

Constructive and Co-operative Federalism?
A Series of Commentaries on the Council of the Federation

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**The Council of the Federation:
From a Defensive to a Partnership Approach**
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Foreword

Canada's Provincial and Territorial Premiers agreed in July 2003 to create a new Council of the Federation to better manage their relations and ultimately to build a more constructive and cooperative relationship with the federal government. The Council's first meeting takes place October 24, 2003 in Quebec hosted by Premier Jean Charest.

This initiative holds some significant promise of establishing a renewed basis for more extensive collaboration among governments in Canada, but many details have yet to be worked out and several important issues arise that merit wider attention.

The Institute of Intergovernmental Relations at Queen's University and the Institute for Research on Public Policy in Montreal are jointly publishing this series of commentaries to encourage wider knowledge and discussion of the proposed Council, and to provoke further thought about the general state of intergovernmental relations in Canada today.

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Harvey Lazar
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Jean Charest's proposal to create a Council of the Federation, approved in principle by the premiers of the provinces and territories at their annual conference in Charlottetown last July, leaves unanswered the whole question of the goals and specific character they want to assign to this new institution.¹

An Interprovincial "Containment" Strategy

In its most benign form, the Council of the Federation sketched out in Charlottetown could be merely a formalizing of the Annual Premiers' Conferences that have been held for decades, and the consecration of the essentially defensive mission of these meetings in reaction to the unitary and domineering federalism as practised by Ottawa.

With a permanent secretariat and better equipped working groups, like the one that will be examining the fiscal imbalance between the federation's two orders of government, such a council would lend more intellectual and political weight to the traditional demands of the provinces and territories in their fight against the "take-it-or-leave-it" federalism à la Jean Chrétien. However, such a council would in fact only be a more dignified version of the "ganging-up" and "fed-bashing" strategy that has already been

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deployed without much success by the provinces for too many years.

In trying to make marginal changes to the management of the federation without calling into question the very nature of the unitary and domineering federalism practised by Ottawa, this council would only be a de facto recognition of a vision of Canada that fosters a sense of alienation in the Western and Atlantic provinces and that nearly led to the secession of Quebec in the October 1995 referendum.

This vision, promoted by Trudeau, Chrétien and company, is that of a civic “one-nation” Canada, subject to a “national” charter of rights and freedoms, allergic to the collective rights of the country’s founding peoples, and served by a federal system that pits thirteen “junior” governments against one “senior” government responsible for ensuring that the “national” interest prevails over the parochialism of the provinces and territories. In this conception of Canada, “national sovereignty” belongs entirely to the “Canadian people” who give Ottawa the exclusive responsibility of ensuring the greater good of the nation and guaranteeing equal rights to citizens across the country.² These responsibilities confer on the Canadian Parliament a right, indeed a duty, to interfere in the fields of provincial jurisdiction through its spending power.

It was this form of federalism that brought upon the provinces the drastic cuts in social transfers unilaterally imposed by Mr. Martin in 1995. It was this form of federalism that prevented the provinces from even considering user fees or the involvement of the private sector to try to contain the costs of their health care systems. It was this form of federalism that threatened to impose sanctions on Alberta and British Columbia for failing to comply with the standards established by the *Canada Health Act* and the Canada Assistance Plan. It was this form of federalism that excluded the provinces from the “Axworthy Reform” and the Romanow

² See Pierre Elliott Trudeau, *L'épreuve du droit: le débat sur la souveraineté canadienne*, Harper Collins Publishers Ltd, 1991. See also Tom Axworthy, *Colliding Visions. The Debate over the Charter of Rights and Freedoms*, 1980-81, Conference held in Vancouver, March 1985.

Commission, two federal initiatives aimed at regulating the exercise of provincial powers in social policy.

