

PUBLIC OPINION ON ASYMMETRICAL FEDERALISM: GROWING OPENNESS OR CONTINUING AMBIGUITY?

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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

"The question is," said Alice, "whether you can make words mean so many different things."

Lewis Carroll, Alice in Wonderland

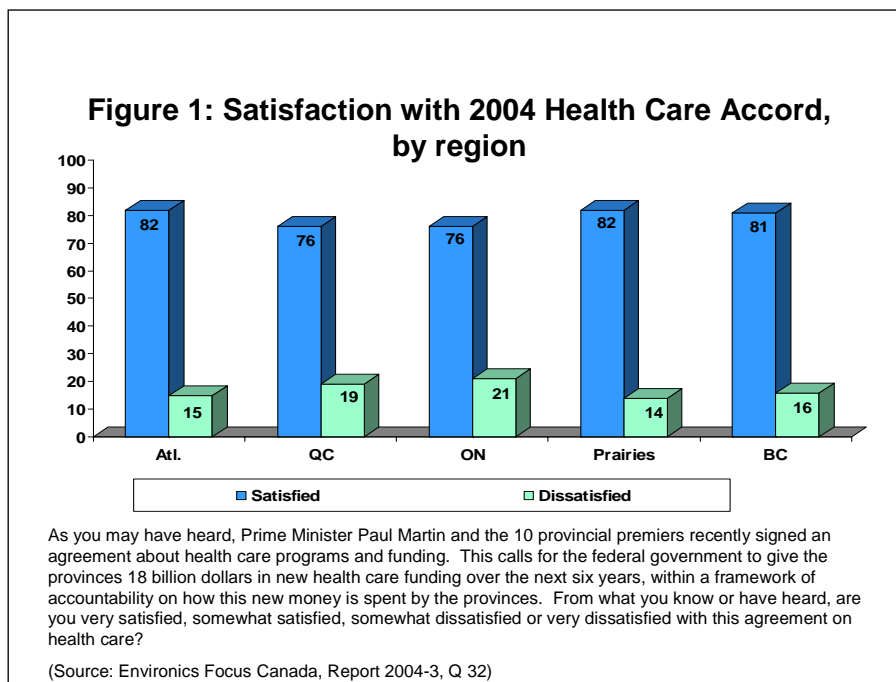
In politics, words can be used for good or ill; they can help clarify complex public policy issues or baffle even well-informed citizens. At different times and in different contexts, the expression 'asymmetrical federalism' has probably performed all of these functions and others. Some have used it to describe what they see as a strength of Canadian federalism, namely that provinces are not identical in their history, circumstances and public policies. Others have used the term to express their opposition to the 'special treatment' they believe one province, namely Quebec, seeks – or already receives - within the federation. Still others claim that even modest asymmetry, such as variation in intergovernmental agreements (as opposed to the letter of the Constitution), violates the principle of the equality of the provinces.

Largely because of the association with Quebec, politicians and policy makers have tended to avoid using the term 'asymmetrical federalism' in their speeches, official statements or intergovernmental agreements. That trend was broken, however, on September 16, 2004 when a communiqué titled "Asymmetrical federalism that respects Quebec's jurisdiction" was released along with the Health Accord agreed to by all First Ministers. The communiqué reflected the agreement between Prime Minister Martin and Premier Jean Charest that the Quebec government would use the additional funding from the Health Accord "to implement its own plan for renewing Quebec's health system" and that it "will report to Quebecers on progress in achieving its objectives" and on 'the use of all health funding.'" The communiqué also stated that the elements of the agreement that applied only to Quebec were based on asymmetrical federalism, "that is, flexible federalism that allows for the existence of specific agreements and arrangements adapted to Quebec's specificity."

In the first section of this article we present public opinion data from autumn 2004 on the Health Accord, including the provisions that apply only to Quebec, and on the question of potential differences in agreements between the federal and provincial governments. In the second section, we explore what may be the roots of many Canadians' continuing antipathy to particular arrangements between the federal government and Quebec by reviewing findings from public opinion surveys since the late 1980s on the attempts to recognise Quebec's distinctiveness in the Constitution and related issues. The analysis suggests that, although the term 'asymmetrical federalism' can be

respondents indicated they were very or somewhat satisfied with the agreement; only 18% were somewhat or very dissatisfied. Moreover, there was not a great deal of variation by region: the highest satisfaction levels were in the Atlantic provinces and the Prairies – 82% in both cases; the lowest levels were in Ontario and Quebec – 76% in each province (see Figure 1).

