

**Open Federalism, Section 94, and Principled Federalism:
Contradictions in Vision**

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“If the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one’s own judgment recoils, there is, in my opinion, good reason for believing that the construction which leads to such results cannot be the true construction of the statute.”

Lord Coleridge as quoted in F.R. Scott, “Section 94 of the British North America Act”

The Conservatives were elected in January 2006 promising all Canadians that the new government would embrace a form of open federalism. Under this friendly concept, the new government pledged to recognize the “unique place of a strong and vibrant Quebec in a united Canada,” respect provincial jurisdiction, recognize a larger role for the provinces in the international arena, address the fiscal imbalance and improve the tenor of intergovernmental relations. A year and a half later: Quebec has received recognition as a nation within Canada causing disquiet in the west and the ranks of the Conservative party itself; the federal government has exited some areas of provincial jurisdiction causing grumbles within the provinces; Quebec, but not other provinces, has seen an expansion in its role in international affairs recognized by Ottawa causing eyebrows to raise in other provinces; the fiscal imbalance has been addressed raising anger in Saskatchewan and Newfoundland and consternation in Ontario and financial circles; and the tenor of intergovernmental relations has been raised but not in a harmonious pitch. In making these promises and then acting on

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them, Prime Minister Harper has opened the debate on Canadian federalism to a greater degree than since the last set of constitutional wars in the 1990s.

As was predictable, conflicting visions of the nation have rushed in to fill the debate. One vision gaining strength concerns Section 94 of the *Constitution Act, 1867*. Arguments over the meaning of this constitutional provision for the place of Quebec in Canada have arisen with dangerous implications for national unity in the long term. This relatively obscure and certainly ignored section of the constitution provides for the uniformity of laws in the provinces outside Quebec. It is being used to justify asymmetrical federalism, provincial opting in to programs, limits on the federal spending power and an expansion of Quebec's jurisdiction among other things.²

This paper argues that the revival of interest in section 94 is fraught with difficulties. Current suggestions for its use may fuel the very fires of national disintegration which they seek to quell. While there is a certain compelling quality to the section 94 justifications for the special status of Quebec in Canada, these arguments are based on contested histories and interpretations of the constitution and may contribute to deepening faultlines in the federation by furthering Quebec's isolation. While a strong case can be made for recognizing Quebec's difference within the federation, it more fruitfully lies in a return to principled federalism which is more consistent with the modified version of open federalism espoused by the new government.

To make this argument, the paper proceeds in five steps. First, the current arguments for a renewed interest in section 94 as the answer for Quebec and their rationales are presented. Second, three sets of arguments are presented that contest this view of section 94, with special attention paid to the first set. Finally, the paper concludes with a suggestion of how to accommodate difference among the provinces, Quebec included and suggests that the federal government must return to a posture of principled federalism if national comity is to be furthered.

Section 94 to the Rescue: Empowering Quebec

Section 94 has been an infrequently studied section of the *Constitution Act, 1867* until recently. The two major studies of it previously were offered by F.R.

² See for example, Thomas Courchene, "Variations on the Federalism Theme," *Policy Options* (September 2006), 46-54; Benoit Pelletier, "Speech," delivered to the IIGR conference, "Looking Backwards, Thinking Forwards," Queen's University, Kingston, May 12, 2005; Marc Antoine Adam, "Federalism and the Spending Power: Section 94 to the Rescue," *Policy Options* (March 2007), 30-34.

Scott in 1942 and the Hon. Justice Gerard La Forest in 1975.³ The section provides:

Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Thus, section 94 provides for the Parliament of Canada to make laws in relations to property and civil rights and to court procedure for the three original common law provinces subject to the consent of their legislatures. While Scott, La Forest and others agree that Quebec is excluded from this section by virtue of its civil law tradition and would require a constitutional amendment to effect the same change of jurisdiction,⁴ Scott goes on to argue that the section now applies to all of the common law provinces despite some textual confusion.⁵ Read through provincial eyes, this section explicitly acknowledges provincial immunity from federal laws in the areas of property and civil rights and court procedures.

Section 94 has received a surprising amount of attention as a key justification of asymmetrical federalism and limits on the federal spending powers. Although its potential is acknowledged by Guy Laforest and Tom Courchene and other scholars of federalism,⁶ Benoit Pelletier and Marc Antoine

³ F.R. Scott, "Section 94 of the British North America Act," in Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), 112-130, originally published in *Canadian Bar Review* XX:1 (1942) 525-44; Gerard V. La Forest, "Delegation of Legislative Power in Canada," *McGill Law Journal* 21:1 (1975), 131.

