

# PAN-CANADIAN PROVINCIALISM — THE NEW FEDERALISM AND THE OLD CONSTITUTION

Thomas J. Courchene

The September 2004 health accord was “a defining moment in the evolution of our federation,” writes IRPP Senior Scholar Tom Courchene. It marks the re-emergence of asymmetric federalism, which is at the heart of Confederation itself in the division of powers between Ottawa and the provinces. “At the most basic of levels,” Courchene writes, “Quebec’s gift to Canada was federalism. As much as Sir John A. might have wished for a unitary state, this was not acceptable to Quebec. Indeed, the long list of exclusive provincial powers in section 92 is unprecedented in developed federations and is primarily responsible for the decentralized nature of our federation.” With Quebec and other regions of the country moving into a north-south NAFTA economic space, rather than relying on east-west inter-provincial trade, this “will tend to result rather naturally in an enhanced degree of policy decentralization and operational asymmetry.”

L’entente sur la santé de septembre a constitué « une étape décisive de l’évolution de notre fédération », écrit Tom Courchene, chercheur principal à l’IRPP. Elle a ainsi marqué le retour du fédéralisme asymétrique, inscrit au cœur même de la Confédération par la division des pouvoirs entre Ottawa et les provinces. « Au niveau le plus élémentaire, rappelle l’auteur, le Québec avait alors fait cadeau du fédéralisme au Canada ; il ne pouvait accepter l’État unitaire souhaité par sir John A. Macdonald. De fait, la longue liste des pouvoirs exclusivement provinciaux de l’article 92 est sans précédent dans les fédérations développées et explique le caractère décentralisé de la nôtre. » Aujourd’hui que le Québec et d’autres régions du pays misent de plus en plus sur l’espace économique de l’ALENA par rapport aux échanges interprovinciaux, soit l’axe nord-sud plutôt qu’est-ouest, on devrait observer une accentuation naturelle des phénomènes de décentralisation politique et d’asymétrie opérationnelle.



**I**n the wake of the historic September 2004 health care agreement, concerns have arisen that the asymmetric treatment of Quebec will become the template for future federal-provincial deals and in the process will erode any semblance of “national” programs or principles. I much prefer the “glass is half-full” interpretation where, in spite of what the Constitution says, the provinces and territories have “opted in” to an agreement that allows them to work closely with Ottawa in areas of provincial jurisdiction to achieve overarching standards and principles for medicare. While Quebec has admittedly signed an “asymmetric” side agreement with Ottawa, the first line of this side agreement reads “Quebec supports the overall objectives and general principles...in the communiqué of September 15.” Surely, Quebec’s opting out or side agree-

ment is in the nature of a solution not a problem. More generally, the September 15 communiqué is not only the triumph of creative process and substance, but the process adopted by the first ministers is quite consistent with how Sir John A. envisioned Canadian federalism would likely evolve. As important, and obviously related, the communiqué accomplishes in a non-constitutional manner what Meech and Charlottetown failed to do, namely, it recognizes Quebec’s uniqueness and in the process brings the province much closer to opting fully into the Canadian constitutional family.

Toward this end, I begin by articulating a few of the many ways in which Quebec has already influenced the values and processes of Canadian federalism. This is followed by an analysis of the manner in which recent political and

economic forces have altered Quebec's view of itself within the federation and in particular have arguably shifted its demands away from acquiring more powers and toward ensuring that the province has fiscal resources adequate to utilize fully the existing range of provincial powers. Included here is a companion analysis of how these

At the most basic of levels, Quebec's gift to Canada was federalism. As much as Sir John A. might have wished for a unitary state, this was not acceptable to Quebec. Indeed, the long list of exclusive provincial powers, in section 92 is unprecedented in developed federations and is primarily responsible for the decentralized nature of our federation.

forces have likewise influenced the way that Ottawa and the rest of the provinces now view their relationship both to the division of powers and to the federation. This, then, provides the requisite background for addressing and assessing the September health care summit.

