



### **Social Policy and Intergovernmental Relations in Canada: Understanding the Failure of SUFA from a Quebec Perspective**

by Joseph Facal

April, 2005

Public Policy Paper 32

\$5.00; ISBN# 0-7731-0523-9



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**Social Policy and Intergovernmental Relations in Canada:  
Understanding the Failure of SUFA from a Quebec Perspective**

*SIPP Public Policy Paper No. 32  
April 2005*

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ISBN# 0-7731-0523-9  
ISSN# 1702-7802

The Social Union Framework Agreement (SUFA) was signed in February 1999 by the federal government, nine provinces and the territories. Only the Quebec government refused to endorse SUFA. To this day, SUFA is the only nonconstitutional agreement attempting to clarify the respective roles of federal and provincial governments in the areas of health care, social services, post-secondary education, social assistance and training. It grew out of a concern to limit the federal spending power in areas of exclusive provincial jurisdiction, ensure adequate, stable and sustainable funding for social programs, prevent duplication and overlap, accentuate transparency and public accountability, and manage intergovernmental disputes.

The first section of this paper recalls the main events that led to the signing of SUFA from a mainly Quebec perspective. The second section compares the content of SUFA with the consensus positions elaborated by all provinces during the negotiations leading to the signing of the final agreement on 4 February 1999. The third section attempts to explain the position of the government of Quebec during the SUFA process in light of its traditional demands and historical experience of Canadian federalism. The fourth and final section assesses developments since the signing of SUFA and evaluates what the future might hold in store in the area of social policy as seen from the perspective of federal-provincial relations.

### **What SUFA Was Meant To Be**

The Chrétien government was first elected in 1993. Its 1994 budget was a ‘business-as-usual’ budget. But hostile reactions to it and the collapse of the Mexican peso led Jean Chrétien and Paul Martin to aggressively tackle the federal deficit in the 1995 budget. Ottawa reviewed all spending programs in its own areas of jurisdiction, but it also severely cut its transfer payments to the provinces. The replacement of traditional transfer mechanisms with the new Canada Health and Social Transfer (CHST) in the 1995 federal budget was accompanied by funding cuts of six billion dollars over two years for health care, social services and post-secondary education, which amounted to approximately 5% of total annual provincial spending. Obviously, Ottawa felt it was less damaging to cut transfers to the provinces than to cut in other more politically explosive areas such as Aboriginal programming, old age pensions or unemployment insurance. Constitutionally responsible for the delivery of these services, the provinces were forced to assume a much larger share of the cost of these programs at a time when most were already saddled with severe deficits and exploding health care expenditures. Thus began efforts on the part of the provinces to find common-ground positions on the need to clarify responsibilities in

the field of social policy, reduce program duplication and overlap, and constrain the federal spending power.

Provincial efforts progressively intensified as Ottawa gradually regained control of its finances and used its new spending muscles to launch one controversial initiative after the other in areas under provincial jurisdiction. The 1997 federal budget gave birth, for instance, to the Canada Millennium Scholarship Fund, the Canadian Foundation for Innovation, the National Child Benefit, and the Health Transition Fund. In other words, the federal government decided to make itself more visible and influential through programs of direct funding to individuals and institutions in areas of provincial jurisdiction, instead of simply restoring funding to pre-1995 levels or vacating room through tax-point transfers to allow provincial government to raise more revenues through tax increases.

The government of Quebec did not participate actively in interprovincial talks from 1995 to mid-1998 because other provinces were not yet ready to agree to its basic demand: recognition of the unconditional right to opt out with full financial compensation for any province wanting to fully assume its responsibilities in areas of exclusive provincial jurisdiction. This had always been a demand of all previous Quebec governments, irrespective of their political obedience and based on a strict reading of the division of powers enunciated in the 1867 constitution. At a meeting of all provincial and territorial leaders held in Saskatoon in August 1998, other provinces finally agreed to this fundamental Quebec demand. The key excerpt of their consensus reads as follows:

Premiers emphasized that the flexibility afforded to provinces/territories through the ability to opt out of any new or modified Canada-wide social programs in areas of provincial/territorial jurisdiction with full compensation, provided that the province/territory carries on a program that addresses the priority of the Canada-wide program, is an essential dimension of the provincial/territorial consensus negotiating position ( The Saskatoon Consensus, 17<sup>th</sup> paragraph, 1998).

