

Spending Power, Social Policy, and the Principle of Subsidiarity

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This essay argues that theories relating to the spending power theory could be enhanced by an application of the principle of subsidiarity. Subsidiarity shares a number of attributes with federalism, and allows for a conception of spending power as a flexible tool of governance of the welfare state. This essay links social and economic development with Canadian constitutional design by advocating for the use of the principle of subsidiarity when analyzing governmental action in the context of social policy.

Dans cet essai, l'auteure décrit et contextualise le pouvoir de dépenser et le principe de subsidiarité. Elle soutient que la théorie du pouvoir de dépenser pourrait être renforcée par un recours au principe de subsidiarité. Ce dernier partage certains attributs avec le fédéralisme. Il permet de concevoir le pouvoir de dépenser comme un outil flexible de gouvernance dans un État providence qui est également un État fédéral. En favorisant l'application du principe de subsidiarité dans le contexte des politiques sociales, cet essai contribue à la création d'un lien entre le développement social et économique, d'une part, et le design constitutionnel, d'autre part.

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Introduction

The Canadian Constitution contains explicit text but also abstract concepts, such as conventions and principles that were adopted and described over time; its design is fluid and responsive to social changes. Since Confederation, spending power has slowly appeared as a concept in Canadian jurisprudence and scholarly literature along with the development of social policies in Canada. Debates over its exercise can be traced back to at least the 1940s, and by the 1960s various cost-sharing programs between the federal and the provincial governments had been established.¹ The words “spending power” do not appear in the Constitution’s text but this constitutional power is inferred in sections of the Constitution that allow the federal and the provincial governments to tax and spend.²

The federal spending power has been controversial. Both levels of governments have such power, but the federal government has in practice gained a lot more spending power than the provinces, and even so comparatively to its legislative power. In fact, the limits of the spending power are only vaguely defined and it does not follow the division of legislative powers, even though the distribution of public property it enables is determined by a law. Its exercise has thus led to centralisation and spending in areas of provincial jurisdiction. One reason spending power has never been strictly limited is because it is understood as allowing the federal government to ensure standard levels of economic and social development across Canada, which requires a central exercise of policy determination and spending. Thus, the federal government has been given broad powers, a reality that has been accused of frustrating the values protected by federalism.³ Political attempts to limit it, such as Meech Lake and Charlottetown Accords as well as the Social Union Framework Agreement, have not led to desired results and some authors are still questioning the constitutionality of federal spending in areas of provincial jurisdiction.⁴

Only recently has the Supreme Court of Canada (SCC) referred to the principle of subsidiarity, and the details of its application remain uncertain. It has been used internationally in other federations to guide the exercise of leg-

1 Ronald L Watts, *The Spending Power in Federal Systems: A Comparative Study* (Kingston: Queen’s University Institute of Intergovernmental Relations, 1999) at 1.

2 *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91(1A), 91(3), 92(2), 92A(4), 102, 106.

3 Nadia Verrelli, “The ‘Cents’ and Nonsense of the Federal Spending Power” (2013) 7 JPPL 111 at 124-125 [Verrelli]; Hamish Telford, “The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?” (2003) 33:1 *Publius: The Journal of Federalism* 23 at 23-24.

4 Verrelli, *ibid* at 121-123 and 113-114.

islative powers in areas that are non-exclusive. Subsidiarity shares values with federalism and presents attributes that could make it a promising principle for Canadian constitutional law. This essay will consider the principle of subsidiarity as a possible means of promoting a constructive exercise of spending power by the federal government; it also offers a compromise between unity and diversity. Part I will describe spending power; Part II will describe the principle of subsidiarity and its use in Canada; and, Part III will analyse subsidiarity in the context of spending power.

I. Spending Power and Social Policy

1. Origin, Constitutional Interpretation, and Criticisms

In Canada, the federal government and the provinces have spending power that allows them to redistribute tax revenues. The concept evolved rapidly following the Second World War when Canada increasingly played a role of “state provider” through welfare initiatives and fiscal intervention.⁵ Federal spending power dwarfs that of the provinces, as the federal government is the centralising unit of government that collects more taxes from the residents of Canada.

The exercise of federal spending power can take many forms, such as shared-cost programs with the provinces, unconditional grants (including equalisation payments), and conditional grants.⁶ The federal government can spend from the Consolidated Revenue Fund directly on individuals, organisations, and provincial governments in areas where it does not hold legislative competence.⁷ Canada’s health care insurance program, for example, is implemented by the provinces but partly funded by the federal government. It establishes the conditions of its grants for this service through the *Canada Health Act*.⁸ To receive the cash contribution from the federal government towards health care insurance plans, the provinces must ensure their plans satisfy the following conditions: public administration, comprehensiveness, universality, portability, and accessibility.⁹

5 Watts, *supra* note 1 at 1; for a historical account see Verrelli, *supra* note 3 at 116-119.

6 Johanne Poirier, “Federalism, Social Policy and Competing Visions of the Canadian Social Union” (2002) 14 NJCL 355 at 364-65.

7 Peter W Hogg, *Constitutional Law of Canada: 2013 Student Edition* (Toronto: Carswell, 2013) at 6-18; Watts, *supra* note 1 at 1.

8 *Canada Health Act*, RSC 1985, c C-6.

9 *Ibid*, s 7.

