

**THE HISTORICAL AND LEGAL
ORIGINS OF ASYMMETRICAL
FEDERALISM IN CANADA'S
FOUNDING DEBATES:
A BRIEF INTERPRETIVE NOTE**

Guy Laforest
Professeur titulaire
Département de science politique
Université Laval

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

"Asymmetrical federalism" is a horrible expression, typical of the jargon of political science, belonging to the same family as, say, "consociational democracy". With good reason, neither expression really sells on the streets. An informed discussion can be made easier by the use of synonyms: asymmetrical federalism means lack of uniform treatment for the various federated units within the political community. Canada has had various experiences with such absence of uniformity since 1867. Asymmetrical federalism is also a way to convey the idea of distinct or special status for federated units, particularly for Quebec. This brief interpretive note will be essentially concerned with the latter layer of meaning. I shall argue that Canada's constitutional founders were explicitly conscious that the Resolutions which were adopted at the Quebec Conference in 1864 and substantially reproduced in the *British North America Act of 1867 (The Constitution Act, 1867, in contemporary parlance)* granted the newly re-established Province of Quebec a significant form of distinct or special status. They contributed to the establishment of what we, historians and political scientists of the twenty-first century, call an asymmetrical federation, although obviously they did not use the expression.

Three preliminary remarks will precede my main argument. First, Canadian political theorists often portray the country abroad as an asymmetrical multinational federation.¹ My arguments here will support their contention, with a caveat. They are right about one pillar of our fundamental law, the *Constitution Act 1867*. However they are wrong, at least with regards to Quebec, if one only takes into consideration the *Constitution Act 1982*. I shall come back to this point in my conclusion. Second, my work here supports a strand of interpretive revisionism in Canadian historiography, attacking the nationalist ultra-centralist readings of Lower, Creighton and F.R. Scott. With Stéphane Kelly, I am trying to make the work of these revisionists available in French Canada and

¹ See for instance Will Kymlicka, *Politics in the Vernacular*, Oxford : Oxford University Press, 2001, p.108-109.

Quebec.² Third and last remark: the thesis developed here could have legal consequences; in the Reference Case on parental leaves currently pending at the Supreme Court of Canada, the government of Quebec partly based its written presentation on this thesis. Further comments will have to await the decision of the Court.

Revisionist historiography has fostered a reconsideration of the centrality of George-Etienne Cartier, George Brown and Oliver Mowat, alongside John A. Macdonald, in the business of founding Canada as a federal Dominion under the British Crown between 1864 and 1867. Led by Brown and later by Mowat, the Upper Canadian Reformists were the strongest political force in what was then called Canada West and they wanted substantial provincial autonomy for Ontario. Maritime leaders also fought for local autonomy but, as Paul Romney has shown, they did not play as crucial a role as Brown or mostly Mowat in the wording of the key resolutions at the Quebec Conference.³ As the heir to La Fontaine, George-Etienne Cartier was the key player in what was then called Canada East, formerly Lower Canada and the “born-again” Province of Quebec after 1867. To fit Cartier’s purposes, the new constitutional arrangement had to be of the kind that would allow him to present himself to his compatriots in Quebec as a strong defender of the motto common to La Fontaine and Etienne Parent : “Notre langue, notre nationalité, nos lois”. Insofar as the political landscape of United Canada in 1864 was concerned, the new order had to be federal because such was the desire of the two key players in the East and in the West, Cartier and Brown. In many respects, Macdonald is the pre-eminent person among our

² Janet Ajzenstat, Paul Romney, Ian Gentles and William D. Gairdner, *Débats sur la fondation du Canada*, French edition prepared, introduced and supplemented by Stéphane Kelly and Guy Laforest, Québec : Presses de l’Université Laval, 2004. In addition to the aforementioned authors, Robert C. Vipond, Sam La Selva and Christopher Moore belong to this revisionist school.

³ Paul Romney, *Getting it wrong. How Canadians forgot their past and imperiled Confederation*, Toronto : University of Toronto Press, 1999, p.105

Founders: he played the leading role in the Quebec Conference, in the drafting of key resolutions, in the process of parliamentary ratification; in addition to all this, he became our first Prime Minister and, thus, he was the first political beneficiary of Confederation. However, he entered the Great Coalition with Brown and Cartier in 1864 as the minor player and the federal idea was clearly imposed on him. His own way of recognizing this in the parliamentary debates of 1865 is the first step of my demonstration with regards to the existence of a Quebec-based asymmetrical federalism at the time of Confederation:

But, on looking at the subject in the conference... 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... would not be received with favour by her people.⁴

Whatever else our Founders wanted to accomplish, they quite clearly were not seeking a constitution that could lead to the absorption of the individuality of Lower Canada. From the perspective of Cartier, the chief political obligation was to secure the protection of this individuality. At the time of Confederation, Cartier was the Attorney-General for Canada East. One of his most important duties in the early 1860s was to preside over the deliberations

