

# ACCORDS AND DISCORD: THE POLITICS OF ASYMMETRICAL FEDERALISM AND INTERGOVERNMENTAL RELATIONS

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Canadian first ministers set intergovernmental relations on a new trajectory with the signing of two accords in 2004. The September health care accord was heralded as a significant achievement that would set the parameters of better healthcare for the next decade. Surprisingly, all of the provincial premiers signed onto this deal that signaled more intergovernmental cooperation in an area of primarily provincial jurisdiction. In contrast, the October Equalization agreement was controversial even at signing, with one provincial premier storming out of the meetings and refusing to sign and other premiers questioning the fairness of the deal for the “have not” provinces. Different in content and temper of the process, the two deals were similar in initiating a new period of asymmetrical federalism; one as part of its terms and the other as a part of its aftermath.

Asymmetrical federalism is a simple concept but sometimes rendered unnecessarily complex. In its most basic form, it may be understood as differences among the states or provinces within a federal system. These differences may arise from geography, history, demographics, economic and fiscal realities, population characteristics, culture or other key characteristics specific to particular units. A

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certain degree of asymmetry in policy is natural in any federation despite national goals or objectives since implementation and interpretation will depend on these differences. However, in its most recent (and reincarnated) usage, asymmetrical federalism is a convenient label for the different treatment of constituent units within a federation. In its silliest and most complex forms, asymmetrical federalism is qualified as symmetrical asymmetry in the federation and contrasted with asymmetrical symmetry. The former refers to the same opportunity for special treatment being available for each unit while the latter means different treatment accorded to essentially similar units.<sup>2</sup> Although these terms have been bantered about, they are too cute and confusing to advance the debate and will not be used here. Instead, asymmetrical federalism will be used to discuss the different treatment of particular provinces within the Canadian federation to offset their disabling differences or to enhance their natural assets.

The two deals served as contrasts in the implementation of asymmetrical federalism. The Health Accord was announced in the form of “A 10-year plan to strengthen health care.” In the agreement, which contained a substantial rise in federal funding, the governments committed to a set of general principles and objectives and specific guidelines that will lead to timely access to quality health care.<sup>3</sup> However, two separate communiqués were attached to the agreement. “Recognizing that an asymmetrical federalism allows for the existence of specific agreements for any province,” the first ministers agreed to a separate deal between the Quebec and federal governments that would allow that province some flexibility in interpreting and implementing the agreement, including different reporting arrangements.<sup>4</sup> While Quebec

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<sup>2</sup> At a recent conference, academics and practitioners bandied about the phrases essentially derailing the debate from the track of meaningful discussion.

<sup>3</sup> Office of the Prime Minister, “A 10-year plan to strengthen health care,” Ottawa, September 16, 2004. Available online at

<http://pm.gc.ca/eng/news.asp?category+1&id+260>.

<sup>4</sup> Ibid.

committed to the overall objectives and general principles of the health accord and especially the principles of a public health system and to cooperating with the other governments on developing indicators of progress and sharing best practices and information, it specified that it maintained control over planning, organizing and managing its health care services. The communiqué also contained an explicit non-derogation clause protecting Quebec's jurisdiction.<sup>5</sup> The second communiqué committed the governments to working together to improve Aboriginal health. Significantly, the Health Accord recognized the specificity of both Quebec and Aboriginal Peoples within Canada.

By contrast, the agreement on equalization and territorial funding did not contain side deals at the time of signing. The Prime Minister and nine premiers established the main features of a new equalization and territorial funding framework for the next five years including increased federal monies in the 2004-5 year, more stable future funding, and the creation of an independent panel to review the equalization program. The payments are designed to offset revenue differences in the provinces and territories and help them provide essential public services to Canadians on a roughly comparable basis. Although the resulting treatment is different according to provincial or territorial status and to level of fiscal disparity (some provinces are recipients, some are not), the formula applies to all equally and is, in that way, symmetrical.

The asymmetry that has resulted from the equalization agreement is subsequent to the signing and found in a succession of separate but related deals. Almost three months to the day after the equalization agreement was signed, the Prime Minister announced an agreement in principle with the government of Newfoundland and Labrador on offshore resource revenues. The deal was intended to "address the province's concerns about offshore resource revenues triggering reductions in Equalization payments,"

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<sup>5</sup> "Asymmetrical Federalism that Respects Quebec's Jurisdiction," available online at <http://pm.gc.ca/eng/news.asp?category+1&id+260>.

raised by the October agreement.<sup>6</sup> The federal government entered parallel discussions with Nova Scotia and more recently has engaged with Saskatchewan on a new financial deal. It also increased its financial support to Ontario over five years by \$5.75 billion to offset its arguments that it contributes \$23 billion more to confederation than it receives.<sup>7</sup> Other provinces are lining up. Asymmetry has come in the aftermath to the agreement to buy peace in the nation.

