CANADA'S SOUL SEARCHING

Essays and remembrance articles

André Burelle

Former advisor to the Trudeau and Mulroney governments

CENTRE D'ANALYSE POLITIQUE
CONSTITUTION FÉDÉRALISME

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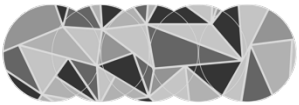

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CAP-CF's director foreword

This short book brings together three recent essays[1] by André Burelle, a Francophone federalist voice from Québec. Together, these texts propose a modern, multinational federal alternative to the "one nation" Americanized model that forms Pierre Elliott Trudeau's legacy.

From 1977 to 1984, André Burelle acted as former Prime Minister Pierre Elliott Trudeau's French language speech writer and political advisor, even as the two men found themselves increasingly at odds with each other. Later, as a senior official at the Federal-Provincial Relations Office (FRPO), Burelle was closely involved in negotiating the Meech Lake Accord, Brian Mulroney's honest attempt at bringing Québec back into the Canadian constitutional fold after the wounding repatriation of the Constitution from Britain and its modification in 1982 despite the unanimous and repeated opposition of Québec's National Assembly.

In the aftermath of the confusing Charlottetown Referendum in 1992, the Privy Council Office of Canada (PCO) granted Burelle a leave of absence to draw lessons from the Meech experience. He was tasked, along with the research group he supervised at Montreal's FPRO office, with proposing, in response to the Belanger-Campeau Commission Report, a reform of our federation based on a partnership that could satisfy both Québec and Canada as a whole. Following Meech's failure, the idea of such a reform had been discussed at the highest level by key senior officials and key ministers of the Mulroney government.

To introduce the ideas behind this proposed rebalancing of the Canadian federation, Burelle penned a series of six articles entitled "Les contre-vérités de Pierre Elliott Trudeau" that were published in *Le Devoir*. An English translation of these articles titled "The Untruths of Pierre Elliott Trudeau" was sent to *The Globe and Mail* by Senator Murray but the texts were never published. This was the first of many instances in which

[1] We thank Les Presses de L'Université Laval et Les Presses de l'Université du Québec for granting us the rights to republish these essays.

Burelle's writings were silently buried by Pierre Trudeau and his followers in Ottawa. In fact, Burelle's main works have never been translated to English, despite the efforts of Charles Taylor, John Trent, Ralph Heintzman, and several of Burelle's friends and colleagues. Indeed, publishers were reluctant to be associated with an author whose writings were boycotted by the Chrétien government and by Trudeau's impenitent followers who still held sway in Ottawa and in the rest of Canada.

In Quebec, even as his books—*Le mal canadien, Le droit à la différence à l'heure de la globalisation* and *Pierre Elliott Trudeau, l'intellectuel et le politique*—have been required or recommended readings for decades in many political sciences departments in francophone universities, Burelle himself was never invited to openly discuss his works with the new generation of Québécois students and their professors.

Fortunately, the situation started to change when my colleagues Guy Laforest, Eugénie Brouillet, and myself invited Burelle to take part in a three-day colloquium to commemorate the 150th anniversary of the 1864 Quebec Conference that laid the foundations for the 1867 Canadian Confederation. This was in 2014 and Burelle's address titled "Le refus du melting pot est-il un refus de la modernité ?" is included in this book.

Four years later, in 2018, the Université du Québec à Montréal (UQAM) invited Burelle to participate in a colloquium entitled "La pensée fédéraliste contemporaine au Québec, perspectives historiques" or "Contemporary Federalist Thought in Quebec: Historical Perspectives". Burelle delivered the inaugural address which he titled "Réflexions d'un vieux routier du débat constitutionnel canadien" or "Reflections of an Old Veteran of the Canadian Constitutional Debate." In the same spirit of bridging the world of abstract academic research with the more concrete and action-oriented reflections born in the corridors of power, Burelle was later asked to write the closing chapter of the colloquium's proceedings. The text he penned "Pressant besoin d'une pensée fédéraliste prospective au Québec et dans le ROC" is included here.

These three translated essays, written at the invitation of UQAM and Laval University form the present book. They represent in many ways the spiritual testament of a modern defender of D'Arcy McGee and George-Étienne Cartier's "multinational federalism;" a vision that Wilfrid Laurier eloquently captured when he described Canada as a UNION WITHOUT FUSION of the founding peoples and signatory provinces of the 1867 Confederation Pact. To understand with greater depth how this union without fusion could be applied to this day and age, I invite you to read and reflect on Burelle's key works, namely *Le mal canadien* and *Pierre Elliott Trudeau, l'intellectuel et le politique.*

I hope that someday soon Burelle's key works will be translated into English (as was intended from the start), so that his fellow citizens of English Canada may discover not only a response to the traditional demands made by Québec and First Nations peoples but also a clear delineation of what these founding nations and provinces could offer in exchange to ensure what Burelle calls "the partnership and pooling of power and resource that Canada needs as a "multinational federation" to solve the urgent continental and planetary problems that the country faces with increased urgency in this age of heightened globalization.

Three "articles of remembrance" were added as a complement to the essays that form the core of this book. Burelle wrote them for the 40th anniversary of the promulgation on Parliament Hill of the 1982 Constitutional Act, and the 30th anniversary of the Meech Lake Accord's failure. These short texts offer a clear diagnosis of the malady from which Canada suffers and that prevents it from designing its future in ways that remain faithful to the social and political contract it inherited from the forefathers of the 1867 Canadian Confederation.

Alain G. Gagnon, director

Introductory notes

Canada's Soul-Searching by André Burelle features three essays broadly retracing the research project conducted under the author's leadership by the Montreal Office of Federal-Provincial Relations, to propose a new partnership approach to Canadian federalism. This research was intended as a response to the report issued by the Bélanger-Campeau Commission and before sending its results to the Mulroney government, it was submitted for "peer review" to more than fifty academics and former ministers and deputy ministers from Quebec and the ROC, as well as to representatives of major economic, social and cultural organizations of the Greater Montreal. These "peers" were gathered for a series of lunch seminars held over the course of two years in the Montreal Office of Federal Provincial Relations.

Three complemental texts published by the author, have been added to complete this book. They form what Primo Levi called acts of "duty to memory" and were published on the 40th anniversary of the promulgation of the *Constitutional Act of 1982* and the 30th anniversary of the failure of the Meech Lake Accord. Their titles speak for themselves: *Canadian Democracy and Government by Judges; Limits to Government by Judges;* and *Meech, the Broken Promises of Pierre Elliott Trudeau*.

Canada's Soul-Searching
Essays and remembrance articles

André Burelle
Former advisor to the Trudeau and Mulroney governments

Contents

PART 1

"Union without fusion" of Canada's founding people: our historical refusal of the American melting pot policy

> *By a historical accident, Canada has found itself approximately 75 years ahead of the rest of the world in the formation of a multinational state and I happen to believe that the hope of mankind lies in multinationalism.*
>
> Pierre Elliott Trudeau, quoted in Peter Gzowski "Portrait of an intellectual", *Macleans*, February 24, 1962.

IS REJECTION OF THE MELTING POT A REJECTION OF MODERNITY?

In my book Le mal canadien,[2] published a few months before the Quebec referendum of 1995, I called on some of the key ideas of George-Étienne Cartier, to denounce the shortcomings of Pierre Elliott Trudeau's "one nation" approach and propose a modernization of Canada's original "multinational" federalism that would be more consistent with our history and the spirit of our times.

Needless to say, from this point of view the Quebec Conference and the seventy-two resolutions that emerged from it in October 1864 have always, for me, held emblematic value. It was during these deliberations that the Fathers of Confederation were asked to choose between two opposing visions of the Canadian social and political contract—either unitary, in the form of the legislative union of the colonies of British North America championed by John A Macdonald, or federal, in the form of the confederation of provinces proposed by George-Étienne Cartier to ensure the "union without fusion," of Canada's founding people and provinces, along with the creation of a vast country able to counterbalance the might of its American neighbour.

THE ONE NATION LEGISLATIVE UNION OF JOHN MACDONALD

At the Quebec Conference, both the diagnosis and the remedy proposed in the Durham Report to the "troubles" of 1837 were called into question. The interest of going over this ground again today is that, at a time when political correctness was unknown, politicians could speak openly of race, ethnicity, and cultural nationality, whether in a positive or negative light.

Everyone is aware, for example, of the brutal diagnosis placed by Lord Durham at the beginning of his report into the state of crisis in Lower

[2] André Burelle, *Le mal canadien* (Saint-Laurent: Fides, 1995).

Canada that followed the Patriot rebellion: "I expected to find a contest between a government and a people; I found two nations warring in the bosom of a single state; I found a struggle, not of principles, but of races."[3]

We are also all aware of the condescending terms in which the Durham Report proposed, in order to terminate "the deadly animosity" between "the hostile divisions of French and English," that the French Canadians, "a people with no history, and no literature," should be assimilated into a United Canada dominated by the "English race" bearing the gifts of civilization. As Durham put it:

The language, the laws, the character of the North American Continent are English; and every race but the English (I apply this to all who speak the English language) appears there in a condition of inferiority. It is to elevate them from that inferiority that I desire to give to the Canadians our English character. [4]

What is less well known, on the other hand, is the way the Durham Report analyzes two possible ways to successfully assimilate the French Canadians into a Canada of "English character": legislative union and federal union. In Durham's words:

By [federal union], the separate legislature of each Province would be preserved in its present form, and retain almost all its present attributes of internal legislation; the federal legislature exercising no power, save in those matters of general concern, which may have been expressly ceded to it by the constituent Provinces. A legislative union would imply a complete incorporation of the Provinces included in it under one

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[3] *The Report and Despatches of the Earl of Durham, Her Majesry' s High Commissionner and Governor-General of British North America* (London: Ridgways, Piccadilly, 1839), 8. https://books.google.ca/books?id=t6wNAAAAQAAJ&pg=PA14&vq=fecest&source=gbs_toc_r&cad=3#v=onepage&q&f=false

[4] Tongue in cheek, Durham writes: *"It is not anywhere a virtue of the English race to look with complacency on any manners, customs or laws which appear strange to them; accustomed to form a high estimate of their own superiority, they take no pains to conceal from others their contempt and intolerance of their usages." Ibid.*, 23.

legislature, exercising universal and sole legislative authority over all of them, in exactly the same manner as the Parliament legislates alone for the whole of the British Isles. [5]

And he added:

> On these grounds, I believe that no permanent or efficient remedy can be devised for the disorders of Lower Canada, except a fusion of the Government in that of one or more of the surrounding Provinces […][6] But while I convince myself that such desirable ends would be secured by the Legislative Union of the two Provinces, I am inclined to go further, and inquire whether all these objects would not more surely be attained, by extending this Legislative Union over all the British Provinces in North America; […] such a union would at once decisively settle the question of races; […] it would form a great and powerful people […] which, under the protection of the British Empire, might in some measure counterbalance the preponderant and increasing influence of the United States on the American continent. [7]

When John A. Macdonald spoke at the Charlottetown Conference, where New Brunswick, Nova Scotia, and Prince Edward Island were discussing their proposal for a union of the Maritime provinces, he drew extensively on the arguments of the Durham Report to support a legislative union of all the provinces of British North America. However, as a wily negotiator, a quality he later displayed in Quebec City, he was careful not to openly endorse the central objective of the Durham Report, which was to make the French Canadians once and for all a minority within a broad legislative union in order to "decisively settle the question of races."

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[5] *Ibid*., 225-6.

[6] *Ibid*., 225.

[7] *Ibid*., 229.

THE MULTINATIONAL FEDERAL UNION OF GEORGE-ÉTIENNE CARTIER

The fact that George-Étienne Cartier was present at his side revealed that on "the question of races" nothing had, in fact, been settled. However, something important had changed: the population of Upper Canada had exceeded that of Lower Canada during the application of the Act of Union, and the "English Canadians" had suddenly converted to representation by population. [8] This virtuous and democratic shift applied to a broader legislative union of all the colonies of British North America would have marked the end of the power of veto exercised by Lower Canada in the parliament of United Canada, and at the same time signed the death warrant of the French-Canadian nation, submerged in a Canadian-American, English-speaking sea.

To avoid this prospect of imminent death, Cartier took a stand and daringly suggested replacing the failed legislative union of 1840 by a federal union able to unite, but not merge, the founding peoples of Canada within a confederation of the provinces of British North America. Instead of merging the founding "cultural nations" of the country in an English-speaking, North American melting pot, he proposed allowing them to live side by side within a "political nation" that would provide access to a shared, supranational citizenship, in this case British. And just as Molière's character Monsieur Jourdain "spoke in prose without realizing it," Cartier, like Joseph-Charles Taché, the putative father of the seventy-two resolutions of the Quebec Conference, [9] proposed, as a way to achieve

[8] In 1840, Lower Canada had a population of 650,000 people, compared with only 450,000 in Upper Canada. Despite this demographic inequality, the *Act of Union* gave equal representation to Lower and Upper Canada, which each had forty-two members in the Legislative Assembly and twelve members on the Legislative Council. This equal representation, embodied in the double majority rule, led to the chronic paralysis of United Canada's political institutions.

[9] See Joseph-Charles Taché, *Des provinces de l'Amérique du Nord et d'une union fédérale* (Quebec: Presses à vapeur de J. T. Brousseau, 1858). The book takes up the theme of the federal union project proposed the previous year by Taché in *Le courrier du Canada*—and the seventy-two resolutions that emerged from the

his goal, a multinational type of federalism that could be labelled "communitarian and personalist" even if that school of thought was not yet born.

CULTURAL NATION AND ATTACHMENT TO THE LAND

Some seventy-five years before Emmanuel Mounier and the personalist thinkers who wrote for the French magazine Esprit, George-Étienne Cartier claimed that a nation was not simply a collection of atomized individuals, acting each in his own interest but a community of persons sharing a history, a language, a set of values, and economic and social solidarity rooted in a territorial homeland that it governed in accordance with its own particular character. In his view, territorial self-government was a vital need for all viable nations, since the mother tongue that provides to their members access to knowledge and spiritual life was not just a family heritage, but a communitary creation governed in its daily use by a people who worked, traded, and celebrated life in this shared idiom. The same applied, of course, to the usage and custom that structure our adult lives and are transmitted by community impregnation throughout our childhood.