Thus was born a provincial common front based on what came to be known as the Saskatoon consensus. It must be noted, though, that the Quebec government was, from the start, under no illusions as to the solidity of this common front. Despite this major Quebec gain, another section of the Saskatoon document made it clear that no element of the Framework Agreement was agreed to until everything was agreed to.

Just four days before the fateful signing of SUFA by Ottawa and all provinces except Quebec, a key meeting of all provinces in Victoria (B.C.) on 29 January 1999, reaffirmed the provincial common front born in Saskatoon in August 1998. Titled *Securing Canada's Social Union into the 21<sup>st</sup> Century*, the Victoria document, which supposedly reflected what was still the common position of all provinces, highlighted among other points:

- recognition that provinces have primary constitutional responsibility for social programs;
- recognition of the importance of clarifying the roles and responsibilities of each order of government and of avoiding overlap and duplication;
- recognition of the right to opt out with full financial compensation for all new or modified Canada-wide programs and to submit the launching of any of these programs to the consent of a majority of provinces;
- recognition of the importance to ensure stable, predictable and adequate financial arrangements restored at the pre-cuts levels and valid for a five-year period;
- recognition of the commitment to eliminate unreasonable barriers to interprovincial mobility while also maintaining the ability of governments to pursue legitimate public policy goals; and,
- recognition of the necessity to establish a dispute-resolution mechanism involving when necessary recourse to a third party.

As it turned out, during unofficial negotiations with the federal government in the days prior to 4 February 1999, all provincial governments except Quebec made a number of key concessions, most notably on the opting-out provision, and finally signed with Ottawa an agreement which was much closer to the federal position than to the provincial one born in Saskatoon and reiterated in Victoria. It was thus without the signature of the government of Quebec that SUFA came into existence. For the record, these were the exact positions of Quebec during the 4 February 1999 meeting at 24 Sussex Drive between Prime Minister Jean Chrétien and his provincial counterparts when SUFA was signed without Quebec, as taken straight from the briefing books of the Quebec delegation:

#### *Roles and Responsibilities*

- a) A fundamental principle of the agreement must be the recognition of the primary responsibility of the provinces, under the constitution, for the elaboration of social policy and the delivery of social programs.

### *Federal spending power*

- a) The Saskatoon consensus must be viewed as an important compromise for Quebec.
- b) The opting-out provision with full financial compensation must be applied to direct transfers to individuals and organizations as well as modified social programs.
- c) The federal commitment on the spending power is limited only to new Canada-wide initiatives resulting from conditional transfers to the provinces.
- d) The federal proposal makes thus possible a repetition of the Millennium Scholarship scenario.

### *Funding*

- a) There is a need for the federal government to formally make a commitment not to reduce the level of its contributions to social program funding without three years' prior notice. Moreover, it must give priority to re-establishing funding through the Canada Health and Social Transfer (CHST) to pre-1995 levels and take into account cost increases in the health care system.

### *Mobility*

- a) Quebec is prepared to commit itself to abolishing unreasonable barriers.
- b) Quebec is prepared to implement within one year an internal process to examine potential barriers to mobility and to produce and make public a report on its finding.
- c) The comprehensive commitment and examination process must take into account the notions of "reasonableness" and of "legitimate public-policy objectives".
- d) Quebec is not prepared to abolish within three years all barriers to mobility as well as make specific commitments on university quotas and differential tuition fees.

### *Accountability*

- a) Each government must report to its taxpayers on the assessment and results of its social programs.
- b) Quebec is firmly opposed to the development of comparative results indicators through which the federal government wishes to compare the provinces, especially in the health sector, without taking into account specific conditions in the provinces, their health care systems and financing capacity.

### *Dispute settlement procedure*

- a) Quebec agrees with the intervention of a third party responsible for making recommendations in a non-binding report to the governments in question. The report should be made public if the dispute persists following the mediator's intervention.
- b) While Quebec has always refused to recognize the *Canada Health Act*, it believes that a joint interpretation of the legislation would be preferable to the current unilateral federal interpretation of it.

All along, the government of Quebec knew that participation in a fragile provincial common-front was a risky course of action, but it reasoned that non-participation would not have been a better option. It would have left the Quebec government with no possibility to influence the process and vulnerable to political attacks on the home-front that it was practicing a futile and irresponsible empty-chair policy.