Why are we entering this period of asymmetrical federalism and is it beneficial for both the constituent units and the federation as a whole? This work traces the roots of the current resurgence of asymmetrical federalism and examines some of the means of implementing these differences in treatment before assessing the merits of asymmetrical federalism. I argue that asymmetrical federalism is the result of a confluence of key factors within the country and especially the federal government's need to justify itself to Canadians. While some degree of asymmetry is necessary and even desirable, it must be implemented carefully or risks becoming the very straightjacket the provinces are attempting to avoid. The healthy future of the nation does not rest on multiplying the degrees of asymmetry but instead on reflecting on the root cause of the sense of need for asymmetry and recasting the role of the federal government in light of those reflections. While asymmetry might be sold to the public as a convenient political tool for national unity, in its current application it is undermining the very sense of comity and reciprocal goodwill needed to sustain the union in the longer term. For guidance on how best to accommodate differences within our federation and to ensure

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<sup>6</sup> Office of the Prime Minister, "Government of Canada Reaches Offshore Agreement with Newfoundland and Labrador," Ottawa: January 28, 2005. Available online at <http://pm.gc.ca/eng/news.asp?id=403>.

<sup>7</sup> Office of the Prime Minister, "Canada-Ontario Agreements: Backgrounder," May 7, 2005. Available online at <http://pm.gc.ca/eng/news.asp?id=482>. See also Premier Dalton McGuinty, "We're for Equalization –but it's costing us our ability to keep contributing," *Globe and Mail*, March 16, 2005, A17.

its survival, we should heed the wisdom of the original founders. But first, we look to causes of the perceived need for this less than innocuous placebo for the nation's differences.

### **Locating the Recent Root Causes of the Need for Asymmetry: or the federal government's search for identity**

The current trend towards asymmetrical federalism lies within successive attempts by the federal government to meet the changing shifts in society and its expectations of government. Following the Second World War, the legitimacy of the federal government was at an apex. Canadians had fought for the country and while conscription had proven contentious, by and large the federal government was seen to have served the interests of the nation well. Most citizens yearned for peace and prosperity and looked to the federal government for a new sense of security: witness the transfer of all or some responsibility for unemployment insurance and pensions to the federal government, federal-provincial cooperation in designing economic policies that would spur the growth of corporate and branch plant (but prosperous) Canada, federal-provincial agreements on a more progressive tax system and tax-sharing arrangements, the emphasis on federal defence and aeronautics spending, the attachment to federal policies establishing Canada as a police and then peace force in the world, and so on.

By the 1960s, cracks in this contentment were beginning to show. Canadians, like most citizens in western democracies, were beginning to question the existence of elements of imperialism and illegitimate authority within their borders, and no longer just in the developing world. The civil rights movements in the United States, brought into people's living rooms with the advent of television, and worldwide struggles against totalitarianism prompted Canadians to question the role of their political leadership. Underlying this challenge to authority, though, was a certain innocence and faith in western liberal democracies and its structures.

In this period of affluence and turmoil, the Canadian government responded. Canadian

policies corresponded to a new and growing sense of social justice fed by the Camelot to the south: the federal slogan of "A Just Society" captured the themes of these programs.<sup>8</sup> The federal and provincial governments engaged in a still relatively harmonious endeavour to expand the welfare state and state activities for the betterment of Canadians. Citizens still looked to the federal government as a benevolent authority, proud of Canada's role and recognition as a peacekeeper internationally and comforted by the federal government's measures for peace and order at home as pockets of insurgence arose.

The 1970s witnessed the loss of this innocence and trust in government. Watergate in the US, the promulgation of the War Measures Act in Canada, growing awareness and rejection of discriminatory policies all contributed to a creeping sense of citizen disillusionment that was only heightened as economic growth slowed and sputtered, resources became increasingly constrained, and federal-provincial bickering over responsibilities and money increased. Citizens began to question the image of government as a vehicle of social justice and assert their rights in opposition to the state.

Federal policies and intergovernmental relations followed this shift from social justice to a rights-conscious society that was skeptical of political authority by the 1980s. Both to justify its role as a national government in the face of the nationalist challenge emanating from Quebec and as a legitimate representative of democratic values in the face of challenges from citizen groups, the federal government pressed for the adoption of the Canadian Charter of Rights and Freedoms inadvertently entrenching both this new sense of entitlement and opposition with the state in the citizen psyche and this tension with Quebec for the foreseeable future.<sup>9</sup>

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<sup>8</sup> See for example the thinking underlying policies beginning in the 1960s in Thomas S. Axworthy and Pierre E. Trudeau (eds.), *Towards a Just Society: The Trudeau Years* (Markham ON: Viking, 1990).