⁴ Scott, op. cit., 114; La Forest, op.cit., 132; cf. Bayard Reesor, *The Canadian Constitution in Historical Perspective* (Scarborough: Prentice-Hall, 1992), 249-50 who seems to follow Scott closely.

⁵ Scott, op. cit., 119-22.

⁶ Guy Laforest, "The Historical and Legal Origins of Asymmetrical Federalism in Canada's Founding Debates: A Brief Interpretive Note," available at http://www.iigr.ca/iigr.php/site/browse_publications; Courchene, op.cit.; cf. Courchene, "A Blueprint for Fiscal Federalism," *Policy Options* (April 2007), 16-24, at 17; cf. Royal Society of Canada, "Who's Afraid of Asymmetrical Federalism?" A summary of a discussion co-hosted with the Institute of Intergovernmental Relations, Queen's University, Kingston, May 12, 2005, see esp. 7-8. Downloaded May 26, 2007 at [Http://www.rsc.ca/print?lang_id=1&page_id=196](http://www.rsc.ca/print?lang_id=1&page_id=196).

Adams embrace their views and offer the fullest arguments. Their arguments are outlined here.

In two separate items released in 2005, Benoit Pelletier, Quebec Minister for Canadian Intergovernmental Affairs, explained what section 94 means in relation to federalism from a Quebec perspective. In a speech to the alumni and present patrons of the Institute of Intergovernmental Relations, Pelletier recalled that in 2003, he had identified three important values underlying the Canadian federal formula: respect for the Constitution, its institutions and the division of powers; respect for the constitutionally defined roles of each level of government; and respect for diversity and our inherent differences.⁷ He suggested that asymmetrical federalism embodied those values since it embraces diversity within the union and respects provincial powers and roles.⁸ And although “Asymmetry constitutes a powerful tool to help all Canadians meet their aspirations and realize their dreams, be they from Quebec or from other Canadian provinces and territories,” he holds that “The origins of the Canadian federation, the developments of the 20th century, and the contemporary debates, all show that asymmetry has been predominantly associated with Quebec,” and may Canadians and provincial governments outside of Quebec do not mind federal intrusion into provincial jurisdiction.⁹

With this background in mind, he eschews nonconstitutional means of justifying asymmetrical arrangements and turns his attention to section 94. He argues that:

Section 94 is eloquent proof that there exists in Canada constitutional rules which permit the development of asymmetrical federalism. This provision enables us to make the demonstration that asymmetrical outcomes are in conformity with the vision of the founding fathers. It forces us to stop perceiving asymmetry as an obstacle to a healthy federalism especially when it allows Quebec to do things differently.¹⁰

Not only does section 94 justify asymmetrical federalism for Quebec, it also underscores the key difference mentioned above between Quebec and the other provinces. He comments that, “What is particularly interesting with section 94, is that it allows Quebec to fully exercise its autonomy in the area of property and

⁷ Benoit Pelletier, “Speech,” op cit., 2.

⁸ Ibid, 5.

⁹ Ibid., 6-7.

¹⁰ Ibid., 7.

civil rights, while at the same time enabling the common-law provinces that so desire to benefit from federal intervention” in areas where they deem it expedient.¹¹

Pelletier further expounds the virtues of section 94. It speaks to the unique position of the province by deliberately excluding Quebec. Further,

Section 94 is eloquent proof that there exist in Canada constitutional rules that allow asymmetrical federalism. It enables us to demonstrate that asymmetrical results are in conformity with the vision of the “Fathers of Confederation”, and that we must stop viewing an asymmetry that allows Quebec to have a distinctive system as a threat to federalism. This is clearly an eventuality that was contemplated at the very time Canada was created.

...The asymmetrical approach provided for in section 94 offers the advantage of being part of a legal process, not an intergovernmental practice. Thus, this section allows the formal setting down of asymmetry in law, while ensuring respect for the Constitution.¹²

Given that “Quebec’s vision” with regards to federalism is often at variance from that of the other provinces, it is important to have a constitutionally recognized basis to justify it adopting a unique approach to the federation.

Therefore, Pelletier establishes five central points. First, Quebec has a unique claim to asymmetry. Second, there is a constitutional basis for recognizing Quebec’s different treatment in the federation. Third, this difference is not a threat to the Canadian federation. Fourth, asymmetry is consistent with the three values underlying the federal formula. Fifth, Quebec exercises full control over property and civil rights in the province. He omits court procedure since it is not essential to his argument here.

