

SURVIVANCE VERSUS AMBIVALENCE: THE FEDERAL DILEMMA IN CANADA

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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 two solitudes in Canadian society have long disagreed on a number of fundamental questions. It thus should not be surprising that Quebecers and Canadians-outside-Quebec have very different perceptions about the purpose and significance of federalism. In this brief historical review, I shall argue that Canadians-outside-Quebec have had ambivalent feelings about federalism in general, and antipathetic sentiments about classical federalism in particular. English-Canadians have tended to view federalism as a hindrance to national unity, and have thus reluctantly accepted the federal form of government, and only then on the understanding that the federal government would be superior to the provincial governments. Quebecers long promoted classical federalism as the best means to ensure cultural survival in a largely English-speaking country, but their faith in the federal form of government has been seriously undermined by the ambivalence towards federalism in the rest of Canada. Quebecers, historically at least, have always wanted more federalism while English-Canadians have generally wanted less federalism. Asymmetrical federalism has emerged as the two solitudes have pushed federalism in opposite directions. It is not clear though if asymmetrical federalism serves either solitude well.

Sir John A. Macdonald was a reluctant federalist. In the Confederation Debates of 1865 on the proposed British North America Act, he stated a clear preference for a legislative union, and he accepted federalism only when he was satisfied that the proposed constitution empowered the general government with "all the powers which are incident to sovereignty."¹ Macdonald assumed that matters of *national* importance would be the responsibility of the federal government, while the provincial governments would be responsible for all matters of merely *local* importance. The leader of the opposition from Quebec, Antoine Aimé Dorion, agreed entirely with Macdonald's characterization of the constitution and

¹ *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec: Hunter, Rose and Company, Parliamentary Printers, 1865; reprinted 1951), p.33.

consequently rejected it. Dorion argued that “that the Federal Parliament will exercise sovereign power, inasmuch as it can always trespass upon the rights of the local governments without there being any authority to prevent it...We shall be – I speak as a Lower Canadian – we shall be at its mercy.”²

While Sir Georges Cartier is largely credited with selling the proposed constitution to sceptical Quebecers, Dorion’s fears were most squarely addressed in the Confederation Debates by Joseph Cauchon, a Conservative backbencher. Cauchon endorsed the draft constitution because, contradicting Macdonald, he claimed,

There will be no absolute sovereign power, each legislature having its distinct and independent attributes, and not proceeding from one or the other by delegation, either from above or from below. The Federal Parliament will have legislative sovereign power in all questions submitted to its control in the Constitution. So also the local legislatures will be sovereign in all matters which are specifically assigned to them.³

In the end, the draft BNA Act was adopted by the comfortable margin of 91 to 33, but among French Canadian voters in Lower Canada the split was a much narrow 27 to 21.

Dorion and Cauchon sparred vigorously throughout the Confederation Debates in the Canadian legislature. The ferocity of this debate cannot be underestimated. It was far more than partisan politics. At issue was the survival of the French Canadian population in the province of Quebec. Dorion was obviously convinced that the proposed constitution was detrimental to French Canadian interests. On the other hand, Cauchon revealed Quebec’s conditional endorsement of confederation: Quebec could only accept the proposed constitution if it entrenched what we now call “classical” federalism. As far as Macdonald was concerned, classical federalism was the principal cause of the American Civil War, and he was adamant

² Ibid., p.690.

³ Ibid., p.697.

that Canada would have none of it. The character of Canadian federalism has changed since Macdonald’s day, but the government of Canada has never embraced the principles of classical federalism, nor have the citizens of English Canada.

It is frequently argued – at least in English-speaking Canada – that it is impossible to maintain the principles of classical federalism in an age of economic interdependence. Without questioning the merits of that argument, it would seem that the government of Canada has made very little effort to maintain the independence of the two orders of government in its pursuit of the economic and social unions, both of which have their origins in the federal government’s “Green Book Proposals” and the first Conference on Reconstruction in August 1945. Mackenzie King opened the Conference on Reconstruction with reassuring words for the provinces:

The federal government is not seeking to weaken the provinces, to centralize all the functions of government, to subordinate one government to another or to expand one government at the expense of the others....we believe that the sure road of Dominion-Provincial co-operation lies in the achievement in their own spheres of genuine autonomy for the provinces.⁴