<sup>9</sup> Alan Cairns studies the shift to a rights-based culture and the effect of entrenching a Charter on the Canadian political psyche in a series of essays. See

The consequent skepticism of citizens and challenge to the legitimacy of the state contributed to recent federal governments' attempts to justify its role within the federation often at the expense of intergovernmental harmony. Faced with dwindling sources of new revenues, growing expectations for public services and mounting public debts and deficits, the federal government shifted towards a more explicit rights agenda. Rather than expanding programs and services as in the more affluent previous era, the federal government (as well as provincial governments) began to target social programs to entitled recipients, limit its expenditures, and cutback on provincial transfers even in the crucial and explosive areas of health, social services and education.<sup>10</sup> In return for accepting more responsibility with less funding, the provinces began to develop a stronger sense of ownership and independence in these policy areas.

The cumulative effect of the federal rollbacks in the 1970s and 1980s was that Ottawa's role as a positive force in citizen lives became obscured. Offloading social programs and responsibilities to other governments and third sector agencies meant that the federal government was protected from criticisms for cutbacks in services,<sup>11</sup> but also that it lost visibility. Provincial leaders' criticisms of the

federal government for cuts in transfers encouraged a more negative view of the federal government, reaching new heights with its unilateral change to Canada Assistance Plan and introduction of the Canada Health and Social Transfer (combining monies for health, post-secondary education and social programs) in 1996. The credibility of the federal government was further questioned as its ability to set and monitor national standards in these areas was challenged and limited.<sup>12</sup> Cutbacks in the foreign aid and defence spending began to engender criticisms of Canada on the international front—Canadians could not even take solace any longer in the image of Canada as a benevolent actor in an increasingly hostile world.<sup>13</sup> The sensational failure of the constitutional attempts at strengthening national unity and expanding citizen rights and the near loss of the country in the 1995 Quebec referendum, further delegitimized the federal government in the eyes of Canadians.<sup>14</sup> The effects of globalization on national states only fed perceptions of the Canadian government as impotent and possibly unnecessary.<sup>15</sup>

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Douglas E. Williams (ed.), *Reconfigurations: Canadian Citizenship and Constitutional Change, Selected Essays by Alan C. Cairns*, (Toronto: McClelland and Stewart, 1995).

<sup>10</sup> See for example, James J. Rice and Michael J. Prince, "Lowering the Safety Net and Weakening the Bonds of Nationhood: Social Policy in the Mulroney Years," in Susan D. Phillips (ed.), *How Ottawa Spends 1993-4: A More Democratic Canada?* (Ottawa: Carleton University Press, 1993), 381-416.

<sup>11</sup> John Shields and B. Mitchell Evans, *Shrinking the State: Globalization and Public Administration "Reform"* (Halifax: Fernwood, 1998), 88-115; B. Mitchell Evans and John Shields, "Neoliberal Restructuring and the Third Sector: Reshaping Governance, Civil Society and Local Relations," Paper presented to the Annual General Meeting of the Canadian Sociology and Anthropology Association, University of Alberta, Edmonton, Alberta, May 29-31, 2000, 17-20.

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<sup>12</sup> See Gerard W. Boychuk, "Social Assistance and Canadian Federalism," in François Rocher and Miriam Smith (eds.), *New Trends in Canadian Federalism*, (Peterborough, ON: Broadview Press, 2003), 271-2; Antonia Maioni and Miriam Smith, "Health Care and Canadian Federalism," in Rocher and Smith, *New Trends*, op.cit., 305-9.

<sup>13</sup> Kim Richard Nossal, "Pinchpenny diplomacy: The decline of 'good international citizenship' in Canadian foreign policy," *International Journal* 54 (Winter 1998-9), 88-105; Andrew Cohen, *While Canada Slept: How We Lost Our Place in the World* (Toronto: McClelland and Stewart, 2003).

<sup>14</sup> See for example, Kathy L. Brock, "Executive Federalism: Beggar Thy Neighbour?" in Rocher and Smith, *New Trends*, op.cit., 77-80; compare Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*, (Toronto: Oxford University Press, 1990), 191-276; and, David Thomas, *Whistling Past the Graveyard: Constitutional Abeyances, Quebec and the Future of Canada*, (Toronto: Oxford University Press, 1997).

<sup>15</sup> See for example, Thomas J. Courchene, *A State of Minds: Toward a Human Capital Future for Canadians* (Montreal: IRPP, 2001), esp. 28-31.