This view of section 94 is taken a step further by March Antoine Adam, a visiting fellow at the Queen’s Institute of Intergovernmental Affairs and a senior official in the Quebec government’s Secretariat for Canadian intergovernmental Affairs. Adam uses section 94 to justify limiting federal use of the spending

¹¹ Ibid., 8; cf. Pelletier, “Asymmetrical Federalism: A Win-Win Formula!” Asymmetry Series 2005 (15a), Institute of Intergovernmental Relations, School of Policy Studies, Queen’s University, available at http://www.iigr.ca/iigr.php/site/browse_publications?section=43

¹² Ibid., 5-6.

power. His argument has eight important components. First, while the federal spending power has no explicit constitutional basis, federal intervention in exclusive provincial jurisdiction is contemplated in section 94 but with the crucial element of provincial consent. Federal spending and legislation should be united and under the same rules. Second, the scope of section 94 is broad extending to all matters relating to property and civil rights and can be traced back to the Quebec Act of 1774 when French law was restored in the Quebec jurisdiction. Thus, it gives a unique and special protection to property and civil rights in that province. Third, the federal government may legislate for property and civil rights in the three provinces provided that the provincial legislatures agree, and this action may be initiated either by the federal government or by provincial request. Fourth, section 94 applied to the original three common law provinces in Confederation but now applies to all by universal agreement. And fifth, "The original purpose behind section 94 is quite obvious: the framers of Confederation foresaw that despite the distribution of powers they agreed upon, there would eventually be a desire for further integration among the common law provinces. They also foresaw that this would not work well in Quebec given its specificity. Nearly 140 years later, we can only be impressed at how their predictions proved accurate."¹³ His first five points are preliminary to his sixth, the critical one.

Sixth, Adam notes that section 94 is consistent with the underlying dynamics of Canada's social union, including the 2004 Health Accord and current proposals for a national pharmacare program. His further analysis reveals five benefits of using section 94 to frame the social union: spending and legislating would be seen as two sides of the same coin giving parliamentarians a say in discussions; federal intervention could extend beyond the current restriction to spending and include regulations leading to more sound public policy; outcomes would be justiciable; recognition of this as provincial jurisdiction requiring provincial consent would shift the focus of discussions from jurisdictional wranglings to the merits of the public policy under consideration; and relations with Quebec would be eased without a constitutional amendment or extra powers being granted and without restricting the right of other provinces to opt-out like Quebec.

The Adam view of asymmetry and section 94 appears on the surface to differ in this key respect from the Pelletier interpretation. Pelletier's view holds that Quebec is unique among the provinces and entitled to special rights and

¹³ Adam, "Federalism and the Spending Power," *op.cit.*, 33.

benefits within the confederation on that basis. To support this view, Pelletier, as well as others,¹⁴ cites the Social Union Framework Agreement, the 2004 Health Accord, the Quebec Pension Plan, among other agreements. When confronted with similar asymmetrical arrangements recognizing diversity in the other provinces like the Newfoundland and Labrador and the Nova Scotia agreements on off-shore resource revenues, or Saskatchewan agreement on equalization, they decry them as “one-off deals”, “contractual federalism,” or a “fiscal cafeteria.”¹⁵ The view of asymmetrical federalism that Pelletier is subtly (and others are more directly) dismissing is the one outlined in the 1997 Calgary Declaration which holds that the provinces are equal and any special constitutional arrangements with one province should be open to all provinces--symmetrical asymmetry as you have it.¹⁶ The Adam view on first read seems more consistent with the spirit of the Calgary Declaration on asymmetry. The Adam also approximates the Courchene interpretation of asymmetrical federalism and section 94 since Courchene applies the same rights to all provinces but characterizes it as one of opting-in—each province has a right to opt-in to federal programs.¹⁷

Adam finishes by addressing compensation and reversibility in his seventh and eighth points. He makes the case that provinces opting out of any federal interventions in matters relating to property and civil rights should be entitled to federal compensation. A refusal of compensation would be tantamount to an unbridled and coercive federal spending power and mitigate against the spirit of the guarantee contained in section 36 of the *Constitution Act, 1982* by creating more fiscal inequalities among the provinces. Eighth, he addresses two questions raised by the use of “unrestricted” federal power in the clause: whether any provincial acknowledgement of federal intervention is permanent or reversible and whether federal legislation may be altered without provincial consent after a grant is made. If true, both might be disincentives to the usage of section 94. However, he asserts that early drafts of section 94 suggest the possibility of reversibility as does practical logic. He does not consider that

¹⁴ See for example, other papers in the 2005 IIGR asymmetrical federalism series, especially David Milne, “Asymmetry in Canada, Past and Present,” and Guy Laforest, “Historical and Legal Origins,” op. cit.

¹⁵ See Courchene, “Variations,” op. cit., 49; for contrary view, see Jennifer Smith, “Canada: an noisy squabble over offshore oil and equalization,” *Federations* 4:3 (March 2005), 19-20.

