

# **On Not Finding our Way: The Illusory Nature of Reform of the Canadian Federation**

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The debate between sovereigntists and federalists in Quebec has been raging for nearly 50 years. To break the deadlock, both sides should be able to stand back from their doctrinaire and ideological positions. Sovereigntists should be able to say what would have constituted an acceptable, reasonable and honourable compromise for Quebec within the Canadian federation, and federalists should be able to recognize that a fallback position such as sovereignty with partnership is an appropriate option in view of the fact that it has become impossible to reform the Canadian federation. The inability of each side to put itself in the shoes of the other and the gradual hardening of their respective positions have led to the present deadlock.

Since 1995, I have had several opportunities to speak publicly in favour of Quebec sovereignty. In that time, my position has never changed, but I have been increasingly led to clarify my thinking on the meaning I attach to my efforts. In the jargon of intellectual discussions on the subject, one would say I consider sovereignty as a means, not an end. But the expression itself is ambiguous, since it can mean very different things. Sovereignty can be viewed as a means to carrying out a social plan or a means to gain recognition for our national identity. I believe these two means are more and more intimately interrelated since our national identity is, in a way, shot through with considerations relating to the social democratic plan for society. To preserve the

progressive nature of our society relative to those of the United States and the rest of Canada, we must defend the distinctive nature of Quebec's national identity. In the present circumstances, that means, in particular, preserving the social democratic character of Quebec society. A plan for a country must be distinguished from a social plan specific to a political party because it is theoretically compatible with various social plans, but citizens, intellectual elites and political parties must always understand a national plan from the standpoint of a specific social plan. We always gain access to a plan for a country through the lens of a social plan.

Significant consequences follow from the view that sovereignty is simultaneously a means to gaining international recognition and carrying out a social plan. Saying that sovereignty is one a means to an end may mean that there are other possible means to achieve the same result. In this instance, it might have been possible to consider formal recognition of our status as a people within Canada and, in principle, also possible to expand Quebec social democracy within Canada. In that perspective, criticism of federalism should become an essential part of the sovereigntist argument. Focusing on recognition of the Quebec nation and implementation of its social democratic plan for society, sovereignty becomes an inevitable option only if we are also able to show that recognition of Quebec and the preservation of social democratic gains have become impossible within Canada.

But those who see sovereignty as an end in itself, or as the only possible means to achieving their social plan, view matters quite differently. They tend to push Canadian

federalism off their radar screens. They feel Quebecers should stop relying on a nationalism based on resentment, a reactive nationalism or negative considerations as a basis for building sovereignty. They believe that those who constantly harp on the age-old grievances against Canadian federalism view sovereignty as a makeshift measure, as a last resort. A circumstantial alliance thus appeared possible between those who view sovereignty as an end in itself and those who consider it as the only way to achieve their social plan. They can join forces against those who, like me, consider sovereignty as both one means among many to carrying out a social plan and gaining recognition of our status as a people, and those who contemplate this option because of Canada's historical inability to accommodate the Quebec people's deeply-felt aspirations.

A number of sovereigntists will advance the reasonable view that we should not only rely on the critique of federalism, but also sketch the outlines of a sovereign Quebec. This view indeed seems reasonable, but, in the present context, the new emphasis placed on the social plan often serves to conceal sovereigntists' visceral inability to recognize that multinational federalism could just as easily have been an acceptable solution for Quebec. There is a strong temptation to focus solely on the positive aspects of the PQ's social plan because, in particular, a number of Party members no longer want to have anything to do with Canada since they have never wanted anything to do with multinational federalism. A strategic denunciation of Canadian federalism has always been made in order to deter those who believed in this kind of reform, but it did not proceed from the view that such a reform would have been acceptable. The shift from an argument based on the critique of federalism to an argument based on the positive

outlines of a sovereign Quebec is warranted, in the view of some, by the fact that, in any case, federalism is no longer reformable. But this response is often a way of avoiding the visceral inability of those same persons to admit the value of that reform. The adherence of some to the sovereigntist plan is similar to a religious belief. It is based on a doctrinaire and ideological position, and every possible argument is made to conceal that fact.

I am not opposed to the sovereigntist argument being enhanced by the positive reasons for sovereignty, but I believe that, once we are headed in that direction, the question will inevitably rise as to whether each of the specific objectives that sovereignty would help to achieve cannot be brought about within the Canadian framework. I am thinking, for example, of an objective such as Quebec's effective participation in international bodies such as the WTO, the FTAA and the UN. The question thus arises as to whether it would not be possible to contemplate strict rules for joint action by the federal government and the provinces as a result of which Quebec's voice would be heard at the WTO, as France's is through representatives of the European Union. I am also thinking of greater control over our immigration policies, guaranteed greater independence with regard to our language policies and control over telecommunications. Theoretically, powers in all those areas could be transferred from the federal government to Quebec. As for the continuation of our social democratic plan for society, it would be possible to consider a resolution of the fiscal imbalance resulting in a correction in transfers to the provinces and control granted to Quebec with regard to employment insurance. It would be possible to grant Quebec a genuine right to opt out with financial compensation in order to avoid

federal government encroachments in Quebec's areas of jurisdiction. In short, for each objective considered, there is a theoretical possible solution within the federal state. That is why the positive argument cannot be separated from the negative argument.

Those who view sovereignty as an end in itself endorse one version or another of the principle of nationalities, under which every nation must have its own state. Those who subscribe to sovereignty as a means to a more general end but who wish to avoid considering the federal alternative can do so by claiming that there are no other possible means to achieve the same objectives. For John Stuart Mill, for example, nations must have their own state, not as an end in itself, but to achieve the democratic ideal, and that ideal can only be achieved through the creation of a nation-state. It cannot be achieved in the context of a multinational state. In Mill's view, sovereignty is a means to an end, but it is the only possible means to that end. Thus, no other model than the nation-state should be contemplated for that purpose.