By the end of the 1990s, Ottawa realized the need to repair the damage to its reputation with Canadians. Realizing the emphasis Canadians placed on the social safety net in a fair community as a key unifying national characteristic,<sup>16</sup> the federal government began to reassert itself in those policy areas. Cash-strapped provinces were caught in the bind of desiring federal assistance but resenting federal intrusion into policy areas under their jurisdiction and in which they had grown accustomed to acting with less interference. More money to the CHST in 1999 meant more rigid enforcement of national standards.<sup>17</sup> The same year, the federal government attempted to reassert its leadership in the area of social policy by pre-empting an interprovincial agreement and using financial incentives to induce the provinces to sign a Social Union Framework Agreement (SUFA). The Health Accord signed the following year ensured a federal presence in upholding national objectives at the cost of a more stable federal commitment to healthcare funding. And so it goes into the 2000s with further agreements on social spending, child care, health and other salient programs as well as direct federal action on healthcare research and post-secondary scholarship.

In its quest for identity, the federal government has shifted from promoting a just society to entrenching rights for citizens to expanding its role in primarily provincial areas of jurisdiction such as healthcare, social programs and education. In so doing, the federal government has set itself on a collision course with the provinces. Particularly in the area of healthcare, the federal government has set itself at odds with provinces like Alberta, Quebec and BC, that are experimenting with the contours of the system, by nixing movements towards a

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<sup>16</sup> Successive polls have captured this view. The importance of a strong social fabric to Canadians is captured in Raymond Breton, Norbert J. Hartmann, Jos L. Lennards and Paul Reed, *A Fragile Social Fabric? Fairness, Trust and Commitment in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2004), esp. 30-39,

<sup>17</sup> See Maioni and Smith, "Health Care and Canadian Federalism," in Rocher and Smith, *New Trends*, op.cit.

mixed public-private model of healthcare delivery.<sup>18</sup> In sum, as the federal government has attempted to redefine its place within the hearts and minds of Canadians and justify its role as a national government, it has exacerbated federal-provincial tensions and triggered a protective impulse in the provinces.

### **The Provinces Act and React**

This protective impulse has manifested itself in the collective provincial thrust towards a qualified acceptance of asymmetrical federalism. In recognition of the distinctiveness of Quebec and its historical sensitivity towards federal encroachments on provincial jurisdiction and especially social policy,<sup>19</sup> the nine provincial premiers issued their famous 1998 Calgary Declaration. While this document recognized Quebec's unique place within Canada, it underscored the perspective that any special powers granted to one province must be available to the other provinces: asymmetry yes but with equality of opportunity for all. This position reflects both the desire to accommodate Quebec in the interests of national unity but also the greater emphasis on equality whether at the individual or provincial level in the wake of the Charter. In constitutional terms, the Declaration is more consonant with the spirit of the Charlottetown Accord than the Meech Lake Accord.<sup>20</sup>

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<sup>18</sup> Keith Banting and Robin Boadway, "Defining the Sharing Community: the Federal Role in Health Care," in Harvey Lazar and France St-Hilaire (eds.), *Money, Politics and Health Care: Reconstructing the Federal-Provincial Partnership* (Montreal and Kingston: IRPP and The Institute of Intergovernmental Relations, 2004), 15-18.

<sup>19</sup> This was, for example, a key factor in the Quebec government declining to endorse the 1963-4 Fulton-Favreau and 1971 Victoria agreements on the constitution.

<sup>20</sup> For a summary of public opinion and the distinction between the Meech Lake and Charlottetown approaches to acknowledging Quebec as a distinct society, see F. Leslie Seidle and Gina Bishop, "Public Opinion on Asymmetrical Federalism: Growing Openness or Continuing Ambiguity?", 6-9. Available online as part of the Institute of Intergovernmental Relations Asymmetry Series 2005 at

Similarly, at the behest of Quebec in 2003, the premiers agreed to create the creation of the Council of the Federation (COF), an interprovincial body of first ministers excluding the federal government, to focus on areas of provincial interest including health care, internal trade and the fiscal imbalance. COF is intended to be the vehicle that enables the provinces to drive the federal-provincial agenda in critical areas by encouraging a united provincial front.

Of particular interest to the provinces in forming COF was the vertical fiscal imbalance, defined as the situation arising when one level of government has excess revenue for its spending needs and the other level of government has too little revenue to meet its defined expenditures. However, as Harvey Lazar observed recently, current public debate “suggests that this is a measurable technical concept. It is anything but!” Instead, it is a “political and policy concept.”<sup>21</sup> To determine efficient tax rates vis-à-vis expenditure responsibilities in relation to the two levels of government involves assessing policy and political considerations, not technical ones. Still, the rhetoric emanating from COF and provinces like Alberta, Quebec and Ontario treats the vertical fiscal imbalance as an empirically measurable device.<sup>22</sup>

