

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

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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
Hugh Segal
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In English Canada, it is generally thought that the 1867 *British North America Act* created a country with two orders of government, a national government to administer national affairs and local governments to administer local affairs. This vision, which gives a preponderant role to federal power, never received much support in Quebec. Indeed, at least until recently, Quebecers have generally seen Confederation as the expression of a pact that allowed equal contracting parties to develop in their own way while still being part of a larger whole. According to this vision, the provinces are the prime movers behind Confederation, at least on the historical and political fronts, if not the legal one. Instead of merely being provinces responsible for governing local affairs, they form an order of government that is sovereign within its jurisdiction. Quebec in particular is the seat of government of a national community. Its legislature and government are national institutions, at least in their jurisdictions.

It is therefore not surprising that since 1867, Quebec has steadfastly attributed great importance to all things to do with the defence and affirmation of the province's powers within the Canadian federation.¹ This interest has been expressed in terms of three main issues: the defence and

¹ The Quebec government's Secrétariat aux affaires intergouvernementales canadiennes of the Conseil Exécutif has assembled the positions adopted and recommendations made by successive Quebec governments from 1936 to 2001 in a volume entitled *Québec's Positions on Constitutional and Intergovernmental Issues from 1936 to March 2001*.

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expansion of powers allocated to the provinces, the participation of the provinces in Canada-wide decision-making processes, and the need for more consultation among the provinces themselves. The division of powers and the provinces' participation in decision-making processes are crucial issues. However, due to a lack of space, this article will focus on the third issue, that is, interprovincial co-operation. This issue became more immediately relevant since the provincial and territorial premiers decided to create a Council of the Federation at their July 2003 annual meeting. In reality, this Council will be – at least until further notice – a Council of the Provinces and Territories. As these governments get ready to establish the council, it is useful to try to understand the historical context in which this body is emerging.

The idea of concerted action among the provinces dates back to the late 19th century. It was first put forward by Honoré Mercier, who became leader of the Liberal Party in 1883, leader of the *Parti national* (made up of liberals, conservatives and *Ultramontagnes* with nationalist leanings) in 1885, and finally, premier of Quebec from 1887 to 1891. Mercier was the “father” of what was commonly referred to as provincial autonomism. He was an uneasy witness to the increasing number of centralizing initiatives taken by the federal government during this period and criticized Prime Minister John A. Macdonald for having returned, after the death of Georges-Étienne Cartier, to his old dream of a legislative union. As early as 1886, to ward off this danger he advocated that the “provincial administration...be strong, effective, careful with public monies, independent from the central power and buttressed by national sentiment.”² [translation] He put forward a program focused on vigorously maintaining the principle of provincial autonomy, decentralization at all levels and expanding municipal authority.

Among the means Mercier used to promote his vision of the country was a national conference of provincial premiers in 1887. Mercier had hoped that this meeting – whose participants (in addition to Quebec) were Ontario, New Brunswick, Nova Scotia and

Manitoba – would “safeguard the autonomy of every province in the federation by guaranteeing its independence” [translation]. But the absence of two provinces, British Columbia and Prince Edward Island, decreased the effectiveness of the meeting.³ In any event, Mercier's term as premier of Quebec was short-lived and the 1887 meeting was never followed up. From the early 20th century until the Second World War Canadian political debates were dominated by trade relations with the United States, the First World War, the educational rights of religious and linguistic minorities, immigration, the economic crisis of the 1930s and the resulting increased responsibility for all levels of government, the emancipation of Canada from British tutelage, the rise of totalitarian regimes in Europe and finally the Second World War itself.

In Quebec, there was little talk of constitutional issues during this period. From 1900 to 1936, there were 11 general elections in Quebec. During this entire period, the electoral platforms issued by the two main parties, the Liberal Party and the Conservative Party, included no serious constitutional issues. Nor were any specific commitments made in this regard, other than to defend the rights of Quebec and to try to maintain good relations with the other partners of the federation. Each party functioned in symbiosis with its federal counterpart. After having governed for 35 years straight, in its 1935 electoral platform the Liberal Party unabashedly declared its close ties with the federal Liberal Party. “Ottawa and Quebec,” wrote the authors, “the Liberal Party in Ottawa and in Quebec constitute one party, we walk hand in hand, we are Liberals of the same school, the same colour and the same stripe.”⁴ [translation]

While the period preceding the Second World War was generally quiet on the constitutional front, in the latter half of the 20th century there were many initiatives. Immediately following the war, the federal government was determined to prevent Canada from being plunged once again into a situation like the Great Depression. It undertook to implement policies based on the report of the Rowell-Sirois Royal Commission, which had recommended that the federal government take a stronger leadership role in

² Jean-Louis Roy, *Les programmes électoraux du Québec*, Volume 1, 1867-1927, p. 53.

