

ASYMMETRY IN CANADA, PAST AND PRESENT

David Milne

Professor Emeritus, Department of Political Studies, University of Prince Edward Island and Visiting Professor, University of Malta

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

Let us begin this series by recognizing that nature and history as a matter of course confer *differences* or *asymmetry* upon the units of every federation around the world. While the substance and scale of differences may vary from one federation to another, Canada is scarcely unique in showing differences among its units or provinces – whether in size, wealth, population, economy, geography, culture, or history. Table 1 reveals, for example, some profound disparities in population, wealth, and size among the provinces that in turn both reflect and lead to an inescapable inequality of power among provinces. Here disclosed is a Canada with a dominant centre (consisting of Ontario and Quebec) and peripheries (consisting of all the rest).

This pattern of asymmetry arises from Canada's geography, history and political economy. However, these inequalities generate vigorous debate over the nature and fairness of these patterns of asymmetry. In turn, they may give rise to demands for making formal changes in our constitutional or political arrangements to redress these disparities of power.

Once the debate over asymmetry moves beyond noting 'natural' differences to consider formal differences among provinces at a legal, constitutional or political level, we enter the very heart of the politics of asymmetry. For the key question in Canada and in many other federations is the extent to which formal differences can or do exist among the provinces or units, and the extent to which these can be justified. The differences can touch upon asymmetry in law or practice with respect to any of the following:

- ❑ provincial jurisdictional powers, entitlements and duties;
- ❑ provincial representation in central institutions;
- ❑ or to the application of national laws and programs by province.

Table 1
Provincial Comparisons (2003-04)
Size, Population, Wealth, Dependency

	<i>Area</i> (000 km ²)	<i>Population</i> (000s)	<i>Nominal GDP per</i> <i>capita (\$000s)</i>	<i>Federal*</i> <i>Dependency Ratio</i>
Newfoundland and Labrador	405.2	518.8	35.2	36.79%
Prince Edward Island	5.7	137.1	28.1	37.72%
Nova Scotia	55.3	935.3	30.9	32.19%
New Brunswick	72.9	750.7	29.9	32.86%
Quebec	1542.1	7466.3	34.0	15.01%
Ontario	1076.4	12167.4	40.6	12.09%
Manitoba	647.8	1157.8	32.8	27.00%
Saskatchewan	651.0	994.7	36.7	19.74%
Alberta	661.8	3136.6	54.5	9.69%
British Columbia	944.7	4130.8	35.2	13.70%
Yukon	482.4	30.3	43.8	72.22%
Northwest Territories	1346.1	41.8	86.8	64.46%
Nunavut	2093.2	28.9	32.9	90.20%

*Federal Transfers as a Percentage of Total Provincial/Territorial Revenues

Sources: (most recent accessible data used in each case)

Geographic Area: *Canada Yearbook*, 2001, Table 1.1

Population: CANSIM II matrix 510005, data for first quarter 2003, accessed February 8, 2004.

Nominal GDP; CANSIM II matrix 3840001, data for 1 January 2003, accessed February 8, 2004.

Provincial Government Revenues & Transfers Received from Federal Government: CANSIM II matrix 3840004, data for 2002, accessed February 8, 2004.

The following tables illustrate some of the considerable formal asymmetry that exists in our federation. It is important at the outset to recognize that asymmetry was present from the very foundation of the Canadian Confederation. Some of it, such as the differential subsidy arrangements among the provinces, or the special provisions for continuous steamship and telegraph service to Prince Edward Island in 1873, are by their very nature specific, pragmatic,

and uncontroversial. However, others, such as the inequality accorded to the provinces in representation in the Senate, are by their very nature contentious and extremely important. Indeed, the question of representation of the units in the second House of the federation, and specifically whether to grant equality of representation by province or not, has been a classic debate over asymmetry that every federation in the world has had to navigate.

Table 2
Constitutional Asymmetry in Law: Selected Examples

<i>Subject of Provision</i>	<i>Section</i>	<i>Notes</i>
<i>Constitution Act, 1867</i>		
denominational education	93(2)	extends minority education rights in Ontario to Quebec
language and civil law	133 129	bilingual legislative regime and civil law system only in province of Quebec
uniformity of laws in certain provinces (opting-in)	94	Ontario, New Brunswick, and Nova Scotia (but <i>not</i> Quebec) are invited to unify laws on property and civil rights and court procedure by opting for federal control
Senate representation	22, 23	unequal representation of provinces, different qualifications for senators from Quebec
judges' qualifications	97, 98	section 98 applies only to Quebec; different system of appointment of judges from other provinces if section 94 is activated
<i>Provincial Constitutions</i>		
natural resources	109	Alberta, Saskatchewan, and Manitoba are not given this jurisdiction until 1930
language	23 (Manitoba Act)	Manitoba joins Quebec with bilingual regime in its legislature
subsidies	118, 119	differential direct grants
denominational education rights	various	different denominational rights (some in section 93, others in provincial constitutions)
terms of union (British Columbia, Prince Edward Island, Newfoundland)	various	different constitutional commitments to provinces (e.g., P.E.I. steamship & telegraph service)