At the most basic of levels, Quebec's gift to Canada was federalism. As much as Sir John A. might have wished for a unitary state, this was not acceptable to Quebec. Indeed, the long list of exclusive provincial powers in section 92 is unprecedented in developed federations and is primarily responsible for the decentralized nature of our federation. Beyond this, Quebec has left its mark on Canadian society in many other ways. First, Quebec has brought legal (civil law), linguistic (official bilingualism) and institutional (opting-out) pluralism to Canada which, among other implications, has facilitated the self-government aspirations of our First Nations and their integration into the Canadian federation. Second, the sharing nature of the Canadian federation, as reflected in our comprehensive social envelope for citizens and our equalization system for provinces, has been influenced in no small way because Quebec, as one of the two "founding nations" or founding language communities, is also a "have-not" province.

Third, even accepting the decentralist thrust of the *Constitution Act, 1867*, Quebec's subsequent actions have served to enhance this degree of decentralization. While part of this relates to the province's continuing pursuit of greater powers, arguably the more important initiative was Quebec's establishing its own personal

income tax system in the mid-1950s. The federal government responded to this with two very important initiatives of its own. The first was to alter the nature of the tax-sharing agreements so that henceforth the provinces' shares of the tax would be allocated according to the *destination principle*, that is, allocated in accord with the amount of income tax revenues actually collected in that province. Because this would generate a different amount of income tax revenues per capita across the provinces, Ottawa then embarked in 1957 on its second initiative, creating the equalization program to ameliorate these per capita income tax differentials. The enduring message here is that without a comprehensive equalization program in place, there is no way that the have-not provinces would ever have allowed the existing degree of tax decentralization.

A fourth way in which Quebec has had a major influence on Canadian society is that the Royal Commission on Bilingualism and Biculturalism provided the catalyst for minorities in the rest of Canada to opt for "multiculturalism" as the complement to bi-culturalism. Without the Bi and Bi Commission, multiculturalism would not today have the sweep that it does. The fifth influence is related:

Quebec is the bastion for "collective rights," arguably driven in part by its more collective civil law regime. More controversial is the proposition that this paved the way for the various collective-rights sections of the Canadian Charter on Rights and Freedoms.

Finally, but not exhaustively, Quebec's brand of capitalism is more "communitarian" than is the individualistic Anglo-American variety, e.g., the *Mouvement Desjardins*, the *Caisse de dépôt et placement du Québec*, the European universal banking model, the more corporatist approach to civil society, the concern about ownership, and so on. This is an appropriate time to note that some of the enumerated features of Quebec's influence on Canadian political economy are not unique. For example, the producer and consumer co-operatives in Western Canada and Canadians' love affair with Crown corporations have also contributed to the communitarian nature of Canadian capitalism relative to the American variant.

What is intriguing about all of the above influences is that not only do they set us apart from the Americans but they do so in ways that Canadians are by and large happy with and that indeed provide key aspects of our identity in the northern part of North America.

All of this is by way of backdrop to the rest of the analysis, which focuses on rather dramatic and certainly fascinating changes in Quebec's federal-provincial and interprovincial relations within Canada, and culminates in the form and substance of the September 15 communiqué. Attention will be directed to both political and economic relations, roughly from the Chrétien era onward for the former and since the FTA/NAFTA for the latter.

In terms of the political/federal dimension, the combination of, first, Paul Martin's massive cuts to provincial transfers in his 1995 budget and his accompanying request that the



CP Photo

From left to right: Premiers Gary Doer of Manitoba, John Hamm of Nova Scotia, Dalton McGuinty of Ontario and Jean Charest of Quebec hold a news conference following a meeting of the Council of the Federation in the run-up to the health summit with Ottawa. With Paul Martin in a minority posture and having staked his future on getting a deal in a provincial jurisdiction, the premiers were in the driver's seat and drove a hard bargain. But at the end of the day, a good one, writes Tom Courchene, it was a "defining moment in the evolution of our federation."

provinces help design Canada's social policy principles in the CHST era, second, the emergence post-NAFTA of a north-south trading axis, and, third, the perception if not the reality that Ottawa had bungled the 1995 Quebec Referendum have interacted to spawn a very innovative and exciting period in Canadian federalism, namely *pan-Canadian provincialism*. The underlying reality, gradually recognized by the provinces as their policy overlaps and externalities began to mushroom, was that Ottawa was both fiscally able and politically more-than-willing to invade provincial jurisdictions if the provinces did not adopt a more pan-