This is the role of cultural matrix and concrete pathway to universal humanity that Mounier ascribed to local communities when he praised "small homelands within the greater." If the family, village, and nation were not there to ensure the intergenerational transmission of the knowledge and moral wisdom accumulated by humanity over the centuries, the only possible result would be a perpetual return to the wild state.

Cartier did not think any differently, and emphasized forcefully that a cultural nation could only survive and play its role as a "small homeland within the greater" if it was rooted in a specific territory. As he wrote:

Quebec Conference bore a striking resemblance to the proposals made by Taché in 1858.

> The population alone does not constitute a nationality; the territorial element is also needed … race, language, education and morals allow a nationality to exist, but this personal element is not sufficient. To maintain and render permanent a nationality, we must […] leave to our children not only the blood and language of our ancestors, but also ownership of the soil […] As individuals, nationalities have both a moral and a physical nature, they have a soul and a body. The duty of each generation is to transmit both parts of this nationality.[10]

To ensure this dual transmission, Cartier fought to give back to French Canadians the territorial rights that accompanied the linguistic, religious, and cultural rights recognized under the 1774 Quebec Act, especially since those collective rights had been confirmed by the 1791 Constitution Act. Alongside the indigenous peoples, the latter Act consecrated the existence of the country's two founding peoples: the people of Lower Canada, Franco-Catholic and governed by French civil law; and that of Upper Canada, Anglo-Protestant and governed by British common law.

Since the 1840 Act of Union had clearly failed to merge these two "races" or cultural nationalities, there remained only one solution in Cartier's eyes: to establish a form of multinational, territorial, and communitarian federalism bringing together all the colonies of British North America, and able to unite, without merging, the founding peoples of Canada under a supranational citizenship.

A MISSING PIECE IN THE SEVENTY-TWO RESOLUTIONS

Surprisingly, the seventy-two resolutions adopted unanimously [11] by the constituting provinces did not mention the two opposing visions of

[10] Quoted by Eric Bédard in *Les réformateurs: Une génération canadienne-française au milieu du XIXe siècle* (Montréal: Boréal, 2012), 260-1.

[11] Given the fact that it was decided, at the Quebec Conference, that the resolutions had to be passed unanimously by the provinces and that Upper and Lower Canada

Canada discussed at the Quebec Conference. And this silence concerning the refusal of the melting pot, which led to the federal union proposed by Cartier rather than the legislative union proposed by Macdonald, is made even more striking by the fact that without this wish to achieve "union without fusion" of the founding peoples of Canada, it is hard to understand the Quebec Resolutions. Why, for instance, did Resolution 29, Article 33, give the General Parliament the power to legislate to render uniform property and civil rights laws in the common-law provinces, when sanctioned by their legislatures, but exempted the provisions of the Civil Code of Lower Canada? It is also hard to understand Resolution 46, which imposes the use of both English and French in the General Parliament and in the Local Legislature of Lower Canada, as well as in the federal court and the courts of Lower Canada but exempts the other provinces from this requirement. And it is difficult to explain why the

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would each have a vote despite the Act of Union which, on paper, joined them officially, it is not clear where the Supreme Court got the idea for its constitutional convention that an amendment to the Constitution affecting the powers of the provinces required only "a substantial degree of provincial consent" (Re: *Resolution to amend the Constitution*, [1981] 1 S.C.R. 753), especially since the same requirement of unanimous consent became a determining factor at the London Conference. The same disdain for history can be seen in the work of the judges who, in 1981, rejected the idea of a pact or treaty between the constituent provinces of 1867. On this topic, it is worth re-reading the paper by the great Canadian historian George F. G. Stanley, "Act or Pact, Another Look at Confederation." The quotations from the period it contains are unequivocal. One among many is from a speech by the Colonial Secretary, Lord Carnarvan, to the House of Lords: "The Quebec resolutions, with some slight changes, form the basis of a measure that I have the honour to submit to Parliament. *To those resolutions all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union"* (our italics) (Sir R. Herbert, *Speeches on Canadian Affairs by Henry Howard Molyneux, fourth Earl of Carnarvan*; London, 1902, 92). Another quote comes from Under-Secretary Charles Adderley: "It will, I think, be manifest, upon reflection, that as the arrangement is a matter of mutual concession on the part of the Provinces, *there must be some external authority to give sanction to the compact in which they have entered (…) Such seems tome to be the office we have to perform in regard to this Bill"* (our italics) (O'Connor, Report, Annex 4, I49.) The full text of the paper by George F. G. Stanley is found at: http://id.erudit.org/iderudit/3oo387ar.

signatories took such care to separate the powers of the federation's two levels of government as far as possible.

Rereading the seventy-two resolutions of 1864, one is struck by the drafters' desire to draw up an exhaustive list of the local powers assigned to the provinces and the central powers assigned to the federal parliament, and by their decision to allocate any residual powers to each level of government in two separate "subsidiarity" clauses. The first gives the provincial legislatures "generally all matters of a private or local nature, not assigned to the General Parliament" (Resolution 43, Article 18); and the second gives the General Parliament "all matters of a general character, not exclusively reserved for the Local Governments and Legislatures" (Resolution 29, Article 37). In fact, one can only admire the way in which the various decisions issued by the Judicial Committee of the Privy Council in London so faithfully reflect the intentions of the Fathers of Confederation concerning conflicts of jurisdiction between Ottawa and the provinces. To demonstrate this, I will limit myself to a citation from a decision by the Judicial Committee of the Privy Council, Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick, 1892, in which their lordships declared:

> The object of the [British North America] Act of 1867 was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the province for the purposes of provincial government. But, in so far as regards those matters which,

> by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. [12]

Here, too, their lordships had nothing to say about the cultural reasons that encouraged the Fathers of Confederation to circumscribe the powers of the two levels of government with such care.

REJECTION OF THE MELTING POT AND THE MULTINATIONAL FEDERALISM OF 1867

To uncover the true raison d'être or "ultimate cause" of Canadian Confederation, we need to look at the speeches made by Cartier and Macdonald before the Legislative Assembly of United Canada in February 1865. Cartier's address on 7 February is particularly clear:

> Now, when we are united together, if Union is attained, we shall form a political nationality with which neither the national origin, nor the religion of any individual, will interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races is utopian—it is impossible. Distinctions of this kind will always exist. Dissimilarity, in fact, appears to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation cannot be formed because Lower Canada is in great part French and Catholic, and Upper Canada is British and Protestant, and the Lower Provinces are mixed, it is futile and worthless in the extreme… In our own Federation we will have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success will increase

[12] *Decisions of the Judicial Committee of the Privy Council Relating to the British North America Act, I867, and the Canadian Constitution, I861I954* (Queen's Printer and Controller of Stationery, Ottawa, 1954), Vol. 1, 268-9.

> the prosperity and glory of the new Confederacy… We are of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.[13]

It would be hard to state any more clearly, as a sine qua non condition for the confederation, the idea of a new "political nationality" able to bring together under a shared, supranational citizenship, in this case British, the two "races," "cultural nations," or "founding peoples" of Canada. And it would be hard to affirm any more strongly that such a political nationality required the application of a multinational federalism, giving the central government responsibility for "large questions of general interest in which the differences of race or religion had no place" and allowing the country's founding peoples, provided the rights of isolated minorities were protected, to preserve their respective languages, legal systems, and cultures through local self-government based on equivalent rights, and equivalent treatment, for each of the federated communities.

On 6 February 1865, at the Legislative Assembly of United Canada, Macdonald unwillingly accepted Cartier's arguments:

> I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the

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[13] *Débats parlementaires sur la question de la Confédération des provinces de l'Amérique du Nord britannique,* 3rd session, 8th parliament (Quebec: Hunter, Rose et Lemieux, 1865), Tuesday, 7 February 1865. It is interesting to note that Cartier defines the rights of the minorities isolated in Upper and Lower Canada in terms of religion rather than language. This may appear surprising to us today, but less so in light of the "cuius regio, euis religio" that applied before, and even after, the Treaty of Westphalia. The goal of the test oath, after the Conquest, was to impose the Protestant religion on the French Canadians. When the Quebec Act re-established Catholics' right to practise their religion, the thirteen American colonies named it as one of the five "Intolerable Acts" that justified their rebellion against Great Britain because it authorized the existence of a "Papist" colony to the north. This is how religion became the guardian of language under the British North America Act. For an English-speaking Irish Catholic like McGee, this was a serious problem, but he came to accept what later became section 93 of the BNA Act.

> strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did […] we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favour by her people.

And, generalizing this "rejection of the melting pot," Macdonald added:

> We found too, that though their people speak the same language and enjoy the same system of law as the people of Upper Canada, a system founded on the common law of England, there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as separate political organizations, as we observed in the case of Lower Canada herself. [14]

None of which prevented Macdonald, once he became prime minister of Canada, from cheerfully using the residual powers, and the powers to reserve and disallow legislation contained in the British North America Act, to submit the provinces to the powerful central government of which

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[14] *Débats parlementaires sur la question de la Confédération des provinces de l'Amérique du Nord britannique,* Monday 6 February 1865. This fine speech did not, apparently, prevent Macdonald from going back on his word at the London Conference where, with assistance from the representatives of the Maritime provinces, he attempted to substitute a legislative union for the federal union agreed on at the Quebec Conference. According to the novel *Lady Cartier* by Micheline Lachance (Montreal: Québec/Amérique, 2004) and a paper by Chanoine Lionel Groulx from 1918, htt p://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/groulxC onfLondres.htm, Macdonald's attempt failed because Cartier threatened, so it seems, to leave the Conference and return to Canada to demand the dissolution of the Parliament of United Canada.

he had always dreamed—even if he was later called to task by their lordships of the Privy Council in London, referred to by some as the "godfathers of confederation."

If only their successors, the judges of the Supreme Court, had applied the rules as rigorously as their lordships in London! Alas, since the end of the Second World War, centralizers have been easier to find in Ottawa and the Rest of Canada than true federalists. Convincing proof is found in the classic work by Eugénie Brouillet, *La négation de la nation*,[15] in which she does a better job than I ever could of listing all the unitary excesses of modern-day Canada.

For anyone wondering how the Canadian federation can draw inspiration from Cartier's ideas to renew itself while remaining faithful to its history and current planet-wide concerns, I suggest reading my book *Le mal canadien*, essai de diagnostic et esquisse d'une thérapie. Although the world, Canada, and Quebec have changed since it was published, the federal response to the Bélanger-Campeau Report that it suggested is still valid. A supranational citizenship[16] and justice system based on equivalent rights and treatment, respect for the federal principles of subsidiarity and non-subordination, a partnership-based management of interdependency to unite without merging the founding peoples of Canada—all of this remains relevant, in my opinion, at a time when globalization is undermining the territorial powers of nation-states everywhere.

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[15] Eugénie Brouillet, *La négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Septentrion, 2005).

[16] Concerning the return to supranational citizenship attempted during the Meech Lake period, see my paper from the McGill seminar *"La culture publique commune au Québec en débats."* It constitutes Chapter 7 in the collective work *Du tricoté serré au métissé serré?* published by Les Presses de l'Université Laval in 2008 under the direction of Diane Lamoureux, Dirnitrios Karmis, and Stephan Gervais.

IS THERE A FUTURE FOR A UNION WITHOUT A MERGING OF THE PEOPLES?

However that may be, the real question that must be asked today, and which could hardly be asked at the time of Meech Lake, concerns the end rather than the means of the "multinational" federalism proposed in *Le mal canadien*. I would phrase it as follows: *Is the objective of preserving the existence of a civil law, French-language-based "cultural nation" still an honourable goal worth fighting for, in the eyes of Quebecers? Or, on the contrary, do Quebecers, whether sovereignist or federalist, consider that this objective is outmoded ethnicism, irreconcilable with the individualist, anti-communitarist requirements of the modern world and international free trade?*

This crucial question concerns federalists first, since, following the failure of Meech Lake, Canada turned once again, blissfully unaware to the unitary "nation building" inherited from Pierre Trudeau in 1982. In this approach, the concept of "founding peoples" was discarded, and the new Canada was defined as an essentially "multicultural" society, rejecting the idea of a host society in Quebec, or even Canada, with which immigrants had to integrate. In this way, the righteous thinkers in the Rest of Canada could pride themselves on being open to the world and practicing civic nationalism, as opposed to the self-centered ethnic nationalism of the Quebecois.

The same question, concerning the legitimacy of the combat to ensure the ongoing existence of a civil law, French-language-based "cultural nation" in North America, must also be addressed to sovereignists. After the unfortunate speech by Jacques Parizeau ascribing the defeat of the "Yes" side in the 1995 referendum to "money and the ethnic vote," many Quebec intellectuals carefully began to remove any trace of ethnicism from the "le nous québécois." Some went so far as to question the idea of fighting for a Quebec "cultural nation" to be preserved and promoted, relying on a

disincarnated civil nationalism worthy of the "Chartist," Jacobin Trudeau they so detested. [17]

Even Lucien Bouchard said he would be "unable to look at himself in the mirror" if, as premier and PQ leader, he permitted a return to Bill 101 in the area of commercial signage. Ignoring the collective rights foundations of Bill 101, the Larose Commission suggested that the language rights of English-speakers should be elevated to the rank of fundamental individual rights under Quebec's Charter of Human Rights and Freedoms. [18] And at a seminar organized at McGill University, leading sovereignist academics passed a devastating judgment on the concept of "shared Quebec public culture."[19] Last, even the policy on the francization and integration of immigrants adopted by Quebec after negotiating the McDougall-Gagnon-Tremblay agreement, however intercultural it was, was swept under the carpet by the same self-righteous supporters of modernity and the concept of civic nation. Once again misquoting Molière, let us cover up this "ethnocentrism" that we cannot allow ourselves to contemplate!

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[17] On this topic, see the remarkable contribution by Daniel Jacques to the *Devons-nous en finir avec l'indépendance?* series published in the Fall 2007-Winter 2008 issue of *Argument*.

[18] On this topic, see my discussions with Jacques-Yvan Morin published in Le Devoir and reissued on the website Vigile under the title "*Polémique BurelleMorin sur le chartisme*": http://www.vigile.net/archives/dossier-101/ index/4-1 o 1-citoyennete.html.

[19] For challenges to the concept of a shared Quebec public culture, see the proceedings from the seminar held at McGill University: Lamoureux, Karmis, and Gervais, *Du tricoté serré au métissé serré?* For a review of this collective work, see http:/ /www.erudit.org/revue/rsi2oo9/v5o/n2/ 038043ar.html. For Garry Caldwell's reaction, see http://www.erudit.org/revue/rs/2009/v50/n2/038045 ar.html? vue=resume.