The concept of spending power does not appear in the Constitution's text. It is inferred from the provisions of the Consolidated Revenue Fund (section 102 of the *Constitution Act, 1867*), the power to levy taxes (section 91(3)), the power to legislate in relation to public debt and property (section 91(1A)), the power of the provinces to establish direct taxation (section 92(2)) and tax in regards to natural resources (section 92A(4)), and the power to appropriate federal funds (section 106).¹⁰ It has also been associated with section 36 of the *Constitution Act, 1982*.¹¹ This section stipulates the commitment of both federal and provincial governments to promote equal opportunities as well as the commitment of the federal government to ensure, through equalisation payments, that the provinces have sufficient revenues to promote comparable levels of public services.

Spending power is not limited by the doctrine of the divisions of legislative powers.¹² The enactment of legislation and the redistribution of public property have been understood as different processes that do not have the same level of constraints on citizens and that do not stem from the same governmental role. Legislation is understood as creating more constraints than spending, and spending as creating more opportunities than legislation.¹³ In relation to the difference in the governmental role in each exercise, Peter Hogg asserted that "there is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects."¹⁴

A limit to federal spending power exists. An exercise of spending power is considered impermissible if it amounts to regulation of a matter within provincial jurisdiction.¹⁵ In 1937, in the *Employment and Social Insurance Act Reference*, Lord Atkin found the Act invalid as it affected property and civil

10 *Constitution Act, 1867*, *supra* note 2; Hogg, *supra* note 7 at 6-18, 6-19; *YMHA Jewish Community Centre of Winnipeg Inc v Brown*, [1989] 1 SCR 1532 at 1548, 59 DLR (4th) 694 [YMHA].

11 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Winterhaven Stables Ltd v Canada*, 1988 ABCA 334 at para 21, 53 DLR (4th) 413 [Winterhaven]; Marc-Antoine Adam, "The Spending Power, Co-operative Federalism and Section 94" (2008) 34:1 Queen's LJ 175 at 182 [Adam]; Thomas J Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives" (2008) 34:1 Queen's LJ 75 at 103 [Courchene, "Reflections"].

12 *YMHA*, *supra* note 10 at 1548-49; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 564-67, 83 DLR (4th) 297 [CAP Reference]; Watts, *supra* note 1 at 1.

13 Hogg, *supra* note 7 at 6-18, 6-19.

14 *Ibid.*

15 *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 355, [1937] 1 DLR 684 (PC) (*sub nom Reference Re Employment and Social Insurance Act, 1935*) [Employment Act Reference]; *YMHA*, *supra* note 10 at 1548-49; *CAP Reference*, *supra* note 12 at 567.

rights in the province.¹⁶ By doing so, the Privy Council indicated this limit on spending power, which is still used today.

The SCC has had little chance to interpret spending power as there have been few claims before the courts that its exercise was *ultra vires*.¹⁷ Governments have found the risks of constitutional litigation of the issue too high compared to its benefits.¹⁸ In *YMHA*, Justice L'Heureux-Dubé, writing for the Court, analysed its limit the following way:

[W]hile Parliament may be free to offer grants subject to whatever restrictions it sees fit, the decision to make a grant of money in any particular area should not be construed as an intention to regulate all related aspects of that area. Thus, a decision to provide a job creation grant to an organization such as the YMHA should not be construed, without other evidence, as an intention to remove provincial labour law jurisdiction over the project.¹⁹

In *Reference Re Canada Assistance Plan*,²⁰ the SCC considered a case in which the federal government had cut its contribution under the Canada Assistance Plan to richer provinces. The Plan was a shared-cost welfare and social-assistance program.²¹ The Attorney General of Manitoba argued that given the direct influence Canada had on the population of the provinces through the funding of the program, the withholding of money was creating constraints that amounted to regulation.²² Justice Sopinka, delivering the judgment for the Court, rejected this position:

The new legislation does not amount to regulation of an area outside federal jurisdiction. Bill C-69 was not an indirect, colourable attempt to regulate in provincial areas of jurisdiction. It is simply an austerity measure. Further, the simple withholding of federal money, which had previously been granted to fund a matter within provincial jurisdiction, does not amount to the regulation of that matter.²³

Thus, it could be said that an exercise of spending that creates constraints akin to those created by legislation would be *ultra vires*. For example, when strict and specific conditions are added to the provision of funds by the federal

16 *Employment Act Reference, ibid.*

17 Two provincial judgments are often cited: *Canada Mortgage and Housing Corp v Iness*, (2004) 70 OR (3d) 148, 236 DLR (4th) 241 (Ont CA), and *Winterhaven, supra* note 11.

18 Sujit Choudry, "Constitutional Change in the 21st Century: A New Debate over the Spending Power" (2008) 34:1 Queen's LJ 375 at 383 [Choudry, "Constitutional Change"].

19 *YMHA, supra* note 10 at 1549.

20 *CAP Reference, supra* note 12.

21 *Ibid* at 526.

22 *Ibid* at 566.

23 *Ibid* at 529.

government to a province, an exercise of spending power could create improper constraints. Professor J-F. Gaudreault-Desbiens gave the example, in relation to the *Canada Health Act*, of a “norm determining the maximum delay to be respected for treatment in an emergency room.”²⁴ In this example, the condition imposed by the federal government for the granting of money to the provinces for the provision of health care insurance creates constraints that are akin to those of a legislation in the matter of health care, a power allocated to the provinces under 92(7) of the *Constitution Act, 1867*. Gaudreault-Desbiens also added that a difference should be made between conditions that create standards, such as those of the *Canada Health Act*, that give a substantial margin of appreciation to the provinces and those that would leave no margin. Only the latter would be unconstitutional.

