

**Fiscal federalism and the future of Canada:
Can section 94 of the Constitution Act, 1867 be an alternative to the spending power?**

By Marc-Antoine Adam¹

Introduction

25 years after the coming into force of the *Constitution Act, 1982*, we can now appreciate how much the Canadian *Charter of Rights and Freedoms* has profoundly influenced Canada's constitutional evolution, both as regards the functioning of the State and the development of Canadian identity. Ironically, as the Charter pushed the principles of limitation on sovereignty, judicial review, constitutionalism and the rule of law to a level never seen before in a British parliamentary system, those very same principles were all but abandoned as regards federalism. In other words, 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.²

This inconsistency in our relationship with constitutional rules and the weakening of federalism in Canada may well be rooted in our failure to tackle adequately the issue of interdependence between the two orders of government as well as the conflicting desires – often opposing Québec and the rest of Canada – for more or less pan Canadian integration. As a result of this failure, a considerable gap has developed between the Constitution and the practice of 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 fiscal federalism and more generally of Canada's social union.

Using the fiscal imbalance debate as backdrop, this paper will first stress the need to go back to a rules-based federalism, more specifically a constitution-based federalism (part 1). With this need in mind, we will then turn our attention to the issue of the “unlimited” federal spending power which, essentially, 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 ask both whether it is really compatible with our constitutional law (part 2) and whether it faithfully reflects the practice on the ground, or for that matter, what Canadians truly want (part 3). After having identified important deficiencies with this thesis, the remainder of the paper (parts 4 and 5) will shed light on section 94 of the *Constitution Act, 1867* which could, it is contended, provide a better alternative to the spending power thesis as a potential legal foundation for Canada's social union.

The need for rules

Over the last decade, academics have devoted much attention to “what works and what might work better” with respect to Canadian fiscal federalism (to borrow from one of the Institute of Intergovernmental Relations’ publications)³. The criticisms relating to fiscal federalism are numerous and often longstanding. To be sure, it is credited with great successes. But those achievements seem to belong to a now distant past. There is in the literature a perception that while the system might have been working relatively smoothly up until the late seventies – when money was flowing – this has not been so much the case since. Hence, complaints of potential misspending and lack of transparency and accountability traditionally associated with fiscal federalism were more recently joined by other perceived shortcomings such as the lack of binding effect of intergovernmental agreements, the absence of dispute settlement mechanisms, the political tension and constant conflicts over jurisdiction and more generally the absence of rules, the lack of process and the lack of collaboration (Lazar 2000; Telford, Meekison and Lazar 2004; Papillon and Simeon 2004; Leslie, Neumann and Robinson, 2004, Noël, 2005).

Although there seems to be a growing consensus over these weaknesses, at least in the academe, and no shortage of ideas to create new structures to address them (e.g. Burelle, 1995; Courchene, 1997; Frank, 2004; Cameron, 2004; Lazar, 2005; Leclair, 2005), fiscal federalism and Canada’s social union appear forever impossible to regulate. This paper puts forward the idea that maybe our existing institutions are more adequate than we think in this respect; maybe the problem is that we disregard them.

Indeed, what is striking with Canadian federalism is that we try to govern this country without the assistance of a legal framework, i.e. the Constitution. 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. Leaving aside the second of these two perceptions for a moment, let us challenge the first one.

For many, Canada’s Constitution, at least those sections dealing with federalism, is a liability. Its rigidity is an obstacle to Canadian nation building. It is considered to be divisive and focusing too much on it might even pose a threat to Canadian unity. Hence, the very term constitution has become a bad word in our vocabulary. Conversely, these same people are convinced that our ingenuity to skirt around the Constitution, or to “muddle through”, as some put it, has made Canada a stronger country. Maybe... but then, 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 system⁴. That we should constantly be negotiating is perhaps normal, that there should be no permanent agreed upon rules to govern our negotiations and what we negotiate is more troublesome. But this is what a constitution is meant to provide: a set of fundamental rules or a framework within which the day to day political process can take place. Lack of agreement on day to day political issues is normal and healthy. Lack of agreement on the fundamental rules is a different matter. In fact, one could say that in our federation, because of this lack of agreed upon fundamental rules, the management of what should be day to day political issues has a tendency to mutate into quasi constitutional negotiations, with the ironical result that Canada, for wanting to avoid its constitution, finds itself locked in a state of permanent constitutional debate.

In November 2004, the Québec Government put forward five principles that ought to govern us to meet the challenges facing the Canadian federation. These are respect, flexibility, balance, cooperation and the rule of law⁵. Incidentally, shortly after this, Stephen Harper pledged that if he became Prime minister of Canada, he would strictly abide by these same principles⁶. When mentioning the rule of law in the speech he delivered in Charlottetown on this topic, Québec's Premier, Jean Charest, stressed the importance that the practice of Canadian federalism be grounded in the Constitution. He also said that resorting to law courts to settle a dispute is sometimes better than carrying a sterile political struggle on forever.

The rule of law and constitutionalism 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.⁷ 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 of Rights and Freedoms is concerned; it is broadly acknowledged and supported. However, we tend to overlook this same rational when it comes to the federal distribution of powers. As Hamish Telford has noted, because Québec is the home of a "minority community" in this country, the federal distribution of power constitutes for Quebecers a form of constitutional protection in much the same way as the Charter (Telford, 2005).

The Constitution and the federal spending power

A great deal of the controversy surrounding the notion of fiscal imbalance, at least the vertical imbalance, relates to diverging interpretations of the allocation of roles and responsibilities between the provinces and the federal government (Boadway, 2005). These differences, in turn, are a direct result of the lack of legal certainty and political consensus concerning the federal spending power. In a sense one could view the federal spending power as the shaky foundation of fiscal federalism and Canada's social union.