OVER THE LONG TERM, ALL NATIONS ARE CULTURAL NATIONS

As a "communitarian-personalist" philosopher who acted as a federal negotiator for the Canada-Quebec agreement on immigration signed in the wake of Meech Lake, I find this guilt placed on the Quebec majority as unfounded as it is debilitating. To the supporters of republicanism in the French or American style, who denounce the ethnicism of the "cultural nation" and depict the "civic" or republican nation as the only possible incarnation of modernity, I have for many years replied that, historically, the civic nation has typically been built in one of two ways: through a revolutionary republican process in the French or American style, or in a liberal evolutive process in the Swedish, Danish, Dutch, or even Canadian style. This changes the facts of the case.

In the revolutionary republican process, in either the French or American style, all cultural, political, and social structures are razed by a violent revolution, following which a civic nation is reconstructed on the basis of a shared language and a set of civilized values inherited from the instigators of the revolution.

These values are then proclaimed in a constitution and a charter of individual rights and freedoms designed to prevent, by the force of law, a decline into the injustice and inequality that prevailed before the revolution. The "civic" nation is seen here as an *ab ovo* creation, an ideal of justice to aim for, but paradoxically it leads to the merging of the citizenry in the melting pot of a new "cultural nation" built on the shared language and values imposed by the victors of the revolution—to the point that over time, the new nation is formed by a "group of individuals brought together by a number of civilizing factors, including a community of language and culture," the actual definition of an ethnic group (as opposed to a race) given in *Le Petit Robert*.

In contrast, in the liberal evolutive process, a pre-existing cultural nation is gradually modernized by conversion to the universality and equality of citizens' rights, with no violent razing of the previous system. This

progressive evolution in mindsets includes respect for individual rights and freedoms while ensuring the organic and historic coherence of an "integrative" cultural nation, meaning one that is open, without denying its own nature, to cultural pluralism. This is, in general, the pathway to modernity followed by "small nations,"[20] and the route taken by the Quebec nation during the Quiet Revolution.

The federalists who launched this quiet revolution, and the sovereignists who continued it, used the powers of the state to the full to "modernize," within Quebec's borders, a "French-Canadian" cultural nation submitted, for centuries, to a suffocating clericalism, economic domination by an English-speaking elite,

and the centralizing vision of Ottawa. The question is: Was placing the Quebec state at the service of a "French-Canadian" cultural nation compressed within Quebec's borders and renamed "Quebec nation," to open it up progressively to modernity and cultural pluralism, a betrayal of the ideal of civic nation? I consider that it was simply a different way of using the state's powers to promote a civic nation that was not invented *ab ovo*, but grounded in a specific history and territory, as many other liberal nation-states have done.

In my opinion, Quebec in the 1960s had neither the means, nor in fact the desire, to become a republican nation-state. As a federated "small nation," the only way open to it to transform itself into a modern nation was that of evolutive liberal nation building. Following the failure of Meech Lake and the dead end in which the sovereignist project has become trapped, the real question facing the defenders of the Quebec nation is whether it is possible to combat the Jacobinism of Pierre Trudeau's "one nation"

[20] See Alain Finkielkraut, *L'ingratitude, conversations sur notre temps* (Montréal: Éditions Québec Amérique, 1999), The concept of "small nations," characterized by their precarious destiny, was first introduced by Kundera before being taken up by Finkielkraut. In his view, "a small nation is one whose existence may be called into question at any time, which may disappear, and which knows it."

Canada by using the seeds of Cartier-style multinational federalism still contained in the Constitution Act, 1867. [21]

To make that move possible, the supporters of modernity will have to stop thinking of the civic nation in ethereal terms, as more tolerant than it really is. What the federalist and sovereignist advocates of the civic nation never mention is the degree to which the French and American authorities had to use violence and legal constraints to impose the common language and common values introduced by their respective revolutions on their citizens. [22] What they refuse to see is how the Canadian provinces other than Quebec can rely on the demographic weight and economic strength of the United States to impose the shared English language and culture of the continent on the immigrants who settle there.

As noted by Alain Finkielkraut, from whom I borrowed the concept of large and small nations, the advocates of the civic nation who denounce the ethnicity of others and claim to rise above it to ensure citizens' freedom and equality, can practise self-righteousness only because the ethnicity of the majority has prevailed within their own national territory, and can now continue to thrive thanks to the hidden force of demographic weight and economic laissez-faire. All these purists apply what Finkielkraut calls the "morals of large nations," which, having practised a successful policy of assimilation based on constraint and violence within their territory, refuse their landlocked "small nations" the right to practise their own linguistic "nation building," even if it respects the rule of law, is restricted to the public sphere, and open to cultural pluralism.

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[21] L.R.C. 1985, ap II, no. 5.

[22] To gain an idea of laws and vexatious measures used by France and the United States to impose French and English on their respective populations, see the following websites: http://www.axl.cefan.ulaval.ca/europe/france 2politik_francais.htm, http://www.axl.cefan.ulaval.ca/amnord/usa_1 situatgenerale.htm. For a vivid account that concerns France, see Claude Duneton, *Parler croquant* (Paris: Stock 1973).

As the only "small nation" with a majority population of French language and culture on a continent awash with English, Quebec has refused to blindly follow the creed of multiculturalism. As the cradle of one of the country's founding peoples, and backed up by the collective rights recognized by the Constitution Act, 1867, it has refused to be simply the home of one of the numerous minorities making up Trudeau's multicultural, individualistic, and chartist Canada. This is why it has opted to implement a policy called interculturalism that 1) recognizes that the majority population in Quebec, a minority in both Canada and North America, is entitled to use the law to impose French as the common language within its territory, and 2) targets a mutual enrichment between the host culture of the majority and the cultures of Quebec's old and new minorities, in a manner consistent with the democratic rules gathered together in 1988 by Gary Caldwell and Julien Harvey under the name "Quebec public common culture."[23]

The role of "form-giver" and "integrative centre of the nation" legitimately given to Quebec's French-speaking majority is what fundamentally differentiates interculturalism from multiculturalism. This is the crucial difference that Quebec has placed at the heart of its policy statement on immigration and integration, the *Au Québec pour bâtir ensemble, Énoncé de politique en matière d'immigration et d'intégration*, by proposing the idea of a two-way moral contract between immigrants and the host society. [24]

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[23] For an outline of this Quebec public common culture, see Gary Caldwell, *La culture publique commune, Les règles du jeu de la vie publique au Québec et les fondements de ces règles* (Montréal: Éditions Nota bene, 2001), which also exists in English: Gary Caldwell, *Canadian Public Culture: The Rules of the Game in Canadian Public Life and Their Justification* (Fermentation Press, 2012).

[24] See *Au Québec pour bâtir ensemble, Énoncé de politique en matière d'immigration et d'intégration* (Quebec: Ministère des Relations avec les citoyens et de l'Immigration, 1990). Well before the Bouchard-Taylor Commission and the charter of Quebec values proposed by the Marois government, this policy statement, in my opinion, goes to the heart of the matter with a level of discernment and plain speaking that has still not been equalled.

When the Quebec and Canadian supporters of anti-communitarist individualism in the Trudeau mould reject the very idea that Quebec can, as a distinct society, practise such a clearly civilized form of interculturalism, they are also shattering the foundations of the Meech Lake Accord and the multinational federalism of Cartier and McGee.

More dramatically, it is the recognition of Quebec as a "nation" or "distinct society" that they empty of all specific content, justifying the need for the Rest of Canada to serve up its never-ending What does Quebec want? to avoid answering the question What does Canada Want?, posed by its own rejection of the Meech Lake Accord.

Addendum

To be honest, let us note that the conception and practice of Canadian multiculturalism have evolved since the time when I wrote Le mal canadien. Clearly, no political leader today would sign the pamphlet, entitled *How to become a Canadian citizen*, that the federal authorities gave to immigrant candidates in 1993. I quote here an excerpt from that pamphlet which leaves us speechless today: "*Some of you believe that by becoming Canadian citizens, they will have to definitively renounce their past and adopt a completely different mode of behaviour. However, this is not the case in Canada, because the Canadian Constitution guarantees everyone equality before the law and gives everyone the right to be themselves, by prohibiting any discrimination based on race, national origin or ethnicity, colour, religion, sex, age or mental or physical ability.* ***So you don't have to give up you're your way of doing things when you become Canadian, because while there are two official languages in Canada, there is no official culture. You are therefore free to live according to your own customs.***" At the time, I asked an annoying question: what happens if these customs prescribe the infibulation of women or bigamy? The Harper government has asked itself the same question and has decided to provide candidates for

Canadian citizenship with a guide that adopts a completely different way of briefing today's immigrants[25].

What is still misleading today is the idea of a postnational Canada preached by Justin Trudeau. Since in that supposedly postnational Canada, our Prime Minister keeps talking of "national standards" and "national programs" when adopted by the Canadian Parliament. In reality, Justin Trudeau's postnational Canada is a "one nation" Canada whose capital is Ottawa. And this unitary vision of the country is secretly in line with the public opinion in the rest of Canada. The truth is that to recognize Quebec as a "distinct society within a Canadian multinational federation" Canadians are asked to reconnect with the UNION WITHOUT FUSION of the founding peoples and provinces of Canada preached by Wilfrid Laurier and Pierre Elliot Trudeau, the intellectual of Cité Libre. And the same holds true when we speak of the right to self-government of our native peoples. But who dares to remind clearly and courageously that basic truth the more and more Americanized Canadians of today?

[25] For those who are interested, here is the internet address of this document entitled *Study Guide – Discover Canada – The Rights and Responsibilities of Citizenship*: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/discover-canada.html

PART 2

A country deeply divided after the 1982 repatriation of its constitution despite Québec's national Assembly's unanimous opposition

English Canada must understand without any doubt that, whatever is said and whatever is done, Québec is today and will remain forever a distinct society, free and able to assume its own destiny and development.

Robert Bourassa in an address to Québec's National Assembly following the unraveling of the Meech Lake Agreement. June 22, 1990.

A DOUBLE CRISIS OF THE CANADIAN SOCIAL ET POLITICAL CONTRACT[26]

As a veteran of the Canadian constitutional debate, I am deeply convinced that to avoid tangling oneself and our leaders up in untenable moral and intellectual contradictions, a political adviser or public servant seeking to contribute to a deep reform of its mother country must imperatively adopt from the start a conception of humanity and political life that is compatible with the ethos and history of that country.

To be clear, we are free to manufacture utopias in university settings, but in the real world of politics one does not advise the Prime Minister of a country like Canada, which is based on rejection of both the melting pot and the survival of the fittest doctrines, as one advises the President of the United States. The Canadian dream is not the American dream or the French dream, and what we learn on the campuses and in the books of our neighbours to the south or of our French cousins across the ocean cannot be applied to the Canadian federation without first being rethought on *sui generis* foundations.

Therefore, if, as a political advisor or a public servant, you want to provide elected officials in Québec and Canada with ideas that are both feasible and creative, you sometimes have to learn to take distance from the fashion of the day.[27]

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[26] I mean "social contract" in the sense given by the late political scientist Richard Simeon: "A settled understanding, a set of shared premises, that broadly defines common purposes, mutual obligations, and a sense of the appropriate roles of government." Richard Simeon, *In Search of a Social Contract,* (Toronto: C.D. Howe Institute, Benefactors Lecture, 1994), p. 8.

[27] A famous opponent of intellectual trends, Péguy boasted of being a "miscontemporary", that is to say, a critic of modernity. We need thinkers like him more than ever in this time of unfettered globalization. See Alain Finkielkraut, *Le mécontemporain Péguy: lecteur du monde moderne,* (Paris: Gallimard, 1992).

You have to think "outside the box" and invent ways to modernize and manage the Canadian federation that are respectful both of the historical roots and the existential complexity of not only Québec but also Canada and our endangered planet.

CANADA'S SOCIAL AND POLITICAL CONTRACT: A TWOFOLD CRISIS

As soon as we take this stance, as the FPRO research group that I directed in Montréal tried to do, we see that Canada's social and political contract[3] has been in the throes of two major crises for decades. In truth, the very foundations for the collective will of the citizens and the founding communities of Canada have been shaken by two crises born from attempts to fit our country into ideological straightjackets that deny the spirit specific to the Canadian venture.

The first of these crises, which was confirmed by the failure of the Meech Lake Accord, stems from Trudeau's charter of rights inspired by the American melting pot ideology. Rejecting that doctrine was and remains at the very heart of the Canadian confederation pact, but the strictly individualist reading of the *Canadian Charter of Rights and Freedoms* that Pierre Elliott Trudeau dishonestly sold to the country in his fight against Meech succeeded in demonizing the very notion of collective rights. It led to the refusal to recognize in the fundamental law of the land that Québec is clearly a distinct society within the Canadian federation. Moreover, making individual rights absolute, and condemning the "community rights" recognized from the start to Canada's founding peoples undermine the ethos of Canada by reducing to ethnicism, even to shameful racism, rightful defence of Québec's cultural and linguistic difference within the Canadian federation. The situation is even worse for Indigenous peoples, who have been criticized for upholding birth rights and community segregation as they are required by the *Indian Act,* a legislation that the federal parliament itself has imposed upon them.

The second crisis undermining the Canadian federation is related to the major social programs that Canada adopted after World War II. In this case, Canadian rejection of American-style survival of the fittest doctrine has come under fire from free-trade proponents and neoliberalism devotees for whom less government is better government. Such anti-statism, raised to the level of dogma by the Chicago School, spawned the all-out fight over-indebtedness by our governments to save their credit ratings on the financial markets. Even if there were often good reasons for the budget cuts decreed by the federal and provincial governments to whip our public finances back into shape, they deepened the crisis of a welfare state that was already suffering from globalization, which cripples governments and puts Canada in direct competition with countries where might makes right reigns as well as systemic social injustice. The result is that rejection of American-style social Darwinism might not be dead in Canada, but the triumph of neoliberal individualism and the insidious privatization of health care in Québec and elsewhere has undermined the Canadian ethos of mutual assistance between rich and poor citizens and regions across the land.