Political attempts to limit federal spending power have not led to the desired results. Meech Lake (1987) and the Charlottetown Accord (1992) failed to be adopted.²⁵ The Social Union Framework Agreement (1999),²⁶ which was signed by all provinces except Quebec, was questioned for its effectiveness.²⁷

Thus, the spending power *per se* has been understood by some as having no limits,²⁸ or at least as being extremely broad. In relation to federalism, the question of the constitutionality and legitimacy of spending power has been debated at length by Canadian scholars and policy-makers,²⁹ the biggest opposition coming from Quebec. Critics have said that by spending on social programs, the federal government intervened in the provincial sphere of com-

24 Jean-François Gaudreault-Desbiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy” in Sujit Choudry, Jean-François Gaudreault-Desbiens & Lorne Sossin, eds, *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: Toronto University Press, 2006) 185 at 190 [Choudhry et al, *Dilemmas*].

25 For a description of the propositions in the Accords see Verrelli, *supra* note 3 at 121-22. For an account of the critiques associated with the propositions, see Alain Noël, “How Do You Limit a Power that Does Not Exist?” (2008) 34:1 Queen’s LJ 391 at 400-401.

26 Canadian Intergovernmental Conference Secretariat, *A Framework to Improve the Social Union for Canadians: An Agreement between the Government of Canada and the Government of the Provinces and Territories*, 4 February 1999, online : <www.scics.ca/en/product-produit/agreement-a-framework-to-improve-the-social-union-for-canadians/>; For a factual analysis see Poirier, *supra* note 6 at 393-405.

27 Adam, *supra* note 11 at 177; Choudry, “Constitutional Change”, *supra* note 18 at 383; Alain Noël, *supra* note 25 at 404-405.

28 See e.g. Adam, *ibid*; Noël, *ibid*.

29 See e.g. Quebec, Commission on Fiscal Imbalance, *Fiscal Imbalance: Problems and Issues*, Discussion Paper (Quebec : Bibliothèque Nationale du Québec, 2001); Andrew Petter, “Federalism and the Myth of the Federal Spending Power” (1989) 68 Can Bar Rev 448; Choudhry et al, *Dilemmas*, *supra* note 24; The multiple essays published following the 2008 Symposium “Open Federalism and the Spending Power” were sponsored by Queen’s University.

petence and had a direct effect on people, altering social standards when it was not competent to do so.³⁰ By using conditional grants, the federal government has been accused of creating constraints often close to those created by legislation. Parliament was accused of doing indirectly what it cannot do directly.³¹ Furthermore, repeated instances of federal spending in the areas of provincial jurisdiction is said to have the effect of centralising power. Spending power could thus be understood as leading to “de facto changes in the divisions of powers”³² in favour of federal interests.

On the other hand, the fact that flexible spending power leads to centralisation and allows a ‘direct impact’ on citizens can be viewed as essential to providing the level of social services that we have today. Canada acts as a generous state provider that maintains relatively high standards of social security across the country in key areas of development and addresses disparities across provinces. These initiatives necessitate the allocation of funds, which the central government is more apt to collect and redistribute. Conditions attached to the spending exercises are a way to safeguard a certain level of social security and reduce disparities among provinces.³³

2. Spending Power, Development, and Human Rights

Social programs are important in the development of the State and of its individual members. Canada as a welfare state has a responsibility to develop opportunities for its residents. It is a question of fostering human rights; in this case, mainly economic and social rights. Ultimately, it is a question of interpersonal equality and distribution of freedoms. Amartya Sen’s writings have defined human rights in the context of welfare economics. Human rights can be linked to the degree of freedom that a person possesses, which enables her or him to realise her or his capabilities.³⁴ In turn, we can think of these capabilities as “the opportunity to achieve valuable combinations of human

30 Courchene, “Reflections”, *supra* note 11 at 77.

31 Noël, *supra* note 25 at 395.

32 Thomas J Courchene, “Variations on the Federalism Theme” (2006) 27:7 Policy Options 46 at 46, cited in Library of Parliament, Karine Richer, *The Federal Spending Power*, PRB 07-36E (Ottawa: Library of Parliament, 2007) at 21, online: <www.lop.parl.gc.ca/content/lop/researchpublications/prb0736-e.pdf>.

33 Harvey Lazar, “The Spending Power and the Harper Government” (2008) 34:1 Queen’s LJ 125 at 1-2; Poirier, *supra* note 6 at 6 citing Robin Boadway, “Delivering the Social Union: Some Thoughts of the Federal Role” (1998) 19 Policy Options 37 at 38.

34 Kim Lane Scheppele, “Amartya Sen’s Vision for Human Rights - And Why He Needs The Law” (2011) 27:1 Am U Intl L Rev 17 at 18, citing Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009) at 231; See also generally Amartya Sen “Human Rights and Capabilities” (2005) 6:2 J Human Development and Capabilities 151 [Sen, “Human Rights”].

functionings — what a person is able to do or be.”³⁵ Thus, if human rights and human development advance together, they reinforce each other,³⁶ and Canada as a welfare state has taken the responsibility of fostering both.