Later that day, however, Louis St. Laurent elaborated that the objectives of the federal government’s post-war reconstruction program were “high and stable employment and income” and he stated clearly that the “division of responsibility [in Canada’s federal system] should not be permitted to prevent any government, or governments in cooperation, from taking effective action.”⁵ On behalf of the government of Quebec, Maurice Duplessis rejected the federal proposals, saying the “complete autonomy of the Provinces constitutes the best safeguard for the protection of minorities as well as an essential condition of

⁴ *Dominion-Provincial Conference 1945: Dominion and Provincial Submissions and Plenary Conference Discussions* (Ottawa: Government of Canada, 1946), p.5.

⁵ Ibid., p.59.

national unity and progress in Canada.”⁶ Once again, Quebec’s demand for classical federalism fell on deaf ears.

The conference collapsed after Duplessis’s departure, but most of the shared cost proposals made by the federal government were realized in a more piecemeal fashion in the quarter century that followed. The government of Quebec forcefully resisted most of these initiatives, and in 1953 it established a Royal Commission of Inquiry on Constitutional Problems, chaired by Thomas Tremblay, to investigate the operation of Canadian federalism. The Commission expressed the view that federalism was still the preferred option of a majority of Quebecers, but it endorsed a quintessentially classical definition of federalism as an “association between states in which the exercise of state power is shared between two orders of government, coordinate but not subordinate one to the other, each enjoying supreme power within the sphere of activity assigned to it by the constitution.”⁷

The Tremblay report, however, had no impact on the government of Canada and its relations with Quebec. On the contrary, the battles between the governments of Canada and Quebec over pension plans, medicare, and other social policies severely strained the federation over the next decade. In 1968, Lester Pearson outlined the federal government’s position in *Federalism for the Future*. While he was genuinely concerned with linguistic rights, he noted that “the division of powers between orders of government should be guided by principles of functionalism, and not by ethnic considerations” and he proceeded to outline an extensive list of powers he deemed essential for the federal government.⁸ This list of powers was excerpted and included as an appendix by René Lévesque in his 1978 autobiography *My Québec*

under the heading “Federal Evangelism.”⁹ He offered no additional commentary but his implication was clear: if this was going to be the future of federalism in Canada, Quebec would have no part in it.

For the past forty years, the principal conflict between the governments of Canada and Quebec has been the federal spending power – which empowers to the federal government to spend money on matters that it cannot legislate, primarily matters that fall constitutionally in areas of provincial jurisdiction. Whatever the constitutionality of the spending power may be, it is not compatible with the classical conception of federalism, a point that has been acknowledged by the federal government. In 1969, Pierre Trudeau argued in *Federal-Provincial Grants and the Spending Power of Parliament* that

It can be argued that the Constitution should be contrived so as to avoid any need for a spending power – that each government ought to have the revenue sources it needs to finance its spending requirements without federal assistance.... The difficulty with this tidy approach to federalism is that it does not accord with the realities of a Twentieth Century state.¹⁰

Trudeau insisted that

[t]he modern industrial state is so interdependent, particularly in technological and economic terms, and its population is so mobile, that it has become quite impossible to think of government policies and programmes as affecting the people within the jurisdiction of the particular government responsible for these policies.¹¹

Thirty years later, the federal government’s view of the spending power was embedded in the

⁶ Ibid., p.356.

⁷ *Report of the Royal Commission of Inquiry on Constitutional Problems, Volume II* (Province of Quebec, 1956), p.102.

⁸ The Right Honourable L. B. Pearson, *Federalism for the Future* (Ottawa: Government of Canada, 1968), p.36-38.

René Lévesque, *My Québec* (Toronto: Methuen, 1979).

⁹ René Lévesque, *My Québec* (Toronto: Methuen, 1979).

¹⁰ The Right Honourable Pierre Elliott Trudeau, *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Government of Canada, 1969), p.30.

¹¹ Ibid., p.22.

Social Union Framework Agreement, an agreement endorsed by all the governments of Canada save Quebec. So, once again, the English Canadian conception of federalism prevailed.