Compounding the situation, these two crises stoke each other's fires. Since World War II, all of the major pan-Canadian social programs have been set up through the federal government's spending power in areas of jurisdiction that were originally reserved to the provinces so as to guarantee their right to cultural and regional difference. The result is that not only does the federal government trespass on the provinces' turf, but the legitimacy of the "national" standards that the country has adopted in health care erodes when Ottawa cuts funding to the provinces but demands them to continue meeting the standards it has decreed.

CANADIAN SOUL-SEARCHING, A MODERN *MALADY*

Given these strong and deeply rooted trends at work inside and outside Québec, the research group I was heading in the wake of the *Bélanger-Campeau Commission,* came to the conclusion that our federation was

suffering from a "never-ending soul-searching" we called the *Canadian Malady*.[28] And it made us realize that the two crises of the Canadian social and political contract we had brought to light were clearly related to the most urgent political challenge of our time. Namely: reconciling the vital need of individuals and communities to preserve their own language and culture through local self-government, and the equally vital need of a central government endowed with the powers and resources needed to tackle the most pressing problems of our planet. And we soon realized that not just any conception of how humans should live together, and not just any type of federalism, can harmoniously reconcile, in Canada as well as on the international stage, these two crucial requirements: local self-government needed by nations and communities to preserve their roots, and the pooling of economic, social and political resources to which those nations and communities must consent in order to solve the supranational problems of our time?

Speaking more specifically of Canada, how can we defend the idea of "union without fusion" of our founding peoples, celebrated by thinkers such as Cartier, McGee and Laurier, when we are asked to condemn the very notion of "cultural nation" or else risk being accused of ethnicism or even irredeemable racism by well-meaning Québec and Canadian academics?

How can we understand and defend Bill 101 when linguistic and cultural rights are reduced to simple individual rights by willfully ignoring the fact that language and culture are collective creations that can be sustained only if there is a territory-based community that lives, works, names and celebrates the world in a shared idiom? And when the neoliberal doxa of someone like Milton Friedman has absolute rule in the world of business and invades our university campuses, how can we defend the government intervention that has made it possible to maintain broad socioeconomic solidarity in Québec and Canada since World War II?

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[28] André Burelle, *Pierre Elliott Trudeau, l'intellectuel et le politique,* (Montréal : Fides, 2005), p. 25–45.

We cannot cure the individualism of modernity and unchecked capitalism by further enshrining individual rights and enfeebling people's responsibilities to the common good of the communities that sustain them materially and spiritually. By returning to the writings of George-Étienne Cartier and the sources of the Québec Quiet Revolution, as well as to the origins of the European Economic Community, my colleagues at the FPRO discovered the theory of "federalism for small nations" preached by proponents of personalism such as Emmanuel Mounier, Jacques Maritain and Denis de Rougemont.

As a philosopher, I have made the rounds of the great political thinkers, from Plato, Aristotle, Hobbes, Locke and Montesquieu to Hegel and Marx, not to mention Taylor, Kymlicka, Rawls and Habermas. Yet, communitarian personalism is in my eyes the current of thought best able to deal with the multinational character of Canadian federalism and also with the most urgent political challenge of our time: managing the planet's most pressing supranational problems while respecting individuals' and communities' right to be different.

Personalism was not taught at the Université de Montréal where, as a penniless student, I did all my studies in philosophy, but I discovered it on my own. After immersing myself in communitarian personalism at the age of 20, I went on to teach it at Collège André-Grasset throughout the 1960s, and I thus found myself by accident in the company of the vast majority of returnees from Europe who imagined and shaped Québec's Quiet Revolution: André Laurendeau, Claude Ryan, Fernand Dumont and Guy Rocher all professed Mounier's personalism at one time, as did Gérard Pelletier and Pierre Elliott Trudeau, who created the journal *Cité libre* with the express ambition of it becoming a Québec and Canadian equivalent of the journal *Esprit.*[29] Since almost all the fathers of the European Community were members of *Esprit*'s communitarian

[29] On this, see Jean-Philippe Warren and E.-Martin Meunier, *Sortir de la "Grande Noirceur": l'horizon personnaliste de la Révolution tranquille,* (Québec: Septentrion, 2002).

personalist movement, I was quickly initiated into the "federalism for small nations" so dear to Mounier and his close collaborator Denis de Rougemont.

THE FEDERALISM FOR SMALL NATIONS OF MOUNIER AND DE ROUGEMONT

For those who are not familiar with the thought of Mounier, Maritain and de Rougemont, I have provided a 20-page summary of communitarian personalism in the introduction to my book *Pierre Elliott Trudeau, l'intellectuel et le politique.* [30] Here, I will simply quote the key passages of that summary.

Person vs individual

For Maritain, Mounier and the *Esprit* movement, the great failure of republican liberal individualism, and the root of why modernity has gone wild, is that it reduces humans to simple interchangeable individuals and, to provide a foundation for the equal, universal rights of such individuals, it paradoxically feels obliged to strip humans of everything that makes them individual. This it has done to the point of making them "simple legal abstractions with no ties, no fabric, no neighbours, no poetry".

Mounier and his collaborators contrasted the abstract, disembodied individual of lawyers and economists with persons as beings of relationships: cognitive and loving relationships with themselves, with their fellows and with the cosmos, for "the fundamental action of a person is not to become separate but to commune."

[30] André Burelle, *Pierre Elliott Trudeau, l'intellectuel et le politique,* (Montréal : Fides, 2005).

Concrete universal vs abstract universal

Denouncing republican, mercantile "false universality", personalism insists that humanity is not a simple gathering together of abstract, disembodied, deterriorialized individuals. It is a broader, more far-reaching community of persons rooted in local communities that serve as living places for learning about others and about persona! responsibility. These "small homelands under the larger one" are concrete paths toward a true form of universality that does not sacrifice persons to the community or the community to persons.

This is how personalism leads to federalism, which Mounier considered to be the only system that could guarantee the sustainability and autonomy of human scale communities within the large political wholes that humans need to manage the planetary problems of our time.

COMMUNITARIAN PERSONALIST FEDERALISM: A REGIME FOR SMALL NATIONS

Mounier wrote that "personalist democracy is a regime for small nations. Large nations can bring it about only by dissociating power so that each is constrained by the others." Rejecting the sacrosanct principle of the nation-state that had put Europe to fire and sword, Mounier and Maritain argued that only a regime of federal inspiration could reconcile communitarian pluralism—which is indispensable for people to be rooted yet also responsible—with the need for an authority able to fairly and efficiently manage a common good that now transcends national borders. Community roots for persons and just, efficient management of a common good that is increasingly "supranational" are, in the eyes of personalists, the two contradictory imperatives that our time must reconcile, and that reconciliation demands the adoption of what Denis de Rougemont called *a federal solution.*

De Rougemont wrote: "I propose to affix the label *federalist problem* to any situation in which two antimonic, but equally valid and vital, human realities compete against each other and where a solution cannot be found by negating one of these two realities or subordinating one to the other, but only by engaging in a creative endeavour that encompasses, satisfies and transcends the requirements of both. I would therefore call *federal solution* any solution that takes as a rule to respect the two antinomic entities that are in conflict while bringing them together in such a way that the result of their tension is positive."

FOUNDING PRINCIPLES OF COMMUNITARIAN PERSONALIST FEDERALISM

For de Rougemont, building a true federation means translating into political and institutional terms the personalist philosophy that he constantly defended, from the time of his first contributions to *Esprit*. Drawing lessons from the secular Swiss experience, he formulated on several occasions the six cardinal principles that must preside over the building of a true "multinational" federation.[31]

Reformulated and reduced to their essential, these six principles of communitarian personalist federalism can be boiled down to four:

1) Equivalency *rather than identity of rights and treatment* as the foundation for equality of citizens and of federated communities, because treating unidentical beings identically denies their difference and rejects the doctrine of "union without fusion" of federated communities;

[31] First formulated in 1948 in *L'Europe en jeu*, these guiding principles of federalism were reworked and enriched many times by de Rougemont, in particular in Denis de Rougemont, "Orientations vers une Europe fédérale", *Bulletin SEDEIS*, 56, May 1963. See the wording of these principles in Burelle, *Pierre Elliott Trudeau …*, pp. 43–44.

2) *Subsidiarity* as a principle of division of powers because, to keep the exercise of power as close as possible to local persons and communities, the central government of a federation must be responsible only for tasks that cannot be managed justly and efficiently at the local level;

3) *Non-subordination* as a principle of division of sovereignty because, to ensure that two orders of government live together peacefully and creatively within a single federation, neither of those orders can be in law or in fact subject to the other in its exercise of the sovereign powers it is given under the Constitution;

4) *Joint decision-making* as a principle for managing the interdependency of the partners in a federation because, to respect the principle of non-subordination, any restrictions to the exercise of sovereign power of the central as well as the local government must be decided upon jointly to solve problems that straddle their respective areas of jurisdiction.

A WIN-WIN REBALANCING OF THE FEDERATION IN RESPONSE TO BÉLANGER-CAMPEAU

Taking inspiration from these four broad principles, the FPRO research group I directed proposed to the Mulroney government a partnership renewal of the Canadian federation based on the following negotiation quid pro quo strategy:

- A formal constitutional recognition that Québec and Indigenous peoples have a right to remain distinct societies within Canada, and that all the provinces are entitled to protect and promote their regional differences, accompanied by the decentralization of powers and the fiscal resources necessary for exercising these rights;

In exchange of

- The signature of a Pact on the Canadian economic and social union, by which all the partners in the federation, including Ottawa, Québec and eventual Indigenous governments, would undertake to coordinate the exercise of their sovereign powers through European-style joint decision-making in a council of First Ministers, in order to enforce the shared goals and minimum common standards needed to maintain and strengthen the Canadian union in the face of the technological and economic pressures of globalization and international free trade.

I cannot summarize here all of the aspects of the win-win negotiation that we proposed at the time of the Mulroney government and that I tried to describe in detail in my book *Le mal canadien.* However, I can say that as soon as Indigenous peoples' claims began to monopolize the messy discussions that led to the Charlottetown Accord, any rational debate on means to consolidate the Canadian social and economic union against the disintegrating forces of globalization became impossible. And, after the Accord was rejected in the 1992 pan-Canadian referendum, my superiors gave me a sabbatical leave to write a book destined to save from oblivion a win-win plan to rebalance the federation that had made its way to the top of the federal hierarchy, where it had been examined in ministerial committees by the most influential members of the Mulroney government.

Le mal canadien was thus published in 1995 to keep open the future of a reform that was judged promising. In the summer of 1994, I gave a copy of my manuscript to Michel Bélanger and five other federalist leaders in Québec, with the open aim of convincing them to incorporate the broad lines for rebalancing the Canadian federation described in my book into the "No" campaign's manifesto during the referendum held by the Parizeau government. However, by the fall of 1994 it was already too late. The federal government had already forced the "No" campaign to adopt its hardball strategy of putting nothing on the table. Jean Chrétien was

persuaded that if Quebecers were forced to choose between Parizeau's uncompromising sovereignty and the Canadian *status quo* inherited from Pierre Elliott Trudeau, they would opt to remain in the "best country in the world", which even René Lévesque said was not a gulag.

In May 1995, when the organizers of the Association francophone pour le savoir (ACFAS—the French-language Canadian learned society) conference in Chicoutimi invited me to present my book to a group of hardline political scientists, the Parizeau government's referendum on pure sovereignty was rushing headlong into disaster. Since it looked like the "No" camp was going to win, I suggested once again that its manifesto be amended to include the holding of a Québec referendum proposing a reform of the Canadian federation based on the win-win negotiation strategy described in *Le mal canadien*. My primary goal was to prevent Québec from becoming a prisoner of the *status quo* after a federalist victory if no reform obligations were incorporated into the manifesto required under the Québec *Referendum Act*. My secondary objective was more proactive and pacifying, and involved putting a reform of the federation on the table such that moderate partisans of sovereignty-association would basically be satisfied if they lost the referendum.

To my great surprise, the political scientists in the room, with Louis Balthazar in the lead, concluded that such a referendum would garner the support of 70 to 75% of Quebecers, and that this was the winning referendum that should be proposed to the people of Québec. The "No" campaign once again turned a deaf ear, but the sovereigntists understood that, by adding a Québec-Canada partnership plan to the hardline sovereignty of the Parizeau government, they would have a chance of avoiding the defeat looming on the horizon. Everyone knows how that story ended.

However, something that you may not know, but that might prevent you from giving up hope, is that after the near victory of the sovereigntists on October 30, 1995, a group of 22 leading figures in English Canada signed

a manifesto written by John McCallum and Charles Taylor[32] in favour of a reform of the Canadian federation in line with the win-win approach proposed in *Le mal canadien*. As if by chance, the Chrétien government scheduled a major press conference at the same time as the manifesto's launch, and the Group of 22 found itself talking to an empty room.

That did not prevent certain researchers in the rest of Canada from jumping on the bandwagon of the Pact on the Canadian Social and Economic Union while conveniently forgetting the other half of the equation set out in my book, namely, the constitutional recognition of Québec's distinct nature at least equivalent to that offered in the Meech Lake Accord.

Half a dozen studies were then published, including *ACCESS* by Tom Courchesne"[33], who argued in favour of a new social and economic union determined jointly with the provinces, and *Securing the Social Union* by Kathy O'Hara, and published by the Canadian Policy Research Network.[34] O'Hara's study alluded vaguely to fundamental rules for managing intergovernmental cooperation, but did not state any. And then the little flame was snuffed out when the Chrétien government managed to strong-arm the provinces into accepting the Canadian Social Union Framework Agreement, which more or less placed them under custodianship. Only Québec refused to sign the Agreement, which left it all alone in its corner.

After Paul Martin's 1995 budget and the massive cuts in transfer payments to the provinces, Ottawa regained control of its finances and the Mulroney

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[32] Alan Cairns, David Cameron, Gretta Chambers and Thomas J. Courchesne, *Réadapter le Canada/Making Canada Work Better,* Manifesto of the Group of 22, May 1, 1996, https://www.researchgate.net/publication/237577916_Making_Canada_Work_Better, visited on January 29, 2020

[33] See Tom Courchesne, *Assessing ACCESS: Towards a New Social Union,* (Kingston: Queen's University, Institute of lntergovernmental Relations, 1997).

[34] Kathy O'Hara, *Securing the Social Union,* Study No. 2, (Ottawa: Canadian Policy Research Networks, 1998).

government's interest in taking a partnership approach to managing the interdependency of the governments practically disappeared. Likewise, the constitutional recognition of Québec's distinctness, which a panicking Chrétien had promised on the eve of October 30, 1995, never became concrete, and then the Clarity Act put yet another nail in the coffin of constitutional change.