In the same Focus Canada survey, respondents were asked the following question: "The agreement exempts Quebec from some of the new provincial requirements for reporting on the use of these health care funds. Do you approve or disapprove of Quebec having

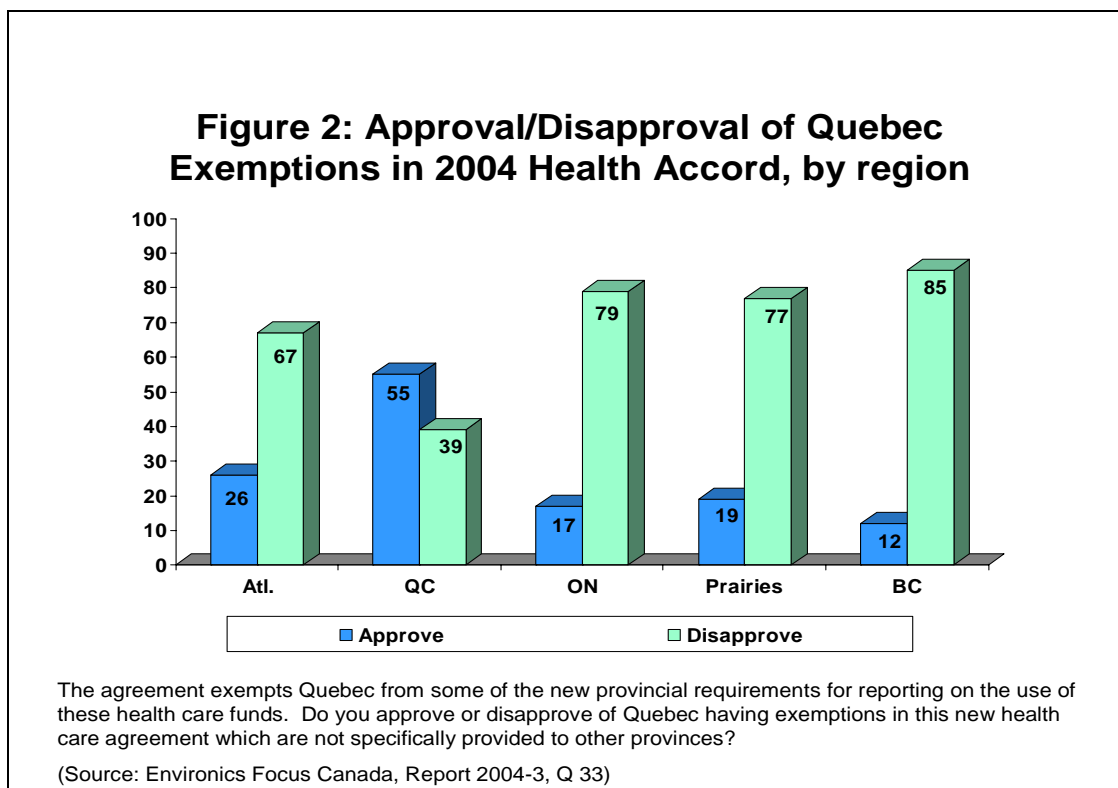


seen as a synonym for flexibility within the federation, a reality that does not seem to excite much opposition, for some it remains linked to the issue of 'special treatment' for Quebec.

CURRENT VIEWS ON ASYMMETRICAL ARRANGEMENTS

The Health Accord announced on September 16, 2004 met with a high level of approval from Canadians. In an Environics Focus Canada survey carried out between September 23 and October 12, 2004, 78% of

exemptions in this new health care agreement which are not specifically provided to other provinces?" In all parts of Canada except Quebec, the results were almost the mirror of the general question about the accord. In British Columbia, 85% of those surveyed indicated they disapproved of the 'exemptions'; the next-highest level of opposition – 79% - was in Ontario. In Quebec, just over a majority of respondents (55%) approved of the provisions that applied only to Quebec (see Figure 2).

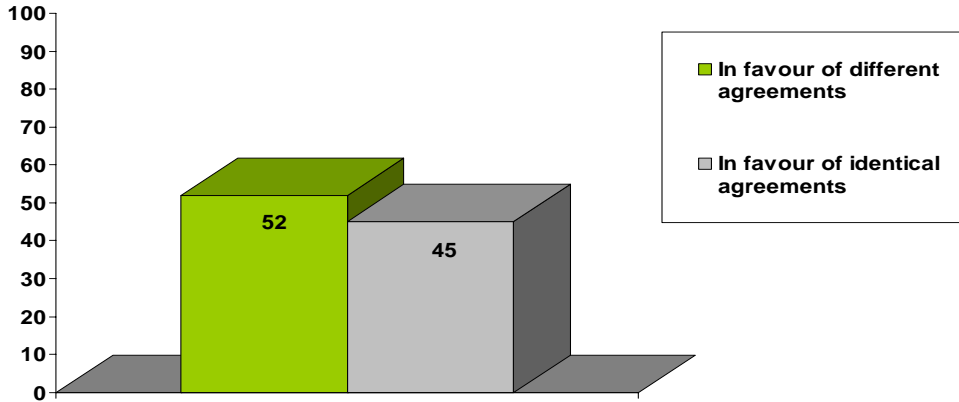


It should be said that the wording of the statement that preceded the question could give the impression the Quebec government will not be required to report on the use of the health care funds; in reality, it agreed to respect certain reporting requirements *to its own population*. Even so, the high level of disapproval of the provisions that applied to Quebec but no other province suggest that this practical example of asymmetrical federalism was not well received elsewhere in the country.