Similarly, according to the view of a number of sovereigntists, sovereignty is a means to achieve a plan for society, but it is the only means to that end. Consequently, the possibility of reforming federalism to suit these aspirations is out of the question. I disagree with many sovereigntist thinkers on this point. There is no reason to think that the multinational state is a fad or a theoretical construct. On the contrary, it is a practical necessity. There are 5,000 nationalities on this planet, and it is ridiculous to contemplate creating an additional 4,800 states or to assimilate 4,800 nations into the 200 that already have a state. Canada could have changed into a genuine multinational state. Those who

believed in that had a highly noble and avant-garde vision. Federalist Quebecers who have fought for a federalism based on two founding peoples have not been mistaken or misled all along. Those who still believe in it should be taken seriously. Only in that way will sovereigntists be listened to and their political choice heard. Otherwise we will be condemned to mark time or go around in circles, which amounts to the same thing.

I do not believe I meet the description of a nationalist thinker who feels resentment toward English Canada. The Canadian problem can be described in a cold, lucid and clinical manner without bringing moods into the picture. On the contrary, I believe that those who exclude Canada from their radar screens are precisely those who are full of resentment. Nor do I view sovereignty as a last resort. In my opinion, multinational federalism is the last resort. On paper, or in theory, as it were, sovereignty with partnership is a much better option for Quebec. However, I am enough of a pragmatist to consider a last-resort solution that I would have accepted if it had been possible.

My detractors will view this pragmatic approach as evidence that I believe federalism can still be reformed, that, ultimately, I ardently wish for a reformed Canada, or that I have a sentimental attachment to Canada. But, once again, I am sorry to disappoint them: that is not the way things are. I no longer believe that Canadian federalism can be reformed, I have no secret wish for a reformed Canada and I do not describe myself as a Canadian. I would only agree to be considered Canadian if Canada agreed to recognize the Quebec nation.

But if one no longer considers oneself Canadian and no longer believes that Canadian federalism can be reformed, why draw up a list of grievances about the Canadian experiment? Why still consider what a reformed Canada could have been? There are many answers to those questions. It is of the utmost importance that we not allow ourselves to be caricatured by our opponents as defending a doctrinaire and ideological view. The sovereigntist option is appealing, not for doctrinaire and ideological reasons, but rather in the context of the turn Canadian history took when Pierre Elliott Trudeau entered it.

It is also of the utmost importance to watch those who mistakenly believe such reform is possible. The best way to convince undecided citizens is to follow them in their thinking. Sovereigntists constantly wonder how to convince the undecided, but it never occurs to them to put themselves in the shoes of their fellow citizens who believe in, hope for and want a reformed Canada. It is of the utmost importance to appropriate the legacy of previous generations and to adopt Quebec's historical approach. It is important to recall Quebec's major demands and to assert what would have been the strict acceptable minimum.

It is also important not to cut ourselves off from the global federalism fad and not to be caught in a vision that categorically condemns all forms of federal systems. Globalization concerns ideas, not just economics. An open mind to issues discussed around the world should lead one to consider debates underway in Europe and elsewhere. Now more than ever, many firmly believe in the virtues of federalism. The complacency of some

sovereigntists is therefore somewhat disarming. In Quebec, the debate is seemingly being carried on in a vacuum, unaffected by the major global trends, in a kind of political micro-climate. It is being carried on in the unshakable certainty that federalism in all its forms is ancient history. It is this caricature, this hardened doctrinaire and ideological attitude that is our worst enemy.

In *La nécessaire souveraineté*,<sup>i</sup> several hundred copies of which were published at the time of the 1995 referendum, in the context of my activities in IPSO, I asserted that, for each reason for sovereignty, it would be possible to address that issue while remaining part of the Canadian federal state. It was thus the failure of all reform consistent with Quebec's historical aspirations that led me to support sovereignty. At the time, I had an opportunity to clarify my thinking on the question in articles published in the newspapers.<sup>ii</sup> More recently, in *L'action nationale*, I published an article that essentially repeated the same arguments, while returning to a list of principles that I felt constituted an acceptable bottom line for Quebec.<sup>iii</sup> In short, I would have been in favour of a multinational federalist system. The idea was not to write a shopping list, not to list the powers that should be restored to Quebec, but to establish the structural principles of such a reform. In *Le Pari de la démesure* and in the article in *l'Action nationale*, I even proposed that the Parti Québécois government pass another Bill 150 incorporating the idea of an alternative between two major options historically rooted in the heart of Quebecers: multinational federalism and sovereignty with partnership.<sup>iv</sup>

I recall these elements of reform here because I will be using them below. Ultimately, the idea is to secure recognition of the Quebec people and to accept the institutional consequences of such recognition. More specifically, the existence of a Quebec people should be formally recognized in the Constitution of Canada, a specific legal status should be formally conferred on Quebec, and there should be agreement on entrenching a system of asymmetrical federalism in the Constitution. Quebec should be granted a genuine right to opt out with financial compensation and the fiscal imbalance should be resolved through a GST transfer. Quebec should be recognized as the prime contractor in the areas of language, telecommunications and immigration. There should also be a transfer of employment insurance powers. Quebec should be granted a power to take part in the appointment of three of the nine judges on the Supreme Court bench, and the Gérin-Lajoie formula should be ratified in international relations. Genuine cooperation should be introduced between Ottawa and the provinces in UN, WTO and FTAA negotiations. Lastly, the Clarity Act should be repealed. With this set of reforms in place, the claim could be made that Canada had taken a strong step toward multinational federalism.

These reform proposals are not recent inventions. Ultimately, they represent Quebec's historical aspirations. I have not made them up for the purposes of an ad hoc argument. Recognition of the Quebec people is part of Quebec's historical approach. Special status is a demand that dates back at least to the 1960s. Asymmetrical federalism was first referred to in the Pepin-Robarts Commission Report in 1979. The right to opt out with financial compensation has been demanded for decades in Quebec. And so on and so

forth. All these demands have been made time and time again by federalist politicians. So the idea is not to raise the bar too high for the strategic purpose of securing a rejection and provoking a crisis. It is just to be faithful to Quebec's traditional demands.

I have taken up these demands myself a number of times in recent years. In the present context of an apparent relaxing of federal-provincial relations, they provide me with a framework against which to assess suggestions for reform. Bottom-line structural principles also give me ammunition against those who would interpret the present situation in a favourable manner. I am not like those sovereigntists who no longer take any interest in constitutional debate in Canada and who claim that because all reform is impossible, they should not have to question their doctrinaire positions. I am not caught off guard and powerless in the new situation of a minority Conservative government at the federal level. On the contrary, I have a tool that enables me to assess the meaning of the new reforms currently under way.

