THE ASYMMETRICAL ALTERNATIVE: IS ASYMMETRICAL FEDERALISM A VIABLE OPTION FOR THE FUTURE?

by

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ABSTRACT

This analysis is based on an examination of the viability of asymmetrical federalism as a political option within the Canadian federal system. The main argument of this thesis is that asymmetrical federalism provides an option for accommodating the diversity of Quebec and Aboriginal nations in the federal political system. However, given the current political climate, it is not a viable option at the present time. Drawing on the works of several students of federalism, this thesis explores why asymmetry is necessary to accommodate the diverse characteristics of the federal political system, specifically that of Québécois and Aboriginal peoples. More specifically, thesis attempts to address how, and, if asymmetry can be accommodated within the current federal system. I attempt to illustrate this argument by discussing various constitutional and non-constitutional options for asymmetry within the Canadian federation. However, I argue that in terms of its usefulness as a political option, asymmetry is limited by the adherence of many Canadians, particularly English-speaking Canadians, to the principle of the equality of the provinces. Although many academics currently recognize the merits of an explicitly asymmetrical federal system, a number of Canadians, including many of our federal and provincial politicians, have fallen into a rigid manner of thinking and talking about the nature of federalism. While asymmetry requires political ingenuity to survive and flourish, it appears that the ingenuity necessary to move Canada beyond the present political impasse is not in abundance. Although the potential for further asymmetry within the Canadian political system exists, and although there is also room available for some form of asymmetry which is constitutionally entrenched, it appears for the time being that asymmetrical federalism is destined to remain intellectually intriguing, but politically inoperable.

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INTRODUCTION

Asymmetrical federalism offers a viable alternative for accommodating Quebec and Aboriginal nations in the Canadian federal system. In fact, a number of Canadian academics and opinion leaders have recognized the merits of an explicitly asymmetrical federal system in which constituent units would have varying degrees of autonomy. As this thesis maintains, for some this is entirely consistent with the evolution of Canadian federalism. For others, however, this seriously conflicts with their deeply held belief in the principle of equality of provinces. These diverging conceptions of political community lie at the core of many political debates over the nature of the Canadian federal system.

The structure and underlying principles of the Canadian federal system have often been the subject of intense political debate and discussion. From the beginning of Confederation, owing to the profound differences in historical experience, sense of nationality, and central preoccupations that they brought to the new arrangement, Canadians have viewed federalism in very different ways. As the debates over the Meech Lake and Charlottetown Accords demonstrated, Canadians have very different *visions* of their country. If Canadians were to agree that they were members of a single political society coming together to reach agreement on constitutional reforms, there would be no impasse on the trail to agreement. They would deliberate in accordance with, or in articulation of, a shared

understanding. However, there has been no such shared understanding of Canadian society. Instead, Canadians came to the negotiations with their own diverse visions of the federation (Tully, 1993: 161). The precise understanding of these competing visions are, of course, described somewhat differently by different observers, as will be demonstrated in this thesis. Since each understanding articulates the way political power should be organized from its perspective, when it is brought forward as the comprehensive understanding, each necessarily posits its arrangement of political power as normative.

In the immediate sense of the term, it can be said that there exists an impasse in the current federal system because a number of Canadians are resolutely embarked on the dead-end road of a mutually exclusive vision of the future of their relationship (Latouche, 1998: 334). As this thesis argues, Canadians must directly challenge this ideal of a unitary Canadian nationality. The problem is not simply that English-speaking Canadians, Québécois, and Aboriginal peoples desire different powers from one another, although this may be the case in some instances. The problem is that these differences between political communities reflect a much deeper difference in the very conception of the nature of the Canadian federation (Kymlicka, 1998: 26).

At the heart of the present impasse lies a clash of national visions, aspirations and identities. As I argue in this thesis, in order to move beyond this impasse, Canadians must begin to think of Canada more in terms of a multinational federation. We must be willing to acknowledge and accommodate Quebec's and Aboriginal nations' demands within the current boundaries of our federal system via an asymmetrical arrangement. Alain-G. Gagnon and Guy Laforest argue: "At the basis of repeated constitutional failures in Canada, there is

a common denominator which could be summarized as a substantial insensitivity on the part of too many Canadians to the presence of multiple national communities aspiring to share and continue building a country together (Gagnon & Laforest, 1993: 487). As I argue later in this thesis, the desire for national recognition runs deep. It cannot be ameliorated by giving to all political entities that, in the end, which Quebec and Aboriginal nations essentially strive to achieve- greater autonomy in form and substance within the Canadian federal system.