¹⁶ See Kathy L. Brock, “Accords and Discords: The Politics of Asymmetric Federalism and Intergovernmental Relations,” *2005 IIGR Working Papers*, available at http://www.iigr.ca/iigr.php/site/browse_publications; cf. Gordon Gibson, “Some Asymmetries are More Legitimate than Others – And Subsidiarity Solves Most Things Anyways,” IIGR 2005 Asymmetry Series, and Roger Gibbins, “Western Asymmetry,” IIGR 2005 Asymmetry Series, both available at http://www.iigr.ca/iigr.php/site/browse_publications.

¹⁷ Courchene, “Variations,” op. cit., 49.

the fact that reversibility was left out of the final version for a reason. He does argue that if reversible, section 94 provides a solid foundation for the interdelegation of legislative powers, an important means of change currently denied in our constitutional system. He does not address how this would affect Quebec. As Scott points out, for Quebec to engage in a similar agreement to federal intervention in an area of provincial jurisdiction, it would require a constitutional amendment.¹⁸ By his own logic and exclusion, Adam slips back into the Pelletier world of asymmetrical federalism. And like Pelletier, Adam concludes by emphasizing that section 94 provides a legal and constitutional basis to order intergovernmental relations in Canada, particularly as they relate to the social union.

The Pelletier and Adam interpretations of section 94 seem compelling. On first glance, they seem to offer a legal basis for the practice of recognizing “Quebec as a nation within a united Canada.” The clause separates Quebec out from the other provinces by the very exclusion of that province. This is consistent with the two nation view of Confederation. Section 94 empowers Quebec to fully conduct its own affairs legally but also provides a financial basis for it to flourish by justifying its claim to a fiscal entitlement from the federal government for any new programs it develops with the consent of the other provinces. While appearing to be an attractive and sound basis for the full realization of the specificity of Quebec within Canada, section 94 may only offer a temporary and shaky foundation on which to build this house of deux nations as the following sections demonstrate.

1. The Origins of Section 94

A key to understanding section 94 lies in its origins. Unfortunately much of our founding constitutional debates are shrouded in silence. The glimpses we have of the justifications for certain clauses are often brief, episodic and interpreted through the eyes of legislators without reference to the full debate on those clauses. This is true of section 94. However, some references provide insight into this clause as do the principles of common law.

First, section 94 is consistent with British common law justifications for the different treatment of Quebec from the other colonies. Under the common law of colonization, colonies could be acquired by conquest or settlement. If by settlement, then English laws accompanied the settlers. This was the preferred

¹⁸ Scott, “Section 94,” *op.cit.*, 114, 122.

myth of establishment in the colonies with British settlers because it meant that English not French or Spanish law prevailed. If by conquest, then the laws of the conquered peoples continued unless and until they were repugnant to British colonial institutions and laws. Cession was considered a form of conquest and those rules applied. Hence the settlement myths¹⁹ in Canada: Ontario was settled; Quebec was conquered; and, the three Maritime provinces were settled (although in actuality they were ceded to Britain from France).²⁰ As practiced, then, common law and its rules applied to Ontario and the three Maritime provinces while civil law held in Quebec. Section 94 is founded upon the same division between Quebec and the other three founding provinces.

English law could be applied to a colony in two additional ways under common law principles. A colony could enact a statute adopting English law at a specified time. Alternatively, royal prerogative allowed the King or imperial Parliament to legislate for a colony. In the case of Quebec, the *Royal Proclamation of 1763* imposed English law on Quebec but an imperial statute, the *Quebec Act of 1774*, terminated the royal power and restored French civil law to Quebec. While section 8 of the Act affirmed this included property and civil rights, criminal law was left under English law owing to the harshness of French criminal law at the time.²¹ When Quebec was divided into Upper and Lower Canada under the *Constitutional Act, 1791* French civil law continued in Upper Canada (Ontario) until the first act of its legislature imported English law.²² This history set the precedent for the parallel with section 94: civil law continues in Quebec undisturbed while the other colonies could receive federal law just as they received English law under the imperial government.

Second, section 94 reflects not only the division between Quebec and the other colonies established in the pre-Confederation period but also Quebec's fear of the imposition of English laws. Both were captured in the reaction to the *Union Act, 1840* which united the two Canadas in accordance with Lord Durham's recommendation to hasten the assimilation of the French. The two systems of common and civil law continued under an assembly with equal representation from the two jurisdictions. Ontario was dissatisfied as its population growth outpaced Quebec's and Quebec feared its laws would be changed by statute if it were outnumbered in the assembly.²³ This act had three

¹⁹ I use myth in the sense of being animating principles or grundnorms of a society, not as being fictions.

²⁰ See Peter Hogg, *Constitutional Law of Canada* third edition, (Scarborough: Carswell, 1992), 28-9.