Section 36 of the *Constitution Act, 1982*, which is sometimes cited in the literature as justifying federal spending power, is reminiscent of this theory; it enacts the commitment of all levels of government to promote equal opportunities, reduce disparities in opportunities, provide essential public service of reasonable quality to all Canadians,³⁷ and reinforce the federal government’s commitment to ensuring comparable levels of public services at reasonably comparable levels of taxation.³⁸ This vision of welfare economics, as established in section 36, allows for an expression of multicultural diversity in the way programs are implemented. In fact, in Canada there is no claim of uniformity of social programs.³⁹ Policies engendering centralisation in the federation are only necessary because maintaining standard levels of social security and human development is seen as an obligation on the part of the country.

Canadian identity has been shaped by the development of the welfare state. In Canada outside of Quebec, the national sense of belonging is normally one of belonging to Canada and not to the province where one resides.⁴⁰ Hence, flexible spending power, which has a double role of developing the welfare state and building Canadian citizenship, can be perceived as “desirable.”⁴¹ On the other hand, the people of Quebec who identify with their province want to have the freedom to envision their own welfare program where possible, define their own national priorities,⁴² and preserve their national sense of identity. Flexible spending power can thus be seen as illegitimate, even threatening. The debate very much revolves around the idea of identity and protecting it, and not on the importance of having a welfare state. Writing on the Social Union, Johanne Poirier pointed out that one of its challenges was to “[o]ne of the dilemmas of a multinational federation such as Canada, is that there are

35 Sen, “Human Rights”, *ibid* at 153.

36 *Human Development Report 2000*, UNDP (2000) at 2, online: <hdr.undp.org/en/content/human-development-report-2000>; The Human Development Reports are based on Amartya Sen’s ‘Capabilities Approach’.

37 *Supra* note 11, s 36(1).

38 *Ibid*, s 36(2).

39 Poirier, *supra* note 6 at 428.

40 *Ibid* at 422.

41 *Ibid*; For the full analysis read pages 421-434.

42 Hamish Telford, *supra* note 3 at 43.

competing nations, and competing state apparatus, seeking to build themselves with similar tools”.⁴³

In the Canadian federation, would identities and human rights be better served by having an unlimited federal spending power, or by placing limits on the power to preserve the agency of the provinces? In light of this question, let us now turn to the principle of subsidiarity as a means of providing a compromise between unity and diversity.

II. The Principle of Subsidiarity

1. Origin, Definition, and Relation to Federalism

Subsidiarity is understood as regulating the exercise of authority in a political order between a central unit and various subunits.⁴⁴ It suggests that legislative action is better achieved at the level of government closest to the people who will benefit from the measure unless the central government would be more effective in achieving the objective of the proposed action.⁴⁵ Subsidiarity also implies that the “burden of argument lies with attempts to centralise authority.”⁴⁶ Subsidiarity preserves democratic agency, preserves autonomy of lower levels of authority, reduces threats of dominance, and increases efficiency.

Subsidiarity is understood as having many roots. Some trace it back to Greek philosophy,⁴⁷ but it was more fully theorised in the seventeenth century by Johannes Althusius in *Politica methodice digesta*,⁴⁸ and in the twentieth century by the Catholic Church in the 1931 Papal Encyclical *Quadragesimo Anno*,⁴⁹ a letter sent out to all priests to address certain aspects of the Catholic doctrine. The Church was reacting to its loss in power in Italy at the time, in the areas of health, education, and welfare and was calling for limited interven-

43 Poirier, *supra* note 6 at 423.

44 Andreas Føllesdal & Victor M Muñiz Fraticelli, “The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada” (2015) 10:2 *The Ethics Forum* 89 at 89.

45 Andreas Føllesdal, “Survey Article: Subsidiarity” (1998) 6:2 *The Journal of Political Philosophy* 190 at 190 [Føllesdal, “Survey”].

46 Andreas Føllesdal, “Subsidiarity and the Global Order” in Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (New York: Springer, 2014) 207 at 208.

47 Eugénie Brouillet “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” (2011) 54 *SCLR* (2d) 601 at 604, citing Philippe Brault, Guillaume Renaudineau & François Sicard, *Le principe de subsidiarité* (Paris: La documentation française, 2005) at 11-23.

48 For a detailed background see Føllesdal, “Survey”, *supra* note 45 at 200-201.

49 Pope Pius XI, “*Quadragesimo Anno*: On Reconstruction of the Social Order” (15 May 1931), online: <w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html>; Føllesdal & Fraticelli, *supra* note 44 at 95.

tions of the State in areas of real need.⁵⁰ The Church understood that the State was overwhelmed by its tasks, and individuals threatened to be destroy[ed] and absorb[ed] by the State.⁵¹ The Church called for a new associative structure in line with the principle of subsidiarity:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function”, the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.⁵²

This quote reminds the reader of the governance of a federative structure; however, in a federation there is no relationship of subordination between the levels of governments. The subsidiarity described above applies horizontally and not vertically as it would apply in a federation.⁵³ The private sector, to which the Church belongs, is one of the subordinate groups to consider.⁵⁴

In any case, subsidiarity is a similar principle to federalism and can help justify its pertinence. Federalism can be understood as a constitutionally defined structure of governance in which power is shared between a central government and the lower levels of governments. The division of specific powers is entrenched in the Constitution.⁵⁵ Both subsidiarity and federalism imply that power is organised under levels of authority. Under this kind of multilevel governance there will be tension between centralisation and decentralisation of power and between the values of unity and diversity in policy across the State. Subsidiarity is a broader principle, however. If federalism were not to give a clear answer to the question of which level of government should legislate, subsidiarity would be helpful.