In the early 2000's, in response to legal proceedings undertaken by labor unions in Québec challenging the constitutionality of certain provisions of the Employment Insurance Act, the federal government argued that even if the impugned provisions were not deemed to fall under its jurisdiction over unemployment insurance they had to be declared valid owing to the federal spending power which "is in no way limited by the distribution of powers" (*Syndicat national des employés de l'aluminium d'Arvida inc. c. Canada (Procureur general)*, 200-09-004695-042)⁸. The Attorney general for Québec who was impleaded into the proceedings objected to this sweeping claim.

In essence, Québec's argument in this regard is that the federal spending power, as conceived by the federal government and its supporters, is not in the text of the Constitution, nor has it been formally recognized by case law, despite some comments delivered occasionally by justices of the Supreme Court of Canada⁹. These often short and rather vague comments are what we call obiter dicta¹⁰. They are not binding because they were expressed in circumstances where the spending power was not the object of the litigation, the Court didn't need to address this issue to settle the case and it was not presented with all the arguments related to it in an adversarial manner which, in our legal tradition, is considered to be a

safeguard for sound case law. Incidentally, it was also the conclusion reached by the Québec Commission on fiscal imbalance led by Yves Séguin which investigated this matter in 2002 (*The "Federal Spending Power" Report* - Supporting document 2, 2002; see also Lajoie, 2006)¹¹.

In fact, as some authors have pointed out in recent years (Yudin 2002; Telford, 2003), 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* (before the Constitution was amended to transfer unemployment insurance to the federal Parliament). In that case, the federal government was attempting to defend the validity of its legislation by construing it as taxation on the one hand and disposition of federal property on the other hand, and then by arguing that in disposing of such property, it was not constitutionally limited to federal objects. The Privy Council was not convinced by the federal characterization of the statute, but even supposing such characterization to be correct, it rejected the federal claim that its power to dispose of federal property was not limited by the distribution of powers (*A. -G. Can v. A. -G. Ont, 1937*)¹².

What is striking about this case is the resilience of the unlimited spending power thesis despite its clear rejection by the Privy Council¹³. 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 some interesting intellectual gymnastics, first to skirt around the decision of the Privy Council¹⁴ and second to skirt around the distribution of powers¹⁵. 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 (Hogg, 1997, chapter 6). To achieve this result, first, words were read into sections 91 and 92 of the Constitution Act, 1867. Hence, these sections, effecting the distribution of powers, no longer covered all legislation relating to the matters listed, as is written and as the courts have taught us: they would only cover the legislation actively "regulating" these matters¹⁶. Second, it was argued that conditions attached to spending, however demanding and inescapable, are not "regulation", even if it admittedly indirectly achieves the same outcome. Lastly, we were told that the purpose of the spending is not to be taken into account even though purpose has always been a central element to determine the validity of legislation in disputes about the distribution of power¹⁷.

The underlying rationale provided for the unlimited spending power 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 (Hogg, *Ibid*). 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 here¹⁸.

Taken to its logical conclusion, the unlimited spending power thesis would imply that the provision of public services of any kind would largely be excluded from the purview of the distribution of powers, for it is essentially spending. The fact that "compulsory" taxation

provides the means for these services seems irrelevant to the proponents of this thesis, as does the fact that the provision of public services is now the core mission of the modern State. Moreover, little explanation is provided to account for the presence of many items in sections 91 and 92 which actually take the trouble of allocating exclusive public services/spending responsibilities between the federal and the provincial legislatures¹⁹. Nor are we told why exactly we needed to amend the Constitution to allow the federal government to take on unemployment insurance and old age pension²⁰.

As we can see, the unlimited spending power thesis is at odds with many constitutional provisions and principles²¹. It should therefore come as no surprise that it is also sometimes seen by non-lawyers as defying common sense as Donald Smiley once so eloquently put: “Although 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, 1962, p. 61).

What does Canada want?

In the end, the strongest argument in favor of the possibility for federal spending in areas of provincial jurisdiction remains the massive practice of it over the past half century. To be sure, this practice has been welcomed in many parts of Canada, but it also has been the source of many grievances in Québec²².

But while there well may be broad support for some federal involvement in areas of provincial jurisdiction among Canadians outside Québec, it is doubtful that this support would extend as far as to sustain the claim made by the federal government when it declares 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 of fiscal federalism and the governance of Canada’s social union. Indeed, according to the unlimited spending power thesis, the distribution of powers is irrelevant – it doesn’t matter – when it comes to spending measures. The federal Parliament and government can act freely. While this is certainly what happens when they spend in areas of federal jurisdiction, it must be conceded that interventions in areas of provincial jurisdictions are almost always the subject of discussions and negotiations with the provinces²³. Hence, the distribution of power does seem to matter somewhat. Actually, if the unlimited spending power thesis 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. Conversely, nothing would prevent the provinces to have their own army, their own postal service, their own currency. Obviously, we are not there and, presumably, this is not what Canadians want.