²¹ *Ibid.*, 28-29, 34.

²² *Ibid.*, 35.

²³ *Ibid.*, 35-7.

effects for our purposes. First, it meant that Ontario's demand for representation by population was met with Quebec's demand for federalism in the creation of a new union. Second, the two separate systems of law featured in the 1840 Act were continued in the *Constitution Act, 1867* as an established principle. Third, the 1867 Act in general and section 94 in particular reflected the comfort levels of Ontario and the Maritime provinces but not Quebec with common law principles.

Quebec's fear was captured in the Confederation debates as noted by Guy Laforest in his search for a basis for asymmetrical federalism in the 1864-7 discussions and documents. He argues that the inclusion of property and civil rights and all matters of a local and private nature in the section 92 enumerated heads of provincial jurisdiction gave all provinces the same safeguard for their legal identity and thus did not satisfy his quest. However, the inclusion of section 94 and its precursor, section 29.33 in the *Quebec Resolutions* provides a basis for asserting the constitutional difference of Quebec in his view. Moreover, it demonstrates that Quebec requested such an exclusion. He quotes M.C. Cameron and Christopher Duncan speaking in the United Canadian Parliament in 1865 to this end. Cameron asks why section 94 is not applicable to Quebec and notes that he understands the feelings of the French people in not wanting "to have anything forced upon them" but does not understand them in allowing no contemplation of a change in laws that would operate to their benefit or "general weal" with their consent. Duncan, observes that Quebec cannot consent to a similar change in laws to the other provinces even if the province wishes it, placing that province on a "separate and distinct footing from the other provinces."²⁴ Quebec has donned not only belts but braces in order to protect its legal autonomy—the basis and rationale for different treatment within the federation.

Laforest halts his analysis of the comments at the establishment of a basis for the asymmetrical treatment of Quebec. However, reading further into the debates reveals other dimensions of section 94 that are important to our current debate. For example, Cameron's incomprehension immediately leads him to speculate that the French people "having feelings of this kind, and manifesting them so strongly as they do in this document, it appears to me that in going into this union we do not go into it with the proper elements. We go into it with elements of strife and dissension, rather than of union and strength."²⁵ He regrets

²⁴ Laforest, *op. cit.*, 4; as quoted from Janet Ajzenstat, Paul Romney, Ian Gentles and William Gairdner, *Canada's Founding Debates*, Toronto: Stoddart, 1999, 305-6, 346.

²⁵ M. C. Cameron as quoted in Ajzenstat et al, *op. cit.*, 306.

the lack of give and take embodied in this attitude and draws out the negative implications for federalism of entrenching differences and suspicions rather than addressing and overcoming them on a regular basis.

In a similar vein, Christopher Dunkin expresses serious reservations over placing Quebec on a 'separate and distinct footing.' He immediately follows the excerpt quoted by Laforest with his analysis of the implications of provisions like section 94. His admonitions are worth quoting at length:

I say this system, and these peculiarities and exceptions in regard to Lower Canada are adopted with a special view to remedy our Canadian difficulties of race and creed. But sir, this is no way at all of avoiding or lessening trouble from this cause. It is idle to pretend that by this system collision is going to be prevented. Under the legislative union of the Canadas, even worked as it has been, the tendency of minorities in Upper and Lower Canada, respectively, has been towards the maintenance of the union, towards the avoidance of all intemperate language and prejudiced feelings, toward the pulling down of the feuds that before divided them and the respective majorities. And the result has been that while just before the union the feud between the races in Lower Canada was at its highest and bitterest point, it has since then all but disappeared...Indeed, there has been a more tolerant state of feeling in both camps than in any other community so divided as to race and creed that I know of.

Two implications follow from the new arrangement. First, the French Canadians

will find themselves a minority in the general legislature, and their power in the general government will depend upon their power in their own province and over their provincial delegations in the federal parliament. They will thus be compelled to be practically aggressive to secure and retain that power.

Second,

We have a large class whose national feelings turn towards London, whose very heart is there; another large class whose sympathies centre here at Quebec, or in a sentimental way may have some reference to Paris; another large class whose memories are of the Emerald Isle; and yet another whose comparisons are rather with Washington. But have we any class of people who are attached, or whose feelings are going to be

directed with any earnestness, to the city of Ottawa, the centre of the new nationality that is to be created? In the times to come, when men shall begin to feel strongly on those questions that appeal to national preferences, prejudices, and passions, all talk of your new nationality will sound strangely.²⁶

By isolating Quebec with sections like 94 and then creating a common legislature with unequal parts, the founders were encouraging separate loyalties, a lack of accommodation of differences, intolerance and aggressive provincial stances especially in areas of language and creed. Section 94, like the type of asymmetrical federalism it is meant to justify, encourages provinces to work in their own interests without regard for the other parts of the union or even the whole. Instead of learning compromise and the spirit of given and take so necessary for federal comity, the provinces learn self-interest.