### ***Is reform now possible?***

The currently prevailing atmosphere revives the hope that Canadian federalism is after all reformable, flexible and adapted to Quebec's needs. On each of the points on my list of structural principles, changes have taken place in the past 10 years that would appear to be grounds for optimism. In the months that followed the 1995 referendum, Canada passed a resolution in the House of Commons recognizing Quebec as a distinct society. Former Senator Gérald Beaudoin suggested that Quebec was already recognized in the

Constitution of Canada as having special status. We have begun a process that could finally make a system of asymmetrical federalism a reality. The September 2004 Health Accord resulted in Quebec exercising a genuine right to opt out with financial compensation. We have reason to believe that the federal government showed that it was receptive to the provinces' demands on the fiscal imbalance issue. We have reason to hope for specific agreements on parental leave, participation in the appointment of three of the nine judges on the Supreme Court bench and an expanded international role for Quebec, in accordance with Minister Benoît Pelletier's wishes. In short, shouldn't we recognize that we are headed in the direction of what I call the bottom line for Quebec?

I want to show that appearances are deceiving. I contend that not only are we still very far from the reform contemplated, but also that we are moving even further away from it. To prove this, I will use each of the principles cited in my imaginary reform in the order in which I have stated them.

### *Recognition of the Quebec people*

First of all, did Canada's recognition of Quebec as a distinct society in 1996 constitute, for all practical purposes, a recognition of the Quebec people? It will be recalled what that expression meant in the failed Meech Lake Accord. It was no longer an interpretive clause, but only a principle whereby the Quebec government would have an obligation to promote and protect the French language, in a manner consistent with bilingualism which is "a fundamental characteristic of Canada". In short, at most, the clause had an impact on

language that was neutralized, to say the least, by the principle affirming the fundamental character of Canadian bilingualism, to the extent that that principle would enable minorities to challenge Quebec's language laws in the name of linguistic duality.

It will also be recalled that Jean Chrétien toured across Canada to achieve some openness on the part of the provinces to constitutional recognition of Quebec as a distinct society. The premiers' hostile reaction led Mr. Chrétien to settle for a resolution in the House of Commons. Policies subsequently adopted by Mr. Chrétien confirmed that the expression was meaningless and of no consequence. On the contrary, Canada subsequently introduced a number of measures to undermine the strength of Quebec's national identity: reference to the Supreme Court, Clarity Act, Framework Agreement on Social Union, fiscal imbalance, encroachment on Quebec's constitutional jurisdictions, use of a so-called spending power not provided for in the Constitution, employment insurance cuts, contracting irregularities at the Department of Human Resources, propaganda on the CBC, sponsorship scandal and so on.

The Trudeauist conception of the Canadian nation is still alive, and more so than ever: one nation, two languages, five economic regions, 13 provinces or territories, and a cultural mosaic. The provinces of English Canada have discarded any idea of constitutional reform and now consider themselves distinct societies as well. They are no doubt right to view matters in this way, but are they distinct peoples? Of course not. Which is why this is not a debate over semantics. There is a major difference between recognition of a people and recognition of a distinct society. Most if not all the provinces

are distinct from one another, but only Quebec constitutes a distinct people. And yet English Canada is further than ever from recognizing this fact. There was a time when some in English Canada spoke favourably of the two founding peoples. In the view of Canadians, that idea now belongs to the folklore of the pre-Trudeau era, and the Trudeau era is now firmly rooted in Canadian attitudes.

### ***Special status***

But apart from the symbolic nature of recognition of the Quebec people, hasn't the federal government committed itself to institutional transformations consistent with those that would be demanded if it were recognized as a people? What about special status for Quebec? By way of an answer, I take the liberty of recalling the plan for reform set out in the July 1992 version of the failed Charlottetown Accord.<sup>v</sup> The nine Canadian provinces had agreed at the time to recognize a triple-E Senate, that is to say one that would be elected, effective and equal. The principle of the legal equality of the 10 provinces was unreservedly approved. A few years later, the nine provinces restated that principle in the Calgary Declaration.<sup>vi</sup>

Closer to home, in the Health Accord side agreement,<sup>vii</sup> it was agreed that the 10 provinces could also invoke the principle of asymmetrical federalism. Once again, the provinces' equality of legal status was affirmed. Recognizing special status for Quebec was out of the question. Although the principle of asymmetrical federalism has historically been associated with the idea of special status, Canadians now feel that the

principle of asymmetry should be applied symmetrically in a manner consistent with the equality of the provinces.

Senator Beaudoin reminded us that Quebec was in a way granted special status under the Constitution of 1867, in particular through recognition of a civil law system distinguishing it from the rest of Canada,<sup>viii</sup> but this is not what is meant by a special juridical status for Quebec. I am not merely referring to a *de facto* asymmetry in the juridical systems, but rather to a constitutionally entrenched interpretative clause that serves as a general guideline in the application of any federal policy involving Quebec. The federal government could on the basis of such of an interpretative clause justify a regime of asymmetric federalism. Of course, Canada now no longer contemplates that original orientation, and it is the principle of equality of the provinces that is constantly affirmed. That is why it may be concluded that recognition of special status is now more improbable than ever.

### *Asymmetrical federalism*

But can it be said that, since September 2004, Canada has finally, for the first time, taken a deliberate step toward asymmetrical federalism? There was much talk about asymmetry in the Fall of September 2004, and now that the Conservatives are in power, we don't hear much about it. But the expression was in vogue during a short period of time and, in the end, the expression has come to mean both one thing and its opposite. In my mind, asymmetrical federalism stems from the principle of special status for the province of

Quebec. In that sense, it has three basic characteristics: it is entrenched in the Constitution and is therefore not just an agreement in principle; it entails a transfer of powers from the federal state to the federated state and is not merely an absence of encroachment; and, lastly, it applies to Quebec, not all the provinces. It has to be acknowledged that the asymmetry whose merits were praised for a short while does not have these three characteristics. It amounts to an unconstitutionalized agreement in principle that, in the circumstances, only makes it possible to avoid any encroachment without any transfer of powers, and it is an agreement that applies to all the provinces.