A different pattern was evident in the responses to a question in the 2004 Portraits of Canada survey sponsored by the Centre for Research and Information on Canada (CRIC). (The fieldwork for the Portraits survey was

carried out between September 15 and October 4 outside Quebec and between September 16 and October 3 in Quebec.) Respondents were told that agreements between the federal and provincial governments can differ from one province to another and then asked whether they were “in favour of having different agreements depending on the province or identical agreements with all provinces.” Nationally, 52% of those surveyed were in favour and 45% against (Figure 3). This pattern was fairly constant across the country: a bare majority (50% in all cases) favoured identical agreements in Nova Scotia, Ontario and Manitoba; in all other provinces and the North, there was stronger support for different agreements than identical ones (see Figure 4)

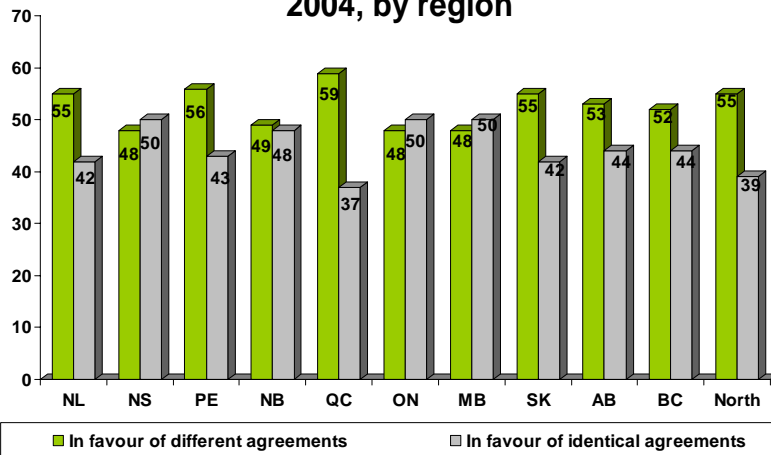
Figure 3: Different or Identical Federal-Provincial Agreements? 2004



Some people think that certain agreements between the federal and provincial governments can differ from one province to another. Others oppose this, preferring identical agreements with all provinces. Personally, are you in favour of having DIFFERENT AGREEMENTS depending on the province or IDENTICAL AGREEMENTS with all provinces? Is that strongly or somewhat in favor?

(Source: CRIC Portraits of Canada 2004)

Figure 4: Different/Identical Federal-Provincial Agreements 2004, by region



Some people think that certain agreements between the federal and provincial governments can differ from one province to another. Others oppose this, preferring identical agreements with all provinces. Personally, are you in favour of having DIFFERENT AGREEMENTS depending on the province or IDENTICAL AGREEMENTS with all provinces? Is that strongly or somewhat in favor?

(Source: CRIC Portraits of Canada 2004)

The CRIC question could be seen as somewhat hypothetical and may have received a more positive response than a question about an actual situation.¹ That said, the results suggest that a majority of Canadians are comfortable with the rather common sense idea that intergovernmental agreements can vary from one province to another. However, it seems that a stronger majority opposes arrangements that apply to Quebec and no other province, particularly if they impose less strict conditions on that province. On the one hand, Canadians seem to be open to asymmetrical arrangements in the abstract. On the other hand, their opposition to what they may see as ‘special’ arrangements for Quebec means there is continuing ambiguity in this regard.

WHY THE ANTIPATHY TO ASYMMETRICAL ARRANGEMENTS FOR QUEBEC?

As various scholars, including Ron Watts and David Milne have noted, there are quite a number of asymmetrical arrangements that apply to Quebec.² Certain ones (sometimes referred to as *de jure* asymmetry) are based in the text of the *Constitution Act, 1867* and subsequent amendments; others (sometimes called *de facto* asymmetry) result from agreements with the federal government, some of which reflect the Quebec government’s desire to ‘opt out’ of national programs. Particularly in the area of social policy, successive Quebec governments have argued that arrangements allowing it to

shape its own public policies and programs are justified by, among other things, the province’s French language, history and culture. In light of the longstanding nature of many of these arrangements, why have the attempts to add further asymmetry by entrenching a statement of Quebec’s distinctiveness in the Constitution met with so much opposition in the rest of Canada (and even within Quebec’s anglophone community)?

The 1987 Meech Lake Accord, a relatively modest agreement intended to obtain Quebec’s assent to the *Constitution Act, 1982*, included a clause stipulating that the Constitution of Canada was to be interpreted “in a manner consistent with...the recognition that Quebec constitutes within Canada a distinct society.” The expression “distinct society” was not defined, although in another part of the clause it was stated that English-speaking Canadians were “also present in Quebec.” In addition, a statement affirming the “role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec” would have been added to the Constitution.

