

## THE CASE FOR ASYMMETRY IN CANADIAN FEDERALISM

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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

Consternation about asymmetry in the conduct of federal-provincial-territorial relations in Canada ebbs and flows. It has received more attention recently on account of the side-agreement on health care negotiated between Ottawa and Quebec that accompanies the health-care accord signed by Ottawa and the rest of the governments in September 2004. Well-known pollster and pundit Allan Gregg argues that the precedent of side deals raises the spectre of "Frankenstein federalism", that is, a federal system that is "reduced to a patchwork quilt of unequal parts."<sup>1</sup> One is tempted to respond that Canada already is a patchwork of unequal parts. However, that hardly does justice to Gregg's argument, which is an argument about principle rather than the substance of public policy on health care. He contends that the country ought to pursue a vision of symmetrical federalism according to which the provinces are treated equally.

Few would argue that symmetry, or the equality of the units of the federation, ought not to be a key feature of the federal system. Certainly in Canada and many other federations, it is a key feature of the system. Assuming this is a desirable key feature, does it mean there is no room for asymmetry? Or can a case be made for some degree of asymmetric practice in federal systems? The short answer is yes. Asymmetry is featured in many of the world's federations. Of course the resort to asymmetry is a matter of judgement in the circumstances, and there are many factors that might bear on the judgement that ultimately is made. In this essay, I begin by defining the concept of asymmetry; consider the reasoning behind the use of the concept; look at asymmetry in law and in fact in Canadian federalism; and consider why resort to asymmetry is warranted from time to time.

### THE CONCEPT OF ASYMMETRY

Occasionally asymmetry is defined to mean that some of the constituent units have more power than others. This is a bald definition that fails to take account of circumstances in which instead asymmetry is a matter of some of the

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<sup>1</sup> "Quebec's Final Victory," *Walrus*, February 2005, 61.

constituent units having more responsibilities than others. It is more helpful to define asymmetric practices – or asymmetry, for short – as the differential treatment of the units of the federation under the constitution or in national public policy. Let us consider, first, the Canadian constitution. In section 94 of the Constitution Act, 1867, Quebec, a civil-law province, is excluded from the uniformity-of-laws scheme under which Parliament, with the consent of the common-law provinces, can standardize their laws on property and civil rights as well as the relevant procedures in their courts, and thereafter legislate in this field of jurisdiction. The uniformity-of-laws scheme portends massive centralization, and no one has ever seriously suggested that the prospect be pursued. Nonetheless, it is useful as an example of asymmetry that is not a matter of assigning the unit treated differently, Quebec, more power. If anything, it is a matter of less power in the sense of a choice being available to others but not Quebec.

In national public policy as opposed to the constitution, it is often the case that differential treatment means an option open to the member units rather than a requirement of the policy, itself. The classic example is the opting-out mechanism, under which a province can choose to opt out of a shared-cost programme negotiated with the other provinces and the federal government, and receive funding anyway so long as it maintains the same type of programme.

Whether exhibited in the constitution or in public policy, the reason behind asymmetry is the validity of dealing with differently situated units differently. It is the exact opposite of symmetry, which means treating the units of the federation the same under the constitution or in national public policy, no matter how each is situated. The principle at work in symmetry is to deal equally with alleged equals.

### **CONSTITUTIONAL ASYMMETRY**

As indicated, most federal systems feature a combination of asymmetric and symmetric practices, and Canada is no exception. At the level of the constitution, the following examples,

by no means exhaustive, give a flavour of asymmetry, Canadian-style. In addition to the aforementioned uniformity-of-laws scheme in section 94 of the Constitution Act, 1867, there is a noted asymmetric language provision. Section 133 stipulates that either French or English may be used in the legislature and courts of Canada and Quebec, and that the records and journals of the respective legislatures be kept in both languages. No other province is mentioned. In terms of representation in the Senate of Canada, Quebec is the only province, each senator of which is appointed from one of the 24 electoral districts in the province. Some would argue that representation in the Senate is asymmetric, period, because the number per province ranges from 24 to 4. On the educational front, Ontario and Quebec are singled out and assigned responsibilities in connection with denominational schools. In the Constitution Act, 1982, which houses the Canadian Charter of Rights and Freedoms, Quebec is exempted from the minority language educational provision under which parents whose first language learned and still understood is that of the official language minority in the province in which they reside can send their children to a publicly-funded school in the minority language, where numbers warrant. Once Quebec signs on to the provision, it will be locked in like the rest of the provinces.