But how is Quebec hurt if the other provinces are also entitled to invoke the asymmetry principle? The answer is quite simple. In the context of a symmetrical application of the principle of asymmetry, any transfer of powers may theoretically result in a weakening of the Canadian state. The federal government will thus be reluctant to grant a transfer of powers to Quebec if the power in question can also be recovered by all provinces. The principle of asymmetry contemplated in the avowed goal of giving tangible expression to special status for Quebec would not achieve that result. The transfer of power to Quebec would be consistent with maintenance of a strong federal state. Indeed, it would be consistent with anything Canadians wish to do.

Of course, numerous forms of asymmetry are in operation in the Canadian federation. Some asymmetries are constitutionalized, others are not. Some apply to Quebec, and others apply to the other provinces. Some are favourable to Quebec, others more harmful. However, we have every reason to be suspicious of these unconstitutionalized interim

agreements that can be revoked depending on the mood of the government in power and the political situation. Furthermore, although history shows that asymmetry has been applied to all the provinces to varying degrees, this is another way of recognizing that Quebec does not have special status within the Canadian federation. Lastly, it is hard to see why anyone should be pleased with the "asymmetry" under which Quebec and Manitoba are the only provinces required to translate their laws into the other official language.

The idea is not to deny the fact that certain asymmetrical principles apply solely to Quebec and are the result of a transfer of powers held by Quebec but not by the other provinces. I am thinking of the Civil Code, the Quebec Pension Plan, Quebec's power to collect a portion of income tax and certain immigration powers. But the question arises as to whether such transfers of power are still possible. The principle of asymmetrical federalism embodied in the September 2004 Health Accord does not augur well in that direction. It applies to all the provinces, and, in the context of that accord, its sole effect is to prevent jurisdictional encroachments, not to authorize a transfer of power. Lastly, we are far from any constitutional review. So the idea that there could be a constitutional reform in which Quebec would be authorized to renegotiate a new distribution of powers is no longer in the cards.

Of course, the definition of asymmetrical federalism set out in the press release of the federal and provincial governments is as vague as can be. It merely reveals a federalism that "allows for the existence of specific agreements for any province". It is nevertheless

noted that this is an administrative arrangement, not a constitutional principle, and that it applies to all provinces. But is it just a means to prevent jurisdictional encroachment? To answer that question, one must consider the definition that appears in the news release prepared by the federal government and the Government of Quebec, which cites a "flexible federalism that notably allows for the existence of specific agreements and arrangements adapted to Quebec's specificity". This is another vague statement, but the title of the news release could not be more clear: "Asymmetrical federalism that respects Quebec's jurisdiction". We are therefore correct in interpreting the principle as an interim non-encroachment measure applicable to any province. This is far from a transfer of power entrenched in the Constitution and applicable only to Quebec. In other words, asymmetrical federalism is at best an unconstitutionalized recognition, applicable to all provinces, of a right to opt out with financial compensation when the federal government, through the use of its so called spending power, decides to invade provincial jurisdictions. Now it appears that no one can take a favourable view of entrenching in the Constitution a new division of powers that favours Quebec.

Those who believe they detect in this an openness to asymmetrical federalism understood as such by the Liberal Party of Canada must also recall that Paul Martin, Pierre Pettigrew, Lucienne Robillard and Stéphane Dion, who then praised the merits of asymmetrical federalism, resolutely used to support Jean Chrétien's centralizing efforts. Their support is reasoned and based on circumstances and may be explained in large part by the Bloc Québécois' spectacular results in the 2003 election, since that was the main reason for the liberal minority government.

Some are often tempted to discard the sorts of arguments I just raised because they amount to a defence of Quebec nationalism, while I appear to be criticizing Canadian nationalism. And so the following question may apparently be raised : why not let the two nationalisms compete in the attempt of winning the hearts of Quebecers? But this is to miss the true spirit of asymmetric federalism. It is precisely an arrangement seeking to harmonize Canadian nation building policies with Quebec nationalism. True asymmetry means that Quebec self-determines itself within an increasingly centralized federal government. By contrast, the so called «competition between the two nationalisms» stems as a matter of fact from a spurious attempt to crush Quebec nationalism, and we all know that this is bound to fail.

### ***A Right to opt out with financial compensation ?***

But the situation is even worse than that. To realize this, we must now consider how the right to opt out with financial compensation is understood. Can it not be said at least that, in the recent Health Accord of September 2004, Quebec was granted a right to opt out with financial compensation in an area of its own jurisdiction? Let's take a closer look.

The Framework Agreement on Social Union,<sup>ix</sup> which was adopted in 1999 without Quebec's signature, states a very important rule governing transfer payments to the provinces:

A provincial/territorial government which, because of its existing programming, does not require the total transfer to fulfil the agreed objectives would be able to reinvest any funds not required for those objectives in the same or a related priority area.<sup>x</sup>

It is important to understand what this means. It means that the federal government is entitled to determine in which directions provinces are to spend the money that they get from transfer payments. Now, there is a striking resemblance on this point between the 1999 Framework Agreement and the 2004 Accord. The Health Accord of September 15, 2004 states:

The funding provided by the federal government will be used by the government of Québec to implement its own plan aiming, notably, at ensuring access to quality care in a timely manner and at reducing waiting times.

The news release of September 15 accompanying the Accord<sup>xi</sup> states:

Quebec supports the overall objectives and general principles set out by the federal, provincial and territorial First Ministers in the communiqué of September 15, 2004, including the objectives of timely access to quality care and reduced wait times.

Consequently, Quebec supports the principles and objectives of the Canadian provinces and federal government with regard to reduced waiting times in hospitals. In other words, Quebec can withdraw from the program and receive financial compensation because the same program has been put in place in Quebec by the Quebec government.

In short, it appears from a careful reading of the Health Accord that Quebec has a right to opt out similar to what is prescribed in the Framework Agreement on Social Union. There thus arises a scenario which is quite different from the one reported in the media.