³ *Ibid.*, p. 66.

⁴ *Ibid.*, Volume 2, 1930-1966, p. 253.

economic and social affairs. To this end, Ottawa thought that it should hold on to the expanded taxation powers that it had been granted to finance Canadian participation in the war. Using the substantial resources at its disposal, it put in place not only unemployment insurance, which had been introduced in 1940, but also a variety of income support measures such as more generous old age pensions, family allowance, financial assistance to post-secondary students, hospital insurance, health insurance, welfare assistance and the Canada Pension Plan. It created several programs to extend financial support to the education, health and social sectors: assistance for public school construction, grants to universities, etc. It also undertook to build a stronger network of national cultural institutions: in the wake of the Massey-Lévesque Commission of Inquiry, the Canada Council was created and generously endowed; and the missions of Radio-Canada, the Film Board, the national museums and art galleries were confirmed and their funding increased.⁵

In Quebec, Maurice Duplessis was ardently defending the view that the federal government's increasing interventions in the areas of social policy, culture and education amounted to an encroachment upon provincial jurisdictions. He devoted all of his years as premier of Quebec – from 1936 to 1939 and from 1944 to 1959, but especially in the latter period – to fighting against the federal government's centralizing tendencies. Duplessis tirelessly advocated a return to the spirit of the Confederation Pact of 1867 and a fairer distribution of tax resources. However, he seldom advanced constructive proposals to improve the Canadian federal regime.

His critics have quite rightly criticized him for his excessive focus on defensive autonomism. Nevertheless, it was under a Duplessis government that Quebec in 1957 established its own personal income tax system and in 1954 patriated the inheritance tax. It was also under his government, in 1957, that Quebec and Ottawa reached an agreement giving Quebec

the right to opt out of the federal program of grants to universities with the transfer of income tax points to Quebec. In 1953 Duplessis had appointed the Tremblay Commission to study constitutional issues. Although Duplessis ignored the commission's recommendations, the broad acceptance they gained in Quebec's intellectual and political circles while he was alive persisted long after his death. In its report, which appeared in 1956, the Tremblay Commission recommended, among other things, the creation of a Council of the Provinces modeled on the American Council of State Governments.

Since the 1950s the Liberal Party, which formed Quebec's official opposition, had spoken out against the negative and demagogic nature of Duplessis' nationalism. However, the party had difficulty shaking off its reputation of being too close to Ottawa, a reputation that it acquired between 1900 and 1940 when the federal and provincial Liberals were indistinguishable and that was reinforced after the Liberal government led by Adélard Godbout made significant tax concessions to Ottawa during the Second World War. Under Georges-Émile Lapalme and Jean Lesage, the Liberal Party tried to turn over a new leaf, and, particularly, to inspire confidence in its defence of Quebec's rights and interests.

In its 1956 electoral platform, the Liberal Party maintained that "in a federation, autonomy at the provincial government and local administrative levels is essential for the effective management of public affairs."⁶ [translation] However, it added, "provincial autonomy goes far beyond saying 'No'; a positive and constructive attitude is required in order to find appropriate solutions to the problems that the economic and social transformation of Canada has created in federal-provincial relations."⁷ [translation] This Liberal Party platform endorsed the recommendations of the Quebec and Montreal chambers of commerce – also adopted by the Tremblay Commission – for resolving the disagreements between Quebec and Ottawa over fiscal issues. Also based on a Tremblay Commission recommendation, the Liberal Party committed itself to promoting the creation of a Council of the Provinces.

⁵ For an excellent synthesis of the history of social security in Canada, see Dennis Guest, *The Emergence of Social Security in Canada* (UBC Press, 1997).

⁶ Jean-Louis Roy, *Les programmes électoraux du Québec*, Volume II, 1930-1966, pp. 367-368.

⁷ Ibid.

In its platform for the 1960 election, the Liberal Party was even more explicit about federal-provincial relations. While the *Union nationale* was collapsing under the weight of 16 years of uninterrupted power, the Liberal Party committed itself to emphasizing Quebec's French character, creating a federal-provincial affairs department, holding an interprovincial conference at which it would present a brief based on the Tremblay Report, suggesting to the other provinces that a permanent Council of the Provinces be created, and proposing that a permanent federal-provincial secretariat be established.⁸

Jean Lesage became premier in 1960 and quickly followed up on his commitment to convene a national provincial premiers conference. Since this first meeting, held in Quebec City in 1960, the provincial premiers have met every year in a different province to discuss issues of common interest, each province in turn presiding over and hosting the meeting. Various mechanisms have also been implemented to foster sectoral co-operation among the provinces. A good example of this is the Council of Ministers of Education, created in 1967, which regularly brings together the ministers of education. There is also the Premiers' Council on Canadian Health Awareness, whose purpose is to increase Canadians' awareness of health issues. It appears that this recently created body will eventually be integrated into the Council of the Federation.

