



THE HARPER RECORD

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Harper, Québec and Canadian Federalism

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THE MOST SURPRISING initiative of Stephen Harper in office was undoubtedly his sponsorship of the motion in the House of Commons recognizing the Québécois as a nation within a united Canada. This comes from a man who in 1997 denounced successive Canadian Prime Ministers for their “appeasement of ethnic nationalism,” citing in particular the attempt to amend the constitution to recognize Québec as a distinct society.¹

That Harper can shift so dramatically on a central question of Canadian political life raises the question of whether or not he has a consistent view of federalism. Has he matured in office and come to recognize the multinational character of Canadian society with this bold but certainly long-overdue recognition? Does this initiative represent a fundamental break with his past convictions, or is it a tactical move motivated simply by the political necessity of gaining electoral support in Québec?

At one level, Harper’s motion was a direct response to the attempt by the Bloc Québécois to undercut Conservative support in Québec by forcing Harper to state where he stands on the fundamental question of the national status of Québec society. The Bloc had given notice of its intention to introduce in the House of Commons on November 23, 2006, a motion “that this House recognize that Québécois form a na-

tion currently within Canada.” In a pre-emptive strike, Harper introduced in the House of Commons on November 22 a government motion “that this House recognize that the Québécois form a nation within a united Canada.”²

Both the Bloc and Harper initiatives took place in the context of a Liberal party convention scheduled to open the following week that was expected to vote on a motion of its Québec wing recognizing Québec as a nation, a motion supported by a leading contender for the party’s leadership, Michael Ignatieff.³ Furthermore, six weeks earlier, the national convention of the New Democratic party had endorsed the Sherbrooke Declaration, which specifically recognizes the national character of Québec and affirms Québec’s right of self-determination.⁴

Harper’s successful tactical manoeuvre was undoubtedly part of a larger Conservative electoral strategy grounded in his recognition that an alliance of economic neoliberals and social conservatives in English-speaking Canada is not sufficient to achieve a majority government in the country. He needs the support of Conservative nationalists in Québec and even a smattering of Liberal Québec nationalists to achieve that objective.

Yet, while the recognition of the Québécois as a nation is new, Harper’s view of federalism is less of a break with the recent past than one might think. A consistent neoliberal approach to Canadian federalism emerged in the mid-1980s and centres on combining a symbolic recognition of Québec with the so-called “principle” of provincial equality, or the same treatment for all provinces. The formula was first advanced in the Macdonald Commission in 1985, it underpinned the Meech Lake Accord and the Charlottetown Agreement, and was clearly spelled out in the Calgary Declaration endorsed by the Premiers of the English-speaking provinces in September 1997 at the urging of the Business Council on National Issues.⁵

This formula involves recognizing Québec society as “distinct” or “unique” while treating all provinces in the same manner when it comes to the division of powers. Under this approach, whatever responsibilities the Québec National Assembly requires to protect and advance the culture of a predominantly French-speaking society are available to other provincial governments. No further rationale is needed; if Québec re-

quires these powers, the “principle” of provincial equality means that other provinces are entitled to them as well.

The result is an ongoing dynamic of decentralization when it comes to social programs that suits the neoliberal agenda well. Symbolic recognition of Québec costs little, but is worth a lot to neoliberal politicians if the results are electoral support in Québec and a general weakening of the federal social role.

The purely symbolic nature of Harper’s “Québécois as a nation” motion was evident within months after it was passed. On May 17, 2007, the House of Commons Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities conducted a clause-by-clause vote on Bill C-303, an NDP private member’s bill directed at establishing conditions for the federal transfer to the provinces for early learning and child care services. Clause 4 of this bill provides an explicit exemption for Québec in the following words:

Recognizing the unique nature of the jurisdiction of the government of Québec with regard to the education and development of children in Québec society, and notwithstanding any other provision of this Act, the government of Québec may choose to be exempted from the application of this Act and, notwithstanding any such decision, shall receive the full transfer payment that would otherwise be paid under section 5.⁶

The NDP, Liberal, and Bloc Québécois members of the Committee voted in favour of the exemption; all the Conservative members opposed it.⁷

One of the telling features of the debate and vote in Committee is that the Conservative opposition was led by Michael Chong, the former Conservative minister of Intergovernmental Affairs who had resigned six months earlier over the “Québécois as a nation” motion. Given Stephen Harper’s well-deserved reputation for micro-management, Chong’s role and the unanimous opposition of the Conservative members of the Committee undoubtedly reflected his views.

