

## Some Asymmetries are More Legitimate than Others - And Subsidiarity Solves Most Things Anyway

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### Foreword

The federal Liberal Party's 2004 general election platform heavily emphasized issues that are mainly subject to provincial competence under the constitution (e.g. health care, child care, cities). Since the federal government lacks the authority to implement detailed regulatory schemes in these areas, acting on these election commitments frequently requires federal-provincial-territorial (FPT) agreements.

A controversial question that arises when considering all intergovernmental agreements is whether they should treat all provinces and territories similarly or whether the agreements should be expected to differ from one province/territory to another. This issue of symmetry or asymmetry arises at two levels. The first is whether all provinces should be and should be viewed as "equal" in legal and constitutional terms. The second relates to the political and administrative level and the intergovernmental agreements it generates. When should Canadians expect all provinces/territories to be treated similarly in these agreements and when should difference be the rule?

Given this political context, it is timely to reconsider the factors that are relevant to the issue of symmetry and asymmetry. We are doing this by publishing a series of short commentaries over the first half of 2005. These papers will explore the different dimensions of this issue- the historical, the philosophical, the practical, the comparative (how other federations deal with asymmetrical pressures), and the empirical. We do this in the hope that the series will help improve the quality of public deliberation on this issue.

Harvey Lazar  
Director

Potential problems of asymmetrical federalism are a proper and continuing concern of Canadians. The concern goes to one of the basic questions in any social or economic arrangement: "Is this deal fair?" If the answer is often or importantly, "No", then difficulties can arise involving unhappiness, frictional economic and social costs and political tensions even to the point of schism.

And interestingly this is a two-way street. For some, *lack* of asymmetry can be the vexatious issue. This is the normal position of Quebec governments and the deal-breaker for sovereigntists. Polling evidence cited elsewhere in this series (see Seidle-Bishop paper) shows that Quebecers by a 59:37 ratio are in favour of differing agreements as between Ottawa and the provinces, while support for this proposition varies from 48 percent to 56 percent in other provinces.

These somewhat different views on asymmetry are exacerbated by the position of many Quebec governments that not only is Quebec a province like no other, but that *it must be acknowledged to be so*. This gets in the craw of the other provinces, and it was this "special status" issue that generated the hottest emotions during the failed Meech/Charlottetown exercises. That status for Quebec is a 'hot button' item for the rest of Canada is also illustrated by the Seidle-Bishop data showing that on the one hand there was broad disapproval outside of Quebec of the special health accord arrangements, but on the other hand a marginal agreement with the general proposition that different arrangements for different provinces are appropriate.

There is an easy way out in principle which is deep decentralization, though subsidiarity is the better word. If the things held in common to be governed by the centre are minimalist, most asymmetry problems go away. Subsidiarity is now a world-wide trend as technology and globalization loosen the grip of nation states.

All that said, a different federal/provincial agreement with Quebec, as in the case of the health accords last September referred to above, can still move some pundits to set their hair on fire. This is particularly the case with those whose intellectual capital is largely rooted in a centrist view of Canada, and whose contacts and power base derive from Ottawa. If Ottawa is powerful so are they – and, alas, if not they’re not. Say no more.

In part as far as the media are concerned this centrist focus is explicable by the fact that news gathering and pontification are so much cheaper and simpler if just one government really counts. It is so costly and messy to have to keep track of what is going on in the outer marches. And there are still a lot of Canadians who would have gladly supported Sir John A. in his preference for a unitary state. As to the parties, I have always maintained that any given national Liberal policy convention would support a motion to hand education over to the central government (Quebeckers dissenting), were the professionals ever so lax as to let such an idea on the floor for a free vote.

But that is not what Canada is about, constitutionally or emotionally. As Quebec Intergovernmental Minister Benoît Pelletier said on this topic in the *Globe and Mail* on December 2, 2004 in arguing for the legitimate place of the two orders of government, “Federalism entails respect, flexibility, understanding and sustained collaboration. Asymmetry is the way to accommodate regional needs and aspirations within a larger national structure.” He was responding to a concern by Senator Serge Joyal that asymmetry will open a “constitutional Pandora’s box” with very bad results.

How are we to reconcile the opposing views of these two men, each so deserving of respect for their distinguished contributions? It seems to me that as so often, it is a good thing to begin with definitions. What is the meaning of asymmetry, or its converse?

First, here is something symmetry in the constitutional sense is *not*: It is not simply equality or sameness, with no further

qualification. Specifically, symmetry is not equality of outcome. However there is one “equality” definition, namely *equality of opportunity*. Where this equality exists, asymmetry cannot (in a constitutional sense).

This definition deals easily and definitively with the September health accords. Quebec got a special deal, yes. Asymmetry? No, and not possibly so, because the central government made it quite clear that as far as it is concerned the same deal is open to any other province. That said there is nothing more to say.

This kind of arrangement, what would be described in trade policy as a “most favoured nation” clause, is a welcome example of a good principle of federalism. The provinces in 1997 included it in their Calgary Declaration in the following terms: “If any future constitutional amendment confers powers on one province, these powers must be available to all provinces.”

This document was signed by all of the provinces except Quebec, being intended by the signatory provinces as a message of friendship and solidarity with Quebec in the wake of the 1995 referendum. But even if Quebec did not sign the declaration, we do have some evidence of how this was viewed in that province.