The third historical insight about section 94 is that although it has been seen as a centralizing feature of the constitution embodying Sir John A. Macdonald's vision of Canada as more appropriately a legislative union, it may in fact be a stronger expression of provincial autonomy. The traditional argument put forward by Scott and Ajzenstat et al, is that

Had the hopes of the fathers of Confederation been carried out, Canada would have moved steadily toward a greater union by this means, and most of the difficulties with the constitution we have since experienced would never have arisen. When section 94 is thought of in relation to the basic principle for the division of powers, namely that matters of 'common interest to the whole country' would belong to the "General Government" and that the 'Local Governments' would have merely 'the control of local matters in their respective sections,' the full weight of the desire for national unity that underlay the constitution can be appreciated.²⁷

Scott observes that two attempts to invoke section 94 failed in 1869 and 1902. Although in 1869 founders like Macdonald, Cartier, Tilley, Langevin and Pope did not fear the eroding effects on federalism that David Mills thought section 94 presented, by 1902 the Minister of Justice suggested in reply to the motion to apply section 94 that it would be practical "to ask the local legislature how soon

²⁶ Christopher Dunkin as quoted in Ajzenstat et al., op. cit., 346-8.

²⁷ Scott, op. cit., 115.

they are going to be disposed to commit suicide.”²⁸ No further attempts to invoke section 94 have been attempted.

Four ramifications of this line of argument are important. First, as Scott observes, one of the two requirements of section 94 is that the provinces consent to the application of any federal laws enacted in relation to property and civil right and court procedure within their jurisdiction. In 1866, T.H. Haviland explained to the Prince Edward Island House of Assembly that “the general government would, undoubtedly, and of necessity, exercise supervision of the individual states; but the power of the federal government to interfere with the exclusively internal affairs of any of the confederated provinces would be of the most limited and inconsiderable character.”²⁹ The centralizing effects of section 94 are limited to areas of explicit provincial agreement. Quebec’s fear was unfounded although perhaps not without justification based on historical precedent.

Second, section 94 has been attempted only two times and unsuccessfully. Instead of being emblematic of the greater penchant or tolerance among the common law provinces toward federal intervention in their affairs as asserted by Pelletier, section 94 may speak to the common desire of all the provinces to protect their jurisdiction, govern their own destinies and have their difference and special circumstances recognized. Perhaps by including the term “unrestricted” to apply to any federal powers granted under this section, the founders condemned the section to disuse.

Third, one of the common contemporary justifications for asymmetry and tolerance of difference among the provinces is that it allows for experimentation in areas of policy, a virtue of federalism. These best practices may then be exported to other provinces. Section 94 could facilitate that action by providing a constitutional vehicle for the adoption of a best practice throughout the common law provinces. Certainly the Gray report concluded in 1871 that section 94 provides a means of selecting the best laws in each jurisdiction and then applying them to all.³⁰ However, nonuse of the clause meant that a constitutional and efficient means of sharing best policy practices through out the nation was lost. Further, the exclusion of Quebec from that clause meant that its citizens never even had an opportunity to experience one of the great promises of section 94 and a federal system. The irony here is that applying the practice of

²⁸ As quoted in Scott, *op. cit.*, 116.

²⁹ T.H. Haviland as quoted in Ajenstat et al., *op. cit.*, 325.

³⁰ As quoted in Scott, *op. cit.*, 115-6.

asymmetrical federalism as defined by Laforest, Pelletier and to a lesser extent by Adam today may foster the silos and competitive aggression mentioned by Christopher Dunkin to the peril of good national policy that is in the public interest in Quebec and elsewhere.

Third, there is a further danger in the use of section 94 as a basis for Quebec's distinctiveness and a legal justification for asymmetrical treatment of that province. Section 94 may prove the opposite. As LaSelva observes, section 94 is subject to explicit provincial consent.³¹ This was the reply of the decentralizing founders of Confederation to the centralizers as Vipond notes.³² Read from the perspective of the advocates of local control over local affairs, the provincial consent clause is the equivalent of the federal power of disallowance over the provinces. That is, provinces may nullify any federal law relating to property and civil rights and court procedures simply by not adopting it. The centralist reply to this assertion of provincial autonomy might be that a law that is in the interests of the people will incite such demands that a provincial legislature may not be able to resist adopting it, even in Quebec. However, the provincial rejoinder is that the clause still provides the provinces with immunity from unilateral federal action in the specified areas. And if a province is forced to consent to a federal proposal at the behest of its population (also known as democratic responsiveness), it may negotiate the terms of that application. In this way, perhaps Oliver Mowat and the decentralizers were the better or at least cannier lawyers than John A. Macdonald and his crew of centralizers as Mowat tended to boast. Section 94 empowers and sustains the provinces. It is not a sign of the compliance of the common law provinces with the federal government or their desire for uniformity but rather an affirmation of their ability to stave off unwanted federal intrusions in provincial jurisdiction.