This unitary and domineering federalism based on “nation building” through Ottawa’s spending power has a pervasive effect on attitudes. It accounts for the contempt for the provinces held by many federal elected officials and public servants, as well as the submissive attitude of the small provinces compelled to eat out of the hand of the central government. It leads to a general shirking of responsibility by the provincial governments, which have become accustomed to demanding and spending federal funds for which they do not have to tax their taxpayers. It drives such a dyed-in-the-wool federalist as Claude Ryan to advocate for Quebec “the unconditional right to opt out with full financial compensation” on social union matters.³ Lastly, it encourages Canadians to see Ottawa as the father and generous provider of social programs, even though these programs were first established in Saskatchewan under T.C. Douglas, and despite the fact that Ottawa now only contributes marginally to the financing of health care and social assistance programs, the cost of which falls more and more heavily on the shoulders of the provinces.⁴

It was against this type of domineering federalism that the provincial and territorial premiers rebelled after the cuts announced in the first Martin budget. And it was this form of federalism that they suggested be replaced with management, “on a true partnership basis,” of the Canadian social union, in the courageous brief of the Ministerial Council on Social Policy Reform and Renewal, published in December 1995. However, it was this type of federalism that they ended up accepting by signing the *Social Union Framework Agreement* with Ottawa on February 4, 1999 in which all the provinces, except

³ See the article by Claude Ryan entitled *Quebec and the Social Union* in the journal *Inroads*, No. 8, 1999. See also the exchange of letters between Ryan and myself following the publication of his article, in the same journal, No. 9, 2000.

⁴ Based on the document *Improving Health Care for Canadians*, published by the premiers of the provinces and territories on February 3, 2003, the federal government’s share of the funds that support health care decreased from 50% originally to 14% in 2003.

Quebec, literally consented to being put into trusteeship in exchange for a tiny share of the money that the federal government had taken away from them with Brian Mulroney's "cap on CAP" and the Chrétien government's unilateral cuts in social transfers.⁵

A Responsible Affirmation of Sovereignty and Partnership

The *Pelletier Report*,⁶ from which Mr. Charest drew his inspiration in Charlottetown, offers provincial and territorial premiers a new opportunity to translate into action their will to rebuild the Canadian union on a "true partnership basis." But to do this, they will have to go beyond the strictly defensive strategy that they have been content to follow until now, and make the Council of the Federation, which they have decided to set up, an instrument of effective and responsible affirmation of the sovereignty of the provinces in their sphere of constitutional jurisdiction.

In order to shield them once and for all from Ottawa's unilateral funding cuts, Mr. Charest proposes that the provinces recover the tax points that are rightfully theirs in order to exercise their sovereign powers in the areas of health, education and social welfare. He also requests that the federal government refrain from intervening directly in these areas and that it focus instead on increasing its unconditional equalization payments to help the poorer provinces provide social services comparable to those of the richer provinces.

In this respect, Mr. Charest's views concur with those of the Commission on Fiscal Imbalance, chaired by Yves Séguin, his current minister of finance, who, in 2002, recommended "the elimination of the CHST and its replacement by a *new division of tax room*, because of the

⁵ On this subject, see my article published in *Le Devoir*, February 15, 1999, entitled "L'union sociale: une mise en tutelle des provinces."

⁶ The report by the Special Committee of the Quebec Liberal Party on the Political and Constitutional Future of Quebec Society entitled *A Project for Quebec: Affirmation, Autonomy and Leadership* but commonly referred to as the *Pelletier Report*. It was followed by a second text in October 2001 entitled *An Action Plan: Affirmation, Autonomy and Leadership*.

assured and predictable nature of the source of funds to which the provinces would have access, its *unconditional* nature and the greater accountability that would result."⁷ All the premiers followed suit in Charlottetown. But if Mr. Charest and his provincial colleagues want to be taken seriously, they will have to demonstrate to all Canadians that the provinces can guarantee through their own means the integrity of social programs that is currently ensured by the federal spending power. It seems to me that there is only one credible way for the premiers to convince Ottawa to withdraw into its unconditional equalization payments while being assured that social services of "comparable quality" will be delivered across the country. They must create an *interprovincial* Council of the Federation, empowered to jointly decide on the common goals and minimum constraints that the provinces will impose on themselves in order to ensure the coherence of the Canadian social union. They must also commit to publishing an annual report and comparative analysis in which the provinces that do not comply with these standards would be exposed.⁸