The Health Accord, which was represented as the consecration of asymmetrical federalism, instead enshrines the procedure triggered by the Framework Agreement on Social Union. It enshrines the rule governing transfer payments in virtue of which the federal government is entitled to force provinces to spend the money in specific areas. The so-called right to opt out to which "asymmetrical federalism" is now reduced is nothing other than a false right to opt out, previously disparaged by Quebec. The Health Accord of September 15, 2004 instead entrenches the false right to opt out provided for in the Framework Agreement on Social Union. The only difference with the Framework Agreement is that Quebec is now no longer dissenting.

Moreover, those who see in the Health Accord a genuine right to opt out should tell us which of the two agreements in principle should prevail: the 1999 Framework Agreement on Social Union or the Health Accord of 2004? As far as I know, the ministers did not agree to repeal the Framework Agreement on Social Union, and the problem of compatibility between the two agreements was not raised. This is therefore another reason to believe that the right to opt out granted to Quebec under the Health Accord is a false right to opt out more consistent with what was provided under the Framework Agreement on Social Union. Asymmetry is thus nothing more than a provisional non-encroachment clause which any province can invoke, provided that it acts in a manner consistent with federal normative goals. It is an "asymmetry" that enables each province to opt out of a federal program, provided it has already implemented a similar program. The Health Accord is not true asymmetric federalism, and it is not even involve a real opting out clause. It only involves the opting out clause in the Framework on social union

that Quebec had rejected and that the Quebec Liberals have now accepted. So far from being a step in the right direction, it is a further step in a Canadian nation-building policy.

It is not only that the previous asymmetry that enabled Quebec to receive transferred powers no longer exists. It is also that the Framework Agreement leads us further away than ever from recognition of a genuine right to opt out with financial compensation. In short, the so called «asymmetry» conceals an unprecedented process of encroachment by the federal government. It only spares Quebec because Quebec has agreed to comply with the federal plan to reduce hospital waiting times. And it only exists because the Liberal government is a minority government.

The Minister of intergovernmental affairs, Benoît Pelletier, claims that Quebec Liberals were able to strike a very good deal concerning the Health Accord, because they were able to use the money coming from the federal government in the way they saw fit, as opposed to the previous agreements reached between the Parti Québécois and the federal government concerning child care. But the Parti Québécois fought against the Framework on Social Union. Now the Quebec Liberals no longer raise any criticisms against the Framework. Worse, they comply with it completely.

The question arises as to whether the federal government is being underhanded and hypocritical in leading us to believe that there is a historic change in the situation consistent with Quebec's aspirations, when it is in fact seeking to impose the Framework Agreement on Social Union that Quebec had initially refused to ratify. Is the federal

government being underhanded and hypocritical in suddenly appearing open to asymmetrical federalism, when that false stance is in fact introduced in order to enhance the federal Liberal Party's image in Quebec? Is the federal government being underhanded and hypocritical in tabling budgets that downplay the actual surpluses of the Canadian government, when the Bloc Québécois is able to value them correctly year after year? Is the federal government being underhanded and hypocritical in officially praising the merits of federalism, but in missing no opportunity to promote Canadian nationalism? Is the federal government being underhanded and hypocritical in seeming to respect provincial jurisdictions, but in taking advantage of each opportunity to invade them shamelessly? Is the federal government being underhanded and hypocritical in making Quebec the main victim of cuts in transfer payments? Is the federal government being underhanded and hypocritical in expressing outrage over the sponsorship scandal, when Paul Martin, Lucienne Robillard, Pierre Pettigrew and Stéphane Dion resoundingly applauded Jean Chrétien every time he dismissed one of the Bloc Québécois' five hundred questions on the subject? Another example of underhanded hypocrisy: in 1999, the federal government shouted from the rooftops that the \$1.5 billion equalization repayment made to Quebec, two weeks before Quebec's announcement that it had achieved a zero deficit, was what made that objective possible, whereas Quebec would have achieved that objective even without federal money. What is worse, all this money served as a smokescreen to push through another measure that was harmful for Quebec, the accelerated reform of the program of provincial transfers calculated in proportion to population. That reform worked to Ontario's benefit, which, in return, enabled the federal government to obtain the provinces' support for the Framework Agreement on Social

Union and the withdrawal of Quebec, which they had initially supported in its demand for a genuine right to opt out.

One has the impression of witnessing a similar subterfuge in the Health Accord. In it, the government praises the merits of asymmetrical federalism, but in fact slips in the Framework Agreement on Social Union, which Quebec rejected five years ago.

### ***Fiscal imbalance***

Fiscal imbalance means that the federal government benefits from fiscal revenues that are way beyond its constitutional areas of jurisdiction, while provinces have access to a smaller portion of fiscal revenues despite the fact that they have to deal with increasing costs related to their constitutional responsibilities. But aren't we at least witnessing a genuine will on the part of the federal government to solve the fiscal imbalance problem?

For the problem to be solved, it first has to be recognized. Despite the unanimous view of Quebec's three political parties, the 10 Canadian provinces, the Séguin Commission<sup>xii</sup> and the Conference Board of Canada,<sup>xiii</sup> the government of the Liberal Party of Canada denied its existence. Mr. Martin referred instead to "financial pressures felt by the provinces" and contended he did not want to engage in a debate on terminology. If he did not want a terminological debate, he should have adopted the universally accepted terminology. In refusing to do so, he showed that he was engaging in a debate on terminology. However, the truth is that his reluctance in using the expression was in fact a reluctance to recognize the reality of fiscal imbalance. Of course, the Conservatives

promised they would resolve the fiscal imbalance, but as soon as they got in power, they began to downplay its importance.