Nonetheless, even the symbolic recognition of the national status of the Québécois is significant and unquestionably a step forward from the less satisfactory language of “distinct society” or “unique society.” One hopes it means that future constitutional discussions in Canada

will start from this premise. The difficulty, however, lies in the refusal to acknowledge that this recognition has any implications for the responsibilities of the Québec National Assembly. It is precisely because the Québécois are a national community that there will be ongoing pressures from the Québec government for greater provincial control over social programs.

The effect of trying to contain the national status of the Québécois within a framework of provincial equality is to reinforce a decentralizing dynamic at the centre of Canadian federalism. Despite the often kneejerk reaction in the rest of Canada that “whatever Québec gets, we get,” the political reality is that progress on social rights at a Canada-wide level requires ending the link between the recognition of Québec and the notion of provincial equality.

Federal spending power

Dropping the anti-Québec bigotry of the Reform party was part of the strategy to unite the right, first under the Canadian Alliance and then the “new” Conservative party. The Policy Declaration of the Harper Conservatives, adopted in March 2005 in anticipation of an impending federal election, endorsed the notion of “open federalism” which included a restoration of “the constitutional balance between the federal and provincial and territorial governments,” “strong provinces,” and a limitation on the federal spending power that would authorize the provinces “to use the opting out formula with full compensation if they want to opt out of a new or modified federal program, in areas of shared or exclusive jurisdiction.”⁸

Harper used the open federalism slogan to great effect during the 2005/06 federal election campaign in a speech to the Québec City Chamber of Commerce on December 19, 2005, and the press conference following it. He promised his Québec audience that as Prime Minister he would fix the “fiscal imbalance,” recognize Québec autonomy, and give Québec a role in international bodies such as UNESCO.⁹

The Conservatives’ spending power promise reappeared in the 2007 Speech from the Throne as a commitment to introduce “legislation to place formal limits on the use of the federal spending power for new

shared-cost programs in areas of exclusive provincial jurisdiction. This legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs.”¹⁰ This is a somewhat scaled-down formulation from the 2005 Declaration, which seemed to offer an unconditional opting-out with compensation of any exercise, cost-shared or direct transfer to individuals, of the federal spending power, past or future, in areas of shared responsibility (e.g., pensions) or exclusive provincial jurisdiction.

In office, the Conservatives have exercised the federal spending power in the form of direct transfers to individuals with the inaccurately named Universal Child Care Benefit and student grants. The 2007 Throne Speech commitment was reaffirmed in the Budget Plan 2008, and a legislative proposal in some form was expected in the fall of 2008 in anticipation of the upcoming election.

An offer by the federal government to limit the exercise of its spending power in areas of provincial jurisdiction is, of course, not new. Louis St. Laurent first suggested it in 1956 in reaction to opposition by Québec’s Union Nationale government to federal social welfare initiatives after the Second World War. As passed by Parliament in March 1957, the *Hospital Insurance and Diagnostic Services Act* required the approval of a majority of provinces before Canadians would see any movement toward a Canada-wide system of hospital insurance. This effectively paralyzed the federal initiative until a new Prime Minister, Conservative John Diefenbaker, eliminated the requirement.

A constitutionalized limitation on the federal spending power was one of the five demands put forward in 1986 by Québec Intergovernmental Affairs Minister Gil Remillard for Québec acceptance of the *Constitution Act, 1982*.¹¹ The Meech Lake Accord contained a proposal to add a new clause as 106A to the Constitution Act of 1867, which would have read as follows:

The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive prov-

incial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.¹²

After the failure of Meech, the Conservative government of Brian Mulroney launched another round of constitutional change, this time proposing that federal cost-shared social program initiatives be subject to the approval of seven provinces representing 50% of the Canadian population, with non-participating provinces being eligible for “reasonable compensation” provided that they “establish their own programs meeting the objectives of the Canada-wide program.”¹³ In face of public opposition in English Canada, the final text of the Charlottetown Agreement reverted to the language of section 106A in the Meech Lake Accord.

