

The Meech Lake Accord drowned on June 23, 1990, after treading water for three years. The Accord encountered much criticism, not least of which were vigorous claims that it would lead inevitably to a "decentralized" federation with a concomitant diminution of Canada's social programs. In the next round of megaconstitutional talks, Bob Rae, who had just been elected premier of Ontario, sought to reverse this "trend." Rae was particularly adamant that the next constitutional agreement had to include a constitutionally entrenched social charter. In the Charlottetown Accord, the governments of Canada committed themselves to "the principle of the preservation and development of the Canadian social and economic union."²⁵ The terms of the economic and social union were to be non-justiciable statement was supposed to reflect commonly held *Canadian* values.

Despite the non-justiciable nature of the social and economic union, its presence in the Charlottetown Accord symbolized the attachment of Canadians, especially outside Québec, to social

²⁵ The social union was intended to obtain the following objectives: "a) providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible; b) providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities; c) providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education; d) protecting the rights of workers to organize and bargain collectively; and e) protecting, preserving and sustaining the integrity of the environment for present and future generations." The objectives of the economic union were to include "the free movement of persons, goods, services and capital; the goal of full employment; ensuring that all Canadians have a reasonable standard of living; and ensuring sustainable and equitable development" (GOC 1992).

programs and the federal role in governing these programs. The framework established in the Charlottetown Accord for the expenditure of government money similarly reflected the growing appreciation of an activist central government. The spending power provisions of the Charlottetown Accord were stated as follows: "The government of Canada and the governments of the provinces are committed to establishing a framework to govern expenditures of money in the provinces by the government of Canada in areas of exclusive provincial jurisdiction that would ensure, in particular, that such expenditures a) contribute to the pursuit of *national objectives*...." (GOC 1992, p.47; emphasis added).²⁶ This enunciation of the federal spending power, rather more in accordance of the views of Canadians outside Québec, clearly enshrined the federal government's practice of intervening in areas of provincial jurisdiction. This was a tremendous setback for Premier Bourassa and made the Accord all that more difficult to sell in Québec. Since the death of the Charlottetown Accord, the debate in Québec has centred on sovereignty and the province's separation from Canada.

The latest agreement on the spending power is included in the "Social Union," negotiated by the federal government and the nine English-speaking provincial governments in February 1999.²⁷ The

²⁶ Charlottetown Accord, Draft Legal Text, October 9, 1992.

²⁷ Claude Ryan provides a detailed critique of the social union; see, Ryan, "The Agreement on the Canadian Social Union," *Inroads: A Journal of Opinion*, 8, 1999. He argues that the social union agreement "represents the third time in the past twenty years that Québec has been abandoned by its partners [the nine other provinces and federal government] after having decided to make common cause with them" (1999, p.27). Ryan accepts that "spending power is an essential feature of a sovereign state" (1999, p.32), but he argues that Canada needs to define and limit the spending power (1999, p.33). He concludes, "[s]ince

agreement declares that "[t]he use of the federal spending power under the Constitution has been essential to the development of Canada's social union." The agreement permits the federal government to continue using its spending power to establish new social programs in areas of provincial jurisdiction. The federal government agreed that it would not initiate new social programs without first negotiating with the provinces, but the agreement also stipulates that the federal government requires only the support of a majority of provinces to proceed with new programs.²⁸ The more stringent constitutional amending formula is thus circumvented. Judy Rebick, a well-known social activist, describes the agreement as "amazing" and states approvingly that the agreement "means that Ottawa, along with the have-not provinces, could launch a new social program without the agreement of Ontario, Québec, Alberta or British Columbia."²⁹ Premier Romanow of Saskatchewan gushed, after

the negotiations on the Canadian social union failed on the question of the spending power, we must sooner or later re-open conversation around this issue" (1999, p.40).

²⁸ Claude Ryan notes that "[s]ince a majority of the provinces can be attained with a mere 15% of the population and since the smaller provinces are more inclined to rely on federal government support, this requirement will be relatively easy to satisfy" (1999, p.34).