But did we not at least achieve a true unanimous agreement between all ten provinces that promises to change the attitude of the federal government on this issue? We now see what such a unanimity has come to. There are deep disagreements between the provinces on how to resolve the imbalance. First, a true and lasting solution to vertical fiscal imbalance between the federal government and the provinces requires fiscal transfers from the former to the latter. Provinces must have more fiscal room to manoeuvre and thus must have a bigger portion of the fiscal pie, while the federal government must have a lesser portion. However 1% of tax point transfer means a lot more money for richer provinces and much less for poorer provinces. So a reform must also be provided to solve the horizontal fiscal imbalance, the one that takes place between the provinces. This means that we must reform the method of transferring equalization payments. Revenues coming from natural resources must be counted in, and all ten provinces must be included in the calculations. But the leaders of Ontario and Alberta disagree with this approach. They either oppose a reform of equalization, or argue that the horizontal fiscal imbalance goes precisely the other way around. They have the impression that they are giving away much more than they are getting from their participation in the federation. This disagreement among provinces leaves the federal government with all the political leverage that it needs to impose its own solution to the problem. The suggestion to transfer all the surpluses beyond three billion dollars (these must serve to pay back the debt) to the provinces is perfectly compatible with a centralized federal government

encroaching provincial jurisdictions and spending like crazy in order to enhance its own visibility, especially in Quebec.

The failure of provinces to maintain a common approach on the issue of fiscal imbalance was from the very beginning easy to predict. Here I anticipate on the next section. As we shall see, in the Framework Agreement on Social Union, nine provinces (excluding Quebec) have agreed that the federal government was entitled to use its so called spending power as much as it wants. The Canadian government must therefore have fiscal resources in addition to those granted it under the Constitution of Canada. If the Canadian government's right to encroach on provincial jurisdictions is recognized, it can then be legitimately claimed that it needs additional fiscal flexibility because its needs now to extend its spending power far beyond its own areas of jurisdiction. Without such additional resources, it will be unable to address health, the family, cities and education.

Recall the definition of fiscal imbalance. It is the fact that the federal government benefits from fiscal revenues that are way beyond its constitutional areas of jurisdiction. The fiscal imbalance exists only if the constitutional jurisdictions of the federal and provincial governments are taken into account and respected. If the constitutional division of powers cannot be relied upon, then it is hard to conclude that such an imbalance in fact exists. The federal government's approach is thus perfectly coherent. It is the provinces that denounce fiscal imbalance but signed the Framework Agreement on Social Union that are clearly acting inconsistently. There was therefore every reason to predict that the provincial consensus would break up over the fiscal imbalance issue. The consensus on

that point was entirely provisional. This looks very much like *déjà vu* all over again. A consensus reached between provinces that breaks and leaves Quebec all alone fighting against a nationalist federal government. One could recall the unilateral patriation of the constitution that was once opposed by all provinces, the Meech Lake Accord that was once a matter on which all provinces would agree, or the common front of provinces over a true opting out clause with financial compensation, just before their capitulation in favour of the Framework Agreement on Social Union. Now, the unanimous common front of provinces breaks over the issue of fiscal imbalance. For a while, it looks as though Quebec is not alone in wanting to reform the federation and oppose strong centralization. But on each and every issue, it loses the support of the provinces, because in spite of their profound divergences, they are all united and engaged into Canadian nation building.

The dissolution of the consensus over fiscal imbalance is just another instance of the underhanded and hypocritical manner in which the federal government and the nine provinces make Quebec swallow a number of bitter pills only one at a time: unilateral patriation, Meech lake, the Framework Agreement on Social Union and the fiscal imbalance. The Canadian federal government's nationalist centralizing efforts must be served out in small doses.

An understanding of fiscal imbalance helps in grasping the nationalist logic of the federal government. As Tom Courchesne emphasizes, the federal government has discovered that the key to its electoral appeal and "nation-building" policy in a knowledge-based

economy is to become a player in provincial spheres. That took the form of hourglass federalism: starving the provinces so that they had to divert discretionary spending from all other sectors in order to feed the voracious appetite of the health system, to the point where citizens and cities now welcome some and even all federal expenditures made for them. Hourglass federalism is not only another name for vertical fiscal imbalance, but also one for fiscal imbalance with a goal.<sup>xiv</sup> This was true of the Liberal Party of Canada, but it is also true of the Conservatives. They might just want to adopt a softer pace in order to neutralize the growing support in favour of sovereignty within Quebec.

The Framework Agreement on Social Union and the fiscal imbalance are the federal government's two most recent instruments for consolidating its control over the provinces. The Canadian state is increasingly losing the characteristics of federalism and increasingly acquiring those of nationalism. Provincial independence is built on two basic pillars: political independence and fiscal independence. However, the Framework Agreement attacks the provinces' political independence and the fiscal imbalance undermines their fiscal independence. In other words, the fiscal imbalance is a recent invention of the federal government, which, combined with the Framework Agreement, provides the necessary ammunition to encroach on the provinces' jurisdictions as never before in the history of Canada. As a result, we are further away than ever from putting a limit on the central government's spending power.

### ***Spending power and jurisdictional encroachment***

What is worse, under the Framework Agreement on Social Union, the nine provinces formally authorized the Canadian government to encroach on their jurisdictions. They did so not only in the above sense, by allowing the federal government to impose norms on the way to spend the money coming from transfer payments. For the first time in Canadian history, they also allowed the Canadian government to invade exclusive provincial jurisdictions with federal programs involving direct transfers to individuals. The Canadian government has the right to proceed in such a fashion as long as it informs provinces in advance that it is about to do so. This is an unprecedented recognition of the federal spending power by nine provinces. The Framework on social union enshrines a principle ratified by the nine Canadian provinces authorizing the federal government's spending power and acceptance of encroachment on provincial jurisdiction. This is yet another instance of an underhanded hypocritical nation building policy.

Those who are hopeful that changes will take place should ask themselves the following questions: has the Canadian government waived its spending power? Does it admit that the so-called spending power does not really exist in the Constitution of Canada? No one can claim that the Canadian government is about to waive the spending power. The Canadian government still claims that the spending power is set out under the Constitution. But does it intend to stop encroaching on Quebec's jurisdictions? On this point, we should not seek to attribute to others aims they have not expressly stated. Let's look solely at the intentions Mr. Martin stated in the Speech from the Throne in early October 2004.<sup>xv</sup> The Canadian government's priorities were health, education, the family and cities. These are all provincial jurisdictions. This would have been unthinkable

several years ago. Far from being inclined to limit its so-called spending power and to stop encroaching on provincial jurisdictions, it should, on the contrary, recognize that it is encroaching now more than ever in the history of Canada.