In order to determine what has led to an interest in asymmetrical federalism in recent years, this thesis begins by analysing what exactly is meant by the term "federalism". Chapter 1 provides a comprehensive overview of the concept of federalism, focusing largely on the significance of diversity to federalism. This overview by no means exhausts the literature on Canadian federalism. It is merely meant to serve as an interpretative guide in an attempt to illustrate that the study of federalism, in particular asymmetrical federalism, is not a monolithic venture. In this chapter, I argue that a major reason for the adoption of federalism in Canada has been to recognize and accommodate diversity. Broadly speaking, the term "federalism" as employed in this chapter refers to the coming together of communities for some purposes and underscores a deep respect for their differences. It maintains and promotes the deeper differences that distinguish communities from one another. As this chapter illustrates, a number of attempts have been made to "define" federalism over the years. However, almost any possible definition poses potential problems. I argue in this chapter that rather than viewing federalism as a single, easily-definable concept, it is much more useful to view federalism as a "multi-faceted" or multi-

dimensional concept. In effect, we must acknowledge that within any definition of federalism there are a number of different interpretations of this concept. Therefore, it is essential to move beyond a rigid manner of thinking about the nature of Canadian federalism to explore alternative concepts and models for the future, such as asymmetrical federalism. This chapter maintains that we must look to a federalism that recognizes diversity. A federalism based on diversity, as argued throughout this thesis, is closer to asymmetrical federalism.

In Chapter 1, my argument is elaborated through a discussion of the concept of federalism. While the body of literature on federalism is taken as my starting point and informs the basis of my understanding of asymmetrical federalism, I attempt to draw out some of the main shortcomings which have become dominant in the contemporary literature. In brief, many contemporary accounts of federalism have tended to view federalism from a purely a structural and institutional perspective. This focus on federalism, however, largely serves to underestimate the current complexities of the federal system- including the fact that within Canada there exists diverse nationalities with diverse needs that demand accommodation within the federal union. Apart from the fact that traditional classifications of federalism fail to tell us little about how political systems actually operate, this focus is problematic because it fails to adjust to the realities of social and political processes, especially the multinational reality of the contemporary Canadian federal system. Moreover, viewing federalism as a rigid structure cannot explain the continued presence and resiliency of Quebec and Aboriginal demands for greater autonomy within the federal system. While knowledge of the structural characteristics of federalism is important to gain an

understanding of, for instance, the operational aspects of the federal system itself, equally important, however, is obtaining a deeper understanding the nature of the political processes of federalism.

In Chapter 2, I examine in detail the principles of asymmetrical federalism and the equality of provinces. My task in this chapter is to examine the dynamic relationship between these two competing principles which are often at loggerheads with one another. Asymmetrical federalism and the principle of equality of provinces form the basis of a number of contemporary arguments on the nature and structure of Canadian federalism. For the purposes of this analysis, asymmetrical federalism is described as a system in which some federal units have greater autonomy than others. This chapter maintains that the basis for accommodation of diversity within the federal system exists in a strategy based on asymmetry. Asymmetrical federalism currently offers an alternative for accommodating the diversity of Quebec and Aboriginal nations within the Canadian federation. Often the argument against asymmetry is based on the belief that provincial equality requires uniformity with regard to provincial powers. However, this chapter argues that this line of reasoning imposes on Quebec and Aboriginal nations a domination that they fundamentally reject. While a number of students of Canadian federalism subscribe to the principle of equality of provinces, in this chapter I argue that Canadian federalism has never required the idea of the equality of provinces. While all provinces may be equal *juridicially* under the Constitution (British North America) Act, 1867, in practical terms, the nature and extent of their responsibilities vary to some degree. In short, while asymmetry may seem well-suited to the shape of political commitment in Canada- and even though Canadians have, at times,

arranged their political structures in ways that recognize (implicitly at least) the value of asymmetry- this chapter argues that there still remains widespread suspicion of it.

Chapter 3 explores the historical evolution of asymmetry within Canada as it relates specifically to Québécois and Aboriginal peoples. This chapter begins by providing a brief sketch of some of the asymmetrical arrangements already in existence in the Canadian federal system. I have made no attempt in this chapter to reconstruct every historical argument which has bore the question of asymmetry. Instead, I have concentrated rather broadly on a limited number of asymmetrical illustrations and possible arrangements for the future, particularly as they relate (or could potentially relate) to Québécois and Aboriginal peoples. While asymmetrical federalism is a concept that has been used with greater frequency in recent years, it is a concept that also has deep roots in Canadian history. One premise that informs this chapter is that it is much easier to understand the dimensions of the current political debate when it is placed and examined in the larger historical context from which it is derived. I argue that from its very origins, the Canadian federal system has had to cope with the existence of deep territorial, cultural, and linguistic differences. Indeed, in 1867, the Fathers of Confederation agreed to create a new country based on a recognition such diversity. This was acknowledged in the Constitution Act, 1867, under various provisions outlined in this chapter.