²⁹ Judy Rebick, "Union Rules," *Elm Street*, April 1999, p.112. In another article, with Barbara Cameron, Rebick writes, "[t]he framework agreement not only legitimizes the exercise of the federal spending power in social programs, but lowers the bar in terms of how many provinces have to agree to any new social program. If it had been in place a couple of years ago, we might even have a national child-care program today." See, "The Social Union is a Step Forward," *Globe and Mail*, February 8, 1999; p.A13.

obtaining the agreement, "to me this is how Canada should work and how it does work best."³⁰

The Social Union agreement of 1999 institutionalizes the position on the spending power that the federal government articulated in the late 1960s. The federal government has maintained this position without compromise, despite sustained opposition from the government of Québec. Claude Ryan has noted that "when it comes to proposals to integrate the provinces and Québec and thereby dilute provincial jurisdictions, Québec generally refuses to sign, whatever party may be in power in Québec City" (1999, p.37). It is thus not surprising that the government of Québec rejected the Social Union agreement. Indeed, Premier Bouchard put his finger precisely on the core issue: "the rest of Canada," he said, "is defining its own country in accordance with what it wants without being concerned about what we want, without being concerned about the conflicts."³¹

The Conflict of National Values: Where Does Sovereignty Live?

"What does Québec want?" asked Pierre Trudeau (1990, p.438). He answered, "[a]s far back as memory serves, French Canadians were essentially asking for one thing: respect for the French fact in Canada and incorporation of this fact into Canadian civil society, principally in the areas of language and education, and particularly in the federal government and provinces with French-speaking minorities" (1990, p.438). This, he claimed, was accomplished with official bilingualism and the Charter of Rights and Freedoms (1982). Québec, however, has wanted

more. From Confederation to the Quiet Revolution, political leaders from Québec have insisted upon sovereignty in their sphere of jurisdiction, and sufficient revenue to make that sovereignty meaningful.

The various governments of Québec, federalist and separatist alike, have objected strenuously to the erosion of provincial sovereignty, especially the realm of social policy. Claude Ryan argues:

[p]rovincial sovereignty in the fields of health and higher education must be clearly recognized and respected. Sovereignty here means primary and exclusive provincial jurisdiction over hospital and health insurance programs and the structure and management of higher education. Federal funding of these programs must not serve as a means of encroaching on areas of decision that are within the exclusive jurisdiction of the provinces (Ryan 1985, p.218).

More recently, Bernard Landry, the Deputy Premier of Québec, stated, "[t]he Constitution is clear: Education or health, it is our jurisdiction. The federalists should practice their own doctrine and respect the Constitution."³² In a federal system, the provinces should be free, within constitutional limits, to determine how to utilize their autonomy. This is the federal bargain, a bargain which has been undermined in Canada over the last fifty years, primarily by the federal spending power.

Canadians outside Québec seem blissfully unaware that the federal bargain with Québec may have been broken. The majority of Canadians outside Québec have an identity that corresponds to the Canadian state. Indeed, they rather presumptuously regard Canada as *the* nation,

³⁰ Quoted in "PM Gets Social-Union Deal but Québec won't Sign," *Globe and Mail*, February 5, 1999; p.A1.

³¹ Quoted in "Bouchard Warns of Fallout from Social Union," *Globe and Mail*, February 9, 1999; p.A4.

³² Bernard Landry, quoted in the *Globe and Mail*, January 27, 1999, p.A4.

much to the consternation of the Québécois.³³ As nationalists, many Canadians outside Québec believe that sovereignty should be vested with the federal government. Many Canadians outside Québec have been highly suspicious of the federal principle and the concomitant notion of shared sovereignty, and they are strong supporters of federal social programs, especially medicare. Indeed, health insurance seems to have become a part of the Canadian identity outside Québec. Michael Valpy, writing in the *Globe and Mail*, has argued that "[t]hrough its spending power, Ottawa initiated national hospital insurance and health care...Without it, we would not have achieved what *national standards* exist in other social services and programs. We would not have, in short, much of a country."³⁴

Many English Canadian nationalists are concerned that the fulfilment of provincial jurisdictions by the provinces would transform the country into a "patchwork quilt." This, of course, is precisely what federalism is supposed to do. The objective of federalism is to stitch together diverse social fragments while maintaining their cultural distinctiveness. Federalism is supposed to provide "unity with diversity." Canadians seem eager to preserve Québec's cultural distinctiveness, but there seems to be little point to this if Québécois are not granted the freedom to determine their own social and cultural policies, at least within the sphere of provincial jurisdiction. If Québécois are distinct, they cannot be expected to make exactly the same policy choices as other Canadians. The enforcement of "national standards" in areas of provincial jurisdiction is a

rejection of diversity. Unity *without* diversity is not federalism.