⁴ Janet Ajzenstat, Paul Romney, Ian Gentles and William D. Gairdner, *Canada's Founding Debates*, Toronto: Stoddart, 1999, p.279. Thus spoke Macdonald in the Parliament of United Canada, February 6, 1865.

of a commission whose task it was to codify the French-originating civil law of this section of the colony. Through the Quebec Act in 1774, the British Crown had formally granted to its new subjects the continuation of their French laws concerning property and civil rights. This aspect of the identity of the colony had been maintained at the worst of times, i.e. in the aftermath of the 1837-1838 Rebellions. In 1840-1841 the *Act of Union* had expelled the French language from the life of political and public institutions, but it had not attacked the French civil law heritage. The exercise of codification was completed in 1866 and, more or less at the same time, provinces were given jurisdiction over property and civil rights in the Quebec Resolutions (43, subsection 15) and in the *Constitution Act 1867* section 92(13). McGill historian Brian Young has this to say about the relationship between codification and Confederation:

Confederation and codification were bedfellows in the crucial juncture of the 1860s when the form of Canadian federalism was being negotiated. In the process by which Quebec became one province among others and in which French Canadians became a minority element in a federal state in which English would be the dominant language, codification institutionalized and reconfirmed Lower Canada's separate legal culture.⁵

A key merit of the Confederation settlement for Cartier was the restoration of Lower Canada—Quebec as a self-governing political community endowed with the institutions of responsible government. This represented substantial progress on the axis of political freedom. As the job of codification was being completed, Cartier could also rejoice with the provision that squarely placed property and civil rights within the realm of provincial powers and local autonomy. This provision had to be seen as

⁵ Brian Young, *The Politics of Codification. The Lower Canadian Civil Code of 1866*, Montréal and Kingston: McGill-Queen's University Press, 1994, p.16.

a safeguard for the autonomous legal identity of all provinces. It went hand in hand with the federal idea all right, although it did not offer Quebec any distinct, asymmetrical status. In order to find a basis for a Quebec-based asymmetrical federalism in 1864-1867, one would have to look elsewhere. The strong, unmistakable historical and legal foundation for such a principle of asymmetry is to be found in the following passage of the Quebec Resolutions (29, subsection 33, slightly reformulated in section 94 of the *Constitution Act 1867*):

Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, and rendering uniform the procedure of all or any of the courts in these provinces; but any statute for this purpose shall have no force or authority in any province until sanctioned by the legislature thereof.⁶

At the time of the Rowell-Sirois Commission in the late thirties, F.R. Scott—legal scholar, essayist, poet and strong voice of the emerging centralist and nationalist Left—formulated what would become the hegemonic reading of this provision in English-Canadian historiography. Section 94 came to be seen as a legal avenue towards centralization, allowing the federal government to standardize the field of property and civil rights in common law provinces. In Scott's own grand interpretive scheme, this was a key element in his attacks against the decentralizing thrust of the constitutional jurisprudence coming from the Judiciary Committee of the Privy Council. We shall leave aside here the related matter of the relevance of this section for the issue of constitutional amendment.⁷ As Sam La Selva

⁶ Ajzenstat, Romney, Gentles and Gairdner, *Canada's Founding Debates*, p.468.

⁷ On this topic, see Sam La Selva, *The Moral Foundations of Canadian Federalism*, Montréal and Kingston : McGill-Queen's University Press, 1995, p.56ff. See also Guy Laforest, *Pour la liberté d'une société distincte, Québec* : Presses de l'Université Laval, 2004, p.201ff.

has argued, Scott neglected one dimension of the provision: no standardization would ever occur without the explicit consent of the provincial legislature involved in the operation.⁸ For my purposes here, it is interesting to point out what Scott, despite his unimpeachable centralist credentials, had to say about the relationship of Quebec with regards to this provision. On numerous occasions in his famous piece on Section 94, Scott reiterated that it did not apply to Quebec.⁹ In the field of property and civil rights, the province of Quebec could not relinquish its legislative powers. Now this has to be seen as a clear legal manifestation of asymmetrical federalism. Recent revisionist historiography such as the work accomplished by Ajzenstat, Romney, Gentles and Gairdner in *Canada's Founding Debates* unmistakably support this dimension of Scott's interpretation. On the matter of property and civil rights, our Founders thought that Quebec, with its civil law tradition, could never be rendered uniform with the other provinces, not even if it gave its own consent to such standardization! The following excerpts of speeches pronounced by M.C. Cameron (Canada West) and Christopher Dunkin (Canada East) in the United Canadian Parliament in 1865 lend support to such a reading of this dimension of our constitutional arrangement :

Such being the guarded terms of the resolution, why is it not made applicable to Lower Canada as well as to the other provinces? I can easily understand the feeling of the French people and can admire it –that they do not want to have anything forced upon them whether they will or not. But they will not allow you to contemplate even the possibility of any change taking place for the general weal, and with their own consent, in their laws... I do not understand.¹⁰

⁸ La Selva, *The Moral Foundations of Canadian Federalism*, p.56-57.