Canadian approach to their collective actions. This might not prevent federal intrusions, but it would at least make them politically more difficult to implement. The instrument chosen by the provinces for addressing these pan-Canadian policy spillovers and for advancing provincial interests was the revitalization of the Annual Premiers' Conferences (APCs). Under the aegis of the 1995 APC (and in response to Paul Martin's request), the Ministerial Council on Social Policy Renewal and Reform released its *Report to Premiers*, which, among other things, embodied 15 principles to underpin social Canada. This docu-

ment was endorsed by the premiers at the 1996 Jasper APC along with a further request that the Ministerial Council design provincial and/or provincial-territorial mechanisms and processes in order to develop and promote adherence to national principles and standards. The resulting mechanisms (both provincial-territorial and provincial-territorial-federal) were presented at the 1997 St. Andrews APC and further honed for, and ratified by, the 1998 Saskatoon APC.

**B**y this time it became clear to one and all and especially to Ottawa that the initiative and momentum for

social policy reform had shifted to the provinces. Indeed, a year earlier, the 1997 federal budget took a page out of the *Report to Premiers* and introduced the Canada Child Tax Benefit (CCTB). The CCTB was an exercise in creative federal-provincial co-determination.

Two remaining initiatives relating to pan-Canadian provincialism merit highlight. The first of these is the 1998 Calgary Declaration. Although only a page long, this is a remarkable document because it reveals the extent to which the provinces other than Quebec were anxious to back away from the post-Charter philosophy of “symmetrical federalism.” It is especially fitting that the declaration was signed in Calgary, the hotbed of the erstwhile symmetry rhetoric, and home of the triple-E Senate movement.

Ottawa sharply increased refundable child tax benefits to low income families via the federal income tax system. For their part the provinces were allowed to reduce their payments for children in welfare-receiving families by a similar amount, provided that these monies were redirected to other programs relating to child support in low-income families. With this model in mind, shortly after the Saskatoon APC the federal government joined with the provinces to formalize this creative federal-provincial co-determination in the form of the 1999 *Framework to Improve the Social Union for Canadians*, generally referred to as SUFA (Social Union Framework Agreement). Among SUFA's provisions are the following:

- a set of social policy principles, mostly adapted from *A Report to Premiers*;
- mutual recognition of occupational qualifications across provinces;
- creative ways to allow the exercise of the federal spending power in areas of exclusive provincial jurisdiction, provided that a majority of provinces were on side and that provinces would have a role in both policy design and implementation flexibility; and
- a dispute avoidance and resolution procedure that would allow for third-

party fact-finding (which could apply to the *Canada Health Act*).

All in all, a flexible intergovernmental and co-determinational process designed to allow the federation to accommodate external and internal pressures for change and one

that served to underpin much of the September 15 health communiqué.

Nonetheless, readers will have recognized that what is missing from this overview of SUFA, and pan-Canadian provincialism more generally, is the reality that Quebec was *not* a formal party to any of this. One could argue that this would follow directly from the fact that the Parti Québécois was in power in Quebec. For example, just prior to his defeat at the hands of Jacques Parizeau, Premier Daniel Johnson (fils) was a signator to the Agreement on Internal Trade (AIT) in 1994. However, there is more at play here than whether Quebec is governed by the Liberals or the PQ, since all three Quebec parties lined up against SUFA. One obvious substantive reason for this is that SUFA formally recognizes the existence of the federal spending power in areas of exclusive provincial jurisdiction (although it must be noted that Quebec's longstanding desire to curb or eliminate the federal spending power in provincial jurisdiction necessarily requires a recognition of its existence in the first place). The larger issue is that Quebec is not about to enter an agreement with Ottawa that would impinge upon those policy areas that Quebec deems to fall under its exclusive jurisdiction. The issues surrounding the

AIT are quite different, relating as they do to reciprocal responsibilities among equal constitutional players. In any event, SUFA represents a valuable instrument in an era where federal-provincial policy externalities and spillovers are ubiquitous. Moreover, and certainly relevant in terms of the September health deal, henceforth buying influence and leverage in areas of exclusive provincial jurisdiction would require, apart from the requisite financial package, the flexibility of SUFA-informed accords rather than Ottawa-driven agreements.