It remains that, to the surprise of the Chrétien government, the Supreme Court opened an unhoped-for avenue to Québec's claims when in 1998 it ruled, in *Reference re Secession of Québec,* that Ottawa and the rest of the country would have a legal obligation to negotiate in good faith if a constitutional reform proposal was approved by the majority of the population of Québec.[35]This was so heartening that I proposed, in newspapers[36] and many other forums, the holding of a winning federalist referendum on the plan to rebalance the partnership in the federation outlined in *Le mal canadien*. At risk of repeating myself, I remain convinced that such a referendum is still the only truly efficient lever still available to Québec to get the rest of Canada to change its mindset.

Will Québec pass up this opportunity to re-engage with the multinational federalism of 1867 by proposing a viable modem alternative to the anti-communitarian "one nation" doctrine that was imposed on it in 1982?

I would like to end this paper on an optimistic note, but I must take note that our politicians seem to be short-sighted and subject to the overwhelming pressure of the post-modernity ideology currently in fashion. This means that you, as university researchers, have the herculean task of rethinking, outside the box, the union without fusion of the founding peoples of Canada as well as the Canadian economic and social union, which are both threatened by anti-communitarian forces of

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35 On this topic see in les *Cahiers de droit* the article signed by Patrick Taillon et Alexis Deschênes, *Une voie inexplorée de renouvellement du fédéralisme canadien : l'obligation constitutionnelle de négocier des changements constitutionnels https://www.erudit.org/fr/revues/cd1/2012-v53-n3-cd0260/1011937ar/*

36 *Le referendum gagnant que l'on refuse aux Québécois, Le Devoir*, December 11, 1998.

globalization based on the cult of the individual and the law of might makes right.

My hope is that environmental and climate crises will increasingly force our leaders to "think globally and act locally"[37] in order to prevent the planetary catastrophes that are threatening us. Since the survival of humanity hangs in the balance, I dare hope that these crises will open the hearts and minds of our leaders and our fellow citizens to the virtues of partnership federalism and European-style joint decision-making as ways to manage the interdependency of peoples while respecting their right to be different.

Having said this, nothing is certain in this world, and it is up to you to decide whether you will have the wisdom and courage to go against the present flow of economic and legal individualism and engage in fresh thinking about the increasingly interdependent future of Québec, Canada and the planet as a whole.

[37] https://en.wikipedia.org/wiki/Think_globally,_act_locally

PART 3

In search of a win-win approach

Reconciling our "founding peoples" and "constituent provinces" "right to be different" with the imperative for Canada to pool the political, social, and economic resources needed to face the global problems of our time

> *The purpose of our group is to rebalance and revitalize the federation. Rebalancing speaks to realigning powers and enhancing overall cohesion and coordination. Revitalizing speaks to citizen commitment by creating a system that speaks to the values, aspirations and self-images of Canadians in all parts of the country.*
>
> *Making Canada Work Better,* a Manifesto penned by a group of 22 intellectuals from English Canada led by John McCullum and Charles Taylor in the aftermath of the 1995 Quebec Referendum.

PRESSING NEED FOR FEDERALIST FORWARD THINKING IN QUÉBEC AND THE REST OF CANADA

By way of a contribution to the history of contemporary federalist thought in Québec, allow me to recall in broad strokes the lack of both federalist and sovereigntist forward thinking during the 30 years that I was closely involved in Canada-Québec constitutional and political debates.

THE BIRTH OF A NEW WORLD

On the federalist side, after the abortion of the Laurendeau-Dunton Commission, the advocates of federalism, both in Québec and in the Rest of Canada (ROC), faced a situation not foreseen and particularly disturbing: the accelerated erasing of provincial as well as national boundaries by the technological, economic and financial forces of globalization. The result was that even in the glory days of the Pepin-Robarts Commission, Marc Lalonde's *A Time for Action* (Bill C-60) and Claude Ryan's *Beige Paper*, the great mission to be accomplished by those who wanted to reform Canadian federalism was simply to "contain" federal spending power and try to reconcile the *multiculturalism* preached by Pierre Elliott Trudeau with the original *multinationalist* approach embodied by the Canadian confederal pact of 1867. No one really anticipated how the World Wide Web and international free trade would break down provincial and national boundaries. And no one realized how the member States of the Canadian federation would have to coordinate the exercise of their territorial sovereign powers to tackle the increasing global problems of our times.

When I was tasked, as a senior public servant in the Federal-Provincial Relations Office (FPRO), with reflecting on the content of the Meech Lake Accord in order to correct the 1982 constitutional patriation imposed on Québec, I had to deal with a lack, in both Québec and the ROC, of realistic new ideas for

1) reconciling the individual rights protected by the Canadian and Québec charters of rights and freedoms with the collective rights guaranteed to Canada's founding peoples under the *Constitution Act, 1867*; or

2) ensuring the collaborative exercise of the sovereign powers of the provincial and central governments to

    a) resolve issues that increasingly transcend the strictly territorial powers of the two orders of government of our federation (the environment, free flow of goods, capital and persons, etc.); and
    b) consolidate the Canadian social union based on the major economic and social mutual assistance programs that Canada adopted in the wake of World War II and that are threatened today by a form of globalization allergic to community solidarity as well as State rules imposed on wild capitalism.

TWO FORMS OF CHRONIC BLINDNESS

To limit my comments to the Meech Lake period (which had nonetheless begun in a spirit of renewal), I was then struck by the inability, or even the refusal of federalist reformers, to imagine the future of Canada in a context of antigovernment globalization. In my view this was due to the prevalence of two ideological mindsets that are as subtle as they are insidious.

The first of these mindsets took, and still takes, the form of what I would call the *rear-view mirror reflex* of the legal experts who advise our governments. By overcautiousness, they are unable to propose the slightest constitutional innovation if they cannot invoke ironclad precedents to prove their case in advance. Yet, rethinking the future of a country means, by definition, venturing off the beaten path to propose

something new. The simple truth is that this requires great creativity and a willingness to take "calculated risks", which are not aptitudes cultivated by our faculties of law, where Common Law predominates and prudence is too often confused with jurisprudence. This leads to timid conservatism in constitutional matters.[38]

The second mindset took a more ordinary, but just as insidious, form that I would call the habit of political thinkers and leaders in Québec and the ROC *wearing blinders*. Their tunnel vision resulted, and still result, in a myopic vision of the future and a weak memory of our collective past. Even those who rejected the "fixation on the immediate" engaged most often in debilitating *bon-ententisme*. To "keep" peace among Canadians, they preferred to sweep problems that shocked and divided under the carpet, even if that meant sacrificing the past and future to the present.

This explains why courage and forward thinking were in short supply among our intellectual and political leaders when it came to taking on, even at the time of Meech Lake, two crucial challenges that Canada is confronted with more than ever today. I would resume them as follows:

1. How can we find a way that is both moral and truly egalitarian to reconcile the collective rights of the founding peoples of Canada with the "one nation" conception of Canadian citizenship that

[38] One example of something new that gave cold sweats to legal experts in Ottawa is the idea of rewriting section 95 of the *Constitution Act, 1867*, to replace the competing federal-provincial powers with respect to immigration by a more clear-cut, yet collaborative, distribution of sovereign powers between the federal government and Québec. It was accepted only thanks to the efforts of a fearless young lawyer on the federal team that I was leading during the negotiations on the *Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens*. Since the Meech Lake failure had made it impossible to constitutionalize the Accord, the cooperative distribution of sovereign powers that it establishes between the federal government and Québec with respect to immigration now has quasi-constitutional status according to the documents from Ottawa. For the Accord, as concluded, provides that the parties to it may not re-open it unless they agree ahead of time on how they will close it again: a political means of anchoring it that is effective, but not very orthodox in the eyes of some constitutionalists.

Ottawa and the ROC forced on Québec when the Constitution was repatriated in 1982?

2. How can we find a way that is both fair and efficient to manage the interdependency of the provinces and the central government in this time of irresistible globalization with mounting problems that transcend provincial boundaries as well as Canada's borders, and that can be solved only through concerted exercise of the sovereign powers that the Canadian Constitution distributes to the provincial legislatures and the Parliament of Canada?

After the Meech Lake and Charlottetown failures, innovative ideas for helping Canada deal with this two-pronged challenge were so few and far between that the FPRO research group I was heading had to put on the table the key concepts at the centre of the draft federal response it proposed to the Bélanger-Campeau report.

SUPRANATIONAL CITIZENSHIP AND JUSTICE BASED ON EQUIVALENCE

This is how we came to propose the concepts of "supranational citizenship" and "justice based on equivalent rights and treatment" of individuals and federated communities to guarantee, in a modern Canada, what Laurier called "union without fusion" of the founding peoples and provinces of our country. For, treating dissimilar peoples and provinces in an identical manner and trying to merge them together into an amorphous multicultural Canada, as Trudeau-style centralizing nation-building and charter devotees proposed, meant in the eyes of Quebecers, and in our eyes, tossing away the rejection of the American melting pot policy that was at the heart of the Canadian social and political contract of 1867.[39]

[39] On the concept of "supranational citizenship" that we proposed, see André Burelle, *Plusieurs cultures publiques communes peuvent-elle coexister au sein du Canada chartiste et multiculturel de Pierre Elliott Trudeau*, in Stéphan Gervais, Dimitrios

In fact, the FPRO in Montréal was a voice in the wilderness with respect to the need to reconcile multiculturalism and the *Canadian Charter of Rights and Freedoms* with recognition of Québec as a distinct society within Canada. From the point of view of the academics in the ROC who had converted to Trudeau's anti-communitarian reading of the Canadian charter of rights and liberties, what we were proposing was heresy. At the same time, in Québec, the sovereigntist intelligentsia was thinking about only one thing: inventing a "collective us" and a "Québec civic nation" deliberately cut off from its French-Canadian roots to shelter the theorists of a Québec "civic nation" from accusations of ethnicism, or even racism, made by right-minded Canadian Trudeauists.

The result was that the only two "thinkers" the Bourassa government could borrow from to give itself an "interculturalism"-inspired policy on immigration and integration (*Énoncé de politique en matière d'immigration et d'intégration*) in 1990 were two academic outsiders: Jesuit Julien Harvey and sociologist Gary Caldwell, with their concept of "Québec's common public culture".[40]

As for me, as the chief negotiator of the *Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens*, I ended up talking myself hoarse trying to explain to the leaders of a federal apparatus instinctively authoritarian and forgetful of our history:

1) that the multinational federal Canada of 1867 was born under the aegis of the supranational British citizenship that was enjoyed at the time by all members of the Empire and that made possible for Indigenous peoples and Franco-Catholic Canadians to define themselves, prior to the 1948 law on Canadian citizenship, as

Karmis and Diane Lamoureux, eds., *Du tricoté serré au métissé serré ? La culture publique commune au Québec en débats* (Québec City: Presses de l'Université Laval, 2008), 165–182.

[40] Gary Caldwell, *La culture publique commune, les règles du jeu de la vie publique au Québec et les fondements de ces règles* (Montréal: Éditions Nota bene, 2001). For an English version see *Canadian Public Culture. The Rules of the Game in Canadian Public Life and their Justification*, Fermentation Press, 2012.

distinct nations within a federation dominated by the Anglo-Protestant Loyalist Canadians fleeing the American Revolution of Jefferson and company;[41] and

2) that the *Constitution Act, 1867*, had used the Aristotelean notion of proportional equality to recognize that the justice rendered with respect to people in Lower Canada under the *Civil Code of Lower Canada* would be considered as broadly equivalent but not as identical to the justice rendered under the Common Law with respect to the people of the other provinces. The only "Aristotelians" whom I was able to call on for help on this crucial question were the second-generation feminists who were submitting demands to the Advisory Council on the Status of Women in Ottawa not for identical but equivalent rights and treatment in order to achieve "real equality" with men. In other words, they were seeking a form of equality that took into account the biological and psychological differences between men and women to create a true "level playing ground" between the two complementary halves of humanity.

MANAGING INTERDEPENDENCE THROUGH EUROPEAN-STYLE JOINT-DECISION-MAKING

As for means to put an end to the overbearing federalism denounced by Bourassa and to ensure fair, efficient and modern management of the interdependence of the sovereign partners in the Canadian federation, it was a complete wasteland, not only in the ROC but also in Québec, and more understandably among the marginalized First Nations of Canada.

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[41] On the benefits of the rule of law, the system of law and the parliamentarianism that went hand-in-hand with granting supranational British citizenship to French Canadians after their defeat on the Plains of Abraham, see the famous speech to the glory of English-style political liberalism that Wilfrid Laurier gave in Québec City on June 26, 1877. On this, see André Pratte, *Biographie d'un discours: Wilfrid Laurier à Québec le 26 juin 1877* (Montréal: Boréal, 2017).