The federal government is now in a political bind. While the government of Québec wants limits placed on the federal spending power, the left in English Canada wants the federal spending power to be stronger. This dynamic has generated pressure for asymmetrical federalism, but any move in this direction raises the ire of the political right in English Canada, especially in western Canada. The Reform Party of Canada, in particular, is a very strong advocate of what it calls the "equality of the provinces" and asymmetrical federalism violates this principle. Thus, between the left and right in English Canada and nationalism in Québec, the federal government has very little room to manoeuvre around the federal spending power issue.

There is, however, an irony in this political dynamic. The left in English Canada perceives itself to be sympathetically disposed towards Québec culturally, but the social policies of the left leave Québec feeling alienated. While the right in English Canada seems less favourably disposed towards Québec as a distinct cultural community, its predisposition against federal intervention in social and economic policy is perhaps politically more amenable to Québec than the cultural sympathy expressed by the left in English Canada. However, as long as the centre-left vote remains stronger in English Canada, the federal government is unlikely to circumscribe its spending power.

Conclusion

All of the means by which the federal government has tried to justify the spending power have been inadequate. The federal spending power, at best, can only be *inferred* from the constitution; the JCPC ruled that the spending power was *ultra vires*; the gift-giving argument is tenuous; and justifying the spending power as in the national interest is highly problematic in a multinational federation. Even if the federal

³³ The Canadian Broadcast Company's flagship news program is called "The National," while the *Globe and Mail* describes itself as "Canada's National Newspaper." In both instances, the *nation* is presented as coterminous with the Canadian *state*. These are thus prominent examples of English Canadian nationalism.

³⁴ March 4, 1997, p.A.19; emphasis added.

government was able to prove the constitutionality of the spending power in a court of law, there cannot be any doubt that it violates the federal principle. As Lord Atkin concluded, if the federal spending power was constitutional, it "would afford the Dominion an easy passage into the Provincial domain" (1982, p.117). Although federal social programs have been subjected to considerable intergovernmental negotiations, the federal spending power has ultimately allowed the federal government to enter areas of provincial jurisdiction with virtual impunity.

Canadians, outside Québec at least, have come to regard the federal government as the guarantor of (provincial) social programs. It seems that Canadians have come to expect the collector of taxes, the federal government, to be responsible for the provision of cherished programs. Only in Québec, which collects its own taxes, do the citizens turn to the provincial government as the guarantor of their social services. Many Québécois now believe that the locus of sovereignty ought to reside in Québec City, while Canadians outside Québec believe that sovereignty properly resides in Ottawa. The Canadian federation has become unhinged; the two founding nations have diverged.

The federal spending power has encouraged Canadians outside Québec to equate their *national* identity with the boundaries of the Canadian state. This has led many nationalists in Québec to conclude that there is not sufficient room for the Québec nation in the Canadian state. Québec nationalists now consequently desire sovereignty. Without sovereignty, minority nationalities feel vulnerable to the actions of their own state, a state they cannot control by virtue of being a minority. Minority nationalities will likely not feel secure in a multinational society unless they are provided with some form of internal sovereignty. This, of course, is the federal project. Divided sovereignty allows each order of government to make autonomous political decisions within its constitutionally allocated sphere of jurisdiction.

While many Québécois now reject federalism in favour of independence, public opinion polls in Québec continue to indicate that "renewed federalism" is still the preferred constitutional solution for a majority of Québécois. By "renewed federalism" Québécois apparently mean respect for the principle of divided sovereignty. A strict application of the federal principle, however, would seem to prohibit the enforcement of federal standards in areas of provincial jurisdiction. It would thus seem that Canadians have a stark choice to make: they can have "national" social programs with "national" standards or Québec. They probably cannot continue to have both indefinitely.³⁵ The great difficulty, of course, is that English Canadians value *both* Québec and their social programs very highly. Canadians outside Québec consequently may not be able to offer Québec anything but the constitutional status quo, which might not be sufficient to hold the federation together.

If Québec separates from Canada sometime in the future, it is not actually clear which nation will be destroyed. Québec's independence may in fact represent the political realization of the Québécois nation, but it would undermine the 'national' identity of Canadians outside Québec. Thus, the federal spending power may ironically hurt Canadians outside Québec more than it hurts Québec. We might therefore conclude that the process of building the English Canadian nation with the spending power may culminate with the destruction of the Canadian state. Perhaps this paper should have been titled "nation-building and state-destroying."

³⁵ This, of course, is not a zero-sum game. Canadians can, of course, have provincial social programs with provincial standards. Indeed, it might even be possible to establish interprovincial agreements to ensure comparable standards and portability.

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