Two remaining initiatives relating to pan-Canadian provincialism merit highlight. The first of these is the 1998 Calgary Declaration. Although only a page long, this is a remarkable document because it reveals the extent to which the provinces other than Quebec were anxious to back away from the post-Charter philosophy of “symmetrical federalism.” It is especially fitting that the declaration was signed in Calgary, the hotbed of the erstwhile symmetry rhetoric, and home of the triple-E Senate movement. Two of the principles are especially significant:

- *In Canada's federal system, where respect for diversity and equality underlies unity, the unique character of Quebec society, including its French-speaking majority, its culture and its tradition of civil law, is fundamental to the well-being of Canada. Consequently, the legislature and Government of Quebec have a role to protect and develop the unique character of Quebec society within Canada.*
- *If any future constitutional amendment confers powers on one province, these powers must be available to all provinces.*

In tandem, these provisions not only formally recognize the specificity of Quebec but endorse future Ottawa-

Quebec deals, provided they are offered to other provinces as well. This is a recognition of *de facto* asymmetry and, to a lesser degree, *de jure* asymmetry. Since the Calgary declaration was about Quebec, only the nine other provinces were signatories. And to add to its significance, the declaration was passed in all nine of the provincial legislatures, often with considerable fanfare.

The final background provision and the logical capstone of pan-Canadian provincialism is the recent all-province agreement to embrace Premier Jean Charest's proposal for a Council of the Federation (henceforth COF). Cynics may claim that acceptance of this proposal was the other provinces' way of thanking Charest for wresting power from the PQ. However, it should be clear from the above analysis that the COF

represents the obvious final step in the process that began with the revitalization of the APCs. Not surprisingly, therefore, the other provinces eagerly embraced the Quebec proposal. And central to the present analysis is that the issue foremost in the minds of the premiers when they created the COF was to utilize it as a vehicle for pressing Ottawa on the fiscal imbalance file. Significantly, one of the driving forces for this was the report of Quebec's Séguin Commission (named after Yves Séguin, now Quebec's finance minister) on the vertical fiscal imbalance in the federation. Important as this issue is to the provinces, the Council will nonetheless also be drawn into many other coordination and monitoring roles across a wide range of provincial policy responsibilities, running the gamut from overseeing aspects of the *Canada Health Act* to monitoring the inter-provincial economic and social unions.

**W**hile provincial pan-Canadianism makes eminent sense in its own

right, it is also the case that it is not independent of the manner in which the new global economic order was and is evolving. The obvious entrée into Quebec-Canada economic relations in the knowledge-based economy (KBE) is north-south economic integration. With the FTA and NAFTA serving as catalysts, all the provinces' trade has shifted sharply north-south, relative to east-west (table 1). In Quebec's case, in 1989 (the first year of the FTA) exports to its sister provinces exceeded its exports to the US — 22.9 percent of GDP for east-west

Canada has become a series of north-south, cross-border economies rather than a single east-west national economy. And because Canada's provinces/regions tend to differ industrially more from each other than from their cross-border counterparts, the provinces' attempts to enhance their prospects in NAFTA economic space will tend to result rather naturally in an enhanced degree of policy decentralization and operational asymmetry.

exports (or exports to the rest of Canada) and 16.0 percent of GDP for north-south exports (or exports to the USA). By 2001, however, this had changed dramatically. Quebec's north-south exports had increased to 33.6 percent of its GDP while its exports to the rest of Canada has fallen to 19.4 percent. Indeed, as of 2001, all provinces except Manitoba exported more to the US than they did to the rest of Canada.

In effect, Canada has become a series of north-south, cross-border economies rather than a single east-west national economy. And because industrially Canada's provinces/regions tend to differ more from each other than from their cross-border counterparts, the provinces' attempts to enhance their prospects in NAFTA economic space will tend to result rather naturally in an enhanced degree of policy decentralization and operational asymmetry.

Several important implications flow from this development. First, Quebec's economic future is clearly in NAFTA economic space, not Canadian economic space. Compared to the

province's trade dependence on the rest of Canada in 1995, let alone 1980, the economic costs of further loosening economic ties with the rest of Canada are now much reduced. (By way of maintaining perspective, the later analysis will also argue that the benefits of independence are also substantially reduced). Second, as north-south trade integration heightens, all the provinces will become increasingly tolerant of Quebec's nationalist vision of its role in the federation, since they too will want greater degrees of policy

freedom. The best example here is that the "Alberta advantage" policy (which promises that this province will have the lowest tax rates in NAFTA, let alone in Canada) is giving way in some Alberta quarters to a "firewall" vision of Alberta-Canada relations. In a sense, therefore, the post-Charter focus on symmetry as a philosophical goal of Canadian federalism has been trumped by the provincial/regional realities of North American trade integration. Phrased differently, this may be the relevant international (NAFTA) economic reality underpinning the domestic political reality of the 1998 Calgary Declaration.