When I spoke to academics at Queen's about Canada's chronic shortcomings with regard to the federal principles of subsidiarity and non-subordination, they looked at me as if I were speaking Greek. When I drew attention to the urgent need to give Canada a mechanism for managing the interdependence of the sovereign partners in the Canadian federation, given the continent- and planet-wide problems that called for concerted use of the sovereign powers of both orders of government, I collided with Pierre Elliott Trudeau's slogan *Who will speak for Canada?* and the unremitting unitary dream of John A. Macdonald's heirs. [42]

It was not much better on the Québec federalist side. In Robert Bourassa's Quebec Liberal Party (QLP), Claude Ryan had his heart set on unconditional opting out with full financial compensation. As a champion of liberal values, Ryan celebrated the moral greatness of a Canada that practised distributive justice between individuals and rich and poor provinces thanks to equalization and major pan-Canadian social programs. However, at the same time he rejected any idea of common standards, even minimal and decided jointly in a European manner by the provinces and the federal government, that would guarantee the maintenance of such programs when threatened by the each-to-his-own

[42] Things have improved in recent years on the aboriginal front. Two remarkable legal experts, Hadley Friedland (University of Alberta) and Val Napoleon (University of Victoria), have undertaken comparative research on the customary law of Indigenous peoples in the ROC. Based on the traditional narratives, dances and songs that those nations use to transmit their customary law, Friedland and Napoleon, and their students, have sought to identify a number of principles of equivalent justice between the more formalized Common Law of the ROC and the more fluid Indigenous law, which is also more fragile because it has been the victim of discontinuity owing to the residential school system with its goal of assimilation. This exercise in comparative law could lead to the appointment to the Supreme Court of an Indigenous justice responsible for decisions in cases where Indigenous customary law applies. When will such a search for equivalency begin to create bridges between Québec civil law and the customary law of Indigenous peoples living in Québec? See http://fngovernance.org/ncfng_research/val_napoleon.pdf, visited on December 12, 2019.

attitude that periodically rose to the surface in the federation's richer provinces.[43]

As for the Parti québécois (PQ) in the 1980s, there was a complete refusal in its policy conventions to think through the sovereignty-association proposal inherited from René Lévesque. After having removed the association plank from the PQ's official platform, Jacques Parizeau was forced to improvise when Lucien Bouchard forced him to add the promise of a social and economic partnership with the rest of Canada in order to save the hard-core sovereigntist option from a foreseen defeat in the 1995 referendum. And to my great surprise, constitutional expert Daniel Turp, who was then a Bloc Québécois (BQ) MP, came to talk to me about the concept of "partnership management of interdependence" between the sovereign partners in a Québec-Canada economic and social "union." He was seeking to give some minimum content to René Lévesque's sovereignty-association as resuscitated by Lucien Bouchard. Faced with the sovereigntist ranks' obstinate refusal to consider an association that was too "federating", Turp begat a hollow shell (since it entailed no rules and no co-decision mechanisms for managing interdependence). A wishful thinking proposal born from the contradicting views of the BQ and the PQ on the matter.

From reading recent interviews of Louis Bernard by historian Michel Sarra-Bournet, I learned that Parizeau had created a temporary secretariat

[43] The FPRO researchers in Montréal studied the inter-State joint decision-making mechanisms invented by the European Union in order to apply them to the management of the interdependence of the federal government and the federated States in the Canadian federation. However, those mechanisms have evolved and for some years, alongside joint decision-making, the European Union has been using the "open method of coordination". It would be a great project for a bright student to do field research to observe these mechanisms at work and draw lessons that could be used to ensure modern management of interdependence between the central government and the sovereign States in a federation like ours. Such a project should also include an examination of Belgium's system of cooperation accords on certain matters between the federal government and the federates States.

for examining the post-sovereignty economic relations of Québec, with the mandate to prepare in secret a negotiation to establish a partnership with Canada. This example of sneaky ad-libbing at the eleventh hour is a good illustration of the lack of forward thinking among even the most brilliant minds of the sovereigntist movement, as well as in the federalist camp during the 1995 referendum.[44]

ACADEMICS AND DECISION-MAKERS INVITED TO THINK OUTSIDE OF THE BOX

To tell the truth, none of that should have surprised me. When the research group, I was directing in Montréal, decided to hold a series of low-key seminars to submit our plan to modernize the Canadian federation to seasoned experts, it called to the table around 50 of Québec's academics, former deputy ministers and opinion leaders. We found that most of our guests had never reflected on the ideas we were asking them to critique.

When we talked to them about using the joint decision-making processes used by the member states if the European Union as a template for managing the interdependence of the member states of the Canadian federation, in full respect of the federal principles of subsidiarity and non-subordination, their eyes went blank. However, as soon as we gave examples of continental and planetary problems that were beyond the jurisdictions of the provinces as well as the federal government, they had tons of ideas about how to refine our proposals and make them saleable in Québec and the ROC.

Moreover, when we talked about justice based on equivalent instead of identical rights and treatment for individuals and federated communities, they had a whole range of examples to show that such proportional equality is at the very foundation of our system of taxation and

[44] Michel Sarra-Bournet, *Louis Bernard: entretiens* (Montréal: Boréal, 2015), 150–151.

redistribution of wealth. They helped us frame our arguments in plain language and provided us with supporting explanations for a form of equality that could compensate for some of the gravest historical inequalities between the citizens and communities of a single country.

During our discussions with those critics of our proposals, we nonetheless noticed that equivalent rights and treatment meant to them a form of equality. By contrast, talking about asymmetrical rights and treatment indicated there was a will to take into account the different situations in the provinces, but it did not convey the notion of "proportional equality". Speaking about asymmetry even led to a belief in a form of preferential treatment, and therefore a form of injustice when we said that Québec was not a province like the others. In short, with respect to both form and content, the academics, former ministers and senior public servants, as well as the thinkers from the business world and community groups, truly improved our proposals and gave greater credibility to the plan to rebalance the federation that the FPRO had designed in response to the Bélanger-Campeau report.

Having had that experience, I consider that it is exactly this sort of forward-thinking research that Québec and the ROC need if they are going to succeed in inventing a viable shared future in accordance with both their history and the multinational and supranational spirit of our time. The exercise would not be a waste of time as some seem to think.

AN URGENT NEED FOR FORWARD-THINKING FEDERALIST RESEARCH IN QUÉBEC AND THE ROC

Elsewhere in this booklet, I have recalled the fact that, to the surprise of the Chrétien government, the Supreme Court opened an undreamed of door for Québec's demands in 1998 when it ruled, in *Reference re the Secession of Quebec,* that Ottawa and the rest of Canada would have a legal obligation to negotiate in good faith a draft constitutional reform approved by the majority of the population of Québec. That door created

the opportunity for a federalist referendum on the win-win rebalancing of the federation prepared in FPRO and proposed in my book *Le mal canadien* in response to the Bélanger-Campeau report. As I have said before, such a referendum is, in my opinion, the only truly effective tool still available to Québec to get things to move in Canada.[45]

I would simply like to add that, to prepare such a win-win referendum, it is clear that we need to undertake a serious update of the proposals made over 20 years ago by the research group I was piloting in Montréal. Given the current situation, I do not see how such work could be done within the federal apparatus. It is therefore up to you, who do academic research, to decide whether it is worth the effort and whether you want to revive the reforms that we proposed to the Mulroney government as a response to the Bélanger-Campeau report. If, and only if, you decide that it is worthwhile, think especially hard about the reality check that your ideas will have to be subject to in the work you do.

Constituted outside the university elite, the FPRO research group that I directed decided to invite eminent academics from Québec and the ROC, along with former ministers, senior public servants and influential people working in the field, to work together to dissect the plan to rebalance the federation that it was our mandate to prepare in response to the Bélanger-Campeau report.
I suggest the roles be inverted, and it be up to you, academia's elite researchers, to involve critical advisers to your conversation to help you engage in the outside-of-the-box thinking that Québec and Canada so urgently need.

All an old veteran can tell you is that, if you decide to discreetly invite those used to exercising power at the grassroots level to your seminars, you will find yourselves summarily ejected from your comfort zone. And you will be surprised to see how well you fare off your beaten path as you

[45] See André Burelle, « Le référendum gagnant qu'on refuse aux Québécois », *Le Devoir*, December 11, 1998.

experiment in their company the pleasures of looking to the future in a way that is open to adventure but at the same time rooted in the history and major trends that shape Québec, Canada and the planet as a whole in these times of destabilizing globalization.

I wish you this grace, as we used to say, for Québec's understocked constitutional arsenal would be improved by such a new weapon of democratic "persuasion" that our elected representatives could use responsibly if they ever find the courage to think ahead of their time.

Three remembrance articles[46]

April 17, 2022, marked the 40th anniversary of Proclamation of the Constitution Act of 1982, signed by Her Majesty Queen Elizabeth II. On this occasion, I wrote for the journal *Argument*'s website a searing analysis of the harmful role the Supreme Court played during the repatriation of the Canadian Constitution imposed on the Quebecers against the unanimous will of their National Assembly in 1981. And, in addition to this global analysis entitled *Canadian Democracy and Government by the Judges*, I published in *Le Devoir* a defence of the notwithstanding clause entitled *Limits to Government by the judges*.

June 20, 2020, marked, for its part, the 30th anniversary of the Meech Lake Accord unravelling. To counteract our collective tendency to forget, I penned once again an article for *Argument's* website, in which I explained, with evidence to support my analysis, how this emblematic agreement, had it been ratified, would have enabled the modernization of the Canadian federation in ways that respected its history by reconnecting with the *original* understanding of Canadian federalism outlined in 1867. I argued that Meech was a *multinational arrangement* the virtues of which Pierre Elliott Trudeau had championed during his time with *Cité libre* only to later disavow them. I showed that Meech would have delivered the very same reforms that Trudeau himself had promised before and during his years in power before outrageously denouncing them when Mr. Mulroney brought them to life through the Meech Lake Accord. And I reminded Canadians that Meech was a creative agreement unanimously approved on three occasions by the country's prime ministers before the

[46] The duty of remembrance implies the moral obligation to remember a tragic historical event and its victims, to ensure such an event does not happen again. In French, *Devoir de mémoire* is the title of a book published in France by Primo Levi in connection with the Second World War and the Shoah. The concept has since been extended to other traumatic episodes in the history of nations and human communities.

Trudeau-Chrétien-Wells clan, joined at the eleventh hour by Elijah Harper, dealt it a series of vicious blows that brought it to its end.

The dissolution of Meech led us to Quebec sovereignists' near-win at the 1995 referendum and to the malaise that has since gnawed away at Canada as it continues to fail to live up to its foundational brilliance, namely the concept of ~~a~~ *union without fusion of the founding peoples and provinces of Canada* celebrated by Laurier and extolled by Trudeau when he entered politics. Recall what Trudeau said to Peter Gzowski on February 24, 1962: "By an accident of history, Canada found itself some 75 years ahead of the rest of the world in becoming a multinational state, and I am deeply convinced that multinationalism is the future of humanity." It is no wonder that Quebecers feel betrayed by Trudeau's rewriting of the Canadian constitution in 1982 putting the concept of *one nation* at its core.

CANADIAN DEMOCRACY AND GOVERNMENT BY THE JUDGES[47]

In his famous Gettysburg address, Abraham Lincoln pays tribute to the soldiers who died in the battlefield to preserve the American democratic ideal, which he defines as "the government of the people by the people and for the people", may live on. Nowhere in this unforgettable definition of democracy does he mention the concept of "government by the judges" that has since prevailed among our neighbours to the South. This is because, for Lincoln and Jefferson, only the elected representatives of the People could bestow the entire body of laws that govern a democratic country, the cultural grounding and political legitimacy necessary to sustain a sense of citizenry and the collective will to live together.

It is important to note that Lincoln is not referring here to a plebeian or a scattered crowd driven by their most primitive instincts. He speaks of the People, of the nation as a human community animated by a collective will to live together under a democratic regime like the one established by the Founding Fathers of the American Confederation.

In such a regime, it is worth remembering that the only true constituent is the People: "We the People of the United States … do ordain and establish this Constitution of the United States of America." The power entrusted to the judges is strictly judicial: to ensure that laws passed by the People's elected representatives respect the nation's Constitution and it's Charter of Rights and Freedoms. It is this vital role as guardians of the Constitution that has enabled American judges, and to a lesser extent Canadian judges, to "create law", not to say "rights," in areas where, facing a divided public opinion, the Peoples' elected representatives are willingly practising legislative ambiguity. Appealing to the wise is a salutary human reflex, but it is not, however, without risks.

[47] Article published in *Argument* for the 40th anniversary of the Proclamation of the Constitution Act of 1982.

In his magnum opus, *The Republic*, Plato entrusts the governance of the City-State to wise men called "philosopher kings" whose mission it is to counteract the base instincts of the plebeians. But, worried about these wise men's possible abuses of power, Plato poses a question that still haunts us today: *Who will guard the guardians of the City-State?* Who will protect us from the "philosopher kings" were they to abuse of their power?

To answer this question, the best solution men invented over the centuries has been the separation of and competition between the executive, legislative, and judicial powers to prevent any monopoly of power in a democratic regime. It is this theory of counterweights advanced by Montesquieu that our English-speaking compatriots call the *check and balance*. A comparison of the Canadian and American Charters of Rights and Freedoms reveals, however, that this check and balance differs profoundly depending on whether one lives (or not) in a regime that rejects the American-way of life based on the melting pot and the survival of the fittest philosophy.

To clearly mark Canada's refusal to govern itself in the American way, the authors of the Canadian Charter of Rights and Freedoms deliberately inserted two clauses that significantly distinguish it from its American counterpart.

The first of these clauses affirm from the outset that individual rights are not absolute and can, under certain conditions, be restricted by a rule of law deemed reasonable in a free and democratic society. Here is the exact wording:

> ***1*** *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out therein. They can only be restricted by a rule of law, within limits that are reasonable and demonstrably justified in a free and democratic society.*

The second clause, known as the "derogatory" or "notwithstanding clause", provides that in the event of irreconcilable conflict between the interpretation of the Canadian Charter by the judges and that practised by the Peoples' elected representatives, the latter will have the right to temporarily exempt certain provisions of their laws from the application of the Canadian Charter. This clause reads as follows:

> ***33 (1)*** *Parliament or the legislature of a province may pass an Act expressly stating that it or any provision thereof has effect notwithstanding any particular provision of section 2 or sections 7 to 15 of this charter.*

Such a derogation is allowed for a period of five years, and its extension must be subject to a new critical examination by the Peoples' elected representatives.

These clauses are not innocent: they aim to guarantee the rights of individuals while respecting the collective rights granted by the Constitution to Canada's founding peoples. The relationship, never simple, between judges and representatives of the People becomes even more complex in a "multinational federation" like ours. And, in the case of Quebec, this relationship is outright problematic since the Constitution Act of 1982 and its Charter of Rights and Freedoms were imposed on Quebecers against the unanimous will of their National Assembly, and thus both suffer from a glaring lack of democratic legitimacy.

The Meech Lake Accord was attempting to correct the lack of moral and political legitimacy of the Constitutional Act of 1982 by bringing Quebec back into the Canadian constitutional fold. And, one day, the spirit if not the letter of Meech will need to be revived to give full legitimacy to the Canadian Constitution. In the meantime, all is not lost, as, according to the late Roger Tassé, the architect of the Constitutional Act of 1982, the law on secularism (Bill 96) recently passed by Quebec's National Assembly would be compatible with the Canadian Charter of Rights and Freedoms in its current form.