### **From Saskatoon To 24 Sussex Drive: Light Years Away**

Though it is a non-legally-binding administrative agreement only valid for three years and not a constitutional accord, SUFA was seen in Quebec at the time as a major breakthrough for the federal government. Not only did it break the Saskatoon interprovincial consensus and isolate Quebec, but it clearly recognizes most of the fundamentals principles and goals held by the federal government during the negotiation process. Most crucially, from a historical point of view, it is to our knowledge the first time ever the provinces officially acknowledged and therefore gave political legitimacy to the federal government's spending power in areas of exclusive provincial jurisdiction, without succeeding in limiting its use in any significant way nor obtaining any other substantial concession in return. It is but a slight overstretch to say that the distance between the Saskatoon interprovincial consensus and SUFA can be measured in light years. A leading Quebec scholar in this area, Alain Noël, wrote:

More importantly, the Framework Agreement once again isolates Quebec, confirming the ability and willingness of the other governments to define and redefine the country without seeking the approval of the Quebec government (or even the official opposition) and without recognizing the distinctiveness of Quebec society. (Noël, 2000, p. 9)

Immediately after the signing of SUFA, the government of Quebec asked seven reputed Quebec academics to study the agreement from the twin points of view of Quebec's historical positions and the province's previous positions as spelled out in the Saskatoon and Victoria

documents. In the most sweeping of those studies, political scientist Alain Noël makes three major points. He first shows how SUFA turns upside down the provincial point of view regarding the status of the different governments:

Rather than recognizing the provinces' primary responsibility for social policy, the Social Union Framework Agreement simply evokes the respect of each government's "respective constitutional jurisdictions and powers." It is no longer a question of clarifying roles and avoiding duplication and overlap. Rather, the purpose is to "publicly recognize and explain the respective roles and contributions of governments". Far from recognizing provincial primacy, the Framework Agreement in fact affirms and highlights the federal government's role. (Noël, 2000, p. 15)

He then goes on to show, through a detailed reading of the agreement, how SUFA contains a number of passages depicting the provinces as subordinate governments always on the verge of nefarious behaviour and therefore requiring adult federal supervision.

The second major point Noël makes is that SUFA contains provincial and territorial "explicit and almost unrestricted recognition of the legitimacy of the federal spending power in fields of provincial jurisdiction" (Noël, 2000, pp. 11-12). Though the federal spending power has no clear and well-defined constitutional foundation, SUFA views it as "essential" for pursuing "Canada-wide objectives" and says it is so "under the constitution". Nowhere does SUFA recognize that social policy is in most instances an area of exclusive provincial responsibility, but instead calls on the governments to act "within their respective constitutional jurisdiction".

His third major point is that the federal spending power is almost unrestricted in SUFA. Ottawa pledges not to initiate new transfers to provinces without the consent of a majority of provincial governments, but a majority can now mean as little as six provinces accounting for 15 per cent of Canada's population, well below the traditional constitutional threshold of seven provinces representing 50 per cent of the general population. Even more important, these minimal, self-imposed constraints only apply to new transfers to provinces, which have not been Ottawa's preferred vehicle for years. Direct transfers to individuals and organizations, which bypass provincial governments, have been Ottawa's basic approach to social policy funding for years and SUFA makes sure these can go on unabated.

From these three fundamental observations, Noël goes on to show how SUFA contains a number of specific points all seeking to define a Canada-wide perspective with little regard for regional or cultural diversity and provincial autonomy. He sums it up this way:



Subordinate role for the provinces; strict mobility rules; lack of commitment regarding the sufficiency, stability and predictability of program financing; weak dispute-resolution mechanisms; nearly virtual controls on the federal spending power: in all respects, the Social Union Framework Agreement falls far short of the proposals jointly elaborated by the provinces since the publication of the December 1995 report. (Noël, 2000, p. 17)

In another study examining more specifically the issue of mobility in SUFA, constitutional law professor Jacques Frémont, from the Université de Montréal, argues that the provinces agreed to impose upon themselves mobility constraints which go beyond current standards and practices and beyond the requirements of the constitution. Whereas the provinces wanted initially to get rid of “unreasonable” barriers while permitting governments to pursue legitimate policy objectives, SUFA inverts the burden of proof, depicts almost all barriers as unjustified and calls on the provinces to eliminate them within three years. He concludes:

[...] it seems evident that the differences between the provision adopted in Victoria [concerning mobility] and that of the Framework Agreement are substantial. From a provision that essentially confirmed the applicable law, the parties chose to adopt a clause that imposes obligations and serious constraints on the signing governments. Note that these obligations affect provincial governments considerably more than they do the federal government, because ultimately the provinces have jurisdiction over these areas. Moreover, the only clause that directly refers to federal jurisdiction, that relating to the mobility rights of Aboriginal Canadians, has simply been set aside. In addition, as we have seen, the Framework Agreement intentionally changed the logic on which the standard is founded. In short, a provision that respected what the provinces had granted in the past has been transformed into a clause that imposes several changes on the new understanding of the concept of freedom of movement within Canada. (Frémont, 2000, p. 76)

The same reversal of logic in favour of the federal government is also noted by law professor Ghislain Otis from the Université Laval with respect to SUFA’s provisions regarding accountability. Ottawa gains increased room to maneuver in two ways. First, it will be able to impose unilateral changes to current programs by simply giving notice. Second, should a province decide to opt out of a new federal Canada-wide initiative, it will still have to commit itself to respect the accountability framework defined by Ottawa and a majority of provinces. He writes:

In short, it is undeniable that the change in positions from the Saskatoon consensus to the Framework Agreement saw the provinces soften their stand on several fronts in favour of the federal point of view. The need to enhance accountability through a systematic reduction of overlap has largely faded. The provinces’ freedom to act independently on program evaluation was not accepted; a province must bind itself to an accountability framework imposed by the majority if it wishes to avoid participating in a new Canada-wide program without depriving its population of federal transfers; and Ottawa is under practically no obligation to account for changes in existing programs. (Otis, 2000, p. 119)

Chapter 6 of SUFA, which deals with dispute avoidance and resolution, is no exception either. It contains no mechanism forcing the federal government to abide by its own commitments and only identifies areas of exclusive provincial jurisdiction as areas of collaboration between Ottawa and the provinces. Law professor Guy Tremblay notes:

The cooperative federalism introduced by the agreement and its dispute resolution mechanism consists of permitting the federal government to cooperate in provincial sectors. The federal sectors remain a private preserve that is jealously retained by the dominating doctrine, firm precedents, and Ottawa's legislative, governmental and administrative policies. (Tremblay, 2000, p. 207)

In other words, whichever way one looks at it, SUFA's provisions either fall short or are a complete logical reversal of the positions elaborated by the provinces since December 1995 and laid out in the Saskatoon and Victoria documents. This conclusion was also reached in a very critical assessment of SUFA by the C.D. Howe Institute aptly titled *The Social Union Framework Agreement: Too Flawed to Last* (Robson and Schwanen, 1999) which identifies the same basic problems highlighted by the scholars from Quebec.

How can one explain the rapid collapse of the provincial common front and the endorsement by their governments of positions they had strongly rejected up to then? By the same reasons that provincial common fronts have almost always collapsed in Canada. Just days before the signing of SUFA, the federal government, using both stick and carrot, opened a second front, insisting it wanted to sign a separate agreement on health care funding and hinting that it might be ready to wage ideological war and accuse the provinces of wanting to drastically curtail social programs (Richards, 2002). Cash-strapped provinces were mainly swayed by the lure of money, purely and simply:

[...] it is clear that the lure of money swayed the nine provinces that signed the deal away from their previous unanimous stance in favour of restraining the spending power. (Robson and Schwanen, 1999, p. 3)

Comments by provincial premiers on the eve of the signing of SUFA on 4 February 1999 leave no room for doubt. Ontario Premier Mike Harris declared:

We all know what we want. We want more money. We want a restoration of our health-care money from Ottawa. I think every one agrees essentially, and if we can keep the constitutional lawyers away from Ottawa on Thursday, we'll have a deal<sup>1</sup>.

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<sup>1</sup> Comment made on February 2, 1999, quoted in Greenspon, E. and Fraser, G., "PM Find's More Cash to Woo Provinces: On Eve of Talks with Premiers, He Prepares to Sweeten Health Offer", *Globe and Mail*, February, 3, 1999, p. A1.

B.C. Premier Glen Clark was equally forceful in defense of his previous positions:

I'm taking a different approach than on some issues and trying to be as constructive as I can. Substantially, I'll be supporting the federal government. I'm not going there with a big shopping list of demands<sup>2</sup>

One must keep in mind that not only were the provinces under serious financial strain, but provincial common-fronts in Canada have always been marriages of convenience between very unequal partners. Poor provinces have historically supported centralization since it generally means more federal money. Although there is no ideological uniformity in English Canada, public opinion also tends to favour a strong central government. Furthermore, when the Quebec government is one that promotes sovereignty, all other provincial governments are potentially vulnerable to the charge of being disloyal to Canada if Quebec is seen as one of the main players in a provincial common-front. All this drastically reduces provincial bargaining power and makes it easy for the federal government to split provincial common-fronts by pitting the smaller provinces against the larger ones. Traditionally, only Quebec, Alberta and, to a lesser extent, British Columbia and Ontario have had the clout needed to be strong advocates of a strict reading of the division of powers spelled out in the Canadian constitution.