50 Federico Fabbrini, “The Principle of Subsidiarity” (2016) iCourts Working Paper No 66 at 11 [forthcoming in Takis Tridimas & Robert Schütze, eds, *Oxford Principles of European Union Law* (Oxford: Oxford University Press, 2018)].

51 Pope Pius XI, *supra* note 49 at paras 78-79.

52 *Ibid* at para 80.

53 Fabbrini, *supra* note 50 at 11.

54 Føllesdal, “Survey” *supra* note 45 at 209.

55 Daniel M Weinstock, “Liberty and Overlapping Federalism” in Sujit Choudhry et al, *Dilemmas*, *supra* note 24, 167 at 168, citing William H Riker, “Federalism” in Robert E Goodin & Philip Pettit, eds, *A Companion to Contemporary Political Philosophy* (Oxford: Basil Blackwell, 1993), 508 at 508-09.

Subsidiarity has been associated with constitutional provisions in other federations. For example, it has been interpreted in the content of article 72(2) of the German Constitution of 1949 to regulate the action of the central government in situations of concurrent powers.⁵⁶ More importantly, subsidiarity was included in the Maastricht Treaty as a governing principle of the European Union (EU).⁵⁷ It was meant as a political compromise for all EU Members to be able to accept the Treaty, as it could diminish the risk of over-centralisation.⁵⁸ By adopting the principle, the EU intended to ensure a degree of autonomy for the lower bodies in relation to the central authority within the federation.⁵⁹

In the EU, subsidiarity is understood as being the principle that regulates the exercise of the Union's powers in areas of shared competencies. Article 5(3) of the *Treaty on European Union* describes its application in these terms:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.⁶⁰

56 Føllesdal, "Survey", *supra* note 45 at 193; Fabbrini, *supra* note 50 at 12. The Bund was entitled to legislate if federal regulation was needed: 1) because a matter could not be settled effectively by the legislation of the various Länder; 2) because the regulation of a matter by the law of a Land could affect the interests of other or all Länder; 3) to safeguard the legal or economic unity, and in particular, to safeguard the homogeneity of the living conditions beyond the territory of a Land. The text of Article 72(2) of the German Basic Law was amended in 1994 by the *Gesetz zur Änderung des Grundgesetzes*, BGBl. I 3146. It now reads that the Bund shall have the powers to legislate in areas of concurrent competences "if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest": Art 72 Abs 2 GG.

57 EC, *Consolidated Version of the Treaty on European Union, Treaty of Maastricht* [2002] OJ, C 325/05 [TEU]. The principle of subsidiarity was formally enshrined in EU law by the Maastricht Treaty in 1992. Before, a reference to subsidiarity was included in the EC, *Consolidated Version of the Treaty Establishing the European Community*, [2002] OJ, C 325/33 [TEC]. The *Treaty of Lisbon*, [2007] OJ, C 306/01, repealed the reference in the TEC and incorporated it in article 5(3) TEU: see European Parliament, *Fact Sheets on the European Union: The Principle of Subsidiarity* (2017), online: <www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf>.

58 Mark A Pollack, "The End of Creeping Competence? EU Policy-Making Since Maastricht" (2000) 38:3 J Common Market Studies 519 at 525.

59 Fabbrini, *supra* note 50 at 6, n 19, citing Mattias Kumm, "Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union" (2006) 12:4 Eur LJ 503.

60 *Consolidated version of the Treaty on European Union*, [2012] OJ, C 326/19. The action of the Union pursuant to the principle are limited by the principle of proportionality: "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.": TEU, art 5(4). Both the principle of subsidiarity are analysed in tandem. The *Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality*, [2004] OJ, C 310/207 [Protocol No 2], regulates their application.

Furthermore, in the EU, compliance with the principles of subsidiarity is reviewed at multiple levels.⁶¹ For example, draft legislative acts have to state how they comply,⁶² national parliaments can flag inconsistencies with the principle according to a specific procedure,⁶³ and the EU Court of Justice can review their compliance.⁶⁴ Authors have generally found the principle of subsidiarity helpful as a general legislative principle, but judicial review by the EU Court of Justice has proven challenging.⁶⁵ The principle is political in nature and policy decision-making is understood as being discretionary.⁶⁶ In fact, the European Court of Justice has never held that a legislative act was invalid on the basis of subsidiarity and gives considerable deference to the opinion of the legislative authorities in its judgments.⁶⁷ This shows its uneasiness with reviewing a political process of decision-making at the EU level.⁶⁸

Competing views on the nature of the principle of subsidiarity have arisen. Some scholars perceived the principle as carrying a negative bias⁶⁹ towards the Member states and restricting the actions of the Union unless its intervention is necessary for reasons of scale and externalities.⁷⁰ This version of the principle gives an answer to the question of *whether* the Union is entitled to act.⁷¹ In this case the central government's actions would be the exception to the norm. Another perception of the principle viewed it as more

61 For a description of the procedures, see Patricia Popelier & Werner Vandenbruwaene, "The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: On 'Regional Blindness' and Co-operative Flaws" (2011) 7:2 Eur Const L Rev 204.

62 *Protocol No 2*, *supra* note 60, art 5.