These two developments are bearing fruit. The Calgary Declaration was a precursor of the form of asymmetry embraced in 2004 Healthcare Accord. If rumours are accurate, according to Tom Courchene the federal government agreed orally to extending the same arrangements to Alberta and BC and thus any other province during the final negotiations on the Health Accord.<sup>23</sup> The understanding that the

other provinces could qualify for the same deal as Quebec should they desire it, ensures that Quebec is accommodated without the entitlements of the other provinces being adversely affected. The COF is an impetus behind the asymmetrical arrangements introduced by the 2004 Equalization Agreement and subsequent accords responding to the provinces’ perceptions and definitions of a vertical fiscal imbalance. What this deal would seem to indicate is that COF encourages the provinces to engage in a united front unless they can cut a better deal for themselves—asymmetry becomes raw self-interest without serious concern for the effects on the nation as a whole.

The impetus towards asymmetrical federalism is also being driven by the provinces on an individual basis, largely in reaction to the federal government’s actions in attempting to redefine its role in the nation. Whether the Liberals or Parti Québécois are in office, the government is expected to assume a tough posture against Ottawa and protect that province’s sovereignty and autonomy. Opting out of national deals involving social policy is a common strategy of that province.<sup>24</sup> Underlying this posture is the threat, driven home by the 1995 referendum, that without the ability to opt-out of particular intergovernmental deals with sufficient compensation, Quebec might just opt-out of the federation. But unlike in the past, now the other provinces expect the opportunity for similar arrangements being extended to them, thus undermining a sense of national purpose

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and The Old Constitution,” *Policy Options* 25:10 (November 2004), 27.

<sup>24</sup> See Peter Graefe, “Scope and Limits of Asymmetry in Recent Social Policy Agreements,” Available online as part of the Institute of Intergovernmental Relations Asymmetry Series 2005 at

[http://www.iigr.ca/browse\\_publications.php?section=43](http://www.iigr.ca/browse_publications.php?section=43); cf. Alain Noel, “Collaborative Federalism with a Footnote,” *Policy Options* 21 (May 2000), 44-5; compare Herman Bakvis, “Checkerboard Federalism? Labour Market Development Policy in Canada,” in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness and Legitimacy* (Toronto: Oxford University Press, 2002), 197-219.

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[http://www.iigr.ca/browse\\_publications.php?section=43](http://www.iigr.ca/browse_publications.php?section=43)

<sup>21</sup> Harvey Lazar, Notes for the House of Commons Sub-Committee on Fiscal Imbalance, Ottawa, May 4, 2005, 1, 3.

<sup>22</sup> See also André Pratt’s criticism of the fiscal imbalance debate in “Is Ontario Getting Ripped Off: No,” *The Globe and Mail*, March 16, 2005, A17.

<sup>23</sup> Tom Courchene documents this speculation in “Pan-Canadian Provincialism – The New Federalism

and common interest.<sup>25</sup> Furthermore, Ontario and Alberta, as key donors to the federation, are increasingly engaging in a form of beggar-thy-neighbour federalism, begrudging their contributions to the national coffers rather than realizing the flow back to them of the benefits of the union.<sup>26</sup> BC, increasingly despondent with the federal government, is distancing itself.<sup>27</sup> The smaller provinces whose concerns are often diminished or sacrificed to the issues brought forward by the larger and wealthier provinces, view special arrangements with the federal government as a means of protecting their interests or at least diminishing the harm done by deals favouring central Canadian and wealthier provinces. And so, underlying asymmetry is a new degree of interprovincial resentment and passive hostility.

Some further dangers inherent in the reasoning underlying the drive towards asymmetrical arrangements that especially accommodate Quebec's specificity in Confederation need to be addressed. First, Quebec is credited with the gift of federalism to Canada.<sup>28</sup> This is a myth. Federalism was the result of not just Quebec but also the other

provinces with their unique political, social and cultural configurations desiring some protection. Sir John A. Macdonald's vision of a unitary state was repugnant, not only to the fathers of Confederation from Quebec but also from the other provinces-to-be extending up to include Newfoundland.<sup>29</sup> To deny the equal participation of the provinces in the creation of the federation is to undermine the sense of a collective national project—one that commits all parts equally to making it work.