### **Quebec's Experience Within The Canadian Federal System**

To many observers, particularly in English Canada, the refusal of Quebec to sign SUFA was directly linked to the sovereignist stance of its government at the time. This overlooks the fact that the two other parties in the Quebec National Assembly, the Liberal Party and the Action Démocratique, also rejected it. Liberal Party and Official Opposition leader, and now Quebec Premier, Jean Charest, said precisely that had he been at the head of the Quebec government at the time, he would not have endorsed SUFA either. To quote Noël, St-Hilaire and Fortin:

For Quebec governments, intergovernmental relations are something akin to foreign policy. A clear and consistent line runs from one government to the next, which defines the broad outlines of what can and cannot be done or accepted. Radical turnarounds are generally not possible. If anything, a federalist government led by someone suspected of not having a strong anchoring in Quebec politics may be even more constrained by the official line than a government committed to Quebec sovereignty and therefore seen as less likely to yield on important principles. Quebec governments will change, but Quebec society, with its demands and expectations, will remain, to a large extent, the same. (Noël, St-Hilaire and Fortin, 2003, p. 18)

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<sup>2</sup> Comment made on February 2, 1999, quoted in Greenspon, E. and Fraser, G., "PM Find's More Cash to Woo Provinces: On Eve of Talks with Premiers, He Prepares to Sweeten Health Offer", *Globe and Mail*, February, 3, 1999, p. A1.

Why is that and what light does it shed both on the Quebec's government position during the SUFA talks and on the Quebec National Assembly's unanimous rejection of their outcome? This requires a clear grasp of the broad common reading all Quebec governments have had since 1867 of how and why the Canadian federal system came into being and what Quebec's experience of it has been.<sup>3</sup>

In theory, federalism is supposed to be a form of political organization whereby several member states choose to come together and delegate part of their sovereignty, hence part of their responsibilities, to a central federal state. Many feel that a federal system can enable different communities to coexist within a common political entity because it can be flexible and can adapt to the specific features of its components. Let us now move beyond the theoretical principles of abstract federalism and examine Quebec's experience within the Canadian federal system with reference chiefly to three points that are often associated with federations: respect and promotion of the identity of its components, flexibility and adaptation to specific features and, finally, respect for areas of jurisdiction in relations between governments.

We need first to take into account the following basic premise: Quebec is the only society with a French-speaking majority and a well-defined territorial base on the North American continent. This society has always been aware of its specificity, and has always claimed a status and powers enabling it to preserve and strengthen its identity.

Initially a French colony and then part of the British Empire following a military conquest, Quebec society existed well before modern Canada was created in 1867. It was already distinct at the time with its French-speaking majority, its culture, its civil law tradition, and its own institutions. It was as this kind of society that Quebec signed the 1867 constitution, on the basis of what it saw as a pact between two founding French- and English-speaking peoples, two nations, thereby establishing a federal system in which the two orders of government would be, so it was thought, sovereign in their respective spheres of jurisdiction. Quebec felt it would then have the leeway it needed to preserve its identity (Silver, 1997).

Quebec's desire to maintain its identity was asserted even more intensely in the early 1960s when a modern Quebec state emerged during the period of the Quiet Revolution. Gradually, the notions of a *Québécois* people and of a Quebec nation, both used indistinctly, took

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<sup>3</sup> The following section draws extensively on segments of a speech made by the author on November 10, 2000 in front of members of the diplomatic corps when he was Quebec's Minister for Intergovernmental Affairs.

clearer shape and the Quebec state was confirmed in its responsibility of protecting and developing the identity of this Quebec society (McRoberts, 1993).

Meanwhile, another vision of identity emerged in the rest of Canada, promoted among others by Pierre Elliott Trudeau and ultimately entrenched by him. This was the vision of “One state, one nation”, based no longer on the dual vision on the 1867 pact between two founding nations but on multiculturalism and the primacy of individual rights. This vision of Canadian identity has given the federal government and the federal judiciary an ever-expanding role and has driven Canada into becoming an increasingly less federal and more unitary state. The fundamental problem lies in the fact that these two visions have progressively become more and more incompatible and have experienced growing difficulty in cohabiting within the same political system (McRoberts, 1997).