In Chapter 3, I also offer a brief sketch of recent constitutional initiatives which have attempted to incorporate the principle of asymmetrical federalism in various ways. This chapter argues that attempts at constitutional reform, such as the distinct society clause of the Meech Lake and Charlottetown Accords were, ultimately, trumped by the principle of

provincial equality, advanced most vociferously in these constitutional rounds by politicians such as Clyde Wells and Preston Manning. Rather than addressing the concerns of Québécois and Aboriginal peoples on an asymmetrical basis, recent constitutional initiatives have essentially tried to "paper over the differences" between competing visions of federalism, without seriously addressing the underlying diversity and demands for recognition at the root of the federal union. The fundamental ideological conflict over the very meaning and nature of Canada was kept, for the most part, well beneath the surface in the constitutional arena.

In Chapter 4, I evaluate the current debates surrounding asymmetrical federalism in the Canadian political realm. I begin this chapter by analysing the viability of various options for asymmetry within the current federal system by critically looking at both non-constitutional and constitutional arrangements. The options for asymmetry examined in this chapter include: the status quo option- evolution within the existing federal framework; concurrency with provincial paramountcy; asymmetry via representation in central institutions, including proposals for *"quid pro quo"* asymmetry; and, the option of avoiding the issue of asymmetry. From time to time, a number of political and intellectual élites have expressed specific interest in one or more of the outlined options for asymmetry. I argue in this chapter that while each option may, at first glance, appear politically and intellectually appealing, these asymmetrical options, however, are not without their own share of difficulties.

Chapter 4 also examines how, and, more importantly, if asymmetry can be accommodated within the current federal system. I argue that the notion of asymmetry has

failed to generate any substantial support in English-speaking Canada as a viable federal alternative. As I argue in this chapter, defenders of asymmetrical federalism, such as Will Kymlicka, often claim that greater asymmetry is needed to enable national minorities to pursue their interests and identities. For the most part, however, this claim has been unsuccessful in convincing English-speaking Canadians to support asymmetry. While English-speaking Canadians may be willing to accept a greater degree of provincial autonomy within the federal system, provided it was offered in a symmetrical manner to all federal units, this still falls short of the demands made by Quebec and Aboriginal nations for greater autonomy.

Given the current political climate in Canada, I argue it is unlikely in the near future that we will be able to reach an agreement satisfactory to each party until there is a clear recognition (and acceptance by Canadians) that different communities have diverse needs and aspirations which require recognition and accommodation within the federal system. It is doubtful, however, that the kind of recognition and accommodation demanded, in particular by Québécois and Aboriginal peoples, within the present political system can be achieved by non-constitutional means alone. As Jeremy Webber argues, part of the solution is to adopt an asymmetrical constitution (Webber, 1994: 314). This chapter argues that for Quebec and Aboriginal nations, there is huge difference between relying upon non-constitutional initiatives, such as administrative agreements, which are subject to unilateral abandonment by Ottawa, and firmly established guarantees of constitutional protection. Canada's contemporary political dilemma, however, extends well beyond the constitution to encompass divergent conceptions of the Canadian political community. As Rocher and

Smith argue, "when it is a matter of agreeing upon political identity, it is very difficult to reach some sort of agreement (Rocher & Smith, 1995a: 56)." While a case still remains for a form of asymmetry that is constitutionally entrenched, I argue that because of this later requirement it seems likely that asymmetry, while intellectually salient, is destined to remain on the political sidelines. Indeed, for a number of Canadians, the compromise required by an asymmetrical arrangement is simply beyond the realm of comprehension, at least for the time being.

CHAPTER 1

What is the Meaning of Federalism?

Federalism, as a concept, has had a long and complex history, both inside and outside Canada. Although the United States is often regarded as one of the first modern federations, the history of federalism is much older. Canadian federalism has been influenced greatly by American federalism, which tends to stress the one-nation concept, and no less profoundly by European traditions of federalism, which encourage the expression of many different political streams in the body politic (Gagnon, 1995: 24). One of the fundamental issues facing Canadian federalism today is about "reconciling differences" as Charles Taylor argues- about accommodating diversity within our federal political system. In fact, many have linked the survival of the Canadian federation on its ability to adapt to profound diversity. The following chapter will examine the concept of federalism, focusing largely on the significance of diversity to federalism[1]. This chapter will essentially argue that a major reason to adopt federalism in Canada has been to recognize and accommodate diversity. In this view, asymmetrical federalism is suggested as the path to follow for future attempts at reconciling differences.