In a 2013 interview with journalist Guy Gendron while the controversy over the Marois government's Charter of Values was raging, Roger Tassé "found interesting the idea of solemnly declaring the secularism of the state." According to Tassé, Gendron writes, "secularism is already implicit in the Quebec and Canadian Charters of Rights since governments forbid discrimination based on religion or sex. And contrary to the opinion expressed by the Quebec Human Rights Commission, Roger Tassé believed in 2013, according to Gendron, "that the Quebec government could legitimately hope that its Charter of Values would emerge as the winner of a battle of Charters if it was being challenged in court." We can therefore think that the same would apply to the Secularism Law proposed by the Legault government and adopted by the National Assembly.

Not being a lawyer, my faith in the wisdom of the Supreme Court is unfortunately not the same as that held by my illustrious colleague Roger Tassé. And after being closely involved in Canada-Quebec constitutional litigation for nearly 50 years, I would like to explain my reservation here.

To avoid any ambiguity, let me say right away that I agree with those who believe that in matters related to protecting the individual rights of Canadians, our courts have generally played a progressive and clarifying role which should be celebrated. This is especially true since, in my view, this role has been played with a deep respect for democracy, with the Supreme Court usually confirming the work carried out with thoroughness by previous public inquiries and parliamentary committees. This has led to the evolution of public opinion on subjects as explosive as the right to abortion or the right to die with dignity, to name just two.

Where the power of judges has proved harmful, in my opinion, is on questions surrounding the collective rights guaranteed to federated communities by the Canadian social and political contract of 1867. By stripping Quebec of its historic right of veto, the Supreme Court allowed the exclusion of Quebec from the constitutional agreement of November

5, 1981. This agreement undermined the Charter of the French Language or Bill 101, replacing its Quebec clause with a Canada clause, and allowing the creation of bridge schools to circumvent Bill 101's stipulation that all immigrant children attend school in French. Furthermore, it imposed on judges the constitutional obligation to interpret the Canadian Charter of Rights and Freedoms following a definition of multiculturalism which opposed, in many respects, the conception of interculturalism and secularism endorsed by a clear majority of Quebecers after having lived for too long in a "priest-ridden province" before the Quiet Revolution. Finally, for Indigenous peoples, Quebec's refusal to ratify the Constitution Act of 1982 nipped in the bud the two constitutional conferences they were promised and that would have addressed their ancestral and treaty rights.

The collective constitutional rights originally granted to Canada's founding peoples certainly had to evolve to adapt to today's world, but neither the judges nor the governments had the power to remove them without the consent of the parties concerned nor to erase them on the sly in the name of the primacy of individual rights elevated to the rank of dogma by the proponents of a form of unrestrained multiculturalism enacted without a compass.

Seen in this light, the most extreme example of government by judges in Canada remains, in my eyes, the invention by the Supreme Court of a supposed "unwritten constitutional convention" in support of a constitutional amending formula invented from scratch by the judges of the highest court in the land.

Indeed, when asked to rule on the constitutionality of a motion passed by Parliament on April 23, 1981, the Supreme Court rejected the very idea of a confederation pact concluded between constituent provinces in 1867. The Court then declared that the "unilateral repatriation 'of the Canadian Constitution by the Federal Parliament was legal but inconsistent with an "unwritten constitutional convention" requiring a "substantial" consent of the provinces, that is "the support of more than two provinces, but less than ten of them."

One will search in vain for any trace of such an unwritten convention in the constitutional history of Canada. Let us recall, to be clear, that the adoption of the Quebec Conference's resolutions, which gave birth to the British North America Act of 1867, was done unanimously by the constituent provinces, with Lower Canada (Quebec) and Upper Canada (Ontario) enjoying a separate right to vote despite their merger under the Act of Union of 1840. And to drive the point home, let us remember once again that when the British North American Act of 1867 was discussed and adopted by the British Parliament, the Secretary for Colonial Affairs, Lord Carnarvan solemnly declared the following.

"The Quebec resolutions, with some slight changes, form the basis of a measure that I have the honour to submit to Parliament. To those resolutions all the British Provinces in North America were, as I have said, consenting parties, and the measure founded upon them must be accepted as a treaty of union."

As for the speech delivered by Under-Secretary Charles Adderly on the same occasion, it unequivocally confirms what his superior said.

"It will, I think, be manifest, upon reflection, that as the arrangement is a matter of mutual concession on the part of the provinces, there must be some external authority to give sanction to the compact in which they have entered (…) Such seems to me to be the office we have to perform in regard to this Bill."

What is the basis, then, of the Supreme Court's rejection of the "theory of the confederative pact," when Carnarvan speaks of a "treaty of union" concluded unanimously by the constituent provinces, and when Aderly clearly asks British Parliament to give its assent to a pact signed by all the provinces and "give sanction to the compact in which they have entered"?

Worse still, when the Supreme Court claims an "unwritten constitutional convention" to propose an amending formula requiring "the assent of more than two, but less than ten provinces," it chooses to ignore an undeniable fact, namely that all attempts to repatriate the Constitution since the Statute of Westminster in 1931 have failed because of Quebec's

veto. If there was any, this was the unwritten constitutional convention the court should have taken into account.

It was through the 1981 inventive judgment of the Supreme Court, that the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms were imposed on Quebec on November 5, 1981. And it was by invoking the freedom of expression guaranteed to all citizens by the Canadian and Quebec Charters of Rights and Freedoms that the Supreme Court "invalidated" key aspects of Bill 101.

The problem is that as a small French Nation living on an English continent Quebec cannot be treated by the courts as "une province comme les autres". It needs to be treated as a distinct society.

"What is hard to get across is that we get symmetry in Canada through unilingualism by law in Quebec and unilingualism by sociology elsewhere in Canada" said professor Kenneth McRae in 1990. An this kind of asymmetry is incompatible with the "one nation" Canada we have inherited from Pierre Elliott Trudeau in 1982.

The truth is that language and religion involve collective as well as individual rights. And in my opinion, any "one nation" democratic regime that preaches absolute respect for the rights of individuals, without considering the collective dimension of these rights, is working towards its own moral and political ruin.

Behaving as if individuals had only rights and the community only responsibilities, inevitably leads to a weakening of the common psyche and of the collective desire to live a common destiny, even in a country as jealously ONE NATION as the United States. Needless to say, this triumph of navel-gazing individualism is even more deleterious in a federation like Canada, founded from its origins on the rejection of the melting pot approach and American-style survival of the fittest.

To be frank, I deplore the Lévesque government's decision to not hold a referendum in Quebec to oppose a Supreme Court judgment that deprived the province of the veto right it had exercised de facto since the origin of Canadian Confederation. Such a referendum made sense since the motion submitted to the court by the Canadian Parliament, in April 1981, proposed the formula of modification of Victoria, based on regional vetoes to respect the historical right of veto of Quebec. I regret even more that the Lévesque government did not organize "a saving referendum" the day after the so-called "Night of the Long Knives", when the Quebecois, federalists and sovereignists alike, could have opposed a massive NO to the iniquitous treatment imposed on Quebec on November 5, 1981.

I still do not understand, given that the Lévesque government had given itself an exemplary referendum law, why it decided against using it to defeat the Supreme Court's judgment in 1981, or to disqualify *in extremis* the unjust reform adopted by Ottawa and the ROC provinces on the night of November 5, 1981.

In my eyes, appealing to the people through a referendum is a legitimate tool, even a necessary one, in a federal democratic regime. And I maintain that in the face of a resounding NO on the part of the citizens of Quebec to the 1981 Supreme Court judgment, the British Parliament would never have dared to attack Quebec's historic right of veto and agree to impose on Quebecers the unilateral constitutional repatriation of 1982.

As the philosopher George Santayana said, "those who ignore history are doomed to repeat it." On this 40th anniversary of the repatriation of the Canadian Constitution, an event with which I was associated for better and for worse, I hope that I have respected in this article the duty of memory incumbent upon me. For, beyond its severe criticism of the Supreme Court, one should read the present article as a celebration of the supranational vocation of the Canadian federation so aptly described by Wilfrid Laurier as a *UNION WITHOUT FUSION* of the founding provinces and peoples of Canada.

LIMITS TO GOVERNMENT BY THE JUDGES THE PURPOSE OF THE NOTWITHSTANDING CLAUSE[48]

To those who propose we appeal to the Supreme Court to limit recourse to the notwithstanding clause included in the Canadian Charter of Human Rights and Freedoms, we should point out that doing so would place this Court in a situation where it would become both judge and party, since it would be asked to rule on the application of a clause intended to limit its own powers.

For supporters of such a self-regulating Supreme Court, I suggest reading what Thomas Jefferson himself wrote about the dangers of despotism inherent in a government by the judges. And to capture the essence of his thought, I quote here a few paragraphs taken from the book *The Living Thoughts of Thomas Jefferson* compiled by John Dewey.
To his friend Javis, Jefferson writes the following.

> You seem to attribute to judges the role of ultimate arbiters in any debate of a constitutional nature: a doctrine that I consider dangerous and which exposes us to the despotism of an oligarchy. Our judges are as honest as ordinary mortals, but nothing more. They share the same passions as us, the same tendency towards parochialism, the same quest for power and privileges attached to their position. Their maxim "*boni judicis est ampliare jurisdictionem*" proclaims that the role of a good judge is to extend his jurisdiction, and the power of our magistrates is all the more dangerous as they are appointed for life and have no accounts to give to anyone. (…)
>
> The seeds of the dissolution of our federal country were sown when its judicial system was created. An irresponsible system (because the threat of dismissal of judges is only a simple scarecrow) which has given itself the task of invading, silently, day and night, like the force

[48] An article published in *Le Devoir* for the 40th anniversary of the Proclamation of the Constitution Act of 1982.

of gravity, all fields of jurisdiction for withdraw the powers of the member states of the federation and entrust them to one and the same government for all. I oppose this consolidation of powers, because when any form of government of domestic affairs as well as foreign, in small as well as big things, will have been transferred to Washington, which has become the center of all powers, the end of the mutual limitation of powers between governments and our country will become as vile and oppressive as the British government from which we have separated. (…)

In truth, no human being can enjoy lifelong trust if he escapes all obligation to render accounts (…) And no human group is more in need of accountability than that of the judges attached to our government General, which I call our Department of External Affairs. Because these magistrates interpret the fundamental law of the land by resorting to inference, analogy, even sophism as if it were an ordinary law. And they don't even seem aware that this constitution is not the property of a single government that oversees and controls it, but that it was born of a pact between several centers of independent power that all demand an equal right to understand its content and to demand compliance with the obligations it imposes.

A Fair Balance

Let us recall here that the Canadian Charter of Human Rights and Freedoms already provides a way of limiting the power of judges in accordance with Jefferson's wishes.

Indeed, article 25 reads as follows:

The fact that this Charter guarantees certain rights and freedoms does not derogate from the rights or freedoms – Aboriginal, Treaty or otherwise – of the Aboriginal peoples of Canada, including: (a) the rights or freedoms recognized by the Royal Proclamation of October 7 1763; and (b) existing rights or freedoms resulting from land claims agreements or those which may be so acquired.

Similarly, articles 27 and 29 specify that:

Any interpretation of this charter must be consistent with the objective of promoting the maintenance and enhancement of the multicultural heritage of Canadians. And that the provisions of the charter do not derogate from any rights or privileges guaranteed under the Constitution of Canada with respect to separate schools and other denominational schools.

In the same vein, to ensure a fair balance between the rights and freedoms of individuals and the collective rights recognized to the founding peoples and provinces of Canada, the Meech Lake Accord proposed the addition of the following clauses to our constitution:

(4) *Any interpretation of the Constitution of Canada must be consistent with:*

4) *recognition that the existence of French-speaking Canadians, concentrated in Quebec, but also present in the rest of the country, and of English-speaking Canadians, concentrated in the rest of the country, but also present in Quebec, constitutes a fundamental characteristic of Canada;*

4) *recognition that Quebec forms a distinct society within Canada.*

(2) The Parliament of Canada and the legislatures of the provinces have the role of protecting the fundamental characteristic of Canada referred to in clause (1) (a).

(3) The legislature and government of Quebec have the role of protecting and promoting the distinct character of Quebec referred to in clause (1) (b).

(4) Nothing in this section derogates from the powers, rights or privileges of the Parliament or Government of Canada, or of the provincial legislatures or governments, including their powers, rights or privileges in relation to language.

Necessary Notwithstanding Provision

The Canadian way to properly counter the government by judges so strongly denounced by Jefferson is clearly to enshrine in our country's constitution the obligation for judges to consider the founding peoples' and provinces' collective rights in their interpretation of the rights and freedoms of individuals guaranteed by our charters.

The proper way is also to allow the use of a clearly worded notwithstanding clause if, in the eyes of the Peoples' elected representatives, the judges do not or insufficiently consider these collective rights in the interpretation of the individual rights protected by our charters.
Unfortunately, without the clear constitutional recognition of its collective rights provided by the Meech Lake Accord, and faced with a Supreme court required by law to interpret the Canadian charter from a multicultural perspective allergic to the rights of the founding peoples of the country, Quebec's only option to protect its unique French identity is the recourse to the notwithstanding clause provided in the Canadian Charter of Human Rights and Freedoms. The result is that Canadians will have to, one day, reconnect with the spirit, if not the letter, of Meech to break this impasse, and ensure that Canada becomes something other than a pale copy of the American melting pot.

BRIAN MULRONEY AND PIERRE ELLIOTT TRUDEAU'S BROKEN PROMISES[49]

Thirty years ago, on May 27, 1987, the former Prime Minister of Canada, Pierre Elliott Trudeau, published in *La Presse* and the *Toronto Star* a murderous criticism of the Meech Lake Accord negotiated a few weeks earlier by his successor, Brian Mulroney.
Mr. Trudeau spared nothing and no one in his incendiary pamphlet, which mercilessly skewered every one of the commitments adopted unanimously by the Meech Lake Accord's signatories. It was in my capacity as a senior civil servant in the Federal-Provincial Relations Office and as Mr. Trudeau's former adviser and French speechwriter that I was asked to write a response to my former boss' outrageous attacks.

I did so with a clear conscience because I knew, having advised Mr. Trudeau on these matters, that all the Meech Lake Accord provisions he condemned in his pamphlet only delivered the reforms that he himself had promised to Quebec before, during, and after the referendum of May 1980. Thirty years later, I would like to demonstrate this once again for the record and to do justice to Mr. Mulroney.

Bourassa's Five Conditions for the Ratification of the Constitution Act, 1982

Let us recall that in order to reintegrate the Canadian constitutional fold "with honor and enthusiasm", as Mr. Mulroney invited him to do, Prime Minister Robert Bourassa formulated early on, during the election which brought him back to power in 1985, a set of five conditions for the adoption by the National Assembly of the Constitution Act of 1982.