In fact, the ideal of an absolute, unfettered federal power unilaterally to encroach by way of conditional spending upon areas of provincial jurisdiction was probably never widely supported as a sustainable proposition to guide Canadian federalism. Indeed, the unlimited spending power thesis is hardly compatible with the federal principle itself. This is why several of the rounds of constitutional negotiations Canada has experienced since the appearance of the

concept have sought in one way or another to prescribe proper limits surrounding the use of the federal spending power²⁴. 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 endeavor was again attempted through the administrative route with the disappointing and toothless Social Union Framework Agreement as a result²⁵. Somehow, it seems that the incentive to find an effective, permanent and sustainable mechanism that would allow the federal government to play a constructive and collaborative role in areas of provincial jurisdictions has never been sufficiently strong, longwinded 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. To be sure, there have been some instances of opting out which have succeeded in smoothing over this difficulty, but these were ad hoc arrangements and only came after hard fought political battles²⁶. And this leads to the second difficulty, which is the lack of a legal framework to sustain this vision of federalism in the Constitution, or so it seems.

Indeed unlike other federations, such as Germany for instance, Canada's constitutional architecture was not built around the model of intra-state federalism. It is rather a classic example of inter-state federalism. Accordingly, little seems to be provided in the way of legal principles to address the requirements of interdependence. We have just seen that the unlimited spending power thesis is not very helpful in this regard, for it essentially amounts to suggesting there is a huge legal vacuum at the heart of Canada's federal system, which, in turn, is hardly conducive to genuine principled collaboration. And without a sound legal basis, fiscal federalism and the management of Canada's social union are condemned to remain in the lawless realm of raw politics.

The constitution inside the Constitution

In a speech he delivered in February 2004 at the law faculty of the University of Toronto questioning the legal foundation of the federal spending power, Québec's minister for intergovernmental affairs, Benoît Pelletier, presented many of the above arguments²⁷. After his speech, an interesting discussion followed among the participants. Reflecting on what had been said, Tom Courchene suggested that maybe a second look ought to be given to section 94 of the Constitution Act, 1867.

Section 94 is essentially the only provision²⁸ in the chapter of our Constitution dealing with the distribution of powers that truly contemplates the possibility for the federal government to intervene in an area of exclusive provincial jurisdiction, namely property and civil rights, which constitutes, as we know, the bulk of the provincial domain as well as one of the bases on which it was determined that social insurance was a provincial jurisdiction. Hence, federal spending programs pursuing provincial objects could possibly be respectful of the Constitution in some instances.

The juridical category of “property and civil rights” both referred to in section 94 and subsection 92(13) dates back to the Québec Act of 1774 when, after the British Conquest, French law was restored in the province of Québec 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 certain exceptions²⁹. It is this original construction that has led courts to consider subsection 92(13) as a general power, that acts as a residual clause in section 92, while some more specific headings contained in this section are intended to avoid the potential confusion that might arise from some of the assignments set out in section 91 exceptionally granting the federal Parliament limited powers in the field of property and civil rights³⁰. With respect to section 94, this would imply that its actual scope probably extends to many of the enumerated heads of provincial jurisdiction³¹.

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 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 (Scott, 1942). In fact, at the political level, the process could even be initiated by provincial governments calling upon the federal government to intervene. Hence section 94 is an opt-in formula that allows for asymmetrical federalism (Pelletier, 2005; Laforest, 2005; Brown, 2005; Milne, 2005; Smith 2005; Courchene, 2006). Of course, the federal government could decide, for economic and political considerations of its own, to make its intervention under section 94 conditional upon a required number of provinces accepting to endorse it. It could even request that all the provinces to which this section applies be on board. But there is no legal requirement in this respect. In other words, section 94 is a flexible, enabling tool.

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 Québec 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 (Scott, 1942; La Forest, 1975; Pelletier, 1996, p. 270, *contra* Rowell-Sirois Commission, 1940, vol II, p. 74)³².

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 Québec given its specificity. Nearly 140 years later, we can only be impressed at how the Framers’ 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 fiscal federalism and the governance 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 agreement and the possibility for Québec to opt out. As some authors have pointed out, recent examples like the 2004 health

accord with its Québec addendum and the Premiers' proposal for a federal pharmacare program excluding Québec provide a good illustration of this (Milne, 2005; Courchene, 2006).

There is very little to be found in the legal literature about section 94³³. 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 following the decisions rendered by the Privy Council about the distribution of powers in this area, including the *Unemployment Insurance Reference* (Scott, 1942). 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 (La Forest, 1975). To be sure, both Scott and La Forest themselves became supporters of the unlimited spending power thesis (Scott, 1955; La Forest, 1981). But maybe section 94 was the more promising idea. Maybe the appealing magic of the unlimited spending power thesis has detracted us from more constructive and solid avenues.

If we were to rethink fiscal federalism and Canada's social union using section 94, rather than basing it on the unlimited spending power thesis, 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, with the greater transparency and accountability that come with it.
- 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 acknowledgement that we are dealing with provincial jurisdiction and the constitutional requirement for provincial consent would eliminate federal unilateralism and shift the focus on to the merits of the public policy at stake rather than on jurisdictional disputes.
- the federal government could move forward with its interventions in some provinces without having to secure beforehand cross-Canada consent each time.
- this could possibly go a long way toward easing relations with Québec, without changing the Constitution, without giving Québec more powers, and without even preventing other provinces, if they so wish, from opting out as well.

Some issues for consideration

Section 94 does raise a number of questions to which attention should be devoted if it were to be considered as a potential legal foundation for Canada's social union. Its wording dates from

another period and is not always clear. Unlike other provisions of the Constitution, it has not benefited from successive judicial restatements carrying its meaning through to the 21st century. The following paragraphs are an attempt to briefly explore some of these questions and provide suggestions as to how they could be addressed. While this exercise may sometimes require us to move beyond the mere words of section 94, it is contended that it nevertheless constitutes a much more straightforward account of Canada's Constitution than that provided by the unlimited spending power thesis.