From the constitutional debates in 1865 through to SUFA, English and French Canadians have viewed the merits and purposes of federalism very differently. Will Kymlicka has argued that “it is almost inevitable that nationality-based units [in a federation] will seek different and more extensive powers than regional-based units.”¹² For Kymlicka, then, asymmetrical federalism emerges as these nationality-based units acquire additional powers. But, he argues, asymmetrical federalism is resisted by English-speaking Canadians because they understand federalism in territorial terms. The purpose of territorial federalism – following the American example – is to divide power between several governments to avoid tyranny. The territorial model of federalism assumes that there are no relevant cultural distinctions among the units in the federation.

The historical narrative presented here, though, suggests that asymmetrical federalism does not arise solely from Quebec nationalism, if at all. On the contrary, the argument here is that asymmetrical federalism has emerged from the reluctance of English-speaking Canadians – starting with Macdonald – to embrace the federal principle, or at least the classical definition of federalism. Although the Supreme Court has identified federalism – along with democracy, the rule of law, and respect for minorities – as the fundamental principles of the Canadian polity, there can be little doubt that federalism is the least cherished of these principles among English-speaking Canadians.

Unfortunately, there is not much survey data showing how Canadians relate to the governing principles of the country.¹³ However, an

¹² Will Kymlicka, “Multinational Federalism in Canada: Rethinking the Partnership,” in Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montreal: IRPP, 1998), p.24.

¹³ I would urge those with the capacity to undertake large scale surveys to remedy this deficiency.

unscientific survey of seventy-two university students in British Columbia supports the contention that English-speaking Canadians value federalism less than the other core elements of the Canadian polity. In the survey, respondents were asked to rank the importance of the four principles identified by the Supreme Court on a scale of 1 to 5, with 1 being very unimportant, 3 being neutral, and 5 being very important. The principles were ranked in the following order (with scores in parentheses): rule of law (4.73), democracy (4.66), respect for minorities (4.49), and federalism (3.97).¹⁴ The results are unambiguous: federalism is the clear outlier.

The results of this unscientific survey appear to be consistent with scientific surveys. A survey by the Centre for Research and Information on Canada, conducted in October 2004, asked Americans, Canadians and Mexicans if they strongly agreed, somewhat agreed, somewhat disagreed or strongly disagreed with the following statement: “A federal government, in which power is divided between a national government and provincial and local governments, is preferable to any other kind of government.” A respectable 78.6 percent of Canadians responded positively. In the United States, 81.1 percent of respondents answered positively, while only 58 percent of Mexicans were supportive. The survey revealed federalism was most strongly supported in Alberta and, not surprisingly, it was least supported in Quebec,

Comparative data showing how Canadians value the different governing principles of the federation in relation to each other would be especially helpful

¹⁴ The following questions were asked in the survey.

1. How important is it to you that Canada is a democracy? (i.e. regular and fair elections to choose the government). 2. How important is it to you that Canada is governed by the rule of law? (i.e. the government and its officials are required to obey the law in the performance of their duties). 3. How important is it to you that Canada is a federal political system? (i.e. Canada has a national government and provincial governments, each with its own set of responsibilities). 4. How important is it to you that the governments of Canada demonstrate respect for minorities? The survey was conducted by the author in January 2005. I would like to thank Ruth Fisher for compiling this data.

where half the population has become disillusioned with federalism and now openly supports sovereignty.

The survey suggests that federalism is supported almost equally in Canada and the United States, but the aggregate data does not tell the whole story. It is striking that only 29.8 percent of Canadians were strongly supportive while 48.8 percent were somewhat supportive. These figures stand in stark contrast to the United States, where 46.2 percent of respondents were strongly supportive while 34.9 percent were somewhat supportive. It would thus appear that federalism is more deeply ingrained in the political culture of the United States – the purported territorial federation – than it is in Canada – which is supposed to be the quintessential multinational federation. Adding the 21.4 percent of Canadian respondents who were not supportive of federalism to the half that were only moderately supportive of federalism, it would appear that a large majority of Canadians are at best ambivalent about federalism.¹⁵

Generic questions about federalism are problematic in as much as there are very different understandings about the meaning of the concept. Matthew Mendelsohn and Fred Cutler have discovered that Albertans and British Columbians are generally supportive of *cooperative* or *collaborative* federalism, but show very little enthusiasm for *classical* federalism. Depending on the wording of the question, no more than a quarter of the citizens of BC and Alberta are inclined to support classical federalism.¹⁶ British Columbians and Albertans are arguably the most federalist of all citizens in English Canada, so one can only imagine that support for classical federalism would be even lower in the other English-speaking provinces. One also presumes though

that those Quebecers who continue to support federalism are inclined towards classical federalism and autonomy in all areas of provincial jurisdiction.