Quebec’s vision has traditionally implied a quest for more political autonomy flowing from a status based on special responsibilities relating to its identity as part of an asymmetrical federal system. The Canadian vision, based on multiculturalism, implies an omnipresent central government and equality between the provinces, thus ruling out any kind of recognition of a special status for Quebec (Gagnon, 2003).

The unilateral repatriation of the 1982 constitution without Quebec’s consent was the most striking episode of the clash between these two visions of identity. The Canadian government imposed on Quebec a substantial reduction in the powers of Quebec’s National Assembly. Quebec had imposed on it an amending formula that has turned out to be a constitutional straightjacket. Any change requires unanimity or the support of at least seven provinces making up over half of Canada’s population. The unilateral repatriation was viewed in Quebec as a rupture of the dual pact of 1867 between the two founding nations. No Quebec government, either federalist or sovereignist, has since signed the 1982 constitution nor seems close to signing it (Tully, 1999).

Since this episode, all attempts at constitutional reform to bring Quebec back into the constitutional fold have ended in failure. These attempts all shared the same central point: recognition of Quebec’s distinct character. The death of the Meech Lake Accord and the failure of the Charlottetown Accord in the early 1990s can be largely explained by Canada’s inability to recognize the existence of the Quebec people in the constitution and their specificity.

From a Quebec perspective, the only constitutional arrangement which could accommodate its specificity in ways which a Quebec government could probably sell to the people of Quebec would be an explicit acknowledgment by the federal government and all other provincial governments of a province's exclusive jurisdiction over the public use of language as the Pépin-Robarts Commission had proposed in 1979. But Trudeau's success in turning language into a justiciable minority right in the minds of Canadians and the failures of Meech and Charlottetown have closed that avenue for the foreseeable future. The concept of a distinct society is today a taboo subject in English Canada. Even a symbolic recognition of Quebec's specificity has become unacceptable in the eyes of the rest of Canada. Even more taboo is recognition that Quebec should be granted special responsibilities that relate to its specificity. (McRoberts and Monahan, 1993).

Why is Canadian federalism so unable to make allowance for the recognition of the Quebec nation? Essentially it is because of the clash between those two visions of identity and, consequently, of the impossibility of reconciling, on the one hand, Quebec's quest for autonomy within asymmetrical federalism and, on the other, the emergence of an omnipresent central government ruling over provinces that are perceived as equal to each other. The path to constitutional reform is thus blocked.

This lack of recognition of the national character of Quebec society has led to an absence of flexibility by the federal system with regard to Quebec's special nature, which is also one of the most constant and striking aspects of Quebec's experience within Canadian federalism. Indeed, the principle of equality of the provinces implies an impossibility of any kind of recognition of special status for Quebec, even at the administrative level, because such an opening would be perceived in the rest of Canada as preferential treatment for Quebec.

In the case of administrative agreements, the principle of equality of the provinces translates itself in a clause for so-called equality of treatment between the provinces. This clause has a levelling effect. Any condition offered to one province must be offered to all provinces, thus implying a reopening of existing bilateral agreements. In practice, the federal government establishes a standard in its first bilateral agreement with a province, which will then be offered to all other provinces. Because the other Canadian provinces do not wish as much decentralization or as many additional responsibilities, Quebec is trapped by this levelling down to the lowest common denominator. It cannot hope to get more responsibilities or leeway than

whatever Ottawa has agreed to give to the other provinces. Richard Simeon had already detected this dynamic in federal-provincial relations back in 1972. One would be hard-pressed to find a clearer example of this kind of levelling federalism, which is unable to take Quebec's specificity into account, than the outcome of the SUFA talks.