A Recognition of the Distinct Character of Quebec

[49] An article published in the journal *Argument* for the 30th anniversary of the dissolution of Meech Lake Accord.

The first of these conditions, the one that preceded all the others, was the formal recognition of the distinct character of Quebec in the Canadian Constitution, and the obligation for judges to take this distinct character into account when interpreting the law of the country, including the Canadian Charter of Rights and Freedoms of 1982. To be clear, in response to this first request, the Meech Lake Accord only repeated the commitments that Mr. Trudeau himself had made in the wake of the referendum of May 1980.

Indeed, let's come back to the open letter Prime Minister Trudeau published on July 11, 1980, to assuage the Quebecois following the storm unleashed by his draft preamble to the Constitution beginning resoundingly with a *We the People of Canada* similar to the *We the people of America* of our Southern neighbours'. To correct this blunder Mr. Trudeau wrote the following:

> *The preamble to a new constitution that we have submitted to the Prime Ministers being perfectible, I only ask to modify it to recognize even more explicitly the existence of the two main linguistic and cultural communities of the country, of which the French has its first home and its center of gravity in Quebec, although it extends across Canada. This is a social and political fact that no one dreams of denying and that we must take into account if we want to rebuild a new Canada firmly rooted in reality.*

And to honor this public commitment, Mr. Trudeau submitted to the Prime Ministers, during the Constitutional Conference of September 1980, a proposed *preamble* in which two passages in square brackets were variants of a text drafted by the Quebec delegation. The federal offer read as follows:

[RECOGNIZE the distinct character of Quebec society which, with its French-speaking majority, constitutes one of the foundations of Canadian duality;] or [RECOGNIZE the distinct character of Quebec society with its French-speaking majority;]

In essence then, the Meech Lake Accord merely endorsed this federal offer in the terms approved by Mr. Trudeau years before.

A Constitutional Right of Veto

So that this recognition of Quebec's specificity could not be called into question without the consent of its National Assembly, the Bourassa government demanded, as a second condition for its return to the fold, a right of veto on any substantial reform of Canadian federal institutions. And, here again, Mr. Trudeau had expressed himself on this question on several occasions in the past.

As early as 1970, with his Victoria Charter, Trudeau offered Quebec a right of veto by proposing what has since been called the Victoria Constitutional Amendment Formula. This formula provided a right of veto for Ontario, Quebec and various groupings of provinces in Eastern and Western Canada. It is exactly this proposal that Mr. Trudeau put back on the table at the Constitutional Conference of September 1980, and that he proposed submitting to the People via a pan-Canadian referendum at the November 1981 Constitutional Conference. Unfortunately, the Victoria Charter's "regional vetoes" were removed from the agreement reached in Quebec's absence on the night of November 5, 1981.

The fact remains, however, that section 41 of the Constitution Act of 1982 already required unanimity among the federation's partners in order to modify certain crucial aspects of Canadian institutions (the office of the Queen, the composition of Parliament and of the Supreme Court, the use of French and English and the modification of the amending formulas). All that was required then was to add any modification affecting the Supreme Court and the Senate, or the creation of a new province or the annexation of the territories to an existing province to this short list. To require unanimity to proceed with these modifications would ensure that they be subjected to a right of veto by all the federation's partners, including Quebec. That was the response Meech proposed.

And by gathering three times the unanimous support of all Prime Ministers during the Meech and Charlottetown negotiations, M. Mulroney proved that overcoming the obstacle of provincial veto was no more difficult than overcoming the regional vetoes offered by the Victoria amending formula. Moreover, the provincial veto makes sense when dealing with these crucial matters. As experts tell us, any reform of shared institutions as vital as the Supreme Court, the Parliament and the Canadian Senate performed without the consent of all provinces would ultimately undermine the legitimacy of these institutions and the will to live together of the federation partners. [1]

One need only think here of Quebec's unyielding refusal to ratify the Constitutional Act of 1982 promulgated without the consent of its National Assembly. A refusal which, together with the failure of Meech, led to the sovereignist camp's near-win in the 1995 Quebec referendum.

The Appointment of Supreme Court Justices

As a third condition for the return of Quebec to the Canadian fold, the Bourassa government demanded that the mandatory appointment of three Quebec civil law judges, already provided for in the federal law on the Supreme Court, now be enshrined in the Constitution as the fundamental law of the country. This constitutional guarantee was intended to ensure that the specificity of Quebec as the only province organized around French civil law would be respected in a country otherwise structured by British common law. Mr. Trudeau had already offered Quebec this guarantee during the Constitutional Conference of Victoria in 1971, he repeated this offer in 1978, in his proposal *Le temps d'agir* (Bill C-60), and during the negotiations led by Jean Chrétien after the May 1980 referendum.

As for the provinces' participation in the appointment of the judges of a Supreme Court called upon to arbitrate, in the last instance, the disputes between the two levels of government of the federation, the Meech Lake Accord proposed a double veto as a solution. Thus, Quebec and the other

provinces each gained the power to submit their official lists of candidates and the federal government obtained for its part the power to request new lists from the provinces before making an appointment and until a suitable candidate could be found. This way of doing things was inspired by the Victoria Charter and especially by the Trudeau government's Bill C-60 proposing, in 1978, a mechanism for the appointment of judges through a federal-provincial co-decision process. This process was meant to guarantee the Supreme Court's legitimacy as the ultimate guardian of the country's Constitution. Here again, the Meech Lake Accord was only repeating formal offers made by Mr. Trudeau in the past.

A Constitutional Agreement on Immigration

As the fourth condition for Quebec's approval of the Constitution Act of 1982, the Bourassa government asked that the Cullen-Couture Agreement's principles, negotiated by the Trudeau and Lévesque governments in 1978, be constitutionalized. For context, this agreement recognized in full the need for an "integration of immigrants respectful of the French specificity of Quebec", and, to this end, it granted Quebec authorities the power to select immigrants wishing to settle on its territory. Going a step further, the Bourassa government required exclusive power for Quebec over the linguistic and cultural integration of its immigrants. Quebec would take over these services and would be obligated to offer, using a financial compensation from the federal government, services not identical, but equivalent to those offered in the rest of Canada. Quebec agreed from the start to place these developments concerning the integration of immigrants under the dual protection of the Canadian and Quebec charters of human rights and freedoms. Therefore, none of this went against the spirit, or the letter, of the Cullen-Couture Agreement approved by Ottawa in 1978. And nothing justified Mr. Trudeau's strong language against Bill 101 and the integration policy of immigrants adopted by Quebec in the wake of Meech.

A Framework for the Federal Spending Power

The last request of the Bourassa government was a limitation of the federal spending power in the areas of jurisdiction entrusted to Quebec in 1867 to preserve its distinct character within the Canadian federation. Meech's aims were truly minimalist in this regard. The agreement only concerned "new cost-shared programs" and left existing ones intact.

Moreover, twice, in 1969 and 1978, Mr. Trudeau himself had offered to limit the federal spending power. And, in the affair of federal subsidies to universities that occurred at the time of *Cité libre*, Trudeau had sided with his old enemy Maurice Duplessis to fiercely fight Ottawa's interventions in a field of exclusive provincial jurisdiction, education.

It is therefore surprising that such a convinced defender of provincial autonomy accused Mr. Mulroney of disarming the federal government with Meech and of making it impossible to create new shared-cost programs in areas of exclusive provincial jurisdiction. And this astonishment turns to incomprehension when we know that the Meech Agreement would have imposed on the provinces which refused to join any "new cost-shared program" the obligation to have their own program or initiative in line with the "objectives of the national program", under penalty of being deprived of Ottawa's big money!

Mulroney Facing a Trudeau Unfaithful to Himself

The truth is that beyond his virulent condemnation of the various articles of the Meech Lake Accord, it is the very spirit of the negotiation led by Mr. Mulroney that was denounced by Mr. Trudeau. In the eyes of the father of the repatriation, his successor's unpardonable sin was to open the Pandora's box that The Constitution Act of 1982 had supposedly closed, Trudeau claimed, for 1000 years, no less. And more serious still, Mr. Mulroney had made the mistake of reviving the "dangerous theory of collective rights" [1] of Canada's founding peoples, a theory of which the

Canadian Charter of Individual Rights and Freedoms had rid the country, according to Mr. Trudeau.

What Mr. Trudeau concealed in his attacks was that he himself had enshrined the "dangerous theory of collective rights" by including in the Canadian Charter of Rights and Freedoms a provision (art. 25) stipulating that the rights and freedoms guaranteed to individuals by the Charter could not infringe "the rights or freedoms—aboriginal, treaty or otherwise—of the aboriginal peoples of Canada, including: (a) the rights or freedoms recognized by the Royal Proclamation of 1763; (b) existing rights or freedoms resulting from land claims agreements or likely to be so acquired."

As the cradle of one of Canada's founding peoples, Quebec was therefore justified in demanding, during the Meech negotiations, that the judges be obligated, as in the case of the Aboriginal peoples, to consider its historical rights and its distinct character in the interpretation of the Constitution and the Canadian Charter of Rights and Freedoms.

As for the claim to have padlocked the constitutional Pandora's box for 1000 years, it was, there again, a dream that Mr. Trudeau had himself torpedoed during the ceremony of proclamation of Constitutional Constitution of 1982. In his speech delivered on Parliament Hill, Mr. Trudeau affirmed the following:

Constitutional reform is not over. Governments have made a formal commitment to pursue the definition of indigenous rights. At the same time, they must work to further strengthen the Charter of Rights, including language rights in the provinces. Finally, they must try to define a better division of powers between the two levels of government.

And he added in that same speech: *What we are celebrating today is not so much the completion of our task, but the renewal of our hope, not so much an ending, but a fresh beginning.*

Is this the "millennial closure of the constitutional Pandora's box" claimed by Mr. Trudeau? And what about the openness to community rights that he announced on Parliament Hill, and later confirmed in a series of speeches delivered in France in November 1982? To demonstrate this confirmation, let me quote here at greater length the speech that Mr. Trudeau made at the town hall of Lille, on November 8 1982.[1]

Addressing Mr. Mauroy, our Prime Minister, made himself the champion of communitarian personalism as a response to the problems of our time:

> We live in a time when technical progress and the imperatives of trade demand commonality on a continental, if not global, scale. And it is in this logic of history that the membership of France and therefore of Lille to the European Community make sense.
>
> But while providing material progress, large economic groups lead to the standardization of lifestyles and a certain depersonalization born of bureaucratic gigantism. Hence the resurgence of regionalisms all over the world and the proclamation of the right to cultural intimacy of groups and individuals.
>
> More and more we realize that if the future is in large ensembles, individual persons can only flourish in communities on a human scale. Hence the need not to entrust to a centralized authority (global, continental or even national) the problems that can best be resolved at a governmental level closer to grassroots communities and the immediate area of influence of citizens.
>
> This need for economic and political unity while respecting the cultural diversity and intimacy of citizens is the very basis of Canadian federalism. And I am happy to see that under your leadership, France is in the process of renouncing a certain Jacobin past to try, in its own way, to marry the right to be different with the need for national unity.

> As you know, Mr. Prime Minister, the whole political fight that I lead in Canada is based on the conviction that one can be authentically Newfoundlander, Albertan or Quebecer while being a true Canadian. I note that, in different ways, you are betting, like us, on the fact that one can be a good Frenchman and an authentic Lillois or a Marseillais; that affiliations are not mutually exclusive but complement each other; that one is from one's house, one's district, one's city, one's province and one's country, before being of this planet, and what is called for in our time is to widen the consciousness of men to the dimensions of the world without neglecting their need to be rooted in what Mounier called their small homelands under the largest.

This community-based personalist reading of Canadian federalism literally sowed the seeds of the Meech Lake Accord. Since, according to Mr. Trudeau' speech, the Canadian federation, as well as the European Economic Community, had to offer a better guarantee of the right to national difference of its founding peoples, in exchange for the pooling of economic and political resources and powers to which these peoples had to agree to solve, through a real partnership approach, the continental and planetary problems of our time.

Such was the message Mr. Trudeau delivered in Lille and repeated in Paris in November 1982. And such was, ten years later, the spirit that inspired the Mulroney government's proposed response to the Bélanger-Campeau Report.

What Mr. Mulroney could not foresee when he enshrined Quebec's historic rights in the Meech agreement was that, after his personalist and communitarian speeches in Lille and Paris, Mr. Trudeau was going to change his mind and advocate, with his adviser Thomas Axworthy, an individualist and anti-communitarian interpretation of the Constitution Act of 1982, which is clearly incompatible with the Canadian "multinational" federalism of 1867 he extolled in 1962.

Exit the "multinationalism" and Canadian "supranational federalism" that Mr. Trudeau, the intellectual of *Cité libre*, once proclaimed were the future of humanity. And in comes the "multiculturalism" of a "post-modern" Canada allergic to community rights and to the historical depth of its founding peoples; a Canada devoted to the cult of the individual, submitted to the blind forces of the market, and drifting away of its founding values, attracted by the powerful vortex of the American melting pot.

All in all, the only real error that Mr. Mulroney and all the Meech supporters made was to attribute multinational federalist convictions and an intellectual coherence to Pierre Elliott Trudeau, both of which our former Prime Minister had obviously renounced at the time of Meech.

This begs the question for anyone who claims a filiation to Pierre Elliott Trudeau's ideas. To which Trudeau are you referring? The one pre-Meech or the one post-Meech? The Trudeau who gave the personalist community discourse in Lille or the one who indulged in anti-community individualist diatribes against the Meech and Charlottetown agreements? Refusing to choose between these two Trudeaus amounts to trying to reconcile George Étienne Cartier's federalism based on the "refusal of the melting pot" and its total opposite, namely the "one nation" fusional federalism of John A. Macdonald.

On this 150th anniversary of the Canadian Confederation, it might be time for the federalist camp to first admit that Mr. Trudeau betrayed the post referendum promises he clearly stated in the speech he delivered in Parliament on May 21, 1980. And secondly, to concede that, with Meech, Mr. Mulroney bravely tried to fulfill these broken promises by rekindling and modernizing "the union without fusion of the founding peoples" that Cartier and McGee placed at the heart of the confederation pact of 1867. It is this obstinate refusal of the melting pot which distinguished our federation from the start, and which continues to distinguish the Canadian dream from the American one.