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Dilemmas of Solidarity

Rethinking Redistribution in the
Canadian Federation

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Afterword: Solidarity as the Boldness of Modesty

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The individuals who drafted Canada's federal constitution in the nineteenth century, were trying to respond to a set of preoccupations that were common to the different societal and cultural experiences and interests of their constituents. They were joining together North American British colonies that, prior to Confederation, had not had extensive political or economic ties with each other (with the possible exception of the two parts of the United Province of Canada, which later became Ontario and Quebec). These individuals, the so-called Fathers of Confederation, were working to unite colonies that were either functionally foreign to one another or had been involved in relations where distrust was as much part of the picture as trust. From what was arguably a community of strangers in 1867, they sought to create a lasting community of fate. In spite of their often conflicting views on the future orientations of this new federation called Canada, they compromised and drafted a constitution that took into account the socio-cultural constraints flowing from the presence of pre-existing political entities with well-entrenched identities, while allowing for the creation, by and large incremental, of the desired community of fate.

These constitutional framers spoke to both the past and the future, even though the contours of that future remained ambiguous. The silences of the Constitution Act, 1867 somehow reveal this ambiguity. But this did not prevent them from assigning ambitions to the new country – for example, the creation of a common market, the country's eventual expansion to the West, or the lasting union of a population mainly composed of French Catholics and English Protestants.¹ They soon acknowledged, however, that these ambitions could be achieved only if all constitutional actors were given a tangible comfort zone,

through the creation of a federal structure. Most importantly, the constitutional framers shied away from grand declarations about who Canadians were, or were to be. It has often been noted in this respect that, when compared to other constitutions, for example that of the United States of America, the Constitution Act, 1867 is a rather conservative, if not uninspiring, document. This is probably correct in many respects. But could anything else have been done in a federation that overlaps with a truly federal society?² Weren't the framers showing some prescience about the possibilities, but also the limits, of that type of federation? In that sense, while their decisions evinced the pragmatism ordinarily associated with the British constitutional law tradition, they may also have been informed by a more principled vision of the Canadian federation and of its federal society, albeit an implicit one. Viewed from this angle, the alleged conservatism of the Constitution Act, 1867 as well as its intriguingly non-nationalist silences in an era where nationalism was triumphing everywhere else, may be construed as a manifestation of boldness – the boldness of modesty.

Such modesty was mandated because the evolution of the Canadian federation would inevitably be evaluated by Canadians from very different, and often conflicting, perspectives – what Richard Simeon called the 'criteria for choice' in federations. In a nutshell, these perspectives revolve around various conceptions of community, democracy and functionality.³ While they inform attitudes about federalism everywhere, they are particularly relevant to Canada. Indeed, the relatively open texture of the Constitution Act, 1867, which not only allows for all sorts of political appropriations and judicial interpretations, but also for their permanent contestation, inevitably calls for an incessant balancing of these perspectives in both the political and juridical realms.

This was the case when Canada's federal constitution was drafted, and it is still the case today. Contemporary debates about fiscal federalism and redistribution continue to raise more or less the same questions, and all the contributors to this volume approach these problems from either one or many of these perspectives. More specifically, however, they draw our attention to the hurdles upon which *conversations about solidarity* may stumble, and upon which *solidarity* itself may trip. For if the questions themselves have not changed that much, the manner and the circumstances in which they are posed have changed dramatically.

Starting with the hurdles facing conversations about solidarity, we

are reminded that if redistribution constitutes, to some extent, a norm in the Canadian federation, well-entrenched preconceptions about that federation may actually prevent us from grasping in a complex manner the impact of recent social, political, and economic changes on the implementation of that norm in contemporary Canada. These preconceptions may be about Canada itself, about the identity, contours, cohesion, and political relevance of the different communities forming Canada, about the efficiency of particular modes of governance, or about the way democracy operates in a highly regionalized, multinational, and multicultural federation. As they related to conversations about solidarity, such preconceptions may actually constitute 'epistemological obstacles,' a concept that, according to French philosopher Gaston Bachelard, designates causes of inertia, stagnation or setback in knowledge.⁴ An epistemological obstacle prevents the rigorous intellectual construction that is required in order to grasp realities and concepts in a complex manner. Since an epistemological obstacle does not have any particular, well-defined, identity, this allows it to operate an intellectual closure that facilitates the perpetuation of debatable certainties and received ideas. It may thus elevate 'ideal realities' from the status of contestable constructs to that of unchallenged givens.⁵ In debates about redistribution in a federation as diverse as Canada, epistemological obstacles could, for example, take the form of untested assumptions such as depicting federalism as being inherently opposed to social justice, or the uncritical acceptance of monolithic understanding of the political, financial, and juridical relations inherent to federalism, such as apprehending fiscal federalism solely from the perspective of vertical fiscal imbalance.

The implementation of the norm of solidarity in Canada through practices of redistribution seems particularly susceptible to stumbling upon such obstacles. Several contributors to this volume have, in this respect, directly or indirectly alluded to the impact on pan-Canadian solidarity of existing, emerging, and potentially competing, communities of solidarity. Solidarity can indeed play out at different levels. Acknowledging that inevitably leads one to recognize that the prioritization or ranking of communities of solidarity may vary depending on the primary identification of Canadians with one particular community or another. For some, it can be Canada as a whole, for others it can be their provincial or Aboriginal community, for others still it can be a municipal community or a transnational one. Moreover, the intensity and duration of their commitment may vary widely. More than ever,

communities of belonging, and of solidarity, are contingent and ever-shifting entities. Thus, at the very moment several groups are challenging the hegemony of state-centred identities, be they federal or provincial, the very cohesion of these sub-state groups is itself being undermined by the emergence of competing, and sometimes ephemeral, social communities of interests. As was observed by legal sociologist Jean-Guy Belley, 'the mystical experience shared by the members of a religious cult or the psychedelic ecstasy of a *rave* provide good illustrations of a social marginality that appears impossible to connect with current regimes of legal pluralism. The sociability of communion, in the first case, and the sociability of mass, in the second, indeed reaches an intensity that annihilates the spirit of community needed for any form of juridical rationality or impulse for the law to emerge, or for them to attain any cognizable consistence.'⁶ This quotation not only points to the growing individualism that characterizes advanced societies such as Canada, and which co-exists with another, paradoxical, phenomenon of communitarian affirmation or retrenchment, but also to the mutation of the citizen into a consumer of identities and, possibly, of solidarities. In such a context, it is difficult not to surmise that patterns of solidarity are likely to follow patterns of social identification.

But even if one charitably assumes that these shifts in social identification do not necessarily affect citizens' commitment to solidarity, one is nevertheless forced to examine at which level they are willing to express that solidarity, what costs they are ready to bear for that purpose, and for whom they are ready to incur these costs. There is a need to re-problematize the very concept of solidarity in federations, which seems particularly *à propos* in Canada. The socio-political diversity inherent to such a regionalized, multinational, and multicultural federation, where a genuinely federal society overlaps with the existing federal structure, prevents the emergence of a solidarity based on resemblance – the type that Durkheim labelled 'mechanical solidarity.' But if the form of solidarity that is more likely to appear in such a federal society is one based on interdependence – Durkheim's 'organic solidarity' – it is not even sure that this solidarity can be taken for granted.⁷ This is where assuming the existence and the perennial nature of pan-Canadian solidarity risks becoming an epistemological obstacle, as is assuming that no genuine solidarity is possible in such a context. In this respect, not only is socio-political diversity susceptible of affecting attitudes toward solidarity, but so is the plurality of values

informing the adherence to one or another 'criterion for choice' in the federation.

Thus, it may well be that solidarity cannot be taken for granted any more in Canada. Digging deeper, it is not even clear that mutual trust should be assumed. Arguably, the very existence of a federation, with the constitutionally-entrenched division of powers that it presupposes, seems to indicate that, on the basis of the principle 'good fences make good friends',⁸ a certain level of distrust existed at the outset, even if the constituent parties were willing to look beyond their relative distrust of each other to build a larger, and distinct, legal order. If one defines trust as 'the willingness to make oneself vulnerable to another without costly external constraints,' it is far from clear that any formal constitutional actor is ready to make oneself vulnerable to the others in today's Canada.⁹ Actually, the exact opposite seems to be true. It can be argued that such a definition of trust first and foremost applies to individuals and that it would be naïve to imagine that institutionalized political actors could even consider making themselves vulnerable to others. Still, it is hard to deny that this idea of vulnerability, or of abandonment, captures something essential about trust, whatever the context. Even if we adopt a narrow yet strong, conception of trust as 'encapsulated interest,'¹⁰ resting on the idea that the entity in whom trust is placed will take the interests of those who place such trust into account, vulnerability and thus asymmetry remain central features of trust relationships, even when dealing with institutionalized political actors.

If trust is highly desirable in a federation where solidarity is said to be a norm, it may also be seen as indirectly fostering the unity of that federation. And assuming that unity refers to 'the continuing desire on the part of a population to continue living under the same political institutions, or, perhaps, more precisely, with the *absence* of any desire to sever the existing bonds of political association,'¹¹ a possibly waning desire of one or more parts of the population of the federation 'to continue living under the same political institutions' will arguably undermine federal solidarity. Thus, while it would be equally problematic to assume that trust, unity, and solidarity cannot exist in Canada, or will inevitably disappear from it, presuming that these properties are necessarily present in the federation, cannot vary in intensity, and are perennial by nature, probably constitutes an even more significant problem as far as conversations about solidarity are concerned.

These presumptions may further hide a refusal to acknowledge the

socio-political reality of Canada, where, for a host of reasons, solidarity as a norm and redistribution as a practice seem more contentious than ever. Solidarity, and particularly the type of organic solidarity that characterizes multinational federations, is not a given; it demands work, a work that must take place both at the level of values and at the level of the mechanisms used to implement the norm of solidarity. Suffice it to say here that different types of actors share a responsibility in creating an environment where values conducive to solidarity are fostered. And although the contribution of political actors is absolutely central and invaluable in this respect, judicial actors are important as well. Because most of the debates about solidarity and redistribution in Canada take place in the political realm, it is often thought that the role that courts can play in fostering solidarity and redistribution is marginal at best. While it is certainly true that they cannot implement policies of redistribution, they can nevertheless use their powers to interpret the constitution in a manner that will be more or less conducive to the development of all types of solidarity in the federation. Two examples come to mind here, one that on the whole furthers the agenda of pan-Canadian solidarity, and one that does not.

The recent opinion of the Supreme Court of Canada in *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, arguably promotes pan-Canadian solidarity. In that case, the court confirmed the constitutional validity of federal statutory provisions providing employment insurance benefits to women not working because of pregnancy, as well as other persons not working because they care for a newborn or an adopted child. The court found that these provisions, which essentially provide for benefits replacing the employment income of insured workers in such circumstances, did not encroach upon the provinces' jurisdiction over property and civil rights, even though one of their effects was to facilitate support for families and the ability to care for children.¹² This case is interesting because it fosters interpersonal solidarity at a pan-Canadian level – an important dimension of solidarity, but perhaps not the most significant one from the perspective of federalism – by recognizing the federal Parliament's power to use its jurisdiction over unemployment insurance to launch narrowly tailored social programs which provide for income security in the event of non-participation in the paid labour market.

The evolving interpretation given by the Supreme Court to that particular federal head of power could be viewed by some as another illustration of the Court's preference for what Daniel Weinstock calls in

this volume overlapping federalism at the expense of a strong, watertight conception of jurisdictional exclusiveness. But in our view, the case can hardly be construed as opening the floodgates to massive federal interventions in the area of social policy, even if one considers the broad and dynamic understanding of the labour markets adopted by the Supreme Court.¹³ It remains to be seen, however, how the federal government will devise its interventions in that field, and more particularly, how sensitive and responsive it will be to regional differences across Canada. Indeed, it bears remembering that prior to the Supreme Court's decision in the *Employment Insurance Act Reference*, the federal government had negotiated in 2004 a deal with Quebec, in which it had agreed to contribute to the funding of Quebec's pioneering parental leave program, which is more generous than its federal counterpart. However, that deal was struck after a judgment of the Quebec Court of Appeal, which found that federal jurisdiction over unemployment only extended to wage replacement measures for individuals having lost their jobs for economic, rather than personal, reasons. This is the very judgment that was overturned by the Supreme Court. This begs the following question: Would the agreement signed by Quebec and Ottawa on parental leaves have been possible without that Court of Appeal decision? Or, put differently, would such an agreement have been possible after the Supreme Court's decision? We can only conjecture the answer to that question, but a no would certainly have reinforced negative attitudes about federalism in Quebec, thereby undermining the commitment of its citizens to pan-Canadian ideals, including solidarity.

All of this to say that the manner in which a given level of government that is acting within its constitutional prerogatives implements its policies may have an effect on trust, unity and, ultimately, solidarity. In some cases, flexibility and asymmetry may indeed represent a more appropriate way to promote these values than a one-size-fits-all approach, which calls for the need for possibly more, and not less, collaborative intergovernmental endeavours to tackle complex social issues that pertain to solidarity and redistribution.

One of the problems that such collaborative endeavours face, however, is the arguably defective constitutional framework applicable to intergovernmental agreements in Canada. At the very least, this framework can hardly be characterized as trust-enhancing, as is illustrated by the Supreme Court's opinion in *Reference re Canada Assistance Plan (B.C.)*, where a challenge to the legality of the federal government's

unilateral decision to cap the Canada Assistance Plan was rejected.¹⁴ The problem in this case lies in the Court's refusal to constitutionally preclude a federal unilateral decision that had the effect of drastically upsetting the finances of the recipient provinces, with the ensuing results on how these provinces could exercise their own constitutional powers and deliver the services their citizens expected. The acceptance of the constitutionality of the unilateral repudiation of intergovernmental agreements was, in essence, grounded in the non-legally binding nature of these agreements in Canadian constitutional law and on the principle of parliamentary supremacy. Nothing, or very little, was said about the particular role intergovernmental agreements play in a federation such as Canada, the impact of breaches of such agreements on the equilibrium of the federation, the legitimate governmental expectations arising out of these agreements, or a possible reconceptualization of parliamentary supremacy in light of the particular imperatives of a federal structure. We are not saying here that all intergovernmental agreements should automatically be characterized as legally binding. We are merely saying that it would be appropriate to consider the possibility that those which somehow affect the very capacity of constitutional actors to exercise their powers meaningfully be granted that status. While arguing in favour of an automatic recognition of a legal status to all intergovernmental agreements might stumble upon an epistemological obstacle, it appears equally problematic to systematically refuse them that status. It is one thing to say that most federalism-related disputes can, and should ideally, be resolved in the political realm, but it is quite another to elevate this prudential principle into a fully fledged constitutional principle. Since these disputes sometimes involve significant power imbalances, which may allow one particular constitutional actor to disregard the legitimate interests and aspirations of other constitutional actors entirely, a judicial policy of systematic non-intervention risks amounting to a refusal to uphold the constitution.

As far as intergovernmental agreements are concerned, a legal framework such as the one we have in Canada raises concerns as to the stability and predictability of governmental decision-making processes and of revenue-sharing mechanisms. And if we turn to solidarity as a broader value-norm, this legal framework seems even more problematic. To the extent that, in a complex federation such as Canada, solidarity is arguably more likely to blossom if a solid capital of trust is maintained, any policy, judicial or otherwise, that can reasonably be

characterized as reducing that capital, or as allowing constitutional actors to breach the trust others have placed in them, is worrisome. Thus, reflecting on how such policies could be reformed might be warranted, and could certainly benefit from examining how things are done in other federations, even those whose federal culture and legal tradition is different from ours.¹⁵ Whether topics such as solidarity, redistribution or fiscal federalism are approached from a philosophical, juridical, political, or economic angle, conversations about these topics should always involve prior reflection on the assumptions informing how these topics are grasped. Political debates tend to demonstrate that such a reflective attitude unfortunately represents the exception rather than the rule. Indeed, too many political actors seem content to reiterate constantly their favourite ideological mantras, instead of verifying whether the values they assume to exist, or the objectives they seek to achieve, actually exist or are achievable. If anything, this volume emphasizes that we might need to revisit the ways we converse about solidarity to recast the ways we can concretely achieve it.

As we were finalizing the edition of this volume, an event of significant importance took place in Quebec. A group of prominent citizens, federalists and sovereigntists alike, tabled a manifesto for a 'clear-eyed vision of Quebec' ('Québec lucide'), in which they essentially argued that Quebec society was acting like an ostrich with its head in the sand, and acknowledged that it is facing problems that could drastically undermine its ability to sustain its fabled, solidarity-based, Quebec model.¹⁶ A group of equally prominent citizens, concerned by what they perceived as the right-wing bias of their 'lucid' counterparts, issued a counter-manifesto calling for a Quebec based on solidarity, in which they more or less defended the status quo while calling for more sustainable forms of development.¹⁷ Despite their significant divergences, both groups seem to recognize that solidarity is a work in progress. We hope that a similar debate arises at a pan-Canadian level. However, we would add that, far from being opposed to solidarity, lucidity may be a precondition for it. Indeed, as exemplified in the compromise reached in 1867 by the framers of Canada's federal constitution, while lucidity may compel constitutional actors to formulate their nation-building aspirations in more modest terms, modesty itself does not preclude ambitions: it only induces us to mobilize our energies around ambitions that are realistically achievable. This, alone, may be a bold choice to make when it comes to (re)designing the central policies of a federation like Canada.

NOTES

- 1 The Aboriginal peoples of Canada were conspicuously left out of the deal, since the were then perceived as mere 'objects' of legislation.
- 2 A federal society is one where there is a relatively deep level of ethno-linguistic diversity and where that diversity is territorialized. See William S. Livingstone, 'A Note on the Nature of Federalism,' *Political Science Quarterly* 67 (1952): 81.
- 3 Richard Simeon, 'Criteria for Choice in Federal Systems,' *Queen's Law Journal* 8 (1981): 131.
- 4 Gaston Bachelard, *La formation de l'esprit scientifique: Contribution à une psychanalyse de la connaissance objective* (Paris: Vrin, 1938), 14.
- 5 On the anthropological concept of 'ideal reality,' see Maurice Godelier, *L'idéal et le matériel. Pensée, économies, sociétés* (Paris: Fayard, 1984), 198.
- 6 Jean-Guy Belley, 'Le pluralisme juridique comme doctrine de la science du droit,' in Jean Kellerhals, Dominique Manaï, and Robert Roth, eds., *Pour un droit pluriel. Études offertes au professeur Jean-François Perrin* (Bâle: Helbing & Lichtenhahn, 2002), p. 161 (our translation).
- 7 On these two types of solidarity, see Émile Durkheim, *De la division du travail social* (Paris: Alcan, 1926).
- 8 Antoine N. Messara, *Théorie générale du système politique libanais: Essai comparé sur les fondements et les perspectives d'évolution d'un système consensuel de gouvernement* (Paris: Cariscript, 1994), 63.
- 9 Larry E. Ribstein, 'Law v. Trust,' *Boston University Law Review* 81 (2001): 555.
- 10 Russell Hardin, 'Trust and Society,' in Gianluigi Galeotti, Pierre Salmon, and Ronald Winthrope, eds., *Competition and Structure. The Political Economy of Collective Decisions: Essays in honour of Albert Breton* (Cambridge: Cambridge University Press, 2000) 20.
- 11 Daniel Weinstock, 'Building Trust in Divided Societies,' *Journal of Political Philosophy* 7 (1999): 289.
- 12 [2005] S.C.C. 56, at para. 35.
- 13 On the evolution of the concept of work and on its impact on the law, see generally Alain Supiot, ed., *Au-delà de l'emploi: Transformations du travail et devenir du droit du travail en Europe* (Paris: Flammarion, 1999). On the conciliation of work and family life envisaged from a legal standpoint, see Joanne Conaghan and Kerry Rittich, eds., *Labour Law, Work, and Family* (Oxford: Oxford University Press, 2005).
- 14 *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.
- 15 For example, examining the status of intergovernmental agreements in the constitutional law of other federations could prove extremely fruitful. On

this question, and on the variables influencing the legal or non-legal status of such agreements, see Johanne Poirier, 'Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit,' in Jean-François Gaudreault-DesBiens and Fabien Gélinas, eds., *The Moods and States of Federalism: Governance, Identity, and Methodology / Le fédéralisme dans tous ses états: Gouvernance, identité et méthodologie*, (Brussels and Cowansville: Bruylant and Éditions Yvon Blais, 2005), 441.

16 On line at <http://www.pourunquebeclucide.com/cgi-cs/cs.waframe.index?lang=2>

17 On line at <http://www.pourunquebecsolidaire.info/index.php?manifeste#>

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