⁹ F.R. Scott, *Essays on the Constitution*, Toronto : University of Toronto Press, 1977, p.114-118-122.

¹⁰ Ajzenstat, Romney, Gentles and Gairdner, *Canada's Founding Debates*, p.305-306.

The other provinces may have their laws made uniform, but an exception in this respect is made for Lower Canada, and as if to make it apparent that Lower Canada is never to be like the rest of the Confederation, it is carefully provided that the general parliament may make uniform the laws of the other provinces only –that is to say, provided those provinces consent to it, but by inference it cannot extend this uniformity to Lower Canada, not even if she should wish it... They may become uniform among themselves, but Lower Canada, even though her people were to wish it, must not be uniform with them... Thus, in one way and another, Lower Canada is to be placed on a separate and distinct footing from the other provinces, so that her interests and institutions may not be meddled with.¹¹

There were many aspects to Confederation, and many sides to the political career of Cartier; I wish to over-simplify neither of these complex realities here. Obviously, there were many centralizing aspects in the Quebec Resolutions and in the *Constitution Act 1867*; many of them were approved by Cartier. For instance, as the person with the broadest social connections among our Founders, Cartier supported the powers of reservation and disallowance as means to offer safeguards to the English-Catholic and Protestant groups in Quebec.¹² This notwithstanding, Cartier's central achievements were the restoration of the political existence and autonomy of Quebec, with legislative control over local matters and affairs related to communitarian identity such as property and civil rights. Through the well-understood meaning of Section 94, at least for our Founders, at the time of Confederation and of civil law codification, Quebec re-emerged as a self-governing political community with substantial legislative powers and a unique, distinct, asymmetrical constitutional identity in Canadian federalism. We should not be

¹¹ *Ibid.*, p.346

¹² *Ibid.*, p.435.

surprised to read that similar arguments were employed when Cartier, Taché, Belleau and others had to defend the proposed constitution in Quebec:

What Confederation did was to break up that united province, and to create a separate province of Quebec and a separate province of Ontario. The pro-Confederation editorialists, speech-makers, and pamphleteers pushed that aspect of the arrangement- that Quebec was going to be separated, that French Canadians were going to have a state of their own which would have complete control over all matters of provincial jurisdiction, and that it was a move towards greater separation. That was the selling point in Quebec... It was justified to nationalist-minded French Canadians as a kind of liberation: at least on provincial issues they would be able to follow their own inclinations and not to have to seek cooperation from the English.¹³

CONCLUSION

There was indeed a strong, coherent, logical historical and legal basis for asymmetrical federalism in Canada's Founding Debates, in the Quebec Resolutions as well as in the *Constitution Act 1867*. It was a peculiar kind of asymmetry. It was an indirect, oblique, tacit, sort of asymmetry; it had to be read through "inference", "induction", as those who spoke about it at the time saw it. I shall call this "asymétrie à l'anglaise", or "English-inspired asymmetry". It was the kind of reasoning to which a sharp legal mind, trained in the English or British common law, such as Oliver Mowat, was accustomed. Less than twenty years after British extremists had burnt the Canadian Parliament in Montréal, there was possibly politically no other way to write in the new constitution a distinct special or asymmetrical status for the re-established Province of Quebec. Inasmuch as the *Constitution Act 1867* is still

part of our fundamental law, political theorists like Kymlicka are thus correct to write that Canada belongs to the family of asymmetrical multinational federations. However, our constitutional law and corresponding political culture have been substantially transformed by the addition of the *Constitution Act 1982*. The main author of this reform, Pierre Elliott Trudeau, did not regard favorably the principles of asymmetrical federalism or special status for Quebec. His vision of liberal democracy propounded symmetrical equality for individuals as well as for provinces. On this issue, there are differences between Mr. Trudeau's personal vision and the content of the reform's most important aspect, the Canadian Charter of Rights and Liberties. The Charter, for instance, recognizes indirectly that Canada is a multinational federation through its provisions concerning aboriginal peoples. But the main point for me here is the kind of political culture fostered in the land by Mr. Trudeau's vision and by the reform. The 1982 reform has moved us into an age of solemn, symbolic constitutional declarations. I shall call Mr. Trudeau's vision of clear, solemn, symmetrical equality for all Canadians and all provinces within Canadian federalism, "symétrie à la française", or "French-inspired symmetry".

In our constitution, the 1867 principle of English-inspired asymmetry, granting Quebec distinct status within the Canadian federation, is opposed by the 1982 principle of *French or Cartesian or Trudeau-inspired symmetry*, rejecting any substantial legal distinct status for Quebec. Canadians have not yet found their way to French-inspired asymmetrical federalism. Although history remains open, the debates provoked by the signature of the Health Agreement in September 2004, including a parallel Canada-Quebec Accord on asymmetrical federalism, have taught us that getting there will not be an easy, safe journey for anyone.

¹³ Arthur Silver, as quoted in Robert Bothwell, *Canada and Quebec. One Country Two Histories*, Vancouver : UBC Press, 1995, p.38-39.