A recurring theme in Canadian politics in recent years has been the supposed failure of the Canadian federal system and a growing scepticism about the viability of federalism (LaSelva, 1996: 117). Although political structures have remained relatively fixed over the past few decades, many changes have occurred in perceptions of the federal system. Political alienation, pessimism, and mutual distrust have become widespread in many political discussions (Laforest, 1998b: 425). Today federalism is increasingly viewed by a number of Canadians as an obstacle to the accommodation of territorial, linguistic, and cultural diversity[2]. For some, federalism as it is currently exercised in Canada, denies Québécois and Aboriginal peoples the recognition of their diverse political identities and communities[3].

All too often it is assumed that the choice before Canadians is limited to the acceptance of the present structure of the Canadian federal system or the dissolution of the country. To limit consideration to these two alternatives, however, is to deny the potential for other federal arrangements and innovations- such as asymmetrical federalism. Is Canada merely reduced to these two alternatives? This is only the case if we are misled into assuming that the only kind of significant change to the federal system is comprehensive constitutional change (Watts, 1996: 114). This chapter maintains that Canadians must move beyond a rigid manner of thinking about the nature of Canadian federalism to explore alternative concepts and models for the future. We must look to a federalism that recognizes diversity. A federalism based on diversity, as this chapter will argue, is closer to asymmetrical federalism.

Focusing on the legal, institutional, and structural characteristics of governments, a number of students of federalism have argued that the distribution of powers is an essential

feature of federalism. For instance, K.C. Wheare, in Federal Government, viewed the existence of a constitutionally entrenched division of power as a primary feature that distinguished federal from unitary states. He defined the federal principle as "the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent (Wheare, 1964: 10)." For W.H. Riker, "The essential institutions of federalism are, of course, a government of the federation and a set of governments of the member units, in which both kinds of government rule over the same territory and people and each kind has the authority to make some decisions independently of the other (Riker, 1979: 5)." Richard Vernon, meanwhile, suggests that federalism has traditionally been described in terms of constitutional law as "a system in which powers are divided between central and regional authorities, each governing directly and independently within its own defined sphere, and neither being able to modify the division of powers unilaterally (Vernon, 1988: 3)."

A number of classifications of Canadian federalism have been tied to constitutional positions. Mallory's "Five Faces of Canadian Federalism" is one example of a descriptive delineation of various types of federalism. Ranging from emergency federalism to cooperative federalism, this classification covers the historical development of Canadian federalism in terms of power relations between levels of government. While typologies of this sort are useful in understanding the historical evolution of Canadian federalism, Rocher and Smith argue that they largely serve to underestimate the current complexities of federalism (Rocher & Smith, 1995a: 46).

Attempting to conceptualize federalism as the preceding theorists have appears too narrow where federalism is defined strictly in descriptive terms. While it may seem plausible by some to treat federalism as a concrete, easily defined, and value-free concept, somehow the effort to treat federalism in this manner will never be entirely satisfactory (Stevenson, 1989: 3). Apart from the fact that the formal criteria are restrictive, these classifications tell us little about how political systems actually operate[4]. Federalism strictly defined in such a manner fails to adjust to the realities of social and political processes. An examination into contemporary Canadian federalism, therefore, must go beyond the descriptive aspects of the debate.

From time to time students of federalism have felt uneasy about relying solely upon constitutional law for their categories. In reaction against the rigidity and formality of traditional criteria, a number of political scientists began to explore alternative approaches to federalism, shifting attention from formal institutions to a greater emphasis on political processes. Consequently, many observers began to abandon the classical view that roles and responsibilities could be assigned, once and for all, by means of a list dividing the matters over which order of government would have exclusive legislative authority. Daniel Elazar argues "in a larger sense federalism is more than an arrangement of governmental structures; it is a mode of political activity that requires the extension of certain kinds of cooperative relationships throughout any political system it animates (Elazar, 1984: 2)." In other words, federalism came to be regarded more as a dynamic system in which a constant balance had to be struck between different sets of conditions. Arguably, then, an attempt should be made to understand the ways in which social, economic, and political conditions, and federal

institutions and political processes interact with each other in a federal system. While knowledge about the structural characteristics of a federal political system is important to gain an understanding of its character, equally important is the nature of its political processes. Federalism, in short, must be viewed as more than a *structure*; it is also a *process* (Lenihan et al, 1994: 137).

In exploring the concept of federalism, Gagnon also argues that federalism must be examined from two points of view: institutional and sociological. The institutional dimension refers to the arrangements that structure relationships between communities, regions and levels of government either within central institutions or between orders of government. The sociological dimension, on the other hand, focuses on the issues of homogeneity and diversity, as seen in various federal practices and the reaction of groups and communities who see greater potential in arrangements that give broader expression to community or regional interests. Federalism, he contends, is a political device for establishing viable institutions and flexible relationships capable of facilitating interstate relations, intrastate linkages, and inter-community cooperation. With an emphasis on process, institutions can be seen as arising out of politics (Gagnon, 1995: 23).