There is a corollary to this argument that impacts directly on current attempts to use section 94 as a justification for Quebec's distinct place and asymmetrical treatment within Confederation. By its exclusion of Quebec, section 94 is said to affirm its status as unique. However, section 94 may be interpreted as not only empowering the provinces but giving each province the same power as Quebec to protect its jurisdiction from federal encroachment. By virtue of the inclusion of section 94, no federal laws affecting property and civil rights and court procedures may apply to a province without its consent. All

³¹ Samuel LaSelva, *The Moral Foundations of Canadian Federalism* (Montreal and Kingston: McGill-Queen's University Press, 1995), 56-7.

³² Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

provinces have the same ability as Quebec does to protect themselves from federal interference: the power to say no. Section 94 thus reinforces the vision of provincial equality embraced in section 92.13 granting all provinces control over property and civil rights rather than offering a contrast to the position of Quebec as argued by Laforest.³³ Indeed, the power of section 94 might rest in its logical consistency with the Calgary declaration rather than with a vision of asymmetry that distinguishes Quebec while treating all provinces alike. This is perhaps the most damaging argument to the current Quebec claim.

2. Reading Section 94 within the Constitution

A fundamental principle of judicial interpretation is that a constitution must be read as consistent with itself. Here falls one of the claims to section 94 as a justification for the distinct place of Quebec and its asymmetrical treatment within the federation. This claim to distinctiveness is encouraged by reading the constitution from a draughter's perspective: Section 94 applies to all the provinces as is commonly accepted now but not Quebec, thus privileging the two nation view of Canada. Easy. Wrong. If this were an accurate view then the division of powers applying to all provinces equally would have to be read differently. Senate seats would not have been allocated to give Quebec only one-third in 1867 and still less now. The House of Commons might reflect the principle of representation by population but the Quebec members, at minimum, would have been accorded a veto, at least over matters affecting their province. Too many sections affirm the equality of the provinces, not Quebec's specificity to provide a legal justification for this claim to succeed. Too many sections apply to one or more but not all provinces and each province was admitted to Confederation on unique terms. Special arrangements have been accorded Quebec like the Health Accord or the Quebec Pension Plan but these do not confer special constitutional status.³⁴ This logic explains the motivation underlying the Quebec desire for an interpretive clause like the distinct society clause in the 1987-90 *Meech Lake Accord* and the current interest in section 94—both would facilitate a different reading of the constitution in a way that endorses Quebec as unique among the others. Quebec is distinct yes, but just as each province was distinct in its own way in 1867 and still is today. Each province needs the powers to protect and serve its unique population and

³³ Laforest, op. cit., 3.

³⁴ Hogg, op. cit., 102.

protect its distinct culture. Is it necessary to deny the claim of each province to its unique character to empower one? Can all be empowered instead?

3. Diversity within Unity...or without

Finally, uniformity of the laws has been consistent with diversity in common law. Conditions have been attached to federal laws that allow them to apply differently in different provinces. Uniformity may be desirable where spillover effects occur in certain policy areas and among jurisdictions (ex. SARS). Peter Hogg explains the reconciliation of uniformity with diversity:

Uniformity is desirable with respect to many topics, and for many reasons, but of course, the distribution of legislative powers in a federal system necessarily involves a substantial subordination of the value of uniformity to that of provincial autonomy even where there is no objective necessity for regional variations. In legislative fields which are entrusted to the provinces, it is for the provinces to decide whether or not they desire uniformity: they can achieve it whenever they wish through the enactment of uniform laws.³⁵

Uniformity, whether through section 94 or in practice, is subject to provincial consent and variations. Even challenges to the different application of federal laws within the provinces have failed in both pre- and post Charter times.³⁶ Canada has been built on diversity within unity, a principle that applies to all provinces. This brings us to a concluding consideration of Quebec, asymmetrical federalism, open federalism and principled federalism.

Conclusion: Principled Federalism Rightly Cast

Is Quebec unique? Yes, without a shadow of a doubt Quebec is unique and not only in its civil law tradition, its language, its culture and its very identity. Does section 94 provide a legal basis for the recognition of this distinctiveness? No, not necessarily. While it treats Quebec differently by its exclusion from its terms, it simultaneously empowers the other provinces with the same ability to protect their property and civil rights and their systems for the administration of justice

³⁵ Hogg, op. cit., 446.