63 *Ibid*, art 6; *Protocol on the Role of National Parliaments in the European Union*, [2004] OJ, C 310/204, art 3.

64 *Protocol No 2*, *ibid*, art 8.

65 Fabbrini, *supra* note 50 at 14; Gabriél A Moens & John Trone, "The Principle Of Subsidiarity In EU Judicial And Legislative Practice: Panacea Or Placebo?" (2015) 41:1 Journal Legis 65 at 72 ; Popelier & Vandenbruwaene, *supra* note 61 at 210.

66 Popelier & Vandenbruwaene, *ibid* at 210. It has been said that the courts are not well equipped to challenge that discretion because they cannot incur the information cost necessary to assess the socio-economic rationality of a proposed law: see Aurélian Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency" (2011) 17:2 Colum J Eur L 231 at 257; Brouillet, *supra* note 47 at 611, citing Renaud Dehousse, "Réflexions sur la naissance et l'évolution du principe de subsidiarité" in Francis Delpérée, ed, *Le principe de subsidiarité* (Bruxelles: Bruylant, 2002) at 364.

67 Moens & Trone, *supra* note 65 at 72, 77.

68 Fabbrini, *supra* note 50 at 15.

69 According to Føllesdal, subsidiarity can be interpreted positively or negatively. Since subsidiarity is imposed on the actions of the Union, the "negative" version of subsidiarity can proscribe central action in the absence of comparative efficiency with the Member states. On the other hand, the "positive" version of subsidiarity can require the Union's action when it is comparatively more efficient: Føllesdal, "Survey", *supra* note 45 at 195.

70 Fabbrini, *supra* note 50 at 7.

71 Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009) at 262-63.

neutral, almost Janus-faced, with regard to its positive and negative aspect.⁷² Subsidiarity would guide the allocation of power, depending on capacities of the different levels of government to deal with specific problems at one time. It would respond to the question of *how* the Union is entitled to act.⁷³ What has not been contested is the fact that definitions of the principle in the treaties are ambiguous.⁷⁴

2. The Principle of Subsidiarity in Canadian Law

The principle of subsidiarity is not formally entrenched in Canadian law. According to Peter Hogg, the broad interpretation given by the Privy Council and the SCC to the provincial power to legislate over property and civil rights is a manifestation of their acceptance of the principle of subsidiarity.⁷⁵ The SCC has recently referred to the principle in three major decisions in a way that suggests new possibilities for the principle.

In *Spraytech* the Court had to decide if the Town of Hudson was authorised by statute to pass a by-law regulating and restricting pesticide use.⁷⁶ The impugned provision was found valid pursuant to a *Cities and Town Acts* provision that allows municipalities to enact bylaws related to health and general welfare.⁷⁷ It was also found not to interfere with related federal legislation, even though it exceeded federal norms. This made the units of governments' interventions complementary and not conflicting. To introduce her judgment, Justice L'Heureux-Dubé referred to the principle of subsidiarity:

The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 127, that “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels”. [...] The so-called “Brundtland

72 Fabbrini, *supra* note 50 at 7.

73 Schütze, *supra* note 71 at 262-63.

74 Fabbrini *supra* note 50 at 7.

75 *Reference Re Assisted Human Reproduction Act*, 2010 SCC 61 at para 183, [2010] 3 SCR 457 [*AHRA Reference*], citing Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2013 revision 1) at 5-13.

76 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town of)*, 2001 SCC 40 at para 17, [2001] 2 SCR 241 [*Spraytech*].

77 *Ibid* at paras 21 and 43.

Commission” recommended that “local governments [should be] empowered to exceed, but not to lower, national norms” (emphasis added).⁷⁸

In *Canadian Western Bank*, the SCC reviewed the pertinence of the doctrine of interjurisdictional immunity.⁷⁹ This doctrine articulates that legislation enacted by a level of government cannot have incidental effects on the core of a jurisdiction assigned to the other level of government, even in the absence of law on the subject by the other level of government.⁸⁰ The Court argued at length for a limited use of the doctrine. It found that if used broadly, the doctrine would lead to centralisation and would not be compatible with “the flexibility and co-ordination required by contemporary Canadian federalism.” At that point it cited the principle put forward in *Spraytech*: “The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions ‘are often best [made] at a level of government that is not only effective, but also closest to the citizens affected.’”⁸¹

Both in *Spraytech* and in *Canadian Western Bank*, the principle of subsidiarity is used to push the analysis towards an interpretation of federalism that would empower all levels of government to act in solidarity towards common goals. Subsidiarity is used as a broad principle, broader than federalism, but that same broadness/breadth can help interpret it in a constructive way. While cooperative federalism also encourages solidarity, and is a similar principle to subsidiarity, subsidiarity adds the idea of deference for the unit of government most able to respond to the residents’ needs.

In the *Reference re Assisted Human Reproduction Act*, the Province of Quebec challenged the validity of certain provisions of the statute related to medical practice and research related to human reproduction.⁸² The question was whether the impugned provisions were part of a statutory scheme validly enacted under the federal power over criminal law. Justices Lebel and Deschamps, writing for the minority (Justices Abella and Rothstein concurring), placed a lot of importance on the principle of subsidiarity, even more so than Justice L’Heureux-Dubé had done in *Spraytech*. They tracked its brief history in Canadian law.⁸³ The justices expressed the view that the impugned provisions were outside federal jurisdiction and related instead to the provinces’ jurisdictions over hospitals, property, and civil rights and matters of a merely

78 *Ibid* at para 3.