Given its historic demand for “special status” one might have thought that this proposal, which in effect throughout its text said that we are all entitled to the same things, would be rejected by Quebeckers as insufficient. In fact an Angus Reid poll taken in November, 1997 showed that the response of Quebeckers to the Declaration was almost identical to that of Canadians generally. In all of Canada, 62 per cent strongly or moderately supported the Declaration, while 30 per cent were opposed. In Quebec, the numbers were 59 per cent and 30 per cent respectively, virtually identical.

It would be an interesting exercise to speculate on the reasoning of the 30 per cent in Canada and Quebec who opposed the Declaration, which statement was about as close to motherhood as one can get in politics. Motives were arguably different in the two areas – perhaps

sovereignty in Quebec and yearning for a unitary state in parts of the rest of Canada.

In any event the first point is this: If you have equality of opportunity you cannot argue that asymmetry exists in a constitutional sense. Any asymmetric outcome that evolves under such circumstances is a function of free choice, which is rather hard to criticize.

There is another sort of asymmetry which while real in the sense of affording different opportunities or status to partners is nevertheless legitimate. This arises when the asymmetry is the result of explicit tradeoffs and agreement.

In Canada examples would be the special position of the French language in Quebec and the over-representation of Prince Edward Island in the House of Commons. These are differences that were negotiated while Canada was being put together, as a part of the price of that bargain.

Of course Canada is not unique in such arrangements. In the United States, Texas has the right to break into five states if it wishes. No other state has that. The Virginia Compromise on the form of the U.S. Senate which gives wildly different per capita influence to various states is a rather more important example. This is an enormous asymmetrical tension which is nevertheless fundamental to the federation.

This sort of asymmetry gains legitimacy in a way that is path dependent. Legitimacy flows from the perceived fairness of negotiations, the deal, and the ratification thereof.

In the Canadian context, had the Charlottetown Accord passed its referendum test with acceptable regional majorities, it would have had that kind of legitimacy. (I would still argue it as a terrible mistake for other reasons, which view has fortunately not been put to the test.) Could this sort of thing happen in the future?

Suppose, for example, the “Yes” achieved a majority in some future Quebec referendum. Recall that the Supreme Court of Canada in *Reference re Quebec Secession* gave the central government more than it bargained for by making

it clear that good faith negotiations would then be called for. Suppose such negotiations led to a radically different, bi-polar Canada in which Quebec took on many of the powers of Ottawa, while the other provinces did not. That would be truly major asymmetry. But if validated by appropriate referendums, that asymmetry would also be legitimate, even though incomparably greater than the small examples we have in our current basic law.

Just because asymmetry is lawful does not mean it is legitimate. Legitimacy can only stem from the integrity of the negotiation and ratification process. As an example of the former, an agreement reached under duress lacks legitimacy.

As an example of the latter, i.e. ratification integrity, consider Meech Lake. Ratification was to take place at the legislative rather than popular level and that would have been enduringly controversial given the emotions of the time. Elijah Harper did us a favour by denying unanimous consent on a procedural matter in the Manitoba Legislature. I think it can now be taken for granted that legitimate constitutional amendment in Canada (on matters of substance-minor or process amendments are arguably different) requires popular ratification by way of referendums, in addition to the legislative requirements of Part IV, the amending section of the Constitution Act, 1982. This is of course the law in B.C. and Alberta, and a strong convention in Quebec. Could other provinces refuse? Could Ottawa stay apart from this new convention? No.

Asymmetries arising out of the constitutional amendments of 1982 are on even weaker ground than a putative Meech, the 1982 deal arguably not having achieved the standard of legitimacy of that time (due to the presumption of a Quebec veto and the overwhelming opposition of the Quebec National Assembly).

In addition on this 1982 example, all parts of the bundle of unrelated topics put up for single vote ratification are clearly lawful, but are again attackable on legitimacy grounds because of a lack of specific approval. As a case in point, the very extensive asymmetries among Canadians

validated on the basis of race in S. 35 of the 1982 package and currently being used to justify parallel societies will bedevil reconciliation for a long time yet to come.

This is not to say that bundled asymmetric compromises (like Charlottetown, where there is supposedly something for everyone) cannot be legitimate, for sometimes it is the very bundling that softens or justifies the apparent asymmetry. But this is dicey stuff, and the process must stand inspection.

Non-constitutional asymmetries are of a different order because in principle they can be addressed at the national (though not provincial) ballot box. But they can still be vexing. The significant differential treatment of persons depending upon province of residence in such programs as Employment Insurance and regional development rankles westerners. The de facto exclusion of almost all westerners from significant central government employment as a result of bilingualism policy is another problem.

These are all difficult issues with arguments on both sides but the redeeming feature is that, not being set in constitutional concrete, they are amenable to adjustment over the years.

After this brief canvass I am left with the conclusion that some asymmetry is merely apparent but not real, some is real and unavoidable, much of that which exists is legitimate and desirable, and we must live with it all for the time being in any event. That said and for the future, the far better approach in most cases to achieve the diversity we all desire is subsidiarity. When differences can be left to regional or individual choice, diversity reigns and happiness improves.

Centralists do not get this. Some people think that just because there are parking problems all across the country, we need a National Parking Strategy. We don't. That is one of the great things Canada can show the world.