Second, citing the sections of the *Constitution Act, 1867* that recognize Quebec's distinct culture, judiciary and linguistic conditions as justifications for current asymmetrical arrangements that apply only to Quebec and are not theoretically available to the other provinces is potentially dangerous (not to mention misleading since, for example, bilingualism in the legislature and courts applies to Manitoba as well as to Quebec and as of 1982 to New Brunswick and potentially to other provinces *Constitution Act, 1982* ss.17.2, 18.2, 19.2, 20.2 and 43.b).<sup>30</sup> Instead of allowing for innovative arrangements that strike accommodations across common provincial interests (Quebec and NB on bilingualism), this logic of dualism (Quebec versus the rest of Canada) may impose a straightjacket on policy makers binding them into arrangements that are consistent only with those original defining features of Quebec. To use those original accommodations as a basis for applying different treatment exclusively to Quebec in other areas is like using the accommodations made for PEI's small size to justify special

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<sup>25</sup> F.L. Morton, "Equality or Asymmetry? Alberta at the Crossroads," available online as part of the Institute of Intergovernmental Relations Asymmetry Series at

[http://www.iigr.ca/browse\\_publications.php?section=43](http://www.iigr.ca/browse_publications.php?section=43)

<sup>26</sup> See Brock, "Executive Federalism: Beggar Thy Neighbour," in Rocher and Smith, *New Trends*, op cit. Ontario deliberately shifted away from a focus on Ontario as a leader within confederation to a more self-interested, parochial provincial approach under the Bob Rae NDP government during the Charlottetown negotiations. This approach has continued through the Harris Tories to the McGuinty Liberal government, some would say to the detriment of Canada as a whole.

<sup>27</sup> See Gordon, Gibson, "British Columbia: Affordable Resentment, Growing Options, Diverging Interests," in Hamish Telford and Harvey Lazar, *Canada State fo the Federation 2001: Canadian Political Culture(s) in Transition* (Montreal and Kingston: McGill-Queen's with the IIGR and School of Policy Studies, 2002), 241-61.

<sup>28</sup> See for example, Thomas Courchene, "Pan-Canadian Federalism," op cit., 21.

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<sup>29</sup> See for example, Jennifer Smith's discussion of the founders as "parliamentarians" and "reluctant federalists" in *Federalism* (Vancouver: UBC Press, 2004), 41-54.

<sup>30</sup> See for example, justifications for asymmetrical federalism based on this notion of duality expressed by Kenneth McRoberts, *Misconceiving Canada*, op. cit.; David Milne, "Asymmetry in Canada, Past and Present" and Jennifer Smith, "The Case for Asymmetry in Canadian Federalism," both available online as part of the Institute of Intergovernmental Relations Asymmetry Series 2005 at [http://www.iigr.ca/browse\\_publications.php?section=43](http://www.iigr.ca/browse_publications.php?section=43)



arrangements for it in unrelated policy areas. Critics would scoff at the suggestion. Using the constitution in this context, is to limit the potential. Increasingly, this framework may become too constricting for Quebec and may preclude more convincing justifications for an expansive notion of asymmetry beneficial to the nation as a whole.

This broader notion of asymmetry was captured in sections 91 and 92 of the constitution. By extending the same opportunity to all the provinces to pursue different goals within their jurisdiction, the constitution provides for asymmetry in practice. Difference is tolerated. Similarly, section 129 allows for the continuous of colonial laws, courts etcetera in all of the provinces subject to defeasance by either Parliament or the province depending on jurisdiction. While it permits Quebec's unique institutions and laws to continue, it also provides for potential change and thus more uniformity across Canada.<sup>31</sup> These similar formal arrangements allow for considerable diversity in practice. Canadians react favourably to asymmetrical federalism when posed in these terms.<sup>32</sup>

Asymmetrical federalism is a current reality. However, the key point here is that the need for special arrangements is largely driven by the federal encroachment on provincial jurisdiction in recent years as a means of reasserting its place within Confederation. In the era of retrenchment and rights, it sacrificed its ability to influence the direction of the nation, losing visibility and meaning for Canadians. As it has attempted to regain this lost ground, it has chosen to fight the battle on provincial jurisdiction thus prompting a backlash in the provinces which manifests itself as a desire for more asymmetrical arrangements to protect provincial autonomy. As the sense of comity is weakened and resentment rises with the new asymmetrical arrangements, the federal government should reconsider how it defines its

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<sup>31</sup> See Peter Hogg's reading of this section for a slight variation, *Constitutional Law of Canada* third edition, (Scarborough: Carswell, 1992), 36-38.

<sup>32</sup> See Seidle and Bishop, "Public Opinion on Asymmetrical Federalism," *op.cit.*, 8-11.

role within the federation for the sake of national unity. Fuzzy boundaries between the federal government and provinces have made for complex and contentious relations.

### **Towards Principled Federalism: or Reconceptualizing the Role of the Federal Government and Accepting the Differences Within**

Asymmetry has been part of the federal deal in Canada since inception. While specific provisions were made in the constitution for the distinct nature of Quebec, so too were special provisions made for other provinces. Further attempts to constitutionalize asymmetry have and will only bring the dualistic vision of federalism into conflict with competing visions of Canada as a federal state with ten provinces and three territories as the failure of Meech Lake drove home. However, much more flexibility is available to accommodate difference at both the policy and fiscal levels provided equal opportunity of treatment is open to all the units.