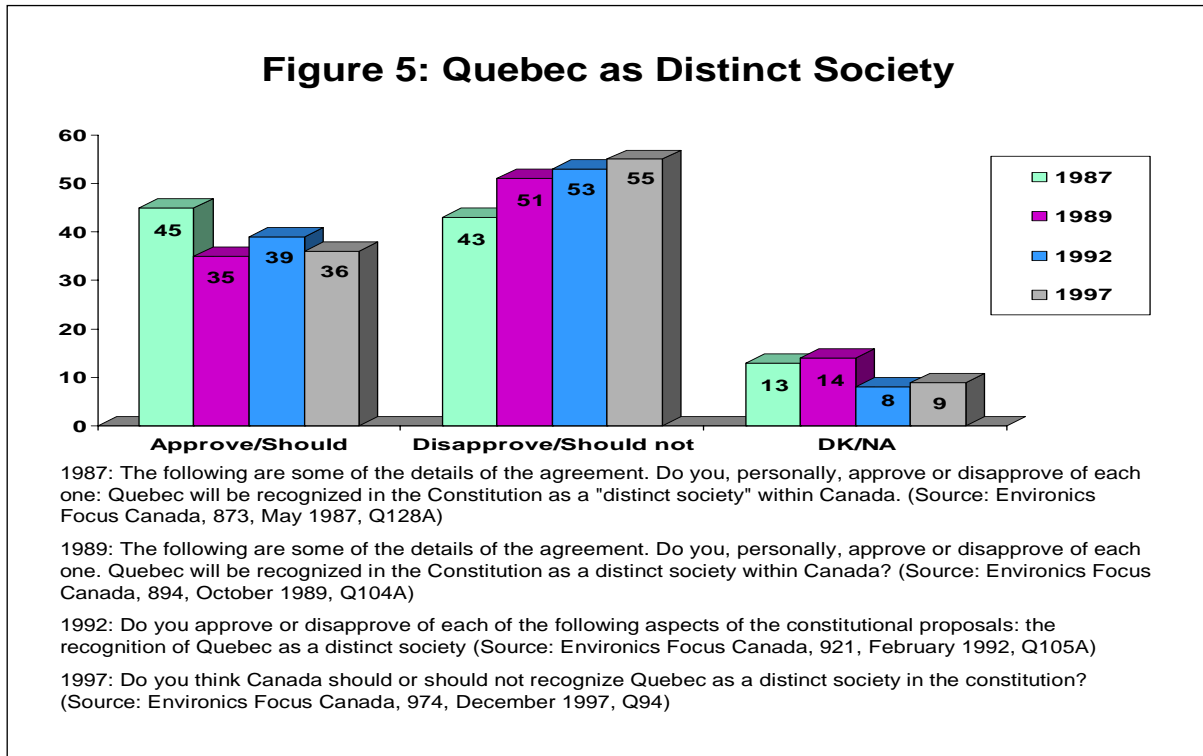
Public reaction to the Meech Lake Accord was initially quite positive: in a June 1987 Gallup poll, 58% of respondents supported the accord.³ However, a majority of Canadians never approved of the recognition of Quebec as a distinct society. Even in May 1987, during the ‘honeymoon’ period following the agreement in principle reached on April 30, only 45% of respondents to an Environics Focus Canada survey said they approved of the provision (see Figure 5). Support for the distinct society clause fell during the ensuing three-year ratification period, as did approval of the accord as a whole (in an April 1990 survey only 25% of respondents said they favoured the accord).⁴

¹ For example, the Environics Focus Canada survey of April 2000 included a question asking whether respondents agreed or disagreed that provinces be allowed to “opt out of any new national program and be entitled to receive national funding if they were to set up their own similar program”; 53% agreed and 47% disagreed.

² Ronald L. Watts, “Canada’s Constitutional Options: An Outline,” in Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991), pp. 25-26; David Milne, “Exposed to the Glare: Constitutional Camouflage and the Fate of Canada’s Federation,” in F. Leslie Seidle (ed.), *Seeking a New Canadian Partnership: Asymmetrical and Confederal Options* (Montreal: Institute for Research on Public Policy, 1994), pp. 107-31. See also the Watts article and the Milne article in this series.

³ Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991), note 19, p. 329.

⁴ Michael Adams and Mary Jane Lennon, “The Public’s View of the Canadian Federation,” in Ronald L. Watts and Douglas M. Brown (eds.), *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990), p. 107.