**H**owever, North American trade integration is not the only force that is forging new Quebec-Canada and Quebec-North America economic linkages. Attention now turns to another pervasive force — the advent of the KBE. The resulting knowledge and information revolution is in the process of privileging human capital in much the same way that the Industrial Revolution privileged physical capital.

Indeed, knowledge and human capital are now at the forefront in terms of the core policy objectives — competitiveness and wealth creation; achieving acceptable income distribution; and enhancing living standards. While this is an exciting development in its own right since it puts citizens and their human capital development centre-stage in terms of both economic and social policy, it is also fundamental to the evolution of Quebec-Canada relations since the constitutional powers needed to pursue a citizen-first policy are largely *provincial powers*.

In more general terms, the central implication arising from the KBE in terms of achieving meaningful sovereignty in the information era is that it significantly increases the role of those powers that lie in provincial jurisdiction. (Note that this is not the same as saying that the KBE enhances the powers of the provinces, as the subsequent analysis makes clear.) While it would not be correct to say that Quebec is now indifferent about acquiring new powers (e.g., the province would obviously like greater room to manoeuvre in terms of negotiating trade and cultural agreements), the fact is that under the KBE *sovereignty will be more about exercising existing provincial powers than acquiring further powers*. Moreover, the interaction of language and culture on the one hand and human capital development on the other is sufficiently close that Quebec will be able to play a larger role in the human capital development of its citizens than will any other province. In other words, language provides an environment within which Quebec will have more room to “policy-determine” its KBE future. Or, in terms of sovereignty, the emergence of the KBE allows Quebec to move toward a fuller nationhood *within* the Canadian state.

From this follows an even more important corollary: the *key to Quebec's*

*future in the Canadian state lies in its gaining access to revenues sufficient to allow it to make use of its existing powers*. Hence, Quebec's rallying call has, appropriately, shifted from “more powers” to “more access to revenues.” Small wonder then that restoring fiscal balance in the federation is Quebec's foremost priority. And for somewhat similar reasons (see below), this is also the number one priority of the other nine provinces.

Up to this point, the lens for viewing the implications of the KBE has been a provincial lens. But Ottawa is much more than a spectator in all of this. Indeed, it is actively engaged in finding ways that it, too, can get access these KBE-compatible powers. It did not take the federal government long to realize that nation-building and electoral saleability in the KBE are not about old-style resource-intensive megaprojects but, rather, have everything to do with citizens' issues — education, health, training and the like. Indeed, and as already noted, with knowledge at the cutting edge of competitiveness, investment in education/skills and human capital generally holds the key to competitiveness and cohesion

It is clear that politically, economically and electorally these (largely provincial) policy areas are far too important to be rendered off-limits to Ottawa by whatever the Constitution may or may not say. So the operational objective for Ottawa becomes one of finding convenient avenues and processes by which it can interact directly with cities and citizens.

alike, both of which are of obvious interest to central governments of all nation states, federal or unitary. And since the performance of Canada's cities, especially our so-called global city regions (GCRs) with their intense concentrations of human capital will determine productivity growth and living standards, they too come into Ottawa's sights.

Cast in this light, it is clear that politically, economically and elec-

torally these (largely provincial) policy areas are far too important to be rendered off-limits to Ottawa by whatever the Constitution may or may not say. So the operational objective for Ottawa becomes one of finding convenient avenues and processes by which it can interact directly with cities and citizens. Not only did Ottawa find a way to do this, but it did so in such a manner that cities and citizens alike welcomed the federal intervention.