After the defeat of the First Ministers’ proposals in the Charlottetown referendum and the near success of the 1995 Québec referendum on sovereignty, the Liberal government of Jean Chrétien pledged in the next Speech from the Throne that:

The Government will not use its spending power to create new shared-cost programs in areas of exclusive provincial jurisdiction without the consent of a majority of the provinces. Any new program will be designed so that non-participating provinces will be compensated, provided they establish equivalent or comparable initiatives.¹⁴

This commitment appeared in the 1999 Social Union Framework Agreement (SUFA), extended slightly to include block transfers as well as shared-cost programs. In exchange, all the provincial Premiers except that of Québec acknowledged that “the use of the federal spending power under the Constitution has been essential to the development of Canada’s social union,” and further, that “conditional social transfers have enabled governments to introduce new and innovative social programs, such as Medicare and to ensure that they are available to all Canadians.”¹⁵ SUFA actually picked up on the proposal in section 25 of the rejected Charlottetown Agreement in which the federal and provincial governments committed themselves to develop a framework “to guide the use of the federal spending power in all areas of exclusive provincial jurisdiction.”¹⁶

Constraints on the federal spending power are directed in part at preventing a repeat of the 1960s Medicare experience when the federal government dispensed with the notion that it had to wait until it had a provincial consensus before it could act. Instead, it simply offered to share the costs of any provincially-operated system of publicly administered health insurance that met certain minimum federal conditions, essentially those currently enshrined in the *Canada Health Act*, 1984. One by one, the provinces signed on and Canada today has a country-wide system of health insurance for medically necessary services.¹⁷

As the federal government has no legal power to force provinces to participate in federally-initiated social programs, the provinces could limit the exercise of the federal spending power simply by refusing to participate in federally-initiated social programs. The problem is that they cannot trust each other not to break ranks. From this perspective, pressuring the federal government to voluntarily limit its spending power is a way to enforce solidarity among the provinces. When combined with the formula requiring that the consenting provinces represent 50% of the population, as initially advanced in the 1991 federal proposals, it would become a means of enforcing the hegemony of the largest provinces. As Québec, on principle, does not recognize the legitimacy of the federal spending power, the population requirement effectively gives Ontario a veto. Under either the majority or the seven-plus-50 formula, Canadians would never have seen Medicare.

Québec's opposition to the federal spending power is long-standing and arises from its understanding that the division of responsibilities among governments in the *Constitution Act*, 1867, was designed to protect the social institutions of Québec. This is historically accurate: Canada would not have been created as a federal rather than unitary system of government had it not been for the existence of a large, French-speaking national minority centred in Québec. Confederation would not have happened if the 1867 constitution had not given jurisdiction over those matters thought at the time essential to the preservation of Québec culture to a legislature elected by a predominantly French, Catholic population. In contrast, the opposition of other provinces has generally been tactical as they temporarily ally with Québec

to wring concessions in the form of more money and fewer conditions from the federal government.

Provincial wariness of federally initiated social programs has grown as a result of unilateral federal cuts to social transfers to the provinces, which began as early as 1977 with the re-negotiation of the Established Programs Financing arrangements and extended through the 1995 federal budget. The historic opposition of Québec and the bad faith of successive Liberal and Conservative federal governments have created the conditions for right-wing calls to limit the federal spending power for ideological reasons.

In addition to the constitutional amendment in 1940 making Unemployment Insurance an exclusive federal power and the 1951 amendment making pensions a shared federal-provincial jurisdiction, the federal spending power was the main instrument for the construction of the post-war welfare state in Canada which guaranteed Canadians certain shared rights of social citizenship. Limiting the capacity of future governments to make use of it is entirely consistent with neoliberal objectives of either commercializing social welfare or off-loading responsibility for it onto families and charities.