As I showed in articles that were published in *Le Devoir*,<sup>xvi</sup> this trend can even be felt in the university research sector. The federal government is financing research in Canadian Universities approximately at the level of three billion dollars each year.<sup>xvii</sup> The vice-president for research at Université de Montréal, Alain Caillé, subsequently answered that my criticisms made "no sense" since researchers accept all federal subsidies.<sup>xviii</sup> It is interesting to note that the vice-president could not deny the federal government's encroachment on provincial jurisdictions, its use of the spending power, the fiscal imbalance or the Canadian government's increased presence in university research. He could not deny that these interventions are a part of a Canadian nation-building policy. His fallback position was merely that researchers accept this state of affairs.

### ***The Conservative government of Stephen Harper***

The above arguments do not take into considerations the spirit of reform opened up by the Conservative government of Stephen Harper. Can we be optimistic about that? It cannot be denied that the Conservatives have recognized the existence of a Quebec nation. But the other side of the coin is that this recognition was merely verbal with no implications whatsoever in the constitution and in the institutions. Moreover, the statement was that the 'Québécois' form a nation, using the French word in an English

text, and this seems to suggest that the Quebec nation is composed of French Quebecers only. When pressed on this issue, Prime Minister Harper said that it was to Quebecers themselves to decide who should count as members of the Quebec nation. This was a shrewd way of escaping the question, since everybody interpreted this as suggesting that if a majority of Quebecers were favourable to an inclusive concept of the nation, this conception would prevail and would be the one to adopt. But one could imagine that Stephen Harper could react positively to those English Quebecers who would wish to self-exclude themselves from the Quebec people, since this too could be a way to consider what Quebecers themselves really think about the issue. According to me, Anglo-Quebecers would be legitimate to self-exclude themselves if Quebec was unwilling to recognize their minority rights. Without such a recognition, the inclusive concept of the Quebec nation would not be legitimate. But if Quebec recognizes its own minorities, then it is the self-exclusion of Anglophones from the inclusive Quebec nation that becomes illegitimate.

As far as Quebec's international role is concerned, the cloud of expectations finally condensed into a drop of administrative reform. The traditional role of Quebec at UNESCO was in a way officially confirmed. The two levels of government tried to make a big fuss out of this issue, but the celebrations did not conceal the meagre result. Once again, the two levels of government made use of very big words like asymmetric federalism to describe the implications of the agreement, but the emptiness of those words in the context is directly related to the total lack of substance involved.

But is it not true that the Conservatives have put an end to fiscal imbalance? Once again, this is an abusive way of describing what actually took place. The Conservatives did give an additional amount of one billion dollars to the Quebec government in equalization payments. But the fiscal imbalance should have meant a correction reaching 3,9 billion dollars, not one billion. The other important thing to notice is that the Conservatives were able at the same time to reduce taxes and refund part of the debt. If anything, the gesture of the Harper government concerning equalization payments is not the resolution of fiscal imbalance; it is rather an expression of fiscal imbalance. The Quebec provincial liberals also made the mistake of using this additional billion dollars to reduce income tax, in order to finally be able to partly fulfill one of their failing promises. But this infuriated many Canadians, and it now seems politically impossible for Quebec to raise once again the issue of fiscal imbalance in Canada. Strangely enough, even though all provinces had initially agreed that there was a fiscal imbalance, no one in Canada has raised the issue since then. But it is bound to remain a fiscal reality in the years to come and it will surely prove a crucial dysfunctional factor in the federation as far as Quebec is concerned.

But can't we at least expect that the Conservatives will stop invading provincial jurisdictions? As far as one can tell, no one in the Conservative government has suggested that the Framework Agreement on Social Union should be repealed. True, the Conservative government has announced that it wanted to impose important limitations on the use of the so called federal spending power. But it appears that these 'limitations' would concern only shared cost programs, and it is a well known fact that the intrusion of the federal government into provincial jurisdictions nowadays take the shape of programs

exclusively financed by the central state. These so called limitations would thus amount to no limitations at all.

Am I not a bit unfair? Why should we be so severe concerning the Conservative policies toward Quebec? Can we seriously deny that the decentralization of the federation would benefit to Quebec? The problem is that like all other Canadian governments before them, the Conservatives do not want to grant special status to the province of Quebec and they refuse a substantial form of asymmetric federalism. Any additional powers given to Quebec must be offered to all the members of the federation. The only way to transfer some additional room to manoeuvre to Quebec is by allowing a substantive decentralization process. There are many problems with this solution. It requires that all Canadians accept decentralization, and since nine provincial governments signed the Framework on Social Union, it can be expected that most of them would be reluctant to a massive decentralization of powers. Furthermore, the federal government will hesitate to accommodate Quebec concerning certain powers like language and culture if this is to mean that language and culture would become exclusively provincial jurisdictions. In short, offering something to Quebec would be tantamount to an abandonment of the jurisdiction altogether and this would reduce the list of powers that the federal government would be willing to give away. In short, as a solution to the Quebec question, the Conservative program of decentralization is just another manifestation of the reluctance to recognize Quebec as a nation.

### *A short shopping list?*

However, can we be optimistic, like Minister Benoît Pelletier, after coming to an agreement on parental leave?<sup>xix</sup> Unfortunately, we were finally able to strike a deal after more than eight years on a Quebec program on parental leave, despite an absolute consensus among all groups within Quebec society. So I suppose we cannot use that example as an instance of federal flexibility.

But if agreements were reached on many other fronts like these, would we not have to recognize that a breakthrough is possible? Instead I'm inclined to distrust these occasional overtures regarding specific powers. Here we see the rising threat of a proposed reform taking the form of a shopping list including only specific administrative powers, instead of a reform based on substantive, structural and constitutionally entrenched principles. Why save a few trees if you lose the forest? I believe I have established that the Canadian government is now more committed than ever to a nation-building process, which has taken the form of an encroachment on provincial jurisdictions and the abusive use of the spending power consistent with the fiscal imbalance. Total encroachment on provincial jurisdictions can thus allow for the few minor powers conceded to Quebec. But this will only serve as a guarantee for a systematic nation-building enterprise subordinating federalism to Canadian nationalism.

