April 25, 2024

Bill 18 Provincial Priorities Act: Alberta Strikes Again

By: Shaun Fluker

Matter commented on: Bill 18, Provincial Priorities Act, 1st Sess, 31st Leg, Alberta, 2024 (first reading 10 April 2024)

On April 10, Alberta Premier Danielle Smith introduced Bill 18 for first reading in the current session of the Legislature, and second reading began on April 17. If Bill 18 passes through the legislative process in its current form, it will be enacted as the *Provincial Priorities Act* and require designated entities to obtain prior approval before entering into, amending, extending, or renewing an agreement with the federal government. The purpose and consequences of Bill 18 have been questioned by those who will be directly affected, including municipalities and post-secondary institutions. The Premier has also spoken to the media about the Bill – see e.g. here. The commentary thus far makes one thing very clear: Bill 18 is a sequel to the *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8 (*Sovereignty Act*) in its attempt to implement the Free Alberta Strategy and block what are seen as federal intrusions into provincial jurisdiction. Less clear is whether there are also some ideological motivations for the Bill. This post examines the content of Bill 18 and, to further understand the purpose of this proposed statute, reflects on the opening statements made by the Premier during first and second reading in the Legislature.

The Premier Introduced Bill 18 into first reading with the following statement:

> Ms Smith: Thank you, Mr. Speaker. I request leave to introduce Bill 18, the Provincial Priorities Act.
>
> This legislation closes a loophole to ensure that federal tax dollars are spent in partnership with provincial tax dollars on actual provincial priorities. Mr. Speaker, this legislation will ensure that the federal government respects section 92 of the Constitution, which states that municipalities fall within the exclusive jurisdiction of the province. Through this legislation cities and other provincially funded and regulated entities must have provincial government approval to receive federal funding. Albertans are entitled to their fair share of federal tax dollars and to have those dollars spent on Albertans' priorities. We will ensure that happens.
>
> With that, Mr. Speaker, I hereby move first reading of Bill 18, the Provincial Priorities Act. (Hansard, 10 April 2024 at 993)

In law talk, the phrase 'close a loophole' normally describes an enactment that prevents someone from taking advantage of an error or oversight in a rule to avoid a responsibility or duty. For example, a 'tax loophole' in legislation allows a taxpayer to engage in tax avoidance without

contravening the law. It is difficult to identify what loophole a provincial statute would close in relation to the federal spending power. What law or rules is federal spending contravening when it funds, say for example, infrastructure projects in a province? And if that law or rule can be identified, how would a provincial statute remedy this? The actual text in Bill 18 as introduced at first reading is not of much assistance in helping to answer these questions.

Indeed, the text of Bill 18 does not even limit its application to federal spending. The operative section 2(1) states that no "provincial entity" (a defined term which includes a school board, public post-secondary institution, municipality, and any other entity designated as such in regulations) may enter into, amend, extend, or renew an agreement with a "federal entity" (a defined term which includes a federal Minister or agency) without obtaining prior approval in accordance with a process established in the regulations. On its current terms, Bill 18 applies to any such agreement, whether related to federal funding or otherwise.

And while the Bill casts a very wide net of 'red tape' and control over provincial institutions, it offers no guidance or direction on how a captured entity can get itself out of the net. Even the most basic of requirements are left for the regulations; the Bill does not stipulate who would grant the approval required by section 2. Is it the responsible Minister for the provincial entity? A ministerial delegate? Is it a cabinet decision? The point of democratic concern here is not only who gets this power, but also that the Bill itself fails to explicitly designate that person(s), which raises issues as to transparency and democratic accountability in the Legislature. Similarly, the Bill offers nothing on the process to be followed or requirements to be met in seeking approval, other than stating in section 2 that such will be established in regulations enacted by the Lieutenant Governor in Council.