In a recent article (*Policy Options*, April 2004), I have called this *hourglass federalism*, namely Ottawa's use of the spending power and other measures to privilege cities and citizens, leaving the provinces increasingly as the squeezed middle of the division-of-powers hourglass. Hourglass federalism evolved in the following manner. First, to make room for these new areas on the policy agenda, Ottawa transferred aspects of the old paradigm of nation building (forestry, mining, tourism, fishing and energy) to the provinces. Second, Ottawa got its fiscal house in order in large measure by downloading its deficit to the provinces. The key initiatives here were the massive Canada Health and

Social Transfer (CHST) cuts contained in Paul Martin's 1995 budget. Third, while these cuts were viewed by most analysts as cuts to health transfers, they had precisely the opposite effect. Since health was at the very top of all the provinces' priority lists, it simply could not be cut. What happened in all the provinces is that funds were directed from here, there and everywhere to sustain, indeed increase, health care spending. Fourth, the result is that medicare is accounting

TABLE 1. INTERNATIONAL AND INTERPROVINCIAL TRADE, 1989 AND 2001

	1989 exports				2001 exports			
	International			Interprovincial	International			Interprovincial
	As % of GDP	Exports to US as % of total	Exports to US as % of GDP	As % of GDP	As % of GDP	Exports to US as % of total	Exports to US as % of GDP	As % of GDP
Canada	25.4	73.2	18.6	22.5	43.1	87.3	37.6	19.7
NFLD	31.0	68.4	21.2	11.9	37.1	65.6	24.3	20.3
PEI	14.7	60.2	8.8	30.6	31.8	89.9	28.5	27.7
NS	15.8	66.0	10.4	21.0	29.0	82.7	23.7	21.1
NB	26.2	66.5	17.4	30.0	45.7	89.1	42.3	31.2
QC	21.2	75.7	16.0	22.9	39.6	84.8	33.6	19.4
ON	28.6	85.9	24.6	22.6	51.5	93.3	48.0	18.7
MB	18.5	62.6	11.6	28.0	30.7	80.0	24.6	29.7
SK	22.7	45.0	10.2	25.6	44.2	59.0	26.1	25.4
AB	24.5	75.7	18.5	28.5	41.3	88.8	36.7	22.1
BC	28.7	83.4	12.5	13.5	31.3	70.9	22.2	14.1

Source: Canada Department of Foreign Affairs and International Trade (2002), Tables 1A and 9E.

for over 40 percent of program spending for many provinces and still rising, while spending on most other areas is declining. Fifth, this has opened the way for Ottawa to go *around the provinces* and to deal directly with these cash-starved areas, whether relating to citizens (millennium fellowships, Canada Research Chairs, the Canada Child Tax Benefit, early child development, etc.) or to cities (the GST exemption and the promise of a share of the federal sales tax).

Intriguingly, the provinces are well and truly trapped by hourglass federalism. As medicare budgets inexorably approach 50 percent of program spending, the provinces will have to dip deeper and broader into existing spending levels of other policy areas. There would appear to be only three ways for the provinces to extricate themselves from this dilemma. One way is to *upload* aspects of medicare to Ottawa. A second is to *download* medicare to citizens (via privatization/de-listing or by imposing dedicated taxes/premiums, both of which Ontario did in its 2004 budget). The third is for Ottawa to address the vertical fiscal balance in the federation (i.e., to provide the provinces with funds sufficient to maintain medicare at sus-

tainable levels, consistent with addressing their other expenditure responsibilities).

All of this was a prelude to the September health summit. It is not an overstatement to assert that, to an intriguing degree, the political, ideological, fiscal and jurisdictional/constitutional forces likely to play a determining role in the evolution of Quebec and indeed the rest of Canada were being funnelled into the vortex of the September First Ministers' Meeting (FMM). While recognized as a defining moment for Paul Martin's minority government, the reality is that the FMM was also and perhaps principally about competing visions of Canada and, as such, was bound to qualify as one of the defining moments in our federal evolution. Turning, therefore, to the anatomy of the process and the substance relating to the new health deal, the launch point was obviously Paul Martin's "fix for a generation," namely, his electoral health care blueprint calling for stable long-term funding, reducing waiting times, reforming primary care, creating a national home care program, and developing a national strategy

for prescription drug care, all of which would respect the CHA and its principles. Although a majority of Canadians were no doubt in favour of a federal health care fix, the election results put the provinces in the driver's seat, for the following reasons:

- Not only were the Liberals in a minority position but the accepted wisdom was that without the health care plank they would have lost power, thus making a successful FMM absolutely essential for Martin's prime-ministerial future;
- The Conservatives and the Bloc, who together have nearly enough seats to bring down the government, both favoured addressing vertical fiscal imbalance;
- Relatedly, with the Bloc garnering 54 seats, the Liberals suffered a humiliating defeat in Quebec, replete with predictions of a rise to power of the PQ and yet another referendum, thus putting immense pressure on Martin to deliver *something* to Jean Charest and the Quebec Liberals; and finally
- The fix for a generation was all about regulating areas of exclusive provincial jurisdiction, so that the provinces were fully in their rights

to extract a significant fiscal price. This is what I refer to as fiscal federalism's "Golden Rule": If you want to make the rules, you have to supply the gold!