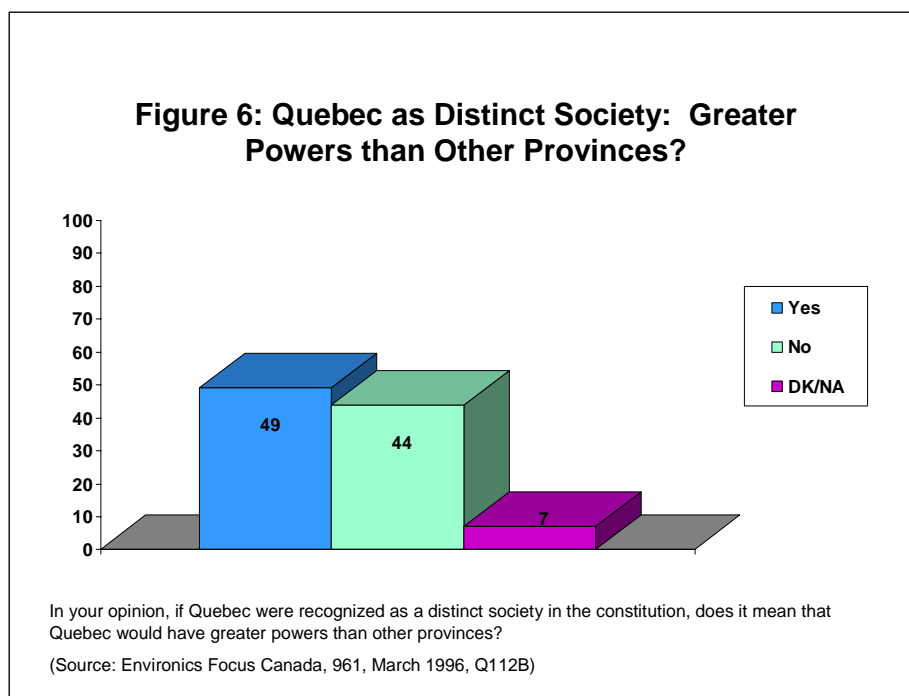
The distinct society clause was criticized on a number of counts. Some argued that it would allow the Quebec government to limit individual rights -- for example, through measures intended to protect the French language. However, the most resonant argument, which began in earnest with former Prime Minister's Trudeau's stinging critique of the accord in May 1987, was that the distinct society clause would give the Quebec government powers not available to other provincial governments and lead to 'special status' for that province. This argument fed an often-strident public debate that turned on the symbolism of the accord and of the distinct society clause in particular. Patrick Monahan, who was a close adviser to Ian Scott, Ontario's Attorney General during that period, described the division in the views of Canadians as follows:

Within the province of Quebec, the accord came to be seen as a symbol of belonging, acceptance and political distinct-society clause was regarded with suspicion in the rest of the country because it came to be associated with the idea of granting special powers or privileges to the province of Quebec.⁵

In a 1989 Decima Quarterly survey, 45% of respondents indicated that the biggest problem with the Meech Lake Accord was that it increased the power of the Quebec government.⁶ Even six years after the accord failed to be ratified by all the provinces (in 1990), close to a majority of Canadians (49%) agreed that if Quebec were recognised as a distinct society in the constitution it would mean that Quebec would have greater powers than other provinces (Figure 6).

⁵ Monahan, *Meech Lake*, pp. 240-41.

⁶ The other choices in the question as to potential problems with the accord were: increases the power of the federal government, increases the power of provincial governments and "no real problem."



A more specific criticism of the distinct society provision was that the expression was not defined. As Monahan put it, some of the resistance “can be explained on the basis of the inherent ambiguity associated with the idea of recognizing Quebec’s ‘distinct identity.’”⁷ When governments returned to the constitutional bargaining table in late winter 1992, they attempted to alleviate some of the ambiguity. In the Charlottetown Accord, which all First Ministers approved but was defeated in the referendum of October 26, 1992, the following wording was used: “Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition.”

Despite this attempt to alleviate fears by defining Quebec’s distinct society, the division over the Meech Lake Accord provision reappeared: in a survey conducted in early October 1992, 85% of Quebecers supported the distinct society recognition, while a majority of non-Quebecers rejected it.⁸ Of course the

Charlottetown Accord did not fall only because of the low support for the distinct society provision outside Quebec. Rather, Canadians outside Quebec believed that the accord as a whole, which repeated a number of elements of the Meech Lake agreement and would have led to a significant devolution of powers from Ottawa to the Quebec (and other) provincial governments, gave too much to Quebec.⁹ Since the referendum on the Charlottetown Accord, governments have not wanted to return to the constitutional bargaining table – on priority matters for Quebec or any other question.¹⁰

1994: A More Democratic Canada... ? (Ottawa: Carleton University Press, 1993), pp. 166-67.

⁹ In a Decima survey carried out after the referendum on the Charlottetown Accord, “Quebec got too much” was the most favoured reason for voting ‘No’ for those outside Quebec; see Reg Whitaker, “The Dog that Never Barked: Who Killed Asymmetrical Federalism?”, in Kenneth McRoberts and Patrick Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993), p. 114.