Bill 18 shares a number of characteristics with the first instalment of this federalism saga between the federal government and Alberta, the *Sovereignty Act*: (1) the statute itself is brief; (2) it broadly defines the "provincial entities" captured by it; (3) it delegates a vast amount of authority to the executive (although exactly who is unclear); and (4) it purports to implement the Free Alberta Strategy. For more discussion on these concerns see "The Alberta Sovereignty Act and the Rule of Law" and "Running Afoul the Separation, Division, and Delegation of Powers: The Alberta Sovereignty Within a United Canada Act". The Free Alberta Strategy calls for Alberta to demand unconditional federal funding as follows:

> Opt Alberta out of all federal transfer and other programs that interfere and seek to influence policy in any areas of provincial jurisdiction (i.e., the Canada Health Act, Federal Heath Transfer, education transfers, national daycare program funding, etc.), and officially request the transfer of our population's share of these federal programming dollars, either through an annual 'no-strings-attached' federal transfer amount (based strictly on a per-capita population basis) or, preferably, through the transfer of tax points from Albertans' federal tax rate to Alberta's provincial tax rate. (at 27)

This is a very ambitious strategy that challenges a longstanding practice of how the federal spending power is used to influence the direction of public policy. While this practice has been criticized by others (see e.g. Andrew Petter, "Federalism and the Myth of the Federal Spending

Power"), Bill 18 really seems to miss the mark by inflicting its power more directly on Alberta institutions than the federal government and failing to address the many complexities and nuances of federal funding in Alberta's socio-economic fabric.

Unlike the *Sovereignty Act* however, Bill 18 does not run afoul of the separation of powers because its terms do not grant judicial powers to the Legislature or the Executive. Whether it is offside the division of powers between the federal and provincial governments is perhaps open to question. No such answers will be forthcoming here, but perhaps this uncertainty explains why the Premier opened second reading on Bill 18 with a statement on the *Constitution Act, 1867*, which began with the following:

> Ms Smith: Why, thank you, Mr. Speaker. I'm pleased to rise today and to move second reading of Bill 18, the Provincial Priorities Act, a piece of legislation that will prevent further intrusion from Ottawa into Alberta's constitutionally guaranteed jurisdiction.
>
> Our government is committed to standing up for Albertans, and this legislation is one more way that we are doing that. You probably know that I love talking about our Constitution, Mr. Speaker, and for the benefit of the members opposite, who sometimes seem to have not fully appreciated what our Constitution, our founding documents of our nation, says, I think it's important for me to go through a few of the aspects of our Constitution Act to understand precisely why we feel this bill is so important. (Hansard, 17 April 2024 at 1122)

First year law students learn that one should resist the urge to read constitutional enactments (or legislation for that matter) and take meaning solely on a literal basis from the words themselves, particularly an enactment made over 150 years ago as the *Constitution Act, 1867* was. Most of the written text in both Constitution Acts (1867 and 1982) requires a reading that also considers judicial interpretation, constitutional conventions, unwritten constitutional principles, and various other contexts, in order to get a full understanding of meaning and how the provision is actually applied. Unfortunately, the Premier's statement to open second reading of Bill 18 seems to read the division of powers literally, and thus makes some odd references, including this one to the disallowance powers granted to the British Crown:

> If you go to sections 55 and 56 of the Constitution Act, 1867, they have in there enumerated the powers of reservation and disallowance of federal legislation formally inscribed in the law. If you want to understand the original intent of disallowance and its practice for the first few years of Confederation, it was considered a means of ensuring that the federal Parliament enacts legislation compliant with the Constitution. It may interest you to know, Mr. Speaker, that since Confederation in 1867 the power of reservation was exercised 21 times by the Governor General, all before 1878.
>
> Mr. Speaker, it's a bit of a shame that it has fallen out of favour, because I can tell you that with the latest spate of laws coming out of the federal government, I could well imagine there would be multiple times in a different spirit of the time that the Governor General might have also disallowed laws as being unconstitutional.

> So perhaps the way to think of Bill 18 is that it's us essentially enacting our own power of disallowance, us declaring to the federal government, in the absence of the Governor General doing so, that under sections 55 and 56 what they are doing simply is not in compliance with how our nation is supposed to work. (Hansard, 17 April 2024 at 1122)

This is a strange comment. Provinces do not have constitutional disallowance powers over the federal government, and reservation and disallowance given to the Governor General in sections 55 and 56 harken back to an era when, as a colony of Great Britain, Canada's legislative power was subject to the authority of the British Crown. By convention, Canada stopped this practice in 1942 (however, the rise of 'legislated transphobia' in the provinces has renewed interest in reviving the federal disallowance power).