79 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 33.

80 *Ibid* at para 44.

81 *Ibid* at para 45.

82 *AHRA Reference*, *supra* note 75 at para 21.

83 *Ibid* at para 183.

local or private nature.⁸⁴ Subsidiarity could potentially be invoked if a doubt remained and, in this case, it would favour the provinces since they were closest to the matter of health. They added “[i]f any doubt remained, this is where the principle of subsidiarity could apply,”⁸⁵ suggesting a new application of the principle.

Justice McLachlin, writing for the majority (Justices Binnie, Fish, and Charron concurring),⁸⁶ argued that the impugned provisions were valid under the federal criminal law. On subsidiarity, she replied that in *Spraytech*, the principle was invoked to explain a valid legislative exercise by the municipality that was complementary to that of the federal; it did not infer a preference for the lower level of government that would suggest the federal government should not interfere.⁸⁷ More importantly, the principle itself could not be used to stop Parliament from legislating on the shared subject of health.⁸⁸

Justice McLachlin stated first that the minority had treated subsidiarity as having a more powerful influence than intended by Justice L’Heureux-Dubé in *Spraytech*. This recalls the discourse in the EU where subsidiarity can be seen as restrictive, indicating whether the central government could act in a particular situation. The majority supported subsidiarity as a neutral principle and argued against giving it a negative force that could mean the preference for provincial exercise in the area of health care, “free from interference of the criminal law.”⁸⁹ Second, Justice McLachlin rejected the proposition that subsidiarity could be added to the analysis of the divisions of powers (if doubts remained). Where Justice L’Heureux-Dubé had referred to subsidiarity in “matters of governance,” Justices Lebel and Deschamps referred to it in the “operation of Canadian federalism.” They suggested this same principle could be employed to decide which level of government would be better suited to address the subject at hand, which is something that had not been done before. Justices Lebel and Deschamps even supported their argument for an application of the principle by interpreting a passage of the *Secession Reference* and the intention of the Court at the time:

In *Reference re Secession of Quebec*, the Court expressed the opinion that “[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular soci-

84 *Ibid* at para 158.

85 *Ibid* at para 273.

86 Justice Cromwell wrote a separate concurring judgment.

87 *AHRA Reference*, *supra* note 75 at paras 69,70.

88 *Ibid* at para 72.

89 *Ibid* at para 69.

etal objective having regard to this diversity” (para. 58). In taking this position, the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added.⁹⁰

Interestingly, Justice Deschamps had written a solo dissent in *Lacombe*⁹¹ only two months earlier. Justice Deschamps stipulated that the principle of subsidiarity was a component of Canadian federalism.⁹² She also used the principle of subsidiarity to support an application of the doctrine of interjurisdictional immunity and paramountcy that could advantage provincial legislation as much as federal legislation in a dispute over the division of power. Neither the majority judgment by Justice McLachlin nor the concurring judgment by Justice Lebel in *Lacombe* referred to the principle, however. While this dissent is not as novel as the minority opinion in *Reference re Assisted Human Reproduction Act*, it seems to pave the way to what Justices Deschamps and Lebel stated in the *Reference*. It points to the principle as being one that can make sense of the choice of one level of government over another, and that the potential of both levels of government to enact law should be protected.

The question that remains following the *Reference re Assisted Human Reproduction Act* would be of the precise application of the principle. The interpretation of Justices L’Heureux-Dubé and McLachlin prevails, but Justices Lebel and Deschamps’s new proposition (with Justices Abella and Rothstein concurring) suggests that the application of this principle could be defined more precisely in the future. Justices Lebel and Deschamps, however, omitted to expand on the reasons for their new proposition. They did not point to the difference in breadth of the principles of subsidiarity and of federalism and why the principle of subsidiarity should be applied the way they suggested within the Canadian federalism doctrine.

As this author understands it, their use of the principle suggests that the principle of subsidiarity can be helpful where the federative principle does not give a clear answer to the question of which level of government should legislate. Justice McLachlin’s argument did not expressly reject this definition, but would limit the use of subsidiarity to a simple justification of existing dynamics.

In the next section, we return to spending power. Given that the theory of spending power lacks maturity and is being contested, it is suggested that

90 *AHRA Reference*, *supra* note 75 at para 183.

91 *Quebec (AG) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453.

92 *Ibid* at para 109.

the principle of subsidiarity would help frame it in a more constructive way for Canadian society.

III. Applying the Principle of Subsidiarity to Spending Power

The entrance of the principle of subsidiarity into Canadian law has been solidified by *Spraytech* and *Canada Western Bank*. It is now possible to foresee that the principle will be given greater attention in Canadian case law. The following is a creative attempt to think of it as a guiding principle for Parliament in justifying an exercise of spending power.

One of the reasons spending power has never really been limited is because of the nature of the rights it creates. Social policy generates widespread opportunities that enable citizens to live better lives, as well as to build a better society. It fosters interpersonal equality and the realisation of individual freedom. Accomplishing this requires the development of countrywide social standards, which in turn leads to centralisation, as it is a matter of scale and the federal will to lead the action. According to this argument, spending power's legal justification would include section 36 of the *Constitutional Act of 1982*, as it anchors these ideas in Canadian law.