In their post-election Council of the Federation meeting in Niagara-on-the-Lake in late July, the provinces showed that they were fully up to the challenge of ratcheting up the stakes. In terms of the formal federal proposals, the premiers responded as follows: 1) Ottawa should increase its share of funding under the Canada Health Transfer to 25 percent of total health care (i.e., close the Romanow gap); 2) this 25 percent share should be maintained (indexed) over time; 3) these transfers are to be unconditional; and 4) any new initiatives agreed to at the September FMM will require *additional and ongoing* federal dollars. The premiers then added two other dimensions to their recommendations. The first of these, and the most surprising, was that they unanimously agreed to transfer responsibility for pharmacare to the federal government. With provinces now spending in the range of \$7 billion on drugs and with "full coverage" estimated to cost in the range of \$12 billion, *uploading pharmacare would go a long way toward extricating the provinces from the hourglass federalism strictures*. Moreover, part of the surprise relating to pharmacare was the *unanimous* provincial agreement that Quebec would opt out of this pharmacare plan with compensation: "It is understood that Quebec will maintain its own program and will receive a comparable compensation for the program put in place by the federal government" (from the Niagara-on-the-Lake press release). The other dimension of the premiers' recommendations related to equalization. Specifically, an infusion of new federal dollars for health care allocated on an equal-per-capita basis was unacceptable without additional provisions for offsetting the recent declines in the level of equalization payments.

**O**n the eve of the September FMM, Ottawa tendered a fresh offer to

the provinces that provided for \$25 billion in new funding over the next 10 years. However, the provinces drove home a much more generous bargain — roughly \$41 billion over these same 10 years. Moreover, and frequently ignored in any of the cost estimates relating to the health care agreement, Ottawa agreed to restore equalization and territorial formula financing (TFF) to their 2000-01 levels and then to index this by 3.5 percent. Finance Canada estimates that over six years this will result in *new* spending of \$12.25 billion and \$1.8 billion for equalization and TFF respectively, with ten year totals equalling \$28.8 and \$4.6 billion. (Note that these estimates assume that in the absence of this agreement the levels of equalization and TFF would have remained at 2004-05 levels). The manner in which these predetermined totals will be allocated across the have-not provinces is one of the issues on the table for the October 26, 2004, FMM on equalization and TFF. This is a radical and historic change in the nature of equalization and will likely lead to the striking of an independent commission to determine the provincial allocations. And it is part of the defining moment alluded to earlier.

In return for all this, Ottawa obtained commitments from the provinces to address waiting periods, including the acceptance of evidence-based benchmarks. In addition, the provinces agreed, among other things, to increase the supply of health professionals in general and for minority communities in particular, to increase short-term acute home care and end-of-life home care, to report on their progress relating to primary health care reform, and to establish a ministerial task force to develop and implement a national pharmaceuticals strategy, this latter with the understanding (drawing from Niagara-on-the-Lake) that Quebec will maintain its own pharmacare program.

**T**wo other features merit highlight. The first is that accountability

pursuant to this agreement will be to the citizens of the various provinces (and *not* to the federal government, i.e., there are no designated penalties for non-compliance). In the words of the FMM news release: "All governments agree to report to their residents on health system performance including the elements set out in this communiqué." The second and the most relevant for present purposes is the asymmetrical federalism side agreement, which explicitly recognizes Quebec's specificity. In effect this is the federal counterpart to the recognition of Quebec's distinctiveness contained in the Calgary Declaration. As noted above, while Quebec agrees to work in collaboration with Ottawa and the provinces in terms of the range of issues in the communiqué, Quebec's own policies will be determined "in accordance with the objectives, standards, and criteria established by the relevant Quebec authorities" (cited from the Canada-Quebec addendum, entitled "Asymmetric Federalism that Respect's Quebec's Jurisdiction"). Apparently, in the final countdown to the deal, Ottawa verbally agreed that Alberta and British Columbia (and by extension all the provinces) could have the same deal as that offered to Quebec. This brings the Canada-Quebec asymmetric rider into line with the relevant provision of the 1998 Calgary Declaration, as elaborated earlier.