As this paper has shown, the real danger arises when jurisdiction is not respected and the federal government begins to encroach on provincial territory. Quebec reacts to protect its right to define and deliver its policies, programs, and services to its public. The wealthier provinces push back and begrudge their contributions to the wellbeing of the nation. And the smaller provinces call for extra protections. Tensions mount, governments argue and citizens become more disillusioned. The comity that binds threatens to become unglued.

The answer lies in a return to a more principled approach to federal-provincial relations and in particular the role of the federal government. This answer has two components. First, the federal government needs to retreat from provincial jurisdiction. Respect the division of powers set down in 1867. Instead of attempting to define national standards and objectives and spending in provincial areas of jurisdiction, the federal government should withdraw.

This proposal raises four immediate objections. One, how do we manage national



institutions and programs that have been set up to assist the provinces in serving their citizens? Either the leadership of these institutions and programs could be assumed by an expanded COF and a supporting administrative body. In its initial phases, the federal government could provide both the logistical and financial support for this body. Alternatively, in cases where shared jurisdiction remains desirable, a governance structure similar to Canada Health Infoway could be more widely applied.<sup>33</sup> This would entail responsibility resting with the Deputy Ministers of the relevant department but active decision-making authority resting with a board comprising five-six representatives from the provinces and territories on rotating terms and one-two federal representatives, at least initially. Any new institutions would need to be negotiated by all 14 governments through the process of executive federalism.

Two, how should federal support continue for these programs? Equalization payments should continue under the present or a reformed formula when they come up for renegotiation at the end of the five year period. In the area of general transfers for social, education and health programs, provinces should submit proposals for a global figure for federal expenditures over a five year period based on past transfers. The federal government would then review this proposal in good faith and then set its final transfer payments. The final decision would lie with the federal government to ensure respect for budget accountability. These proposals including the justifications for the final amounts and the supporting documentation should be available online either through the federal finance department or its provincial and territorial department counterpart or both to ensure transparency and public accountability. Consistent with the current mandate of COF, no province would be obstructed from negotiating additional side deals with the federal government where warranted.<sup>34</sup>

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<sup>33</sup> See Kathy Brock and John Ronson, "Health Care Requires Creative Solutions: Time for Creative Federalism," *Toronto Star*, September 10, 2004.

<sup>34</sup> Of course, the main constraint on this would be the self-interest of the federal government. One deal

Three, how will nation-wide standards or comparability be set and maintained? In this case, the provinces would be responsible for negotiating standards and objectives, taking into account their differences either through COF or alternatively through a joint federal-provincial body with representation drawn from the national, provincial and territorial legislatures to ensure political responsiveness. The federal representative would serve as host and as a neutral chair intended to broker compromises and ensure fair consideration of all provinces' special circumstances. This latter proposal would provide protection for Quebec and the smaller provinces.

Four, in the cases where there is a legitimate federal interest, for example in a health care issue affecting the nation as a whole, how should it be handled? First, the definition of a legitimate national interest should be narrowly construed. The provincial inability test constraining federal action on the environment might provide some guidance here.<sup>35</sup> The final arbiter would need to be the federal government after consultation with the provincial governments and relevant professional associations and experts. As part of the process, the federal government could establish a five person expert panel to advise and report on whether it should act or continue acting in a given capacity.

The default position in all cases should be to respect provincial jurisdiction. The federal role would be minimal in practice but it should undertake a commitment to stable and adequate financial arrangements to avoid outraged cries of fiscal imbalance.<sup>36</sup> The incentive for the federal

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could operate as a demonstration effect for the other provinces or territories.

<sup>35</sup> Peter Hogg, *Constitutional Law of Canada 1997 Student Edition* (Scarborough: Carswell, 1997), 414-16; cf. Gerald Baier, "The Law of Federalism: Judicial Review and the Division of Powers," in Rocher and Smith, op.cit., 124-8. He charts the movement away from the test and criticizes it as too centralizing.

<sup>36</sup> "Outraged" is used deliberately here since it is in the interests of the provinces to raise cries of fiscal imbalance periodically. A key for the federal government would be to require a province making

government to accept this reduced role but still provide funding both to the provinces and territories and to the necessary intergovernmental or national bodies and agencies is substantial. Canadians want a system that works with less friction and confrontation. The federal government would be recognized as a key actor in facilitating a new, more effective and responsive form of federalism.

This leaves the second main issue arising from the reflections on the federal government's attempts to justify its role in Confederation and the resulting intergovernmental tensions. The answer lies in a return to its original jurisdiction.