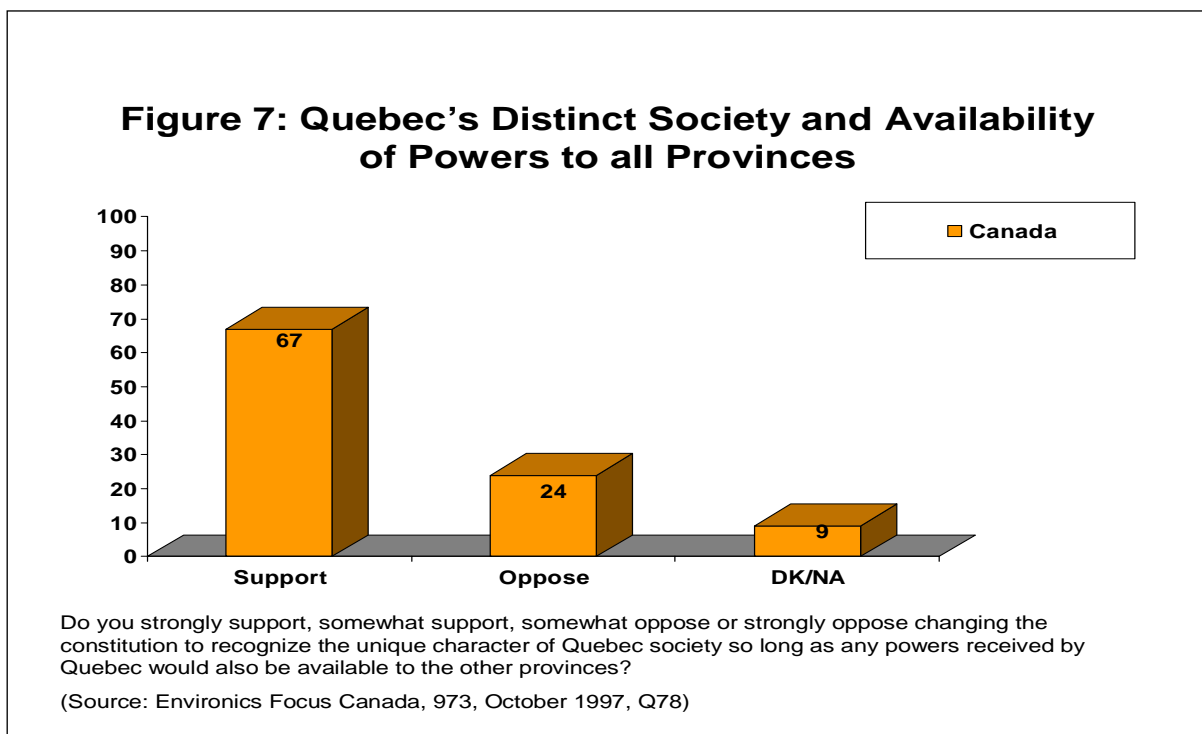
¹⁰ The issue did, however, receive some attention at the federal level in the wake of the Quebec referendum on sovereignty-association held on October 30, 1995. On December 11, 1995, following a promise Prime Minister Chrétien made in Verdun shortly before the referendum, the House of

⁷ Monahan, *Meech Lake*, p. 241.

⁸ Leslie A. Pal and F. Leslie Seidle, “Constitutional Politics 1990-92: The Paradox of Participation,” in Susan D. Phillips (ed.), *How Ottawa Spends 1993-*

However, at their annual conference in Calgary in 1997, all the Premiers agreed on a declaration that was intended to bolster Jean Charest's efforts to defeat the *Parti québécois* in the coming provincial election. The declaration included the statement that "the unique character of Quebec society, including its French-speaking majority, its culture and its tradition of civil law, is fundamental to the well-being of Canada."