The issue of financial compensation for non participating provinces is one such question. Having been written in the 19th century with the liberal model in mind, section 94 is silent on this. 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 that plagues fiscal federalism. This in turn would hardly be faithful to the principle requiring individual provincial consent embedded in section 94. Hence, it is argued that a right to compensation should and could now be inferred from section 94 on federalism and equitable grounds, particularly if read together with section 36 of the Constitution Act, 1982.

Indeed, under the liberal conception of the role of the State prevailing in 1867, where social services were essentially being delivered by religious organizations and the private sector, there was not the same price tag associated with provincial jurisdictions as would later come with the Welfare State. Accordingly, the potential fiscal prejudice that might be incurred by non participating provinces was not readily foreseeable. The best evidence of this is provided by the case of Québec which, as seen above, is formally excluded from any scheme set up under section 94 in order to protect its specificity. If the fiscal implications of section 94 had been apparent to its authors, surely something would have been done to prevent what otherwise would lead to an unconscionable result.

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 the drafters 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 1930's precisely to address the challenges the Welfare State posed to Canadian federalism (Courchene, 1984, pp. 21-26). 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 federalism³⁴. 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..." For similar reasons, 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 external inequalities among them, it would be strange, to say the least, that, meanwhile, it should be free to create between those same provinces, through section 94, fiscal inequalities of its own volition by not compensating Québec and other provinces who exercised their constitutional right to make different choices in ensuring the well-being of their residents. 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. Supposing the federal government did have recourse to it and some provinces did adopt the ensuing federal legislation, would it be possible for the parties subsequently to change their mind and return to the *status quo ante*. Here, there seem to be two points of view: one that regards recourse to this section as a constitutional amendment with a different name and concludes to its permanency (Rowell-Sirois Commission, 1940, vol. 2, p. 74; Scott, 1942); and one that sees it as legislative inter-delegation and leaves the door open to reversibility (La Forest, 1975). The controversy seems to stem from the use of the word “unrestricted” to describe the extent of the power devolved to the federal Parliament under section 94 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 does it mean that once the power is granted, the federal Parliament can amend its legislation at will without having to seek provincial approval again but so long as the initial provincial statute remains in force?³⁵

Earlier drafts of section 94³⁶ as well as, to some extent, its actual wording³⁷ tend to suggest the possibility of reversibility. But above and beyond these clues, it is believed that practical considerations should be borne in mind while tackling this issue. The fear that by using section 94, provinces might be forever surrendering jurisdictional authority has been referred to as a possible reason why this section has never been used (Rowell-Sirois Commission, 1940, vol II, p. 74). 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 – which even allows for asymmetry – under sections 38 to 40 of the *Constitution Act, 1982*. And we know that constitutional amendments are not easy. Conversely, Canada still cruelly lacks a simple mechanism that would allow valid inter-delegation of legislative powers, unless section 94 was to partly provide for one³⁸. Finally, Scott’s characterization of section 94 as a constitutional amending formula led him to the conclusion that the federal Parliament had limited leeway to subsequently modify a statute adopted under that section for fear of violating the original intent (Scott, 1942). We may wonder whether this is a happy consequence in a rapidly changing world. Incidentally, by stretching this reasoning, one could even imagine a careful drafting of such statute limiting its span in time so as to indirectly make it reversible!

The above mentioned issues, compensation and reversibility, are just illustrative of the need for further reflection and research on section 94. The exact scope of the notion of property and civil rights for the purpose of section 94 should also be investigated further. Another issue would be Québec. Admittedly, there are federal programs which suit Québec. What do we do then given the language of section 94? Possible solutions might again be found here, through the techniques of incorporation by reference and administrative inter-delegation well known to constitutional lawyers³⁹. However, it goes beyond the ambition of this paper to provide complete answers to all of the issues involving section 94.

Conclusion

The central point of this paper 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 give a serious look at section 94, as it might potentially offer a more solid and consensual foundation for Canada's social union.

While governments would obviously have a central role to play in reviving section 94, law courts should also take an interest in this forgotten provision of our Constitution. The argument could be made that we have in fact been implicitly using it in a number of cases. When he looked at this section in 1942, Scott suggested this very possibility, given the absence of any formalistic requirements governing section 94 other than federal enactment and provincial adoption. However, in the end, because he viewed the use of section 94 as a quasi constitutional amendment carrying irreversible change, Scott believed there was little chance that a court would conclude to its application in any given case unless there was clear indication that this was the intention of the parties (Scott, 1942). Of course, if section 94 were to be understood as a mere legislative inter-delegation mechanism, as is here suggested, a different attitude might arise.

As this article was being completed, the Québec Court of appeal rendered its judgment on November 15 2006 in the case referred to earlier, opposing Québec labor unions to the federal government over the constitutionality of certain provisions of the Employment Insurance Act (*Syndicat national des employés de l'aluminium d'Arvida inc. c. Canada (Procureur général)* 200-09-004695-042). Motions to appeal have been granted by the Supreme Court of Canada⁴⁰. Essentially, the Court of appeal validated all but four of the challenged provisions on the basis of the federal jurisdiction over unemployment insurance. The remaining four provisions related to manpower training, thus falling within the provincial jurisdiction over property and civil rights and education. The Court concluded nonetheless that they had validly been enacted by virtue of the federal spending power. In reaching this conclusion, the Court did refer to some of the comments made by the Supreme Court of Canada on the spending power as well as to the unlimited spending power thesis found in the literature, albeit with some degree of ambiguity. But more importantly, the Court stressed the fact that "all of these financial measures which cannot be justified by virtue of the federal jurisdiction over unemployment insurance are expressly subject to the agreement of the provinces". From these "limitations" the Court judged that the intent of the impugned provisions was not to "arrogate" provincial jurisdiction and thus that they could not be deemed unconstitutional. But then, somewhat paradoxically, the Court added in its closing remarks on this subject: "This being said, the Court does not have jurisdiction to control the use by the federal government of its spending power".