This leads to the third point in analyzing Quebec's experience within Canadian federalism: respect for areas of jurisdiction in relations between governments. The spending power that the federal government has progressively assumed in areas of provincial jurisdiction has distorted the division of constitutional responsibilities between the governments. For taxpayers, this means costly administrative overlaps and duplications being piled on top of an already heavy tax burden. In a scathing attack on the federal spending power as exercised in Canada, law professor André Tremblay summarized its various negative consequences:

- Lack of compliance with the 1867 constitution because exclusive provincial powers have become competitive powers subject to federal standards.
- Monitoring of provincial powers and orientation of their applications by the federal government.
- Corruption of Canadian federalism in which the federal government is now established as the upper, incumbent or unitary government.
- Impediment to the introduction of asymmetrical and flexible federalism, because spending power is used as a policy standardization instrument (especially in social matters) and to deny Quebec's distinctiveness.
- Increased legislative centralization, subordination of the provinces and decline of provincial autonomy.
- Sterilization of shared legislative jurisdiction.
- Multiplication of all kinds of programs with overlap, contradiction, piggybacking, conflict and wasted money and energy.
- Obligation that the provinces change their priorities and readjust their programs.
- Obstacles to efficient provincial planning and budgetary control, especially when the federal government unilaterally opts out of program funding.
- Disincentive to fiscal responsibility and government accountability because in many cases it is impossible to know who is responsible for a government initiative or action.

- Negation of the subsidiary status principle, which states that the government that is closer to the citizens is in the best position to deal with problems.
- Lack of provincial faith in the written constitution because federalism based on spending power is outside the constitution and outside judicial supervision.

(Tremblay, 2000, p. 15)

This federal spending power or, to be more precise, the particular way it is exercised in Canada can also be read as both a symptom and a consequence of a much deeper problem: the fiscal imbalance prevailing between the financial resources and respective responsibilities of governments in Canada. More specifically, the division of tax resources between the two orders of governments is not proportional to the division of expenditures that they must bear because of their respective constitutional responsibilities. The provinces bear the major portion of social program costs but the federal government has a larger share of the tax resources to pay for them (Commission on Fiscal Imbalance, Quebec, 2002).

This fiscal imbalance has systematically worked to the federal government's benefit over the years. It originated in the federal government's refusal to give back to the provinces the tax room that the provinces had lent it to pay for the war effort during World War II. After the war, instead of letting the provinces levy their own taxes to pay for their programs, the federal government preferred to give them cash transfers. This fiscal predominance of the federal government has helped encourage an increase in federal spending power in areas that come under exclusive provincial jurisdiction (Banting, 1995).

This fiscal imbalance also aggravates needlessly the total tax burden on citizens. The federal government levies taxes that exceed what its constitutional responsibilities call for, hence the huge federal surpluses of the last few years. This exceeding fiscal space should normally be available for the provinces to levy taxes to pay for their own programs, but it is not. The provinces are then caught in a dilemma. Either they abandon to the federal government a responsibility that duly belongs to them, or they cut their own social programs and beg for federal funding, or they have no choice left but to raise their own taxation levels if they want to keep exercising their own responsibilities. Successive Quebec governments have many times denounced this situation, and have demanded that Quebec be able to have all of the tax resources it needed to pay by itself the programs that come under its exclusive jurisdiction instead of getting funding from the federal government (Secrétariat aux Affaires intergouvernementales



canadiennes, 1998). All provinces except Alberta are caught in this stranglehold. The only weak point in the provincial case, in our opinion, is not having resisted the temptation to score political points at home by promising to lower taxes just when the provinces could least afford it due to rapidly rising expenditures and aggressive federal intervention in areas of provincial jurisdiction.

Some of Canada's most eminent scholars have also pointed out that provinces want to have it both ways to a certain extent (Burelle, 2000; Richards, 2002). How can the provinces accept equalization payments and, at the same time, refuse to submit to a set of standards that would ensure a reasonable level of comparable social programs across Canada? After all, section 36 of the *Constitution Act, 1982* says that the federal and provincial governments are committed to "promoting equal opportunities for the well-being of Canadians" and "provide essential public services of reasonable quality to all Canadians". The traditional Quebec position has always been and remains that Quebec did not sign the *Constitution Act, 1982* which was imposed against the will of the Quebec National Assembly, while Quebecers still send their tax dollars to Ottawa.

Theoretically, there are three ways to ensure the delivery of reasonably comparable services across the land in a federation where jurisdiction over social policy belongs to the provinces. The first way would be for the federal Parliament to define national standards and to order the central government to make compliance with these a condition for federal funding. The second way would be for provincial governments to impose upon themselves common standards before the federal government does it for them. The third way would be for the federal and provincial partners to jointly establish these common objectives and minimum standards. This last option was the one advocated by André Burelle in his seminal 1995 essay *Le mal canadien* in which he pleaded for recognition of a degree of asymmetry for Quebec within a supple but coherent Canadian social union.

The first option makes a mockery of the federal principle of non-subordination of one government to the other. What would be left of a province's right to exercise its sovereign powers? One can also make the case for the weak legitimacy of national standards which would be imposed during or immediately following an era when the federal government drastically reduced its share of the funding of these programs.