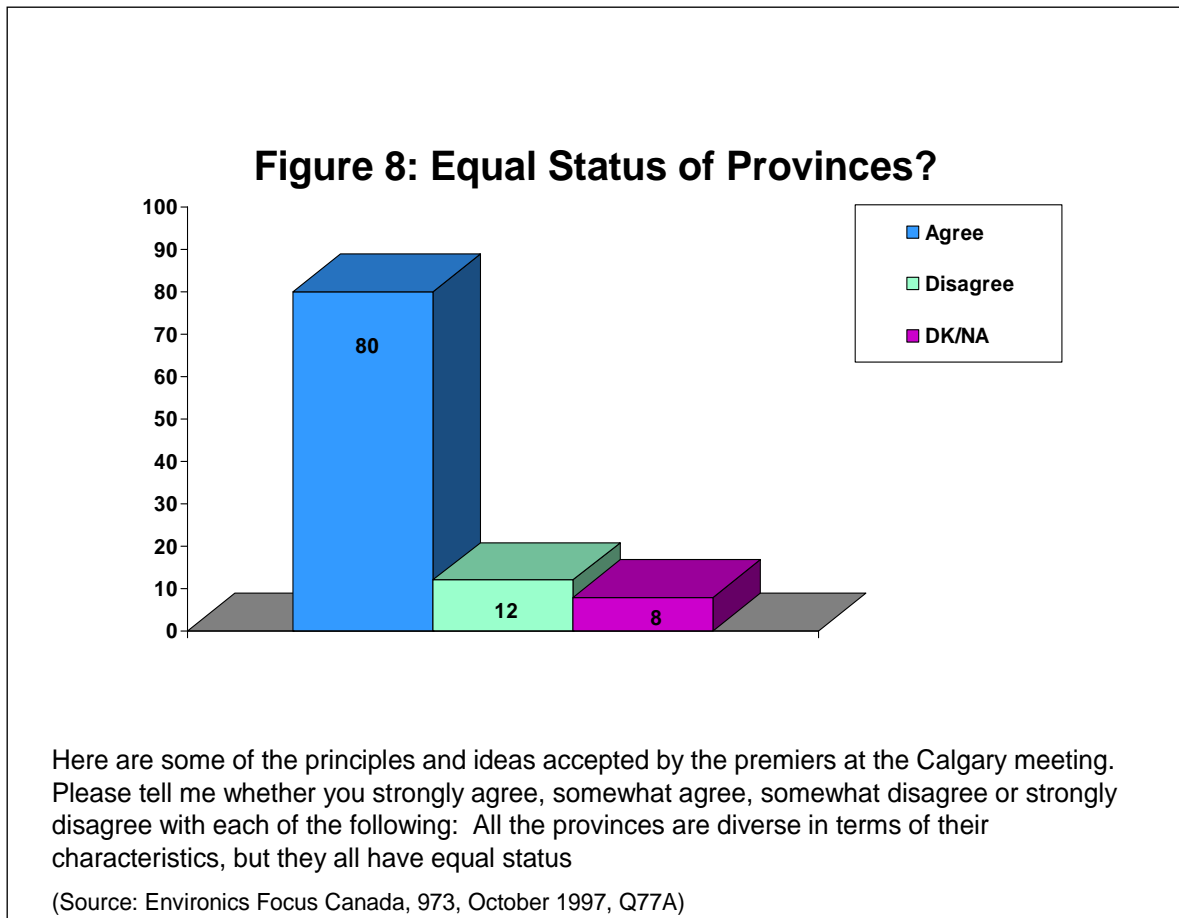
The declaration also stated that "if any future constitutional amendment confers powers on one province, these powers must be available to all provinces." In a question in an Environics Focus Canada survey in October 1997, the possibility of a constitutional amendment to recognise the "unique character of Quebec society" was linked to the statement about making any new powers available to all provinces; that formulation was supported by two-thirds of respondents (see Figure 7).

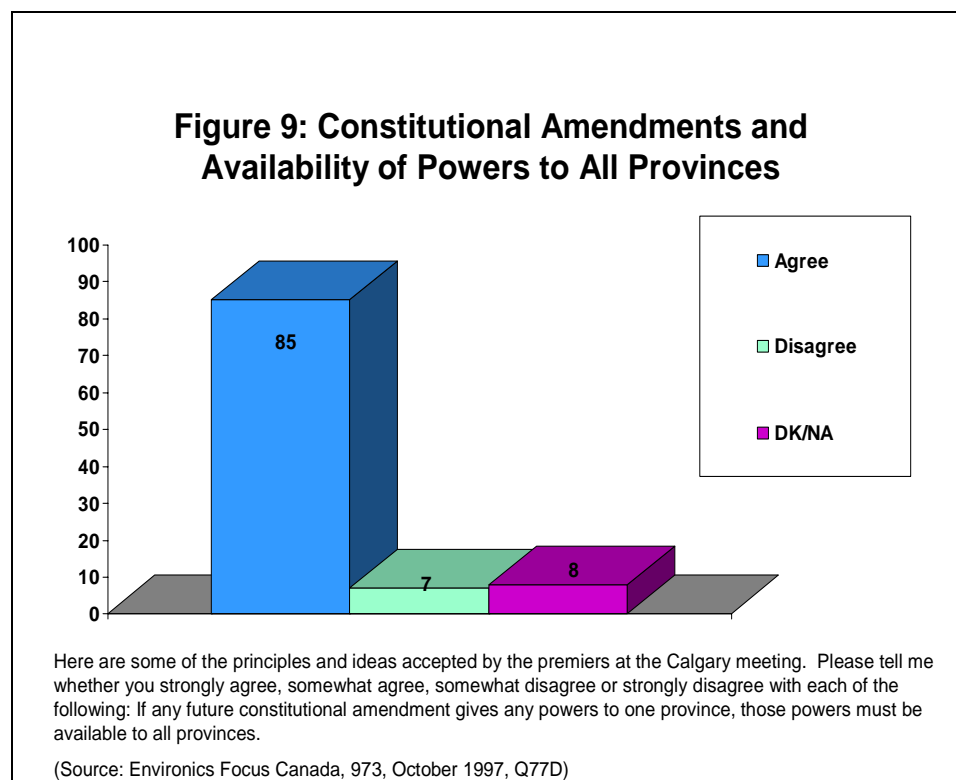


Commons adopted the following resolution: "that (1) the House recognize that Quebec is a distinct society within Canada; (2) the House recognize that Quebec's distinct society includes its French-speaking majority, unique culture and civil law tradition; (3) the House undertake to be guided by this reality; (4) the House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly."