In one important respect, I believe the Québec Court of appeal is quite right: provincial consent is the key. However, in a federation governed by constitutionalism and the rule of law, it is very hard to accept the proposition that law courts should have no responsibility in insuring respect of this principle. In fact, there appears to be a contradiction here between what the Court says and what it does. The reason for this contradiction lies in the inherent flaws of the legal theory called upon to support the federal intervention: the unlimited spending power thesis. This is a case where section 94 could potentially provide a legal base more consistent with the logic of the provisions under examination and the Court's ruling and, for that matter, with the Constitution.

Incidentally, the Québec government found itself in a peculiar position in these proceedings because the challenged provisions related to an area where, after decades of bitter argument with Ottawa – which had been part of the Victoria and Charlottetown constitutional negotiations and lead to one of the three promises made to Quebecers by Prime minister Jean Chrétien on the eve of the 1995 Québec referendum on sovereignty – an agreement allowing Québec to opt-out and run its own manpower training programs had finally been reached a few years before⁴¹. The question is: was all this political tension necessary? When this case or a similar will be examined by the Supreme Court, it might be helpful to ask how the Forefathers of Confederation had arranged for these issues to be resolved.

¹ The author is a member of the Québec Bar. When this article was written, he was a visiting fellow at the Institute of Intergovernmental Relations of Queen's University on detachment from the Government of Québec where he is director of the Direction de la réflexion stratégique at the Secrétariat aux affaires intergouvernementales canadiennes. The author wishes to thank his colleagues from the government, constitutional scholars from Laval and Montréal University and members from the Institute of Intergovernmental Relations, in particular its director, Tom Courchene, as well as Barbara Cameron of York University, for having contributed in various ways to the development of the ideas presented in this paper. Of course, the author assumes full responsibility for the views expressed.

² This irony was underlined recently by Hamish Telford (2005).

³ For example, most of the articles in the following publications of the Institute of Intergovernmental Relations were related in one way or another to fiscal federalism: Canada: The State of the Federation 1999-2000: Toward a New Mission Statement for Canadian Fiscal Federalism; Canada: The State of the Federation 2002: Reconsidering the Institutions of Canadian Federalism; Canadian Fiscal Arrangements: What Works, What Might Work Better, 2005; and of course the current issue of the State of the Federation series.

⁴ These words come from speeches delivered by Stéphane Dion as federal minister for Intergovernmental Affairs: "Intergovernmental Relations Within Federations: Contextual Differences and Universal Principles", Notes for an address at the International Conference on Federalism, Mont-Tremblant, Quebec, October 6, 1999 and *Federalism and democracy: the Canadian experience*, Notes for an address at the University of Manitoba, Winnipeg, Manitoba, April 14, 2000.

⁵ "*Rediscovering the Spirit of Federalism*", speech delivered by Québec Premier on the occasion of the 40th anniversary of the Confederation Centre of the Arts, Charlottetown, November 8, 2004

⁶ Presentation by the leader of the Conservative Party of Canada, Mr. Stephen Harper, made before the Québec Chamber of Commerce, 19 January 2005.

⁷ The great classic on the rule of law is of course the British constitutionalist A. V. Dicey's *Law of the Constitution*, but for a more contemporary and Canadian account of this concept and that of constitutionalism, see the decisions of the Supreme Court of Canada in *Reference re: Secession of Quebec*, 1998, par. 70-78 and in *Reference re: Manitoba Language Rights*, 1985, par. 59-66 . In this latter case, the rule of law was invoked to prevent what could have led to a legal vacuum pursuant to the breach of Manitoba's constitutional obligations with respect to bilingualism. The Court stressed that: "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life"(par. 60).

⁸ Judgment was rendered by the Québec Court of appeal on November 15 2006. Permission to appeal to the Supreme Court of Canada is pending.

⁹ See the legal memorandum filed before the Court of appeal by the Attorney-General for Québec in the above mentioned case.

¹⁰ These comments are found in the following cases : *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, 1989; *Reference re: Canada Assistance Plan*, 1991; *Finlay v. Canada (Minister of Finance)*, 1993; *Eldridge v. B.-C. (A.G.)*, 1997; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004; *Chaoulli c. Québec*, 2005.

¹¹ The Commission examined all of the above-mentioned Supreme Court cases except the two last ones rendered after the issuance of its report.

¹² In the first decades following the *Unemployment Insurance Reference*, this interpretation of the decision rendered by the JCPC was clearly dominant among the authors, even though it displeased some: Keith, 1937; Mercier Gouin and Claxton, 1939; MacDonald, 1941; Pigeon, 1943; Kennedy, 1944; Birch, 1955, p. 162; Tremblay Commission, 1956, pp. 222-223; Ryan and Slutsky, 1964, Beetz, 1965; Dupont, 1967.

¹³ The ineffectiveness of the JCPC ruling in the *Unemployment Insurance Reference* with respect to the spending power has been noted by many authors: Beetz, 1965; Laskin, 1975, p. 638; Petter, 1989; Tremblay, 2000a, pp. 255-256; Beaudoin, 2000, p. 721.