Conservatives and federalist fundamentalism

The answer to the question posed earlier about whether or not the Harper Conservatives have a coherent vision of Canadian federalism is Yes, although their vision is a work in progress. It builds on the neo-liberal formula of symbolic recognition of Québec within the framework of provincial equality that was evident in the mega-constitutional proposals of the Mulroney government. The “new” Conservatives have elaborated this formula by recognizing the Québécois as a nation and embracing the language of provincial autonomy. Their vision is far more decentralizing with respect to social welfare than anything contemplated by a federal government since before the 1930s Depression.

In general, the Conservative view of the role of the state and of federalism supports the right-wing goal of rolling back social gains and reorienting the state to more closely serve the interests of capital. This does not preclude acting in a centralizing fashion when it comes to using

the power of the central Canadian state to harmonize the regulation of business, as seen in their promotion of a national securities regulator, or coerce those felt to be a danger to public order as they define it.

The starting point for Stephen Harper's vision of federalism is his fundamentalist neoliberal faith in private markets. He starts from the position that the role of the state, whether federal or provincial, should be a market-enabling one providing the legal framework for the operation of markets and eliminating obstacles to the free movement of capital, labour, goods, and services. Beyond that, the state should engage in the limited number of activities that cannot be provided by other institutions, including defence and criminal justice. For the most part, private institutions, whether markets or families, can provide for the well-being of individual members of society.

As outlined in the Conservative party's 2005 Policy Declaration, the role of government generally is to "i) protect the lives and property of its citizens; ii) ensure equality of opportunity; iii) foster an environment where individuals and private initiative can prosper; iv) ensure the security of our nation's borders; and v) provide services to Canadians that cannot be provided more efficiently and effectively by individuals or by the private sector."¹⁸

The Harper government's approach to the constitutional division of powers involves identifying the "core" responsibilities of the federal government and leaving as much else to the provinces (and through them to the market) as they can politically get away with. The articulation of the Conservative view of "core" federal responsibilities is found in their budgets' documents, with the most complete elaboration appearing in Finance Minister Flaherty's 2008 Budget Speech.¹⁹ While several "core" responsibilities are mentioned, the greatest emphasis is on two main categories: national defence and public security, and the economic union. Public security includes border security, emergency, and pandemic preparedness, and criminal justice. The economic union essentially encompasses measures to facilitate the free movement of capital, goods, services and labour. Specifically, it involves the promotion of a common securities regulator and international trade, although the Conservatives seem prepared to accept a very active international role for the provinces under their "autonomy" approach. One might think

that inter-provincial trade would also be a “core” federal responsibility, but at the moment the Conservatives seem to hope that other provinces will sign onto the bilateral Trade, Investment and Labour Mobility Agreement (TILMA) between British Columbia and Alberta.²⁰

The 2008 Budget Speech of Finance Minister Jim Flaherty names some other areas as core federal responsibilities, all of which are given an economic twist. Immigration, a shared constitutional responsibility with the provinces, is to be re-focused on the Temporary Foreign Worker Program and attracting skilled immigrants.

The Conservatives cannot avoid acknowledging federal responsibility for First Nations, given that “Indian and Indian Lands” are an exclusive federal responsibility. Flaherty’s stated aim is to shift the federal emphasis away from social services and toward skills training. In keeping with this, the 2008 Budget Plan indicates a Conservative desire to offload education and health services to provinces and territories through agreements involving Aboriginal and provincial territorial “partners.”²¹

Perhaps surprisingly, aspects of post-secondary education, specifically student aid and support for research, are defined as “core” federal responsibilities.

Starting from the premise of a very restricted role for the state, the Conservatives imagine that it is possible to return to a clear delineation of the responsibilities of each level of government. They espouse a Canadian version of the kind of constitutional originalism prominent in U.S. right-wing political thought. In the words of Lawrence Cannon, Harper’s Québec lieutenant, “our autonomy position as a political party is to respect the Constitution as it was written.”²²

From this perspective, nothing has changed since 1867 that should alter the division of responsibilities between the federal and provincial governments. But the *Constitution Act* of 1867 reflected a society in which the well-being of members of society was the responsibility of private institutions, whether the family or religious charities, and, if these couldn’t manage, perhaps local governments. The original constitution doesn’t mention social welfare programs, but instead talks about “charities, and eleemosynary institutions,”²³ a term that means “of the nature of alms, or almsgiving.” Legislative jurisdiction for these activities

was assigned to the provinces, along with everything else considered a matter of a “merely private or local nature.”²⁴

The Harper conservative view of the social role of the state harkens back to this mid-19th century view, and so it is not surprising that his government favours a strict interpretation of the original division of powers.