**F**inally, it is instructive to note that the health care deal falls largely, if not wholly, within a SUFA-type framework, including mutually agreed upon benchmarks/indicators, flexible implementation, and information sharing but with accountability to one's own citizens. Although Quebec was not a SUFA signatory, the asymmetrical rider allowed Quebec to sign the communiqué.

By way of a final comment on both the communiqué and the thrust of the foregoing analysis, a case can be made that the treatment of Quebec is in line with the manner in which John A. Macdonald anticipated our federa-

tion might evolve. To see this, consider section 94 of the *Constitution Act, 1867*. Entitled “Uniformity of Laws in Ontario, Nova Scotia and New Brunswick,” it reads as follows:

*Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.*

The late Frank Scott suggested that the Fathers of Confederation, unable to obtain a unitary state, included this clause so that an easy way would be available for the provinces other than Quebec to pursue a more uniform and unified future. Samuel LaSelva suggests that one reason why section 94 has received so little attention both from the courts and from constitutional experts has to do with its misleading label: rather than “Uniformity of Laws” it should have been entitled “Transferring Constitutional Jurisdiction,” to make it clear that it is in fact an amending procedure. In general, amending the division of powers requires unanimous consent of all the provinces (plus Ottawa). However, section 94 allows provincial powers related to property and civil rights to be transferred to Ottawa *without* the consent of Quebec. In an important sense, the recent health care deal can

be viewed as a non-constitutional way to accomplish a similar goal. It allows the nine provinces to opt into a more uniform and unified approach to the CHA while at the same time allowing Quebec to cooperate and collaborate in most respects but to retain *de jure* control over health care. Actually, the SUFA-like process with opting out for Quebec has several advantages for the provinces over a section 94 process, the most important of which is that once powers are transferred to the federal government then Ottawa can legislate at will and without consulting the provinces.

By way of concluding, we Canadians have proven ourselves

We Canadians have proven ourselves through the years to be masters at the art of federalism. In particular, through creative processes and institutions we have been able to accommodate all manner of societal problems and opportunities, often without any change in the written constitutional word.

through the years to be masters at the art of federalism. In particular, through creative processes and institutions we have been able to accommodate all manner of societal problems and opportunities, often without any change in the written constitutional word. Over the last quarter century or so the most daunting societal challenges have been the national unity issue, on the one hand, and accommodating globalization and the KBE, on the other. While these challenges are in principle entirely unrelated, they have come to interact with each other in ways that are surely nothing short of incredible. As recently as a decade ago Quebecers believed that they ultimately had to become an independent state in order to become their own nation. But the legacy of globalization

and the KBE is that Quebec can thrive as a nation within the Canadian state, because the powers necessary for meaningful nationhood in century 21 are primarily provincial powers. For their part the other provinces have also undergone transformative change in that they are more tolerant of Quebec’s aspirations, because they too require greater flexibility in terms of succeeding in NAFTA economic space. They also have found common cause with Quebec in establishing the Council of the Federation to coordinate pan-Canadian spillovers from their collective actions and to press Ottawa on the VFI issue.

However, all provinces are reeling from a further inevitable transformation thanks to KBE: For reasons of competitiveness, cohesion and living standards, Ottawa needs to be a player in selected areas of exclusive provincial jurisdiction. With all of these political, ideological, fiscal, and jurisdictional balls in the air, the genius of our first ministers is that they took advantage of this unprecedented opportunity to forge a deal that embraces all of these issues in a way that accommodates both of the underlying societal challenges, and in the process establishes a precedent for future deals that brings Ottawa into cooperation with the provinces in advancing pan-Canadian social objectives. Given the thrust of this paper the last word has to be about Quebec: By making substantive inroads into Quebec’s concerns about distinctiveness, powers and vertical balance, we are also making it easier for Quebec to become its own nation within the Canadian state and to become more fully and more formally part of the Canadian constitutional family. September 15, 2004, was indeed a defining moment in the evolution of our federation.

*IRPP Senior Scholar Thomas J. Courchene is the Jarislowsky-Deutsch Professor of Economic and Financial Policy at the Queen’s School of Policy Studies. courchen@post.queensu.ca*