Table 3
Constitutional Asymmetry in Practice: Selected Examples

<i>Subject of Provision</i>	<i>Section (Act)</i>	<i>Form of Asymmetry</i>
pensions	94A (1964)	concurrency with provincial paramountcy permits QPP and CPP asymmetry
amending procedure	38 (3), 40 (1982)	opting-out of constitutional amendments increases asymmetry
notwithstanding clause	33 Charter (1982)	provincial overrides permit unequal applications of the Charter
mobility	6(4) Charter (1982)	limit to mobility rights of Canadians in provinces with high unemployment

In Canada's case, the level of provincial asymmetry in representation in the Senate is very large and analysts have often acknowledged its long term negative consequences for Canadian governance. Western anger in particular has arisen over the guarantee of almost half of Senate representation to the two most populated provinces of Ontario and Quebec in sections 22 and 23, irrespective of the number of other provinces that might be created in the federation. Here, the Confederation deal over the Senate permitted only Ontario and Quebec to parade as both provinces and regions, while the other provinces were forced to merge their provincial identities into two dubious heterogeneous regional categories. Moreover, numbers of Senators per province under this regional arrangement have turned out to be downright arbitrary. Nova Scotia and New Brunswick, for example, enjoy ten senators each, while Newfoundland and the western provinces get six Senators only. The Atlantic region, with the lowest population figures, enjoys more seats than any other region, including the west. The Triple E Senate proposal, enshrining equality of representation by province in the Senate, has been the West's response to this dubious legacy of asymmetry from Confederation.

An even more serious example of asymmetry that has inflamed the West also came quite early in Canada's constitutional history.

This was the provision that withheld provincial control over natural resources under section 109 for Manitoba, Saskatchewan, and Alberta until 1930. This has been the most important and fundamental departure from symmetry in the division of powers among provinces, and it generated deep controversy and long-term bitterness in the region for generations. While in part defensible to build the railway and consolidate settlement of the West, the anger engendered by this asymmetry has made Westerners ever since intransigent champions of provincial equality.

The examples above illustrate the ways in which asymmetrical arrangements can sometimes become part and parcel of the politics of regionalism. Here asymmetrical arrangements seemed to point to Central Canadian colonization and domination of the country and particularly of the Western hinterland, a constant theme of complaint in Western regionalism.

Another preoccupation that arises in the historical politics of asymmetry in Canada – indeed the *central issue* – has been the question of accommodating adequately Quebec's specificity within the Canadian union. This has been at the heart of most of the asymmetry that we see in Canada's constitutional and political provisions and of the thinking and debates that flow from them. The evidence shows that Quebec

again and again predominates in unique asymmetrical provisions, whether in its civil law system and bilingual legislative requirements, or its guarantee of a floor in the House of Commons, or of course in the unsuccessful attempts in recent constitutional rounds to insert a distinct society clause for Quebec in the Canadian constitution. The latter proposal, of course, brought a chorus of denunciation and controversy, spearheaded by former Prime Minister Trudeau in his famous attack on the Meech Lake Accord.

Yet the germ of the idea that Quebec might be distinctly asymmetrical and need to be sheltered from unifying forces elsewhere in the country could already be seen in section 94 of the British North America Act. Here, the founding fathers had expressly exempted Quebec from any potential unification of laws over property and civil rights that might arise elsewhere in the country. Section 94 permitted the other provinces, if they chose, to take a national approach by opting into federal control over property and civil rights. Quebec, however, was excluded and protected from any such centralizing measures. Here arguably we have tacit recognition by the founding fathers of Quebec as a ‘distinct society’ in all but name. Of course, since there was no such interest from the other provinces in centralizing the federation, Section 94 became a dead letter. Yet this section actually contemplated the possible construction of a more centralized country in all provinces except Quebec, and the strict defense of a more autonomous distinct society in this majority French-speaking component. (For a somewhat different ‘take’ on Section 94, see the Jennifer Smith article in this series, to be published shortly.)