Once they have demonstrated unequivocally their ability to discipline themselves, the provinces could eventually open the door of "their" Council to the federal government. They could then officially broaden the Council's mandate to give Canada the institutional tool for *interprovincial and federal-provincial* coordination and codecision that it needs to manage interdependence between the two orders

⁷ *New Division of Canada's Financial Resources*, p. 149. Having condemned all conditional transfers from Ottawa in the areas of health and social services as going against the federal principle, the commission did not suggest any federative means to guarantee the coherence of the Canadian social union currently ensured by federal spending power. It is this weakness that Mr. Charest's Council of the Federation could help to correct.

⁸ During the *Cité libre* period, Mr. Trudeau advocated this self-regulation of the provinces in social matters. Preferring "to safeguard as far as possible the freedom and diversity generated by federative decentralization," he considered it "urgent that interprovincial agreements be negotiated in order to establish, at least in the large industrial provinces, a number of minimum standards of social legislation." (translation) *Le fédéralisme et la société canadienne-française*. Montreal, Éditions HMH, 1967, p. 34.

of government while respecting the sovereign powers of both.

With this new partnership instrument Canada would be better equipped to deal with the growing number of problems, which extend beyond the provincial, national and even international borders and require a joint and coordinated exercise of the sovereign powers of both orders of government. These problems relate, *inter alia*, to the environment, immigration, transportation, telecommunications and macro-management of the Canadian economic union. With this new tool, the federal government would also be in a better position to co-opt the provinces and thus negotiate with more legitimacy the numerous international treaties that, in the ongoing context of globalization, it is called upon to sign in the fields of provincial jurisdiction.

More importantly, however, once it is reassured about its own integrity, thanks to the provinces' willingness to assume their fair share of responsibilities in the overall management of the country, Canada could more easily renew, and at the same time modernize, the "multinational" federalism established by the Fathers of Confederation in 1867.

A Necessary 'Global Rebalancing' of the Canadian Federation

It was in order to return to the origins of this "multinational" federalism, while modernizing it and opening it up to the Aboriginal peoples, that the research group that I led at the Federal-Provincial Relations Office in Montreal proposed, after the failure of the Meech Accord, an overall rebalancing of the Canadian federation based on the following logic:

- an explicit constitutional recognition of the right to national distinctness of Quebec and the Aboriginal peoples and of the right to regional distinctness of all provinces within Canada, along with the decentralization of powers and fiscal resources needed to exercise those rights,

in exchange for

- Pact on the Canadian Union through which all the federation's partners, including

Quebec and eventual Aboriginal governments, would undertake, through a European-style codecision process within a Council of First Ministers, to subject the exercise of their sovereign powers to the common goals and minimum common standards necessary to maintain and strengthen the Canadian economic and social union as it confronts the disruptive forces of globalization and international competition.⁹

To compensate for the "asymmetric decentralization" implied by a Swiss style "multinational" Canada, the Pepin-Robarts Commission had already put forward the idea of a Council of the Federation that could ensure the coherence of the Canadian union. However, this council, modelled after the German Bundesrat, just like the House of the Provinces suggested in Claude Ryan's Beige Paper, brought into question the very existence of the current Senate. This seemed and still seems impossible after the failure of the Meech Accord.

This is why our proposal was to transform the First Ministers' Conferences into a Council of the Federation. These conferences have the advantage of already existing, they come under customary right and their role can be changed without opening the constitutional Pandora's box.¹⁰ And to make this new Council of First Ministers a responsible and transparent coordination instrument, we suggested that it be empowered by the country's legislatures, through the signing of a Pact on the Canadian Economic and Social Union,¹¹ to manage issues, through

⁹This project of rebalancing the federation can be found in my book entitled *Le mal canadien, essai de diagnostic et esquisse d'une thérapie*, Montreal, Fides, 1995.