³⁶ Hogg, op. cit., 447, 1194-1195.

from federal intrusion. In so doing, it embraces a version of asymmetry that is more consistent with the Calgary Declaration than the vision espoused by Pelletier and Laforest explicitly and Adam implicitly. These are shaky grounds for such a claim at best.

Should section 94 be used to justify difference in Quebec anyway? No, as the founding debates pointed out, reading the constitution through the eyes of distinct status can lead to isolation, provincial aggression, tensions, a lack of national loyalty and a disintegration of the principle and practice of comity so critical to the successful operation of a federal system. It also denies the uniqueness of each province and territory and the special conditions of each, thus undermining the principle of respect in the federation espoused by Pelletier. Asymmetry applied to justify special arrangements for one unit in a federation may be fair if also open to all, or if denied to the other units, it may be tantamount to dictating the sameness of all but that one. This is a recipe for jealousies and competitions that are unhealthy to the functioning of a federation.

Is there a valid basis for treating Quebec differently? Yes, the very inclusion and definition of that province in the constitution recognizes its need to be treated equally but differently. It is equal to the other provinces in its need for difference. In the case of Quebec, this difference manifests itself in its civil law tradition, culture, language, demographics, racial composition and more. Policies, statutes and regulations must all respect these differences.

If the founders are right and difference has centrifugal tendencies, then how might these tensions be offset? The answer lies in the concept of "Quebec as a nation within a united Canada," as endorsed by the federal government and part of its modified vision of open federalism as well as a return to principled federalism that is consistent with open federalism. Without engaging in "one-off deals" or "checkerboard" federalism, the federal government must strive to accommodate the different conditions in each province. Negotiated compromises among the federal government and provinces like the federal deal on the fiscal imbalance contained in the 2007 federal budget is a start to enhancing the spirit of give and take in the nation. And while 2007 illustrates that not all provinces and territories will be happy with each set of compromises, consistent endeavours to acknowledge and accommodate difference can only build a sense of trust among the units within the federation. In the same way, offering all provinces the ability to opt-in or -out of legislative proposals will result in policies that are more reflective of a greater variety of views (or the opt-out would be too high) and quell provincial jealousies. Consultations that encourage

the provinces to think of their positions in relation to that of the other provinces and to the national interest will cause them to learn to bridge differences without denying them and build a stronger sense of national loyalty if not national identity (an archaic concept in a global world anyways).

And the federal government? As I have argued elsewhere, the federal government could foster a sense of national loyalty and unity and reduce tensions in the union by a return to principled federalism.³⁷ It should vacate provincial jurisdiction gradually and with the consent of the provinces, limiting its involvement in areas of provincial jurisdiction to where a genuine national concern exists such as coordination of health services among the provinces in the case of a sudden catastrophe or long term chronic condition. Where inequalities among the provinces arise owing to the changed federal role, then they should be rectified through equalization not special deals or spending.

The federal government should then look into its own areas of jurisdiction to promote national unity and the importance of the federation to each and every province and citizen. Invigorate our cultural industries. Promote our culture throughout the nation without segregation as embodied in the Governor General's awards for literature. Reinvest in the CBC as a national vehicle of information and education that carries programming and relevant information about all areas of the country to all areas of the country rather than the cheaper regionally specific model in place currently. Rebuild the transportation system, especially the trains, to encourage Canadians to visit each other and to get to know their land. Invest in our image abroad through increased foreign aid and assistance and build an image of Canada as friend to the needy. These are just a few places to start. Pulling back from attempting to order provincial affairs without penalizing the provinces financially and investing in federal areas of jurisdiction will create ties that are genuinely national and cause citizens everywhere to look at the federal government with pride. And, the fiscal imbalance will be righted as federal responsibilities correspond to federal resources and provincial horizontal imbalances are rectified through the appropriate constitutional vehicle.

Quebec can thrive as a nation within a united Canada without contorting provisions of the constitution in a way that might backfire. But for it to flourish, Quebec must realize that accepting the differences among the common law provinces neither diminishes its uniqueness nor threatens its being. The other

³⁷ Kathy L, Brock, "Asymmetry," op. cit..

provinces must in full reciprocity negotiate in good faith with Quebec as they forge common policies but allow for differences up to and including opting-out. And to enable Quebec and the other provinces to realize their goals and the full benefits of federalism, the federal government must return to the common law principle of nonintervention in provincial areas of jurisdiction except by invitation. To ensure Canada remains united, Ottawa needs to maintain a robust equalization program in conformity with section 36 of the *Constitution Act, 1982* rebuild its neglected areas of responsibility. These separate and joint actions will win the hearts of citizens and temper that passions, prejudices and jealousies that can arise in a federation.