Ironically, we see something of this pattern of development in recent federal-provincial arrangements respecting the social union where all provinces but Quebec appear prepared to work

in concert with Ottawa, even in areas of exclusive provincial jurisdiction. In effect, most provinces are prepared to countenance a stronger national approach to social policy in return for what they hope will be reliable federal funding, whereas Quebec remains outside such agreements or opts out with compensation. In this respect, Section 94 seems prescient in its anticipation of things to come, since across a host of areas from the 1960s Quebec has regularly featured as the opt out province par excellence. This kind of asymmetry fosters the construction of a distinct society in practice, even while it frequently generates resentment and misunderstanding elsewhere.

So far, however, this is mostly a *de facto* construction of asymmetry for Quebec, rather than *de jure*. In other words, Quebec’s distinctiveness has arisen more because it has freely chosen to go its own way, whereas other provinces, enjoying the very same rights to do so, have usually refrained from so doing and have maintained a national approach. In this way, as noted in Table 4 below, the symmetry of formal equality of the provinces at law has been largely preserved, whereas substantial asymmetry in practice has taken place. A good example of this can be seen in the side-by-side operation of the Canada Pension Plan (operated by the nine provinces and Ottawa) and the Quebec Pension Plan. Although section 94A permits all provinces to operate their own contributory pension plans and to protect these against federal encroachment, only Quebec chooses to do so. (In his forthcoming article in this series, Ted Morton proposes that Alberta follow the Quebec lead and establish a separate Alberta Pension Plan.) We need to ask ourselves whether, this practical pattern of nine provinces opting into a national approach and Quebec opting out, points precisely to the logic embedded in section 94 at Confederation.

Table 4
Asymmetry in Federal Programs and Policies: Selected Examples

<i>Asymmetry by Design: Not Available to all Provinces</i>	
<i>Program Area</i>	<i>Notes</i>
regional development	regionally specific programs allow only certain provinces to benefit (ACOA, WDO)
foreign policy	only New Brunswick and Quebec are represented in <i>la francophonie</i>
variable cost-sharing formulae	uneven distribution of costs for shared-cost programs (e.g., forestry 90/10 Newfoundland, 60/40 British Columbia)
Atlantic Accord	unique model shielding equalization for Newfoundland and providing for shifting paramountcy on offshore decision-making
<i>Asymmetry in Practice: Available but not Used by all Provinces</i>	
<i>Program Area</i>	<i>Notes</i>
immigration	special federal-provincial agreement (e.g., Cullen-Couture Agreement) with Quebec in this concurrent area
tax collection	Quebec, Ontario and Alberta collect corporate income tax; Quebec alone individual income tax
opting-out/tax abatement	Available to all, only Quebec has opted out of various programs (special welfare, youth allowance etc.) and received tax abatements
program delivery	Provincial variations in per child rates in family allowances, Quebec opted-out of student loans plan
Social Union Framework Agreement	Quebec chooses not to sign (opt in to) agreement with nine other provinces, territories and Ottawa

Of course, it is principally the persuasion of the federal spending power that has driven other provinces to legitimate and rationalize a national approach even in areas of exclusive provincial jurisdiction. Since there is no barrier to Ottawa using its superior tax position to amass funds and offer these as conditional grants to provinces for launching programs Ottawa would like to see, and then cutting back at will on funding such shared-cost programs, the provinces have been left virtually defenseless against Ottawa's intrusions and subsequent cutbacks. Recent accords have seen the provinces trying to set rules

on how the spending power is used and accepting federal participation in their areas of jurisdiction in return for promises of substantial future federal funding. But clearly this is not a game that Quebec, under any political party, is willing to play. This has produced what analyst Roger Gibbins has cleverly dubbed 9-1-1 federalism, code for a now familiar asymmetrical pattern of nine-provinces, a solitary Quebec, and Ottawa.

From an international perspective, it is not surprising that Quebec would have distinguished itself as a champion of asymmetry. Like the

historic claim of nationality for Catalonia in Spain, Quebec claims to be the homeland of a nation where in this case a distinct majority of French-speaking people happens to live. Hence, Quebec resists, as does Catalonia, arguments that seek to place their status upon the same footing as the other provinces or autonomous communities. Claims of asymmetry and 'deep diversity' then are built into the very nature and self-definition of these communities.

Of course, when asymmetry is advanced in this way as an explicit political principle and program, as it has been by the province of Quebec especially since the Quiet Revolution of the 1960s, it faces much stronger resistance. Equality of provinces is a powerful countervailing principle that has gradually become ascendant in intergovernmental politics, in constitutional provisions such as the new amending formula for Canada, and even in the courts. The Quebec Court of Appeal, for example, in the reference case concerning a Quebec veto, confirmed that at law all provinces are equal. As noted above, while there is much *de facto* asymmetry between Quebec and the rest of the provinces in Canada, there is nothing *de jure* so marked as to justify special status.