¹⁰ Another advantage is that this Council of the Federation could continue to co-exist with a reformed Senate, if it was deemed necessary to give a specific voice to the regions in the exercise of powers reserved for the federal Parliament only.

¹¹By signing this administrative Pact on the Canadian Economic and Social Union, the legislatures would state that they are bound by the common goals and minimum common standards codecided by their premiers within the Council of the Federation. Once this pact has been made, they could only be released from it by denouncing, through a new vote of their legislatures, this "internal treaty" between the

codecision with unanimity or qualified majority coordination, between the provinces themselves, on the one hand, and between the provinces and the federal government, on the other.

What seemed and still strikes me as modern and federative in the European model of codecision is that it allows:

1. for decisions on all coordination issues where unanimity is required to be made in a *confederal mode*, since each partner can exercise a sovereign veto; and
2. for decisions on other coordination issues where a qualified or simple majority suffices to be made in a *federal mode*, since each partner agrees in those cases to cede a measure of its sovereignty to the common will of the majority.

To implement this type of European-style coordination, we proposed that codecision be subject to decision rules unanimously agreed to by the federation's partners. As an example, the following could serve as a basis of negotiation. The qualified or weighted majority in the areas of exclusive provincial jurisdiction could be determined by the following formula: Ontario, Quebec and British Columbia, 1 vote = 10; Alberta, Saskatchewan and Manitoba, 1 vote = 8; New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, 1 vote = 5. The total required to obtain the qualified majority would be 55 out of 74,¹² which would prevent large provinces from forming a coalition against the others and vice versa. The qualified majority in the areas of shared jurisdiction could take many forms, including the following: Ottawa, 1 vote = 30; Ontario, Quebec and British Columbia, 1 vote = 10; Alberta, Saskatchewan and Manitoba, 1 vote = 8; New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, 1 vote = 5. The total required to obtain the qualified majority would be 75 out of 104, which would

federation's partners. This pact could eventually be constitutionalized to ensure its true permanence

¹² If the premiers decided to grant a right to vote to the territories, even though they do not have the status of province, this vote could receive the same weighting as that of the small provinces, i.e., 5, and the threshold of qualified majority could be brought to 65 over 89 at the interprovincial level and to 95 over 119 at the federal-provincial level.

prevent the provinces from imposing their will on the federal government but would also prevent Ottawa from forming a coalition with the large provinces in order to impose its views on the medium- and small-sized provinces or vice versa.¹³

The obligation to establish decisional rules with unanimity would allow Quebec to require unanimity in areas that directly affect its cultural identity and to practise codecision with a qualified majority in all cases where it does not require a right of veto. This would turn out to be more frequent than we think, if codecision does not focus on finicky standards but rather on a flexible coordination and harmonization framework. An example would be the provinces' commitment to harmonize, through mutual recognition and with the obligation to produce results, the health care services, social services and diplomas that they grant across the Canadian union. Another example would be the codecision by the provinces and the federal government on a number of common goals and constraints that all governments undertake to abide by in order to harmonize their fiscal policies and make them complementary instead of competitive.

The *Pelletier Report* and the QLP *Action Plan*

This kind of global rebalancing of Canadian federalism based on the right to distinctness and to local autonomy of federated communities compensated for by a joint reinforcement of the Canadian union was adopted by the QLP under Daniel Johnson in 1996 in a report called *Recognition and Interdependence*. And the same underlying logic is found in the *Pelletier Report* and the *QLP Action Plan*, which Mr. Charest drew on in Charlottetown.

¹³ This formula of "federal-provincial" codecision with a qualified majority could be used by the provinces as a position to withdraw if Ottawa interpreted section 36 of the *Constitutional Act of 1982* and the commitment made by the federal and provincial governments to "provide essential public services of reasonable quality to all Canadians," not as a "shared responsibility" but as a "shared power," authorizing it to participate in the codecision of common goals and minimum common standards that should govern the Canadian social union.