¹⁴ The process through which the actual ruling of the JCPC came to be disregarded by a majority of Canadian authors is fascinating. The first steps consisted in deeming the decision to be unclear and looking in the Supreme Court's motives before its appeal to the JCPC for guidance, while paying particular attention to the two dissenting Supreme Court judges. The JCPC comments on the spending power theory were also labeled as obiter by a number of commentators. Eventually, distinctions were put forward to argue that while the power of the federal government to spend "in areas of provincial jurisdictions" (one will note that the JCPC never wrote these words) may have been somewhat limited by the JCPC's decision, the bulk of it remained unfettered. Hence, a first criterion consisted in differentiating federal expenses funded from a special fund from those funded from the general consolidated revenue fund. A second, somewhat related, criterion consisted in differentiating pure federal expenses (which can nonetheless be conditional!) from expenses mixed with "compulsory" provisions such as the requirement to pay premiums contained in the impugned Unemployment Insurance Act. As time went by, the support for federal spending in areas of provincial jurisdiction became so strong in Canada, and its practice so common, that not only did these distinctions take hold, but by some ironical twist of History, the JCPC's decision even came to be presented by some authors as an outright recognition of such a power. On this evolution see Scott, 1955; Smiley, 1963; Hanssen, 1966; La Forest, 1981, p. 48; Beck and Bernier, 1982, p. 339; Chevrette and Marx, 1982; Rémillard, 1983; Schawrtz, 1987; Choudhry, 2002; Brun and Tremblay, 2002; Beaudoin, 2004. With respect, these distinctions and the resulting interpretations of the JCPC's ruling miss a fundamental feature of the decision which is that for the purpose of settling the case, Lord Atkin had accepted the federal attorney's request to sever the compulsory provisions pertaining to premiums from the spending provisions pertaining to benefits and regard each operation separately. The federal government's contention was that the former was a valid federal tax under s. 91(3) *Constitution Act, 1867*, arguing there should be no distinction between general taxation and taxation to constitute a specific fund. As concerns the second operation – the distribution of the benefits – the federal government argued it was valid owing to an unlimited federal spending power which it presented in these terms: "Parliament is not confined in the appropriation of the funds to objects which are within the enumerated heads of s. 91 of the British North America Act" (p. 358). In the end, Lord Atkin found it unnecessary to resolve the issues raised by the characterization of the premiums as tax, because he flatly rejected the unlimited spending power thesis: "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. It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. [...] 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.” (pp. 366-367). Interestingly, this case has more or less disappeared from much of the contemporary literature supporting the unlimited spending power thesis and has never been discussed, let alone overturned, in the subsequent judicial decisions which are alleged by many as having “recognized” such a power.

¹⁵ For an early articulation of the unlimited spending power thesis, see Scott, 1955. The most complete contemporary articulation is probably provided by Hogg (1997, chapter 6). Accordingly, it acts as the backdrop for the discussion set out in this paper.

¹⁶ This narrow interpretation of the scope of the distribution of powers effected under ss. 91-92 limiting such distribution to “regulatory” powers of a “compulsory” nature and excluding spending legislation, be it direct or delegated, appears to enter in direct contradiction with the principle of the exhaustiveness of the distribution of powers established very early on by the JCPC: “Whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act.” *A.-G. Ont. v. A.G. Can (Reference Appeal)*, 1912, p. 581; Hogg himself formulates the principle of exhaustiveness as following: “the totality of legislative power is distributed between the federal Parliament and the provincial legislatures” (Hogg, 1997, s. 15.9(e)).

¹⁷ One of the very first things law Courts had to establish under division of power litigation was how they were going to analyze legislation in order to assess its conformity with the Constitution. Hence, the first step of the test developed by the Courts consists in identifying the “pith and substance” of the legislation, and in doing so it was decided that the inquiry should go beyond examining the mere legal effects of the legislation and investigate its purpose. The logic here is to not only prevent direct infringements but also attempts to indirectly control matters within the jurisdiction of the other level of government. This is why, when analyzing the effects of a legislation, both legal and practical effects may be considered. Hogg has a good development on this (Hogg, 1997, s. 15.5 (d) and (e)). For a relatively recent judicial statement of the test see: *Kitkatla Band v. B. C.* [2002] 2 S.C.R. 146.

¹⁸ This implicit differentiation in the appreciation of the domain of application of the *Charter* as compared to the distribution of powers is all the more inconsistent when one considers that s. 32 of the *Constitution Act, 1982*, which establishes the domain of application of the *Charter*, simply refers to the distribution of legislative powers contained in the *Constitution Act, 1867*.

¹⁹ For example: postal service (s. 91(5)), marine hospitals (s. 91(11)), ferries (s. 91(13)), hospitals, asylums, charities and eleemosynary institutions (s. 92(7)). Ss. 91(8) and 92(4) are also interesting in that they specify who has exclusive jurisdiction to pay which civil servants!

²⁰ Ss. 91 (2A) and 94A.

²¹ Reference has already been made to the principles of constitutionalism and the rule of law and, in particular, the requirement to create and maintain of “an actual order of positive laws which preserves and embodies the more general principle of normative order” (for an discussion of these principles in the context of the unlimited spending power thesis, see Gaudreault-Desbiens, 2006). Of course the principle of federalism outlined in the *Secession Reference* (1998) should also be mentioned. One could also mention the principle according to which in Canada, executive power, including royal prerogative, is divided between the federal government and the provinces following the same line as legislative power. Hence, under Canadian federalism, both orders of government are said to be sovereign in their own areas of jurisdiction, in the same manner and to the same extent as independent States. And one of the central principles of sovereignty is precisely independence, i.e. protection from outside interference. Andrew Petter (1989) provides an excellent and thorough case of all the constitutional provisions and principles which militate against the unlimited spending power thesis. Many of the points made in this paper are found in his work.