Defining Federalism

Disagreements about federalism are not new in Canada. In fact, Canadians have almost always disagreed about it to some extent. As Garth Stevenson suggests, even those

concerned with the study of federalism largely disagree over what it means, what is included, and what should be excluded in any proposed definition (Stevenson, 1989: 3). While many attempts have been made to "define" federalism, it should be noted that almost any possible definition poses potential problems.

Before beginning an examination of "federalism", it must be acknowledged that the study of federalism is not monolithic in itself. By looking at *federalism* as a "multi-dimensional" and "multi-faceted" concept, we must recognize that within any definition of federalism there are a number of different definitions and interpretations of this concept which depend largely upon the starting point and predominant "vision" of the perceiver. Clearly, federalism means and will continue to mean different things to different peoples and communities.

Broadly speaking, the term "federalism", as employed in this chapter will refer to "the coming together of communities for some purposes and underscores a deep respect for their differences." Federalism maintains and promotes "the deeper differences that distinguish communities from one another (Gagnon, 1994: 95)." In a similar vein, Lenihan, Robertson, and Tasse argue that the choice of federalism is a general commitment that "Canadians' common interests will be subject to, or restrained by, a general respect for the regional, cultural and linguistic diversity of the country (Lenihan et al, 1994: 12)."

For the sake of clarity it is possible to distinguish between three terms: "federalism," "federal political systems" and "federations." In Comparing Federal Systems in the 1990s, Watts argues " federalism...refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule." He argues federalism is based on combining

unity and diversity and accommodating, preserving, and promoting distinct identities within a larger political union (Watts, 1996: 6). Adopting Watts' definition, then, it can be argued that fundamental to federalism is the need to respect diversity. An essential element, therefore, in any federation encompassing a diverse society must be the acceptance of the value of diversity and the possibility of accommodating multiple identities and loyalties[5]. This may be accomplished, Watts argues, through the establishment of constituent units of government with genuine autonomous self-rule over those matters most important to their distinct identity. Equally important, he argues, is the recognition of the benefits derived from shared purposes and objectives within a diverse society providing the basis for parallel processes of shared-rule (Watts, 1996: 113).

While highlighting the significance of unity and diversity to his definition of federalism, Watts, however, does not explicitly define what is meant by "unity", nor does he refer to those specific "matters" which he considers to be most important in the preservation and promotion of distinct identities to which he is referring in his text. At the same time, Watts also fails to provide any detailed elaboration as to what the "shared processes" of shared-rule might encompass. In this particular instance, we can only speculate that Watts presumes Canadians share certain things in common depending upon their community of origin such as, for instance, a profound commitment to democracy, a deep concern for social justice, as well as a clear desire to defend the principle of equality[6]. Watts, however, fails to broaden his discussion of these concepts and their relation to the processes of shared-rule and regional self-rule. For even if Canadians (or some of them, at any rate) share in some of these objectives, they often disagree on their exact meaning and on the means to attain

them.

The term "federal political system" is generally referred to as a broad category of political systems in which two or more levels of government combine *self-rule* for the governments of the constituent units with elements of *shared-rule* through common institutions. This broad genus may encompass a whole spectrum of species, including "federations"[7]. It should be noted that within the genus of federal political systems that each of the other species in itself may encompass a variety of arrangements. For example, it is possible for the powers or purposes assigned to the common institutions in a relatively centralized confederation to be greater than that of those in more decentralized federations. As well, it is possible for other political systems outside the genus category of "federal systems" to incorporate some federal arrangements in the search for political arrangements (Watts, 1996: 6).

As has been previously mentioned, "federations" represent a particular species within the genus of federal political systems. Traditionally, Watts argues the analysis of federations has centred upon relations between federative and state governments (Watts, 1998: 384). Within a federation, two or more orders of government co-exist, each with a range of powers and activities (Leslie, 1994: 65). A federation, it has been argued, "is a regime of coordinate authority, in which some division of jurisdiction between centre and region is constitutionally protected (Vernon, 1988: 3)." Within a federation neither the federal nor the constituent units of government are constitutionally subordinate to the other (Watts, 1996: 7).

The Canadian Experiment: Why Adopt A Federal Union?