The government of Quebec has sensed the resistance towards federalism in English Canada, and they have indicated a willingness to allow the federal government to assume a dominant role in the life of English Canadians so long as Quebec is exempt from federal initiatives in areas of provincial jurisdiction, hence opting-out provisions, footnote federalism, and various policy asymmetries in Canadian federalism. On this point, however, English-Canadians raise objections on equality grounds, as Kymlicka rightly notes. Quebec has always sought to maintain its cultural distinctiveness through classical federalism – which treats all units equally. English-Canadians, however, reject classical federalism in principle. Canadians outside Quebec seem to believe that once a matter reaches a certain level of importance the federal government should assume a role in its governance for all Canadians equally, regardless if the matter is one of provincial jurisdiction. As English-speaking Canadians reject both classical and asymmetrical federalism, it is little wonder then that Quebec sovereignists have given up on Canadian federalism. But the sovereignists have not yet been able to convince a majority of Quebecers that Canadian project should be abandoned. In the mean time, asymmetrical federalism provides an uneasy *modus vivendi* for holding the federation together.

If asymmetrical federalism was a celebration of Canadian diversity, it would be completely defensible, but the other provinces in Canada do not avail themselves of the opportunity to pursue different paths. So, as things stand, asymmetrical federalism in Canada assumes an all against one character. English-speaking Canadians see Quebec standing alone and tend to view the province as an obstacle to unity, while Quebecers believe they have to fight tooth and nail for what rightfully belongs to the province – indeed all the provinces – under the constitution. Asymmetrical federalism positions Quebec as the family outcast, forced to eat in the kitchen

¹⁵ Data provided by courtesy of the Centre for Research and Information on Canada. I would like to thank Gina Bishop for her assistance in supplying the data. The interpretation of the figures, of course, is mine alone.

¹⁶ Fred Cutler and Matthew Mendelsohn, “What Kind of Federalism do Canadians (Outside Quebec) Want?,” *Policy Options* (October 2001).

while the rest of the family eats together in the dining room. This is one way to ensure that the family continues to live under the same roof, but it does not establish a spirit of unity nor is it a celebration of diversity.

For parliamentarians like Macdonald schooled in British constitutional principles, Quebec's theory of classical federalism was difficult to accept, but it shouldn't be so difficult for post-Charter Canadians to embrace. Today, English-speaking Canadians overwhelmingly accept and defend the proposition that the courts may uphold minority rights over and against the wishes of the majority. Minorities, however, are not all alike, and different groups of minorities may require different sorts of institutional protection. The Charter affords protection to individual minorities who are surrounded by members of the majority. Quebec is not simply another minority; it is a provincial community, and federalism is the appropriate device to protect provincial communities. Aboriginal Canadians are another type of minority community, who will ultimately require yet another form of institutional protection.

English-speaking Canadians believe that Canada is a tolerant society that respects minorities and they point to the Charter with pride as the institution that facilitates this tolerance. But more is required for the different cultural communities in Canada to feel secure. English-Canadians now need to embrace federalism, however belatedly, as another institution designed for accommodation – the accommodation of provincial minorities, be they cultural as they are in Quebec or political as they are in all other provinces. For the most part, English Canadians remain ambivalent about federalism in general, and opposed to classical federalism in particular, but greater respect for the federal principle would reduce the pressure for asymmetrical federalism. For Quebec, classical federalism remains the *sine qua non* for membership in the Canadian union. Asymmetrical federalism is a product of this tension between Quebec and the rest of Canada

and an unhappy *modus vivendi* for both parties. As long as the two solitudes continue to disagree about the meaning and purpose of federalism, Canada will hang in the balance.