The Premier similarly refers to a bygone era of federalism with exclusive jurisdictions allocated between the federal and provincial governments (see Hansard, 17 April 2024 at 1123-1124). This out-dated view has since given way to one of shared jurisdiction, double aspect doctrine, and cooperative federalism. As Nigel Bankes and Andrew Leach explain in "The Word "Exclusive" Does Not Confer a Constitutional Monopoly, Nor a Right to Develop Provincial Resource Projects", it is incorrect to assert that a literal reading of exclusive legislative *power* in the *Constitution Act, 1867* grants exclusive *jurisdiction* over a subject. A succinct summary of how federalism has moved past a notion of 'watertight compartments' of jurisdiction was provided by the Supreme Court of Canada in *Reference re Securities Act*, 2011 SCC 66 (CanLII), at paras 54 – 59:

> A. The Federalism Principle: An Historic View
>
> [54] Sections 91 and 92 of the Constitution Act, 1867 divide legislative powers between Parliament and the provincial legislatures. This division remains the "primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation" (Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 ("Secession Reference"), at para. 47).
>
> [55] Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with "control[ling] the limits of the respective sovereignties" (Northern Telecom Canada Ltd. v. Communication Workers of Canada, 1983 CanLII 25 (SCC), [1983] 1 S.C.R. 733, at p. 741). Courts are guided in this task by foundational constitutional principles, which assist in the delineation of spheres of jurisdiction. Among these, the principle of federalism "has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution" (Secession Reference, at para. 57).
>
> [56] The Judicial Committee of the Privy Council, which was the final arbiter of Canada's Constitution until 1949, tended to favour an exclusive powers approach. Thus, Lord Atkin in 1937 famously described the respective powers of Parliament and

the provincial legislatures as "watertight compartments" (Attorney-General for Canada v. Attorney-General for Ontario, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326, at p. 354). However, the Judicial Committee recognized that particular matters might have both federal and provincial aspects and overlap (Hodge v. The Queen (1883), 9 App. Cas. 117). Privy Council jurisprudence also recognized that the Constitution must be viewed as a "living tree capable of growth and expansion within its natural limits" (Edwards v. Attorney-General for Canada, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124, at p. 136, per Lord Sankey). This metaphor has endured as the preferred approach in constitutional interpretation, ensuring "that Confederation can be adapted to new social realities" (Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 9, per Deschamps J.).

[57] The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation — an approach that can be described as the "dominant tide" of modern federalism (OPSEU v. Ontario (Attorney General), 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 18). See also P.E.I. Potato Marketing Board v. H. B. Willis Inc., 1952 CanLII 26 (SCC), [1952] 2 S.C.R. 392; Lord's Day Alliance of Canada v. Attorney General of British Columbia, 1959 CanLII 42 (SCC), [1959] S.C.R. 497; Coughlin v. Ontario Highway Transport Board, 1968 CanLII 2 (SCC), [1968] S.C.R. 569.

[58] If there was any doubt that this Court had rejected rigid formalism in favour of accommodating cooperative intergovernmental efforts, it has been dispelled by several decisions of this Court over the past decade. For instance, in Fédération des producteurs de volailles du Québec v. Pelland, 2005 SCC 20, [2005] 1 S.C.R. 292, the Court considered a comprehensive and "seamless" scheme for chicken production and marketing created by agreement between the federal and provincial governments. Abella J., writing for the Court, upheld the provincial legislative component of the federal-provincial scheme, which could operate to limit the production of chicken destined for the interprovincial market, and observed:

In my view, the 1978 Federal-Provincial Agreement, like the scheme in the Egg Reference [Reference re Agricultural Products Marketing Act, 1978 CanLII 10 (SCC), [1978] 2 S.C.R. 1198], both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility. [para. 15]

[59] Dickson C.J., in concurring reasons in OPSEU, summarized the situation aptly:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the

> aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. [p. 18]

If the purpose of Bill 18 is to assert exclusive provincial jurisdiction and push back against the "dominant tide" of modern federalism, it is hard to see how a Bill that imposes requirements on provincial entities is going to accomplish that. Alberta strikes again, but query whether the damage will be inflicted on Ottawa or Alberta?

Thanks to my colleagues Jennifer Koshan and Nigel Bankes for helpful comments on earlier drafts.

This post may be cited as: Shaun Fluker, "Bill 18 Provincial Priorities Act: Alberta Strikes Again" (25 April 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/04/Blog_SF_Bill_18.pdf