While most Québec nationalists would reject the Harper Conservatives’ conception of the state-family-market relationship, many are not uncomfortable with their view of the limited role for the federal government. The appeal in Québec of an “originalist” interpretation of the Constitution is that the 1867 allocation of responsibilities to provincial legislatures was directed at protecting the social institutions of a French-speaking Catholic society. These cultural protections are linked through the *Constitution Act, 1867*, to mid-19th century notions of the boundaries between the public and the private. At that time, the social institutions closely linked to the cultural survival of French Canada, including the family and the church and its charitable and educational institutions, were located in what was considered the “private sphere.” The provincial state in Québec, as in the other provinces, was expected to have a limited role in ensuring the regulatory framework for the activity of private social institutions.

The link between the “private sphere” and cultural protections for Québec allowed the architects of the Canadian state to reach a political accommodation with the French-speaking national community centred in Québec without having to acknowledge officially its existence by enshrining recognition in the constitution.²⁵ The national status of Québec society was made invisible through the device of assigning to the Québec National Assembly the same responsibilities as the other provincial legislatures.

It is this link between mid-19th century notions of the “private” and provincial powers that is the constitutional basis for the Harper government’s alliance with conservative Québec nationalists. At the level of the Québec state, this link is not recognized because the allocation of responsibilities to the provinces provided the Québec National Assembly with many of the powers required to redraw the boundaries between the public and the private. During the Quiet Revolution of the 1960s,

the Québec state took over direct responsibilities for education and social welfare activities that previously had been under the control of the Catholic Church. However, at the level of the country as a whole, this link is very real. It was the federal spending power that allowed post-Second World War Canadian governments to finesse the antiquated division of powers in the *Constitution Act, 1867* and lay the basis for a modern welfare state.

This does not mean, of course, that other provinces have not or cannot use their constitutional powers to redraw the boundary between the public and the private. Certainly Saskatchewan did this with public medical insurance. However, in today's world of heightened international competition, if all provinces opt to go it alone, the likely consequence will be pressures to lower standards to attract capital, with the result that there will be further erosion of the common standards of social citizenship.

Managerial federalism and the Liberals

If Conservatives can be seen as having a “hard” neoliberal approach to Canadian federalism, the Liberals in office during the 1990s typified a “soft” neoliberalism, albeit underpinned by the slashing and burning of the 1995 federal budget. During the Chrétien and Martin eras, the Liberals adopted a managerialist approach to federalism influenced by new public management theories that positioned the central Canadian state as the coordinator of a network of relationships among governments functioning as partners. National objectives for social programs were to be set through intergovernmental negotiations conducted at the executive level among First Ministers or Ministers responsible for social services.

The purposes of federal expenditures appeared in intergovernmental agreements rather than in statutes duly passed by the Parliament of Canada. Accountability was seen as flowing not from Ministers to Parliament, but directly to the public through annual reports that used performance indicators to demonstrate the progress of governments in implementing their commitments to each other. Legislatures at both the federal and provincial levels were effectively bypassed, with the feder-

al Parliament's role being reduced to approving the necessary expenditures of funds to underwrite the intergovernmental agreements.²⁶ The Québec government, which refused to participate in most agreements, was quietly accommodated through footnotes to agreements noting their lack of participation and affirming that they would nonetheless receive full compensation.

This elitist style of operating excluded legislatures from public debates on social policy and moved discussions entirely behind the closed doors of federal-provincial-territorial meetings. It seriously compromised accessibility and democratic accountability. It succeeded in confusing Canadians even further than they already were about the respective responsibilities of the different levels of government. By deferring to the provinces on the crucial question of Canada-wide objectives for federal social expenditures, the Liberals created the impression of an impotent federal government unable to provide leadership on matters of vital concern to Canadians.