There is a rich federalist tradition in Canadian politics that emphasizes a commitment to respect the country's territorial, linguistic, and cultural diversity. The Canadian constitutional experiment had as a primary objective the accommodation of diversity. Attempting to accommodate diversities within the new federal union, however, would not be an easy task. Problems associated with the accommodation of diversity did not emerge only after Confederation. In fact, as LaSelva argues, many of them already existed prior to 1867 and were apparent in the Confederation Debates of 1865 (LaSelva, 1996: 37). The Confederation Debates of 1865 raised the challenging question of a "common Canadian identity". If Canadians were so different among themselves, what could keep them together? If federalism was the means that enabled different nationalities both to live together and to live apart, as George-Etienne Cartier suggested in the debates, then could a country composed of different nationalities both respect the rights of nationalities and become one nation?

Following the conflict and political instability that characterized the Union government after 1840, it was acknowledged by some of the Fathers of Confederation that a federal system would be the most suitable type of political system to respond to the aspirations of Lower Canada, as well as the marked regionalism of the Maritimes (Rocher & Smith, 1995a: 51). In stating his preference for a "legislative union" before the Canadian Assembly in 1865, John A. Macdonald argued:

> [But] we found that such a system was impracticable. In the first place, it would not meet the assent 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...their institutions and laws might be assailed, and their ancestral associations...attacked and prejudiced (Waite, 1963: 40).

Macdonald continued: "We found too, that...there was as great a disinclination on the part of the various Maritime provinces to lose their individuality, as separate political organizations, as we observed in the case of Lower Canada herself (Waite, 1963: 40)."

While Macdonald may have originally wanted a legislative union, he settled for a federal one. As McRoberts argues: "It was clear that federalism was the price of Confederation, given French-Canadian attitudes...And the Maritime leaders, fearful of dominance by Upper and Lower Canada, were seizing on federalism as a way to protect their own autonomy (McRoberts, 1997: 10)." Thus, federalism came to be regarded as a way of accommodating what the Fathers of Confederation saw as two of the most important forms of diversity in the proposed new country: the regional distinctions between the Maritime provinces (New Brunswick and Nova Scotia) and Upper and Lower Canada; and the linguistic and cultural distinctions between French and English-speaking Canadians (Lenihan et al, 1994: 12). While federalism may have been the basis upon which French Canadians and Maritimers were prepared to join in the Confederation agreement, its status was extremely precarious[8] (McRoberts, 1997: 10).

Although the majority of the Fathers of Confederation appear to have recognized the need to accommodate diversity through federalism, it should be noted that the BNA Act was

drawn up to closely resemble a unitary state. It has been suggested that the Fathers of Confederation [or at least some of them] favoured a centralized federal system whereby, in Macdonald's view, the provincial governments would be nothing more than glorified municipal governments (Rocher & Smith, 1995a: 57). LaSelva argues that Macdonald envisaged a project of nation-building that would gradually reduce the provinces to administrative units of the central government (LaSelva, 1996: 173). Attempting to avoid the mistakes believed to have been made in the design of the United States constitution, Macdonald reasoned: "We should thus have a powerful Central Government, a powerful Central Legislature, and a decentralized system of minor legislatures for local purposes (Waite, 1963: 153)."

While the BNA Act is an ambiguous document, there is evidence that the federal government was intended to be the senior level of government. The inclusion of certain measures in the Act suggested that the central government would play the predominant role in the new federal system (Rocher & Smith, 1995a: 57). These measures included, for example, the powers of reservation and disallowance, the peace, order, and good government clause, and the fact that senators, lieutenant-governors, and superior court judges would be appointed by the Governor-General in Council (Lenihan et al, 1994: 12). Specifically, the federal government was given the right to "disallow" legislation already passed by the provinces, as well as instruct a lieutenant-governor to reserve legislation passed by a provincial legislature until such time as the federal cabinet should consent to the legislation. Owing to the predominance of the English-Canadian bourgeoise in the Confederation movement, the federal government was also given the critical jurisdiction affecting Canada's

economic life, as well as exclusive access to the primary source of revenue- indirect taxes (McRoberts, 1997: 12). While the Fathers of Confederation probably believed that they had achieved a high degree of simplicity and accountability by placing federal and provincial powers in exclusive, watertight compartments, the presence of these "centralizing elements" in the BNA Act has resulted in the original union often being referred to as "quasi-federal"[9].

The Constitution Act, 1867, reflected a limited view of the role of government. The distribution of legislative powers was largely based upon the idea of exclusive jurisdictions. At that time, the division of powers between the federal and provincial levels were between matters which were considered deserving of government attention and action. However, since the time of Confederation the role of government has undergone considerable change (Lenihan et al, 1994: 135-6). Today matters over which governments have legislative jurisdiction in Section 91 and 92 of the Constitution Act, 1867, serve as an inadequate guide to the roles and responsibilities of government in Canada. For various fiscal, economic, and social reasons, Canadian federalism does not operate in "watertight" compartments as the classical theorists of federalism suggest. In practice, a significant level of overlap has developed between various federal and provincial jurisdictions in the post-war era (Rocher & Smith, 1995b: 20). In other words, there is a difference between formal jurisdictions and the working reality of Canadian federalism. This trend is likely to continue into the future.

Federalism As A Conflict-Management Device

Despite the overlap and cooperation that sometimes occurs between levels of government, the Canadian federal system has often been characterized by a great deal of conflict and controversy surrounding the division of powers[10]. Conflict between governments is not a new phenomenon, as the relations between Macdonald, Mowat, and Mercier over a century ago attest (Stevenson, 1988: 56). In fact, it has even been suggested that conflict is a natural part of all federal systems. The success of political systems, then, is not to be measured in terms of the elimination of conflicts but, instead, in their capacity to regulate and manage conflict. Explanations of how federal systems have managed significant crisis, such as economic, political or structural, often emphasize cross-cutting cleavages, political elite behaviour, and political instrumentalities or administrative arrangements (Gagnon, 1995: 25). Ronald Watts argues if conflict is to be managed, then institutional arrangements must permit the effective expression of diversity. Whether conflict within a federation can be managed depends not only upon the strength and configuration of the internal divisions within the society but also upon the institutional structure of the federal system. The way institutions have channelled the activities of, for example, the electorate, political parties, interest group activity, bureaucracies, and so on, contributes to the moderation or accentuation of political conflicts. The function of federations, therefore, is not to eliminate internal differences but, rather, to preserve distinct identities within a united framework. How well this is done, however, has often depended upon the particular form of the institutions adopted within the federation (Watts, 1996: 102).

In short, it is completely misleading to expect federalism to entirely "resolve" conflict. At most, federalism it can only *attempt* to ease tensions and be sensitive to diversity. With this in mind, federalism is not achieved once and for all; rather, it is always in the process of being ameliorated. Federalism is about social engineering and political ingenuity (Gagnon, 1995: 30). Insofar as federal systems seek to accommodate diversity, conflicts must be recognized as inherent to the federal setting.

Canadians, at least until 1982, Gagnon argues, have tended to respect the conflictual nature prevalent in their federal system and to view diversity as a beneficial feature of federalism. While diversity invariably produces some conflict, this does not have to be conceived as a weakness. Rather, federalism can be used to express conflicts and to give incentives for reaching compromises that might otherwise jeopardize the survival of many polities (Gagnon, 1995: 26-7). As Guy Laforest argues: "If conflicts and tensions were to be eliminated, there would no longer be any politics (Laforest, 1998a: 71)."

While Stevenson suggests that federalism protects minorities and enables cultural, linguistic, and ideological diversity to flourish, Vernon argues perhaps this claim needs to be weakened (Stevenson, 1989: 16). Vernon maintains: "federation may be one of the ways in which subnational autonomies are protected, though it is neither (always) a necessary nor (ever) a sufficient condition (Vernon, 1988: 6)." Although it has been suggested that federalism attempts to ensure the protection of minorities and territorial interests, this assumption cannot simply be taken for granted. As Maureen Covell argues:

> ...federalism is not always a guarantee of protection for minorities at the national level. The existence of Quebec as a political unit has not

> allowed the Quebecois to prevent the perpetuation of the British connection, participation in two world wars, and, most recently, the explicit denial of a Quebec veto over future constitutional revision. The existence of the prairie provinces as institutions did not protect farmers against the effects of eastern economic domination...Federal institutions provide a tool for self-defence but no guarantee of success[11] (qtd in Gagnon, 1995: 30).

Reflecting on the cultural diversity of society, Kenneth McRae notes that Western political thought has shown little respect for diversity, preferring instead to adopt universalistic, integrationist, or assimilationist principles (McRae, 1979: 676). In citing Rousseau's *general will*, for instance, Trudeau attempted to advance the view that Canada "had a will of its own" and that Canadians were one people (LaSelva, 1996: 91).

While a number of the Fathers of Confederation sought to create a single nation, united by a strong central government and a common nationality, it has been suggested that they were able to provide a foundation for Canadian federalism because they believed that the divergent aspirations of Canadians could be accommodated within the structures of Confederation. Distinctiveness and difference were situated within the federal system rather than opposed to it. Trudeau's universalism, however, works against this understanding of federalism (LaSelva, 1996: 108-9). Essentially, what Trudeau refused to grant was that different identities within Canada spoke for values that his universalism was unable (and unwilling) to accommodate (LaSelva, 1996: 108-9).

Many have since reacted against aspects of Trudeau's nation-building project by *strengthening* rather than abandoning their attachment to aspects of their communities

(Lenihan et al, 1994: 45). For example, a number of Aboriginal and Québécois nationalists have refused to accept that their concerns be subordinated to a pan-Canadian vision of the country. They argue as historic partners that make up this country, they have distinct national identities and discourses which must be recognized. However, Trudeau's understanding of federalism was such that it failed to recognize the significant diversities that sought mutual accommodation within Canada. It is, in fact, rather ironic that Trudeau's universalism resulted in a vision of Canada that has subsequently exacerbated the very divisions within the country that it was originally intended to heal (Lenihan et al, 1994: 45).

The Canadian Federal System, Diversity, and "Mutual Recognition"

Over the years political leaders and commentators have often called for a return to the "spirit of Confederation." But, upon closer examination, it is clear that more than one "spirit" presided at the deliberations that led to Confederation. In fact, the Confederation agreement was inspired by several conflicting visions. As has been suggested in this chapter, a number of Canadians have disagreed and continue to disagree about their respective *visions* of the country. In one tradition, particularly strong in Quebec and among some Aboriginal peoples, a heavy emphasis is placed on the commitment to respect the diversity of the country through federalism. The commitment to respect diversity through federalism, they argue, is about accommodating different kinds of *communities* in a single state (Lenihan et al, 1994: 35). For example, McRoberts argues that from the outset of Confederation, many

anglophones and francophones had very different understandings of the political order that had been created[12] (McRoberts, 1997: 13). In another tradition, largely advanced by Trudeau, this commitment to diversity is seen as independent of, and subordinate to the view that a liberal state's primary commitment is to protect and promote the freedom and equality of individual citizens (Lenihan et al, 1994: 14). While Canadians may not share in a "common" vision about what actually constitutes the essence of federalism, or even, for that matter, with regards to an alternative structure for the Canadian union, Seidle argues this is not to be entirely deplored (Seidle, 1994: 223). In fact, such a situation may provide an opening for a serious consideration of political alternatives such as asymmetrical federalism.

Proposals such as Macdonald's pan-Canadianism, as well as Trudeau's universalism, assumed it was possible to have a united, homogeneous "Canadian people" within a single nation- Canada. However, upon reflection, it seems foolhardy to attempt to attain a singular sense of common identity within the federal system as Canadian federalism presupposes diversity. It should be recalled that at the time of Confederation, George-Etienne Cartier insisted that Canada's greatness as a nation did not depend on the elimination of the smaller nationalities and local identities that formed a part of it. Rather, he asserted that once adopted, federalism would create conditions that would serve to facilitate cooperation and mutual understanding (LaSelva, 1996: 189-90). What is particularly striking about Cartier's image of federalism was that it tended to privilege cooperation and mutual understanding over assimilation and acculturation[13].

What sustains Canada, then, is not a singular sense of patriotism but a mutual recognition of diversity. LaSelva argues mutual recognition was initially expressed through

the federal idea (LaSelva, 1995: 127, 131). In a culturally, linguistically, and territorially divided country such as Canada, guarantees of mutual recognition require the recognition of difference. A richer recognition of the distinct features of communities must be built into basic institutions and processes within the Canadian political system. By some accounts, if mutual recognition is to be achieved within contemporary Canada, then this presupposes a constitutional recognition of Quebec as a distinct society and a similar kind of recognition of Aboriginal peoples.

It should be noted, however, that guarantees of mutual recognition or accommodation can become ineffective or obsolete if federation becomes associated with over-centralized and unresponsive government or with the suppression of cultural particularisms (LaSelva (1996): 128). When recognition of diversity is rejected, for instance, as was the case with the Meech Lake Accord, significant differences may become more problematic and more difficult to accommodate within the Canadian federal system[14]. In fact, Charles Taylor has warned of the danger of breakup, rooted in the increasing failure of French and English-speaking Canadians and other groups to grant each other mutual recognition (Taylor, 1992: 64).

The Asymmetrical Alternative

Federalism is a process offering a variety of options to cope with many conflicting cleavages (Gagnon, 1995: 39). Over the years federations have varied greatly in their

institutional design and in their operational processes to meet their own particular conditions (Rocher & Smith, 1995a: 56). As Albert Breton notes:

> Federalism...provides greater stability by diffusing conflicts and expectations throughout the system. It offers the opportunity to tailor economic policies to the specific needs and concerns of citizens and groups in different parts of the country...it provides the opportunity for experiment and learning, for flexibility and inventiveness...(Breton, 1964: 148).

The implication of this statement for the future development of Canadian federalism is that we should not be constrained by traditional arrangements or theories about federalism (Watts, 1