### **ASYMMETRY IN FACT**

There are notable examples of asymmetry in national public policy that have arisen out of opting-out choices made by Quebec. It is important to stress that these choices are made available to all provinces, so theoretically it is not a matter of asymmetry in law. It is asymmetry in outcome, in other words, asymmetry in fact. The opting-out provision dates to the Established Programs (Interim Arrangements) Financing Act, 1965. Under the law, provinces were permitted to opt out of specified shared-cost programs. They would receive financial compensation from the federal government in order to maintain the program or programs in question at the existing standard. Quebec was the only province to exercise the option. Quebec also departed from the rest of the provinces in connection with the new Canada

Pension Plan (CPP). It developed and still maintains the Quebec Pension Plan (QPP).<sup>2</sup>

The instances of asymmetry under the constitution and asymmetry in national public-policy outcomes are not arbitrary or bizarre events. On the contrary, they reflect the fundamental differences among the provinces and the territories in terms of geographic size, population, economic prospects and social characteristics. At Confederation there were four provinces, the old British colonies of Nova Scotia and New Brunswick and two new provinces, Ontario and Quebec, each carved out of the colony of the Province of Canada. The eastern provinces are tiny compared to Ontario and Quebec, both of which got larger again in 1912 when the federal government expanded their northern boundaries substantially. Large geographic size is not everything of course but it is a lot when accompanied by strong population growth, comparatively speaking. The economies of the central provinces began to outstrip those of the eastern provinces soon after Confederation, and have done so ever since.

Fast forward to today, and the differences among the provinces loom larger than ever. A common, short-hand description is encapsulated in the blunt phraseology of the 'have-not' versus the 'have' provinces. The discrepancies between the two categories show up dramatically in the revenue-raising capacities of the provinces. Under the Constitution Act, 1867, each province is assigned the same legislative responsibilities as the others, expensive responsibilities in health care, education and social welfare. The combination of equal legislative responsibilities and radically unequal sources of revenue produces uneven spending capabilities of the first order of political importance. And on top of all this is the social factor. Quebec has been and remains a distinct society that includes a large francophone majority. As the country develops, other significant societal patterns are emerging, such as the multi-cultural face of the great cities. Asymmetry is not hatched in a vacuum.

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<sup>2</sup> Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 199-200.

## **WHAT WARRANTS RESORT TO ASYMMETRY?**

As stated above, the rationale of asymmetry is rooted in the validity of treating unequals unequally. The difficulty is to know when to do this. In political life, knowing when to do something is not cut-and-dried, or simply a matter of applying an economic analysis in the hunt for the greatest good for the greatest number at the least expense. It is also the art of the possible, and what is possible at one time is not necessarily so at another. Circumstances evolve; the cast of principal players changes; and so does the political leverage that each of the players can exert against one another. On this line of thought, it is worth noticing the date of the Established Programs (Interim Arrangements) Financing Act - 1965. There were minority governments at the federal level in 1962, 1963 and 1965. In this creative period, when governments in Western liberal democracies were launching new and innovative social programs of various kinds, Canada included, Ottawa played with a weaker than it would have under majority governments. Like minority governments everywhere, it was looking to increase its popularity in order to get a majority at the next election and therefore bound to be more receptive than usual to provincial demands. On the other hand, Quebec's majority Liberal government, backed by rising nationalism within the province, was focused on gaining maximum control over the legislative responsibilities assigned to it under the constitution, along with the financial resources to tackle them.

Let us return to the health care agreement signed by Ottawa and the provinces and territories last September, and the side-bar agreement with Quebec that so exercises Gregg. Is it an exercise in asymmetry? Is it warranted? It follows the pattern of previous agreements under which Quebec alone has chosen to exercise an option that is open to the other provinces. Quebec and Canada issued a joint communiqué in which Quebec supports the objectives of the health accord signed by the first ministers, including the need for reduced wait times for medical procedures, and commits to establish benchmarks for wait times by the

end of 2005. The communiqué also recognizes the province's authority over its own health-care system. For its part, the federal government agrees that other provinces can negotiate separate deals of this kind.

Is the asymmetry – the side-bar agreement that only Quebec invoked but that others might invoke later – warranted? There is no denying the fact that the minority Liberal government led by Prime Minister Martin was keen to ink a deal with the provinces and the territories, and in doing so was not in a position to drive a hard bargain with Quebec. On the other hand, there is also no denying the fact that, as stated in the communiqué, Quebec is onside in terms of the five principles of the *Canada Health Act*: universality, portability, comprehensiveness, accessibility and public administration. Further, the federal government has maintained the publicly-funded health care program in defiance of those who would prefer to see a two-tier system, meaning a private and a public one. From its standpoint, this is what matters most. After all, health is a provincial jurisdiction and, strictly speaking, there is nothing to prevent any province from abandoning the national scheme and launching a private system – on its own dime, naturally.

What warrants the resort to asymmetry? In the case of the health care agreement, the answer is gaining an acceptable agreement that includes advances in such areas as home care, a national pharmaceutical strategy, public health and the reporting practices of the national Health Council – for the cheapest asymmetrical price possible. Cheap because Quebec is doing in its own fashion more or less what Ottawa wants to see in any case.