The non-binding nature of the intergovernmental agreements made it easy for the Harper Conservatives to cancel the Kelowna Accord and the child care agreements as their first acts in office. Facing an opposition majority in the House of Commons that supported both agreements, the Conservative government would have been unable to reverse them so easily had the federal commitments been enshrined in legislation.

Solidarity and federalism: An alternative vision

In response to the hard and soft neoliberal approaches, equality-seeking organizations in Canada outside of Québec have begun to develop an alternative vision of Canadian federalism. The starting point for this vision is recognition of the national character of Québec society and the special responsibilities of the Québec National Assembly with respect to this society. The corollary of this is an appreciation that Québec will have a different relationship than the other provinces to the central Canadian state, particularly with respect to social programs.

This vision involves a rejection of the neoliberal formula of confining the recognition of Québec's unique society within the framework

of provincial equality (or provincial sameness). It affirms an ongoing responsibility of the central Canadian state for a shared social citizenship, while acknowledging the autonomy of Québec.

This formula presents more difficulties in theory than in practice for, to a great extent, it is how Canadian federalism has operated for the past half century. Since the mid-1960s, the Canada and Québec Pension Plans have co-existed happily, with the provisions of each being similar. Québec now operates its own parental insurance program which parallels and significantly improves upon, the parental benefits available under the federal Employment Insurance Program. Money to fund this program comes through a decrease in Employment Insurance premiums paid by Québec residents and the levying of a Québec premium.

The difference between these arrangements and what is proposed here is that the provisions in the CPP and Employment Insurance inserted to accommodate Québec are actually available to all provinces. The expectation was that only Québec would make use of the provisions, which is what happened. However, the decentralizing pressures of neoliberalism mean that they now provide openings for weakening the social entitlements of all Canadians. (That the right-wing is aware of these openings is seen in the infamous “Firewall” letter signed by Stephen Harper along with other prominent Alberta neoliberals that called, among other things, for Alberta to withdraw from the Canada Pension Plan, resume provincial control for health care policy, and transform federal social transfers to the provinces into tax points. As the letter stated, “If Québec can do it, why not Alberta?”)²⁷

In contrast, under this alternative vision, the national status of Québec society would be explicitly and publicly recognized and not achieved by stealth through deals concluded at senior bureaucratic and political levels.

This alternate vision has been implicit in the recognition for some time of Québec’s right of self-determination by many labour and left organizations. It moved from the realm of abstract and usually quietly expressed principle and entered into public debate in English Canada in the form of the “three nations” position advanced by the National Action Committee on the Status of Women during the debate around the Charlottetown Agreement. It is reflected in the Québec exemption

clause in the proposed *Early Learning and Child Care Act* (Bill C-303) put forward by the New Democratic party and which was supported by the Child Care Advocacy Association of Canada, labour unions, and women's organizations.

A vision of Canadian federalism that de-links the recognition of the national character of Québec society from the framework of provincial equality (provincial sameness) creates the conditions for an alliance between organizations supportive of social rights in Québec and the rest of Canada. To some extent, this was evident in the combined support by opposition parties in the House of Commons for Bill C-303, which in effect saw the Bloc Québécois support the exercise of the federal spending power with conditions attached in an area of provincial jurisdiction. Similarly, in response to the 2007 Conservative government's Speech from the Throne, a coalition of Québec women's organizations called on the opposition parties in the House of Commons to push for the introduction of a Canadian system of child care services accompanied by the transfer to Québec of funds for its system.²⁸

The solidarity achieved around the child care bill demonstrates that unity on social programs can be achieved between progressive groups in Québec and the rest of Canada, despite the obstacles posed by the current constitutional framework. Such solidarity is a precondition for making progress on social rights at a Canada-wide level. Ultimately, however, the *Constitution Act, 1867*, is too antiquated a framework to meet the aspirations of either the people of Québec or the rest of Canada.

In particular, the links between 19th century notions of the private sphere, the allocation of responsibilities among governments, and the accommodation of Québec are too strong to suit the needs of a 21st century country. At some point, formal amendment to that document will be required to constitutionalize the recognition of the national status of Québec society and the specific responsibilities of the Québec National Assembly related to this. Until then, progressive Canadians will have to mobilize against right-wing initiatives around federalism as part of the overall fight against neoliberalism.