### *A poor way to negotiate?*

However, as Christian Dufour noted<sup>xx</sup> in response to Claude Morin's reform proposal,<sup>xxi</sup> the problem may be that I am adopting a "French approach", which results in a desire to achieve a comprehensive, written and constitutionally entrenched solution including a list of structural principles. The error, as Mr. Dufour emphasizes, may be to adopt a "French-style" negotiation procedure instead of accepting the "English method" of small informal steps based on mutual trust.

I don't know whether two negotiating methods can be so easily compared in this way by calling them respectively the "French method" and the "English method". But supposing they can be described in this manner, this argument is curious. For the purpose of gaining acceptance for substantive principles of recognition of a French-language people by an English-language community, should a French-style negotiating procedure be waived in favour of an English procedure? How can anyone hope that capitulating on procedural matters will enable us to get what we want in the area of substantive principles?

In any case, however, the so-called English bargaining procedure has already shown itself in its true light. The government is desperately seeking to make us accept Canada's nationalist orientation by pretending to move us a few steps forward toward a reform. The small-steps strategy is in fact an application of Zeno's paradox. At every step, we are told that the remaining distance to a reform of federalism has been cut by half. However,

everyone knows that, at that rate, despite appearances, a reform of federalism will never come.

### ***Conclusion***

In summary, we are now further than ever from an in-depth reform of the Canadian federation consistent with Quebec's historical aspirations because Canada is more than ever committed to a nation-building enterprise and driven more than ever by nationalism.

In the introduction, I criticized doctrinaire sovereigntists who do not wish to express their openness to a bottom line, but I would also criticize doctrinaire federalists who, in Quebec, cannot admit a fallback position. In view of the failure of federalism in Canada and of the subordination of federalism to Canadian nationalism, a pragmatic federalist must consider alternatives such as sovereignty with partnership.

## Notes and references

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<sup>i</sup> *La nécessaire souveraineté. Dix arguments pour le Québec*, prepared by Intellectuels pour la souveraineté (IPSO), printed by the Comité national du OUI for Michel Hébert, official agent of the Comité national du OUI, September 1995.

<sup>ii</sup> "Que faire maintenant?" *Le Devoir*, (February 9, 1999), A7; "Le problème de la nation québécoise n'est pas son existence mais sa (non) reconnaissance", *Le Devoir*, (September 11, 1999), A9; "Quebec and Canada at the Crossroads: A Nation within a Nation", *Nations and Nationalism*, vol. 6, no. 2 (2000), p. 227-55; "Il ne faut pas tenter de guérir une hypothétique peur de la défaite", *Le Devoir*, (March 4, 2000), A9; "Politique québécoise - Pour sortir du cul-de-sac", *Le Devoir*, (June 19, 2002); "Une voie pragmatique et raisonnable", *Le Devoir*, (September 2, 2003).

<sup>iii</sup> "Quel avenir pour le Québec?", *L'action nationale*, vol. XCIII, nos. 5 and 6 (May/June 2003), p. 166-195.

<sup>iv</sup> *Le Pari de la démesure. L'intransigeance canadienne face au Québec*, (Montreal, l'Hexagone, 2001); see Chapter 7.

<sup>v</sup> See [http://www.pco-bcp.gc.ca/aia/default.asp?Language=F&Page=consfile&doc=charlottetwn\\_e.htm](http://www.pco-bcp.gc.ca/aia/default.asp?Language=F&Page=consfile&doc=charlottetwn_e.htm).

<sup>vi</sup> See [http://www.uni.ca/calgary\\_e.html](http://www.uni.ca/calgary_e.html). The second principle states: "All provinces, while diverse in their characteristics, have equality of status."

<sup>vii</sup> See <http://www.hc-sc.gc.ca/english/hea2003/fmm/index.html>.

<sup>viii</sup> Gérald-A. Beaudoin, "Nouveau, le fédéralisme asymétrique?", *Le Devoir*, (September 28, 2004).

<sup>ix</sup> Alain-G. Gagnon, ed., *L'Union sociale canadienne sans le Québec*, (Montreal, Éditions Saint-Martin, 2000), 263-270.

<sup>x</sup> Gagnon, *Ibid.*, p. 268.

<sup>xi</sup> Jean Charest and Paul Martin, "Un fédéralisme asymétrique qui respecte les compétences du Québec", *Le Devoir*, (September 17, 2004), A9.

<sup>xii</sup> See <http://www.desequilibrefiscal.gouv.qc.ca/fr/document/publication.htm>.

<sup>xiii</sup> *Projection des équilibres financiers des gouvernements du Canada et du Québec*, Conference Board of Canada, (February 2002), (PDF, 681 ko). See <http://www.conferenceboard.ca/documents.asp?rnext=659>.

<sup>xiv</sup> Cited and translated by Manon Cornellier, "Il y a déséquilibre et déséquilibre", *Le Devoir*, (September 22, 2004), A3.

<sup>xv</sup> See <http://pm.gc.ca/eng/sft-ddt.asp>.

<sup>xvi</sup> "Le déséquilibre fiscal et la recherche universitaire au Québec", *Le Devoir*, (July 9, 2004), A9.

<sup>xvii</sup> See (with Guy Rocher), "L'État canadien dans les universités québécoises : existe-t-il un pouvoir fédéral de dépenser?", *Le Devoir*, (April 20, 2006); "L'État canadien dans les universités québécoises : pour sortir de l'impasse", *Le Devoir*, (April 21, 2006).

<sup>xviii</sup> Marilyse Hamelin, "Cherche financement désespérément!", *Le Devoir*, (October 2 and 3, 2004), H4.

<sup>xix</sup> Benoît Pelletier, "Fédéralisme asymétrique - L'avenir du Québec au sein de la fédération canadienne", *Le Devoir*, (October 2 and 3, 2004).

<sup>xx</sup> Christian Dufour, "Plus qu'un simple accord administratif", *Le Devoir*, (October 1, 2004).

<sup>xxi</sup> Claude Morin, "Le fédéralisme asymétrique - Comme si rien du genre n'existe déjà!", *Le Devoir*, (September 28, 2004).