The second option also raises numerous problems. Provincial governments have never been successful in finding solid common ground because of their huge differences in interests. They could only agree on such low common standards that Ottawa would undoubtedly consider

these completely insufficient. Even when provinces do agree, Quebec has had a long and very negative experience of provincial common-fronts, which have unravelled in a matter of hours. And who would have final authority in case of disagreement over the interpretation of those common standards? And what would happen if there is no agreement on common standards? What margin of maneuver would Quebec have to maintain distinct policies such as low tuition fees at the university level or seven-dollars-a-day universal daycare? If final authority rests with the federal government even in areas of exclusive provincial jurisdiction, this flies in the face of classic federalist philosophy.

As for a process of codecision, there is so much bitterness, distrust, and venom at the present time that even Burelle admits it would take a “revolution in attitudes” (Burelle, 2000, p.104). Even then, he doesn’t seem to be in the least troubled by the fact that codecision would be limited, if it were even possible, to areas of exclusive provincial jurisdiction. One is tempted to ask mischievously why there are not such noble offers of collaboration from Ottawa in areas of exclusive federal jurisdiction. If the prevailing belief in political circles outside of Quebec is now that the strict constitutional division of powers is hopelessly *passé*, the theoretical course of action would be to acknowledge it and amend the Constitution. If this is viewed as practically impossible, it just shows how dysfunctional Canadian federalism has become and how distant from each other the two solitudes still are.

On the basis of our three initial areas of analysis – respect for identities, adaptation to special characteristics, and respect for jurisdictions in relations between governments – it is therefore not unreasonable at all to conclude that Quebec experience with federalism as practiced in Canada has thus far been very problematic, principally because of the refusal by the central government and the other provinces to recognize the national character of Quebec society and the special responsibilities borne by the government that has been empowered to meet the aspirations of its people.

### **More Of The Same In The Future?**

In no way, shape or form can one conclude that SUFA has stimulated fruitful federal-provincial collaboration in social policy nor is indicative of a new era of cooperative federalism on any other count. The federal government has continued to introduce social policy initiatives in areas of exclusive provincial jurisdiction through the use of its spending power and without consultation or approval of the provinces. One can cite here the National Action Plan for

Children and Families, the National Initiative on Homelessness, the Federal Strategy on Disabilities, and the pilot projects for older workers among many others. As for the 2000 and 2003 health accords, they did not even refer to SUFA and came out of a process that ended with a ‘take it or leave’ stance from Ottawa.

This has led some scholars, like Courchene (1998), to suggest that the provinces should be more imaginative and find new ways to play the federal-provincial game in the field of social policy. But this is easier said than done. Innovative social policy in modern, complex societies which recognize universal entitlements is extremely costly and all provinces except Alberta are cash-strapped. Their interests are so diverse they can hardly find significant common ground. Facing them is a federal juggernaut with huge financial clout, a clear view of what it wants to accomplish, and strong public support everywhere except in Quebec.

In April 2003, Quebecers elected a new federalist government, headed by Jean Charest, which has promised to revise SUFA and initiate negotiations on fiscal imbalance. Ottawa countered by simply denying the existence of fiscal imbalance and thus the necessity to negotiate (Cornellier, 2003, p. A1). Jean Charest did succeed however in convincing his provincial counterparts to create the Council of the Federation as an institutional mechanism to increase coordination and cooperation between the provinces. As Ian Peach (2004) has pointed out, it is certainly an exaggeration to view the Council as a “historic” development, but it is also too early to dismiss it as futile or as a glorified new lobby to ask for yet more federal money.

The bottom line is that six years after the adoption of SUFA without Quebec, the same issues lead to the same disputes using the same rhetoric. Only some of the protagonists have changed. As for Quebec, its core principles and historical demands of respect for provincial autonomy and recognition of the founding dualism of Canada are more marginalised than ever and seen as hopelessly outdated in English Canada. No major federalist political party in Canada could ever endorse the degree of asymmetry that would satisfy Quebec unless it develops a taste for political suicide. The conflict between Ottawa’s desire to promote a more cohesive and uniform set of social policies across Canada in an era of globalization and Quebec’s unflinching will to assert its distinctiveness in ways which will go beyond a purely folkloric difference has all the appearances of a conflict between an irresistible force and an unmovable object. One should not bet against another major crisis in the near future.



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