The huge potential of centralising actions under a barely limited spending power has been perceived by some, mainly in Quebec, as breaching the federative agreement. Subsidiarity would give some importance to the provinces and the municipalities as the levels of government closest to the people. It would not only be a matter of efficiency, which can sometimes lead to over-simplification and unintentional disregard of diversity.

Identities are to be preserved and opportunities to be developed, which requires that we look at what we collectively had in the past and what is needed in the future. However, the evolution of identities has to be accepted as governance looks to the future and leads to inevitable changes, hopefully for the common good. If subsidiarity would be affirmed in the spending power context, or in any context, it would have to be accepted because of social change. Federalism was chosen as a structure of governance in Canada with a view towards future developments and this should inform how we make and accept gradual changes to constitutional design. The reality that informed the divisions of power at that time is not the same reality that exists today. The definition and notion that we attach to Canadian federalism must allow for a fluid evolution, considering the demographic changes the country has seen,

as well as changes in social and economic priorities. Subsidiarity is well suited to Canadian federalism and would not disturb its definition, while questioning centralisation, for some of the same reasons federalism was established in the first place. In the context of the spending power, it would challenge the discourse of unity with the important task of considering diversity. Amartya Sen has asserted that “sometimes human diversities are left out of account not on the misconceived ‘high’ ground of ‘equality of human beings’, but on the pragmatic ‘low’ ground of the need for simplification. But the net result of this can also be to ignore centrally important features of demands of equality.”⁹³

For this purpose, subsidiarity should not be conceived as a justiciable principle, as it is too broad to have a high normative value, and the experience of the EU speaks to the difficulty of reviewing it judicially. It should instead serve as a guiding principle for the federal government. Parliament could still bind itself by agreement on some aspects of fiscal federalism.⁹⁴ The SCC treats it as a guiding principle in *Spraytech* and *Canada Western Bank* and refuses the proposition made in the *Reference re Assisted Human Reproduction Act* to see it as having a higher normative value. Also, in line with this proposition, the exercise of spending power would still have the same limit, which is that it should not amount to legislation. Spending power is otherwise not reviewed by the courts, unless it leads to the violation of one of the rights protected by the Charter.⁹⁵

Further, it is suggested that subsidiarity should not imply any inability but a comparative advantage, thus the principle should not be conceived of as being restrictive. Subsidiarity empowers all levels of government to act in solidarity towards common goals. Once a level of government has decided to tackle an issue, it would guide how power should be distributed to effectively achieve the desired objective. It would mainly act as a guard against undue centralisation.

Subsidiarity promotes efficiency, which can advantage any level of government depending on the scale and externalities of the proposed action.⁹⁶ By matter of efficiency, it could be inferred that projects of a larger scale generating potential externalities would be better accomplished through action at the central level or through a complementary action of all levels of government but not through the action of a small unit of government alone. However, in such

93 Amartya Sen, *Inequality Reexamined* (Cambridge: Harvard University Press, 1995) at 1.

94 It could potentially be conceivable to have political safeguards and reinforcements such as in the EU, but more research would be needed on the feasibility of establishing such mechanisms in the Canadian context.

95 *CAP Reference*, *supra* note 12 at 567.

96 Føllesdal, “Survey”, *supra* note 45 at 206.

cases, subsidiarity would help focus the exercise of spending and its implementation in a way that respects the potential of all levels of government in developing the proposed measure. The threat of dominance by the federal government and the idea that it would bypass the provinces and directly impact residents would thus be reduced. The federal government would have to wonder if the provinces could better achieve the objective of the proposed program. Perhaps the provinces would be more empowered to spend in any area. It can also promote the idea that the multiplication of exercise of authority can lead to innovative ways to conceive projects that can lead to better policy, which is desirable.⁹⁷ Importantly, the principle of subsidiarity promotes the needs and the ideas of people, which we value in the exercise of democracy.

If subsidiarity could not stop Parliament from spending, it would at least trigger the dialogue with the provinces on how the program should be implemented and under which conditions it should function. Diversity appears in the way programs are implemented. Subsidiarity promotes diplomacy between levels of government, which is an intrinsic process of the federated structures of governance. Daniel Weinstock wisely pointed out that federations “incorporate a multitude of occasions for deliberation, discussion, and negotiation, so that the interdependence that holds in a federation can aspire to being reflective and deliberative, rather than the result of the causality of force and power differentials.”⁹⁸

Conclusion

Spending power is a complex and controversial element of Canadian federalism. It has hit the main federalist tension of unity versus diversity at its core. The division of powers has served as constitutional protection in Quebec for much longer than the *Charter of Rights and Freedoms*, and spending power challenges that protection.⁹⁹ The debates over spending power have very much been informed by differing notions of Canadian identities and how we should let them evolve. It is inherently a question of human dignity, interpersonal equality, and freedom. In the Canadian federation, would identities and human rights be better nurtured by an unlimited federal spending power, or it was limited in order to preserve the agency of the provinces? The principle of

97 Weinstock, *supra* note 55 at 170, 173.

98 *Ibid* at 173.

99 Adam, *supra* note 11 at 181, citing Hamish Telford, “Survivance Versus Ambivalence: The Federal Dilemma in Canada” (2005) Queen’s University School of Policy Studies Special Series on Asymmetric Federalism Working Paper, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/asymmetricfederalism/Telford2005.pdf>.

subsidiarity, recently referred to by the SCC and of increasing interest around the world, might offer some clues on how to answer this question.