As a first step, the QLP *Action Plan* suggests to the rest of Canada that an administrative reform of the federation be carried out to ensure full respect of the autonomy of the two orders of government; a reduction of the fiscal imbalance through a transfer of tax points to the provinces and readjustment of equalization payments; a responsible joint management of the Canadian economic and social union through a Council of the Federation; and the conclusion of three agreements in areas of shared jurisdiction -- communications, the environment and international relations.

However, what is envisaged in a second round by the QLP *Action Plan* – and this is seldom mentioned in the ROC, or even in Quebec – is the following, and I quote:

- Recognizing Quebec's specificity.
- Granting a right of veto to Quebec, and possibly to several other provinces, according to a "regional veto" formula.
- Increasing financial compensation for the exercise of the right to opt out in regard to constitutional change.
- Integrating into the Constitution the MacDougall-Gagnon-Tremblay Agreement on immigration.
- Inserting into the Constitution a mechanism for constitutionalizing administrative agreements, if required.
- Ensuring provincial participation in the selection of judges to Supreme Court of Canada.
- Constitutionalizing the composition of the Supreme Court of Canada, with at least three of nine judges coming from Quebec.
- Instituting Senate reform.
- Limiting federal spending power, but without questioning the principle of equalization.¹⁴

¹⁴ *An Action Plan*, pp. 23-24.

With very few exceptions, all the demands formulated by Robert Bourassa during the negotiations of the Meech Lake and Charlottetown accords are repeated on this list, but with two major differences. First, Mr. Bourassa made the signing of the Meech Lake Accord a precondition to the negotiation of the Canada round aimed at strengthening the Canadian union. Second, although he had discussed this matter in 1984, Mr. Bourassa never officially tabled the idea of a Council of the Federation empowered to ensure joint management of the federation through codecision.¹⁵

In my view, Mr. Charest is demonstrating a laudable but unwise and even reckless openness by not demanding any political guarantee that he will be granted the equivalent of the Meech Lake Accord in exchange for the partnership-based strengthening of the federation tabled by him in Charlottetown. And that is likely to be his undoing. Because without this minimum guarantee from the ROC, Quebecers will refuse to consider the interprovincial and federal-provincial partnership proposed by Mr. Charest. Already in Ottawa, the Council of the Federation that he is trying to implement is being considered as simply a lobby by provinces and territories to obtain new fiscal resources. If these attempts to reduce the Council of the Federation to a powerless and irresponsible institution are successful, chances are that Quebec will withdraw into its traditional reflex of unconditional opting out with full compensation. And that will spell the end of any negotiation based on the "right to distinctness compensated by a partnership-based management of interdependence," as proposed by the Pelletier Report in order to sign an honourable constitutional peace with the rest of Canada.

¹⁵ In a brief presented on February 24, 1984, by the QLP before the Commission on the Canadian Economic Union, Mr. Bourassa had endorsed, on pages 25-26, the suggestion of the Goldenberg-Lamontagne Report to create a Council of First Ministers to ensure the respect of the principle of non-subordination within the Canadian federation: "We believe, as is written in the report, that if the Constitution provided for a conference of first ministers, vested with specific functions and powers and equipped with appropriate mechanisms to make decisions, we would choose the solution that is best for the country." (translation)

André Burelle, *From a Defensive to a Partnership Approach*

Without being overly optimistic, it is my hope that the provinces will use the creation of the interprovincial Council of the Federation agreed upon in Charlottetown to truly regain their status as sovereign partners of the federation. Only once they have shed their image of “junior governments” will they be able to open the door to a federal-provincial council operating on a “true partnership basis,” and thus allow Canada to reconcile the right to cultural distinctness of its founding peoples with a joint management of the interdependence between governments that lives up to the spirit of our times.