²² The Québec government has never recognized the existence in Canadian constitutional law of a federal spending power which would be unlimited by the distribution of powers : see Secrétariat aux affaires intergouvernementales canadiennes, 1998. Québec’s refusal to sign the Social Union

Framework Agreement in 1999 was based on this position. For an analysis of this episode see Tremblay, 2000b.

²³ Although it is safe to conclude that the federal government has always had the upper hand, historically, federal spending measures in areas of provincial jurisdiction have generally been the subject of federal-provincial discussions, if not negotiations. This was the case for the initial cost-shared programs in health care, post-secondary education and social welfare, which by definition involved interaction at some point. In fact, the bulk of federal-provincial relations today, with its hundreds of meetings at various levels yearly, is related to such exchanges. Even federal programs taking the form of direct transfers to individuals and organizations are often discussed (e.g. the Millennium Scholarship Fund). While there may be uncertainty about the respective constitutional rights of the federal government and the provinces over the issues being discussed and negotiated, few would dispute the requirement for such discussions and negotiations. In Québec, there is even legislation in place requiring the authorization of the Québec government or minister in many instances (*An Act Respecting the Ministère du Conseil Exécutif*, s. 3.6.2 and following). The federal government itself has on several occasions presented provincial consensus as a precondition for its interventions. The Social Union Framework Agreement was essentially an attempt to codify some of the “rules” in this respect. On this issue, see for example, Leslie, Neuman and Robinson, 2004.

²⁴ This was the case for the Victoria Charter in 1971 with its provisions granting federal jurisdiction over social policy subject to provincial paramountcy. Even though the “spending power” terminology was not used, the intent was to allow the federal government to intervene in the social field subject to certain rules. The Meech Lake Accord in 1987 and the Charlottetown Accord in 1992 sought to accomplish the same thing, but this time, starting from the assumption that the federal Parliament already had such a power through spending programs and attempting to circumscribe its exercise.

²⁵ For an assessment of SUFA, see for example, Leslie, Neuman and Robinson, 2004.

²⁶ The major gains in this respect date back to the 1960’s (Canada pension plan, healthcare, student aid, etc.) The level of political tension reached between Québec’s Lesage liberal government and Ottawa’s Pearson liberal government before the first opting out agreement could be secured in 1964 has been long forgotten but it was quite considerable (Morin, 1972, pp. 19-31). More recent cases of “opting out” could include the Canada-Québec agreement over manpower training in 1997, the Canada-Québec agreement over parental leaves in 2004 and, to some extent, the side-agreement over healthcare in 2004. The first of these was reached in the aftermath of the 1995 Québec referendum near victory of the sovereigntist option following decades of discussions; the second, after the Québec Court of Appeal had declared the federal regime unconstitutional further to legal proceedings undertaken by the government of Québec (*Renvoi relative à la Loi sur l’assurance-emploi*, 2004).

²⁷ “A call into question of the foundations of the federal spending power”, Speech delivered by Benoît Pelletier, Minister for Canadian Intergovernmental Affairs and Native Affairs during a conference on the theme of « *Redistribution within the Canadian Federation* », University of Toronto, Faculty of Law, 6 February, 2004.

²⁸ Some could also view the federal declaratory power under s. 92(10) and the federal remedial power under s. 93 in this light, however they are much more limited in scope and purpose than s. 94 of the *Constitution Act, 1867*.

²⁹ This is evidenced by the way the Quebec Act, 1774, is structured: establishing in section VIII in the broadest terms possible the general principle of the restoration of French Law in all matters related to “property and civil rights” and then subsequently setting limits or carving out exceptions such as the one concerning criminal law. Indeed, the expression property and civil rights would have included criminal law had it not been for its expressed subtraction in section XI (see Hogg, 1997, s. 2.3(a)). Interestingly, the expression “civil rights” was unofficially translated in 1774 as “droits de citoyen” (citizen rights) (see Tremblay, 1967, p. 20). Accordingly, the conventional

assimilation of the notion of “property and civil rights” to the field of “private law”, as opposed to “public law”, may be historically inaccurate. Aside from criminal law, there certainly were principles of English public law that were meant to continue to rule the inhabitants of Québec, not necessarily because such principles, by definition, fell outside the scope of the expression “property and civil rights”; but rather because section VIII of the Quebec Act specified that the right of Quebecers “to hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all their other Civil Rights [...] [as] determined [by] the Laws of Canada [i.e. old French Law]” had to be exercised in a manner consistent “with their Allegiance to his Majesty, and Subjection to the Crown and Parliament of Great Britain”. In other words, it is, one could say, only to the extent of an actual inconsistency with their duty of loyalty toward their new Sovereign, or otherwise in face of some threat to English sovereignty, that Quebecers were to be governed by English Law as opposed to their own Laws. The relatively narrow scope of this restriction was evidenced in a judgment rendered by the Judicial Committee of the Privy Council in 1835 with respect to a litigation arising out of Québec where, in summary, it was held that by virtue of the Quebec Act, “the Prerogative of the Crown with regard to aliens [in this case the *droit d’aubaine*], must be determined by the laws of [Canada, i.e. old French law] and not by the law of England, which is only to be looked at in order to determine who are, and who are not, aliens.” (*Donegani*, 1835).

³⁰ There are obviously many items other than s. 92(13) which deal with property and civil rights, for example, provincial undertaking (s. 92(10)), incorporation of companies with provincial objects (s. 92(11)), solemnization of marriage, etc. See Brun and Tremblay, 1990, p. 426. In fact, the notion of property and civil rights is somewhat akin the notion of peace order and good government, both in view of its potentially very broad scope and in view of its relationship with other more specific categories in sections 91 and 92 (see previous note). As it turned out, it even came to compete with it as the main source and locus of residual power in Canadian federalism. See Hogg, 2005, ss. 17.1 and 21(2).