During the 1960s, Quebec was the main source of Constitutional ideas and initiatives, and it also benefited tremendously from changes in this area. In 1966, Jean Lesage could boast that after six years in power he had increased Quebec's share of personal income tax revenue from 13 to 47 percent and its share of inheritance taxes from 50 to 75 percent. He had obtained the right to opt out of certain shared-cost federal programs with tax compensation by meeting a number of conditions. He had also established the province's pension plan.

However, the defeat of the Liberal Party in 1966 put an end to Quebec's leadership on the Canadian scene, and the federal government

spent the next 20 years attempting to regain control over the constitutional agenda. Except for a fruitless interprovincial conference convened by Premier John Robarts of Ontario in 1967, in which Ottawa refused to participate, and the initiatives of the *péquistes* governments in Quebec aimed at renouncing the federal link, most of the major initiatives taken between 1966 and 1982 came from the federal government. These initiatives had three main goals: (a) to open the door to constitutional change and thus thwart the separatist threat represented by the Parti québécois, a party determined to make Quebec independent; (b) to carry out Prime Minister Pierre Elliott Trudeau's plan to patriate the Canadian constitution and give Canada a charter of rights and freedoms; and (c) to ensure that all Canadians have equal access to economic and social development, regardless of where they live.

Thus the federal government launched numerous initiatives between 1967 – the year the *Union nationale* came to power in Quebec campaigning on the theme of “Equality or Independence” – and 1982, when the Constitution was patriated and the Charter of Rights and Freedoms was entrenched. Several summits were held between 1968 and 1970 to discuss constitutional reform from the perspective of many other issues, and there was the 1971 Victoria Conference, whose failure was caused by Quebec's refusal to endorse an agreement that ignored its demand for jurisdiction over social policy matters. Between 1975 and 1977 there was a new plan to patriate the Constitution, which was also blocked by Quebec; in 1978 Ottawa released its document *Time for Action* and tabled Bill C-60. In 1980 the Pepin-Robarts Report and the Quebec Liberal Party's Beige Paper were released, both of which supported asymmetric federalism and replacement of the Senate by a House of the Provinces. Both reports were ignored by Ottawa. There was the federal government's commitment to amend the Constitution in the event of a victory by federalist forces in the May 1980 Quebec referendum and the launching of a new round of negotiations immediately after the referendum. In 1981-82, without the agreement and despite the protests of Quebec, the Constitution was patriated

⁸ Ibid., p. 385.

and the Charter of Rights and Freedoms implemented.⁹ During this period, successive Quebec governments maintained that in any attempt to amend the Constitution the issue of the division of powers should prevail over the patriation of the Constitution, the adoption of a constitutional amending formula and the implementation of the Charter of Rights.

This analysis of the events of the period suggests that we should be realistic about the scope and limits of interprovincial co-operation and collaboration on fundamental issues. Quebec was not the only province to be apprehensive about federal proposals in the 1967-82 period. On several occasions, the other provinces even supported Quebec's positions. Thus, in 1976, Alberta's Premier Peter Lougheed wrote to the prime minister on behalf of his colleagues from the other provinces arguing that the Constitution should not be patriated without a consensus first being reached on issues of crucial importance to Quebec (provincial jurisdiction in the areas of culture and communications, the Supreme Court of Canada, the spending power, Senate representation and regional disparities).¹⁰ Subsequently, in 1978, the premiers agreed that the division of powers – a priority issue for Quebec – was “the key issue in constitutional reform, and should be addressed in conjunction with other matters.”¹¹ On a few occasions Quebec sided with the other provinces in constitutional reform measures. In April 1981 Premier René Lévesque signed, as one of eight provincial premiers, a draft proposal for a constitutional amendment formula. Quebec also took part in a judicial process set in motion by several provinces to thwart a federal government plan in 1980 to unilaterally patriate the Constitution. Nevertheless, in 1981-82 the other provinces did participate actively in the major constitutional process that excluded Quebec and its demands and ultimately led to the patriation

of the Constitution. The Meech Lake Accord (1987), conceived to make up for the affront to Quebec in 1982, also came to a sad end following Manitoba and Newfoundland's failure to ratify it.