Support for the concept of the equality of the provinces is implicit in the response to the question referred to above. When asked specifically about that concept in the same Focus Canada survey, 80% of respondents agreed with the statement "All the provinces are diverse in terms of their characteristics, but they all have equal status" (Figure 8). An even higher proportion of respondents (85%) agreed that "if any future constitutional amendment gives any powers to one province, those powers must be

available to all provinces" (Figure 9). While the First Ministers who negotiated the Meech Lake Accord probably did not intend otherwise, a decade after that agreement was signed one thing had become clear: Canadians, particularly outside Quebec, were much more at ease with any recognition of Quebec's distinctiveness or grant of greater powers to that province if it was also made clear that the equality of the provinces was not infringed.





It may seem surprising that, during the debates that ran for a good part of a 10-year period, the expression “asymmetrical federalism” was largely absent. A small number of academics and opinion leaders advocated more explicit asymmetry as a way of encouraging Quebec to stay within the federation.¹¹ This view gained somewhat broader support during the “Renewal of Canada: Division of Powers” conference held in Halifax on January 17-19, 1992. In the report on the conference, it was noted that there was little resistance to Quebec’s having transfers of powers “as may be necessary to their needs” and that most other provinces need not avail themselves of such powers. The report then stated: “It was acknowledged that such a course would lead to asymmetry in the way powers would be distributed and exercised but, after much discussion, most participants seemed somewhat surprised to discover that asymmetry

¹¹ One longstanding advocate of asymmetrical federalism is Tom Kent; see, for example, his article “Recasting Federalism,” *Policy Options*, 12:3, April 1991, pp. 3-6. See also Whitaker, “The Dog that Never Barked.”

in the powers assumed by Quebec and other provinces actually presented them with few concerns and no real fears.”¹² This apparent support for asymmetrical federalism was, however, short-lived. The reactions from a number of provincial political leaders, editorial writers and others were swift and quite hostile. The expression “asymmetrical federalism” thus never really entered the political discourse of the constitutional round that ended when Canadians voted down the Charlottetown Accord.

CONCLUDING COMMENTS

The preceding retrospective on important aspects of the constitutional debates that started with the negotiation of the Meech Lake Accord demonstrates a tension between the reality of Canadian federalism and certain concepts that have become part of the discourse about federalism and intergovernmental relations. There does not seem to be much opposition to the various *de jure* and *de facto* asymmetrical arrangements that govern the Quebec

¹² Atlantic Provinces Economic Council, “Renewal of Canada: Division of Powers. Conference Report,” January 22, 1992, p. 23.

government's exercise of its jurisdiction and relations with Ottawa. However, attempts to entrench a label for Quebec's distinctiveness, one that may have allowed it to exercise certain of its powers in somewhat different ways compared to other provinces, have met with resistance. In part, this was based on opposition to the symbolism of the move. More specifically, such attempts were seen as counter to the concept of the equality of the provinces, which is strongly supported in public opinion across the country.

Political leaders, commentators and others rarely tell Canadians that, in practice, asymmetry does not apply only to Quebec. The federal government has immigration agreements with all provinces, but none with Ontario; rules for sharing resource revenues between the federal and various provincial governments vary considerably; Ontario and Alberta (like Quebec) collect their own corporate income tax, whereas Revenue Canada performs this function on behalf of all the other provincial governments. There are further examples in other policy fields, and *de facto* asymmetry could become more common in the future.¹³ For now, though, 'asymmetrical federalism' is associated virtually exclusively with Quebec, and that province's ongoing quest for greater autonomy means that its use in political discourse can often be problematic. In sum, we are not yet at the point where, to use Alice's words, the expression 'asymmetrical federalism' can "mean so many different things."

¹³ For a recent critique of asymmetry, see Allan Gregg, "Quebec's Final Victory," *The Walrus*, 2:1, February 2005, pp. 50-61. Gregg suggests (p. 61) that "providing generalized opt-out options" to all the provinces could lead to "national vivisection." In contrast, Roger Gibbins claims that there was a "muted ... response to asymmetrical federalism" in the wake of the Health Accord because "asymmetrical federalism is not seen as recognizing Quebec's special status, but rather as an option open to all"; see "Asymmetrical more than just a mouthful," October 2004, at http://www.cwf.ca/abcalcwf/doc.nsf/doc/news1_rgib_102204.cm.