Then too much resistance to claims of special status came from Pierre Elliott Trudeau over several decades as he stoutly defended a more symmetrical federal model. His legacy shaped federal policy and influenced much of the thinking on asymmetry among the Canadian public, particularly outside Quebec. The constitutional changes that were made in 1982, promoted equality of provinces not asymmetry in Canada's amending formula (though Trudeau had himself always favoured a veto for Quebec and Ontario), while the Charter of Rights and Freedoms fostered a national language of equal rights for all Canadians. After Trudeau's departure from office in 1984 and with the election of the Conservatives under Brian Mulroney, Ottawa became much more accommodative to Quebec's agenda, particularly, with the distinct society clause of the Meech Lake Accord. But that shift in federal policy was publicly denounced by Trudeau and rejected by large segments of opinion in English-speaking

Canada. Ultimately, that Accord in 1990, together with the Charlottetown agreement that followed it in 1992, both failed to win acceptance of this level of asymmetry. This brought on a crisis between Quebec and Canada that very nearly led Quebecers to vote themselves out of Canada in a referendum in 1995.

Given this failed history and substantial risk in trying to affect mega-constitutional change, more recent ventures with asymmetry, such as the agreement on the social union, have taken non-constitutional forms. Of course, success here has always been easier than with the constitutional route. As noted above, the 9-1-1 patterns that have often emerged demonstrate Quebec's continuing *de facto* distinctiveness, much as they have since the 1960s.

What lessons then do we learn from this brief review of the history and politics of asymmetry in Canada? The record shows, I think, considerable scope for asymmetry in Canada's arrangements, particularly in the operation of federal-provincial agreements, programs and policies. And even at the constitutional level, asymmetry, when approached pragmatically and in small cautious steps in case-by-case circumstances, seems to be easily accommodated. However, when demands for asymmetry are approached at the level of principle and/or the differences become extensive and deeply symbolic, asymmetry invariably becomes a delicate matter for Canadians, challenging their sense of national political community on the one hand, and their fundamental notion of equality or inequality among provinces on the other. The politics of asymmetry then depend very much on the nature and scale of the claims and of the consequent differences that arise from them.

This point can best be grasped by reflecting on the struggle over placement of a distinct society clause for Quebec in the Canadian constitution. This highly symbolic gesture bitterly divided Quebec from the rest of the country and could not be acted upon, even though the Meech Lake Accord had won legislative approval from eight provinces and the federal Parliament. Widely supported by elites in both Quebec and English-speaking Canada, the distinct society

clause nonetheless lacked support in the court of public opinion outside Quebec. Meanwhile, since then the process and requirements for constitutional change, always exacting, have now become even more so with additional hurdles of referenda in many jurisdictions to approve change. In effect, this has brought the drive for Quebec-based constitutional recognition and change, to a halt after two generations of effort.

Though the country is stymied over how to respond to Quebec's aspirations and the constitutional amendment process has for this purpose become quite unworkable, the demand for deep asymmetry will still not go away either in Canada or elsewhere. Indeed, if there is a theatre anywhere in the world that also speaks to these issues, it is undoubtedly contemporary Europe. Here, in countries like Spain or even the United Kingdom, we encounter multinational states that have in recent years moved to recognize constituent nations within the state, and to respond to these 'distinct societies' with specific asymmetrical powers and arrangements. Whether these communities be Catalanian, Basque, or Scottish, they have all required formerly centralized states to restructure profoundly the nature of their constitutional arrangements. Of course, in every case, these changes have been approved much more easily by action of central governments alone, than could possibly be done in an existing federation like Canada's with complicated amendment rules.

Still the level of autonomy and asymmetry on offer may be seen as inadequate, as appears to be the case in the Basque region where a recent decision of the Basque legislature to put a referendum for enhanced autonomy to its people has been rejected by Madrid. In contrast, in cases such as Scotland and Wales, the current arrangements may well be widely seen as quite enough. In any event, Canada's constitutional issues and politics better reflect these European realities than say American or Australian conditions. The founding fathers themselves understood that and made provision for potentially profound asymmetry in Canada on easy terms in section 94 but that was not to be. Nowadays Quebec asserts itself by opting out of many national programs and intergovernmental

agreements and going its own way. This *de facto* asymmetry, however, reflects Quebec's distinctiveness only indirectly, and clearly eschews symbolism and explicit recognition of that distinctiveness. The question is whether over time this expression and level of asymmetry will be seen to be good enough.