The Social Union Framework Agreement (1999) is the most recent example of the fragile nature of interprovincial common fronts. As Quebec had agreed to participate in a process to create a Canadian social union, there was a consensus that the provinces should seek an agreement whereby they would retain the explicit right to opt out, with fair compensation, from any shared-cost program that the federal government introduced with the consent of the majority of the provinces. However, the provinces' consensus on this point, deemed crucial by Quebec, quickly evaporated when they were faced with the lure of increased federal transfers for health care.¹² What all this demonstrates is that interprovincial common fronts are short-lived. They seem to be destined to collapse every time the issue involved reaches a decisive stage where a choice must be made between what Ottawa perceives to be the national interest and the position advocated by a common front of the provinces.

Since the Charlottetown Accord was rejected in 1992, there has been a tacit agreement that the issue of constitutional reform should not be reopened in the foreseeable future. However, this has not prevented the Quebec Liberal Party from continuing to focus on this issue. The party has published two policy documents dealing with the constitutional question since then, in 1996 and 2001. These documents contain useful elements relating to the affirmation of provincial power.

The first, entitled *Recognition and Interdependence*, describes federal-provincial and interprovincial co-operation as two necessary conditions for the smooth functioning of Canadian federalism. Since the federal and provincial governments serve the same population and their responsibilities and interventions often overlap, the document says, it is natural that there should

⁹ For a synthesis of the initiatives taken by the federal government between 1967 and 1981, see James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Minister of Supply and Services Canada, 1996).

¹⁰ James Ross Hurley, *Amending Canada's Constitution*, pp. 44-45

¹¹ *Ibid.*, p. 48.

¹² On the 1999 Social Union Framework Agreement, see *The Canadian Social Union without Quebec*, ed. Alain-G. Gagnon and Hugh Segal (Montreal: Institute for Research on Public Policy, 2000).

be ongoing co-operation among them. For the authors of the document, the need for interprovincial co-operation is self-evident. They suggest that, contrary to what one might think, the main purpose is not to rally the provinces against the federal government, but rather to deal with functional considerations such as the need for provinces to take into consideration the impact of their policies on their neighbours and the common actions that are likely to result from co-operation. However, the report also points out that interprovincial co-operation has yielded modest results, which it attributes to the fact that decisions made within this framework are subject to the unanimity rule. It recommends that decisional rules be made more flexible, but does not suggest possible changes to existing structures of co-operation. Nevertheless, the report favours maintaining distinct structures for interprovincial co-operation. It further proposes that while the federal government should not have the right to vote within these structures, it should be empowered to submit proposals to the provinces and request that a vote be taken to decide on them.

The second document, called *A Project for Quebec – Affirmation, Autonomy and Leadership* is also referred to as the Pelletier Report. It was named after the chairman of the special committee that drafted the report, Benoît Pelletier, MNA for Chapleau, who became minister responsible for intergovernmental affairs in 2003. This document also emphasizes the need for the dual co-operation. However, it does not reach the same conclusions regarding structures. According to the Pelletier Report, there should be a Council of the Federation, whose aim is to promote federal-provincial co-operation and interprovincial co-operation inside common structures. However, the report says little about the likely composition of such a council or how conflicts between the federal and provincial partners would be arbitrated. The chances of such a proposal materializing appear rather slim. The structure envisaged would in fact require a strong secretariat that functions at an equal distance from the two orders of government and with both levels' continuous support. This proposal seems to be somewhat unrealistic.

Summing up the results of this overview, it is fair to conclude that many historical

precedents could be invoked to justify the proposed Council of the Provinces within the Canadian federation. But it can also be said that most of the ideas put forward and initiatives taken in Quebec to promote greater co-operation among the provinces have been made either by the Quebec Liberal Party or by Quebec Liberal governments. The other political groupings have contributed very little on this issue.

Far from contradicting positions the Liberal Party has advocated for the past half century, the proposal to create a Council of the Provinces is quite in line with them. As is true of most measures relating to intergovernmental co-operation in the Canadian federation, many stumbling blocks will be encountered along the way to achieving this goal. However, to increase the chances of its success, certain conditions should be met. Among other things, the council should:

- (a) be an organization of the provinces and territories made up of representatives of the provinces and territories, not of the two orders of government, and its name should reflect its real mission;
- (b) pursue objectives that emphasize research, co-operation and joint projects in areas of provincial jurisdiction;
- (c) be an effective instrument for developing the role that the provinces must play in defining the common good of Canada and not a launching pad for concerted action against the federal government;
- (d) bring together the various existing organizations and mechanisms for interprovincial co-operation;
- (e) have operating rules that will empower it to make decisions on issues of common interest; and
- (f) have sufficient financial and human resources but avoid becoming a cumbersome structure.

Finally, it should be openly recognized by the various parties that the creation of an interprovincial council will not in itself solve the problem of the provinces' participation in the constitutional decision-making processes within the Canadian federation.