³¹ There is no reason to think that such matters (see the previous note) would be excluded from the scope of s. 94. Quite the contrary, they could be viewed as ideal candidate for uniformity since it is often their proximity with matters conferred to the federal Parliament that has led to their specific mention in s. 92 as opposed to relying solely on the property and civil rights clause in subsection 92(13).

³² The best historical evidence that the original intent behind section 94 was that it would apply to all Common Law provinces is illustrated by the fact that the precursor of s. 94 in the Quebec Resolutions adopted in 1865 also listed Newfoundland and Prince-Edward Island which at that time were still taking part in the negotiations to become original members of the new federation.

³³ S. 94 has generated some interest in the political science literature in recent years. For an interesting discussion on this topic and its potential implications with respect to the 1982 patriation, see LaSelva, 1996, pp. 49-63.

³⁴ Both the goal of equity and the need to preserve federalism are found in the terms of reference issued by the federal government upon the creation of the Commission (Rowell-Sirois Commission, vol. 1, pp. 9-10). Despite the centralizing aspect of some of the Commission’s recommendations, such as the transfer of unemployment insurance to the federal Parliament by constitutional amendment, the Commission’s recommendation with respect to unconditional “National Adjustment Grants” was clearly motivated by “the existence of pronounced differences in social philosophy between different regions in Canada” [and] “the presumption that existing constitutional arrangements [assigning social matters to the provinces] should not be disturbed except for compelling reasons” (Ibid, vol. 2, p. 13). Hence, these payments to provinces “illustrate the Commission’s conviction that provincial autonomy in the [social and education] fields must be respected and strengthened, and that the only true independence is financial security. [...] They are designed to make it possible for every province to provide for its people services of average Canadian standards and they will thus alleviate distress and shameful conditions which now weaken national unity and handicap many Canadians.” (Ibid p. 125). In the Commission’s view, it was clear that “while the adjustment grant proposed is designed to enable a province to provide

adequate services (at the average Canadian standard) without excessive taxation (on the average Canadian basis) the freedom of action of a province is in no way impaired. If a province chooses to provide inferior services and impose lower taxation it is free to do so, or it may provide better services than the average if its people are willing to be taxed accordingly, or it may, for example, starve its roads and improve its education, or starve its education and improve its roads – exactly as it may do today.” (Ibid, p. 84).

³⁵ The possibility that the term “unrestricted” would both mean an irreversible grant of power to the federal Parliament, akin to a constitutional amendment, and the unlimited federal capacity thereafter to modify the law at will should be ruled out as it would be tantamount to granting the federal Parliament a tool to change the distribution of power at will in respect of property and civil rights: a proposition hardly compatible with federalism and the economy of s. 94, requiring provincial consent each time recourse is had to this section.

³⁶ The word “unrestricted” did not appear in article 29(33) of the Quebec Resolution of 1865, the predecessor of s. 94, which ended as follows: “but any Statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.” In a subsequent text prepared for the London Conference the following phrase was added: “et, après cette sanction, le Parlement aura seul la faculté d’abroger, d’amender ou de modifier ces lois” (O’Connor, 1939, p. 138) which in the final version of the B.N.A. Act would be replaced by the current notion of “unrestricted” power. Another reason to dismiss the interpretation of s. 94 as an “amending formula” based on historical text is the fact that the B.N.A. Act did in fact contain a provision expressly allowing provinces to effect “Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of the Lieutenant Governor” (s. 92(1)). It begs the question then why s. 94 was devised as a separate provision, crafted very differently and carefully avoiding the term “amendment”.

³⁷ The word “unless” in the expression “unless and until it is adopted and enacted as Law by the Legislature thereof” could be an indication of the requirement of the continuing consent of the provincial legislature for a federal law adopted under s. 94 to remain in effect in the province. In this respect, it should be noted that the word “unless” was specifically added subsequent to the London Conference. Obviously there was a problem with the word “until” standing alone.

³⁸ The delegation of legislative authority from provincial legislatures to the federal Parliament or vice versa was deemed contrary to the Constitution in the well known *Nova Scotia Inter-delegation* case (1950). Despite subsequent cases that allowed the provinces and the federal Parliament to achieve very similar results through administrative delegation, incorporation by reference and conditional legislation, it is still the case today that “one legislative body cannot enlarge the powers of another by authorizing the latter to enact laws which would have no significance and validity independent of the delegation” (Hogg, 1997, s. 14.7). The Fulton-Favreau constitutional amendment proposals sought to remedy this situation through a new constitutional provision inspired by section 94: section 94A. This provision clearly stipulated that its use was reversible. It would have also enlarged the domain of section 94 and made delegation from the federal Parliament to the provincial legislatures equally possible and it would have included Québec (Hurley, 1996, pp. 187-188).

³⁹ See the discussion in the previous note. If by virtue of s. 94, the federal Parliament had legislated with respect to a given topic relating to property and civil rights and its legislation was in force in some provinces, the Québec National Assembly could resort to inter-delegation to effectively opt in without violating the prohibition set out in the *Nova Scotia Inter-delegation* case (1950) since we would not be in a situation where the federal law “would have no significance and validity independent of the delegation”.

⁴⁰ SCC no 31809, and SCC 31810

⁴¹ See the *Entente de principe* and the *Entente de mise en œuvre Canada/Québec relative au marché du travail* signed in 1997.

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