Released from areas of primarily provincial responsibility, the federal government would have an opportunity and the means to focus its efforts. Improving Canada's image internationally would be the first priority. In a scathing indictment of the federal government's rhetoric versus the reality of Canada's response to the Darfur situation, Kim Nossal lays bare the sad state of capacity to act on the international stage. The cumulative impact of cuts to the armed forces, foreign service, and development assistance budgets has been to hollow out our international presence.<sup>37</sup> And yet the overwhelming desire of Canadians to believe the rhetoric extolling our commitment to serving internationally and intervening in atrocity crimes that he documents, is indicative of a desire among Canadians to see our international image restored and strengthened. Similarly, as mentioned above, Canadians took pride in our past image as a peacekeeper in the international arena. While this particular image may no longer serve in a new globalized environment, the federal government needs to buttress our capacity to act internationally both in a military capacity and in delivering on foreign aid promises.

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such a claim to document it and submit the claim to an independent panel of experts selected by the federal and provincial governments.

<sup>37</sup> Kim Richard Nossal, "Ear Candy: Canadian Policy Toward Humanitarian Intervention and Atrocity Crimes in Darfur," *International Journal*, forthcoming 2005.

Trade and security (both internal and external) are two further areas where the federal government could stand to gain by focusing its efforts on rebuilding a sense of trust among Canadians. Under Lloyd Axworthy as Foreign Minister, Canada began to make significant advances in including third sector actors in international negotiations and in contributing to international security through issues like the banning of landmines. Border security, immigration (shared with the provinces), the promotion of international trade are all areas in which the federal government could play a stronger and more innovative role.<sup>38</sup> For example, it has been working in cooperation with the provinces on the accreditation of immigrant professionals, it might press to expand these efforts with other nations. And while the forces of globalization tempt the federal government to redefine education as an issue of human capital and international competitiveness and to expand its role in labour market policy, it would be better to leave the core jurisdiction to the provinces who can best assess the capacity and needs of their citizens. The federal role should be restricted to defining Canadian strengths in the global economy based on cumulative provincial contributions and assisting provincial efforts to ensure the competitiveness of their workers.

Cultural policy is an important area for federal government action. Promoting culture both internationally and within our borders is key to building national pride and belonging. Cuts to the CBC television and radio have hampered its ability to provide distinctive and informed insight into current events. Too often the CBC is reduced to popular tactics similar to the private media rather than offering solidly researched programs. Reductions in federal funding have also meant that the presence of the CBC in the provinces and regions has been

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<sup>38</sup> For a thoughtful discussion of the deficiencies and possibilities in our international presence, see Lloyd Axworthy, "choices and Consequences in a Liberal Foreign Policy," in Howard Aster and Thomas Axworthy, *Searching for the New Liberalism* (Oakville, ON: Mosaic, 2002), 63-79.

diminished, impoverishing our understanding of regional and provincial differences and cultures. The federal government could reach out to Canadians by rebuilding national linkages through a more robust public media. And promotion of our literature, culture and film industries would only enhance Canadian pride and engender an even healthier nationalism.<sup>39</sup>

### Conclusion

In sum, the federal government only needs to look to its areas of jurisdiction to find a means of reasserting a strong presence nationally and rescuing our image on the international stage. In an era of citizen disillusionment with government and skepticism surrounding political authority, this might be a more effective means of restoring democratic legitimacy than either tinkering with institutions with no promise of effective change or continuing to bicker with the provinces.

Asymmetry is natural to a federation as Ron Watts has so thoroughly documented.<sup>40</sup> In Canada, history has taught us that formal constitutional recognition of distinctiveness is less popular than asymmetry in fiscal and policy arrangements. Canadians are pragmatists who understand the need for difference in practice. Even arrangements designed to provide room for Quebec's distinctiveness are justifiable and acceptable to the broader Canadian public provided that an equal opportunity to take advantage of similar arrangements is extended to the other provinces, even if the option is not exercised. However, if the federal government continues along the trajectory of embedding itself further into provincial areas of jurisdiction, it is only likely to trigger more hostile reactions

from the provinces that will undermine a sense of collective goodwill and federal comity.

Canadians have a residual desire to believe in their country as humane, benevolent and fair. Restructuring federal-provincial relations and the role of the federal government to build on that image can only heighten the sense of national unity by encouraging all Canadians to want to be a part of that dream. A dream we have all but lost.

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<sup>39</sup> For an innovative way of thinking about culture, citizenship and economic development, see Simon Brault, "The Arts and Culture as New Engines of Economic and Social Development," *Policy Options* 26(March-April 2005), 56-60.

<sup>40</sup> Ronald Watts, "A Comparative Perspective on Asymmetry in Federations." Available online as part of the Institute of Intergovernmental Relations Asymmetry Series 2005 at [http://www.iigr.ca/browse\\_publications.php?section=43](http://www.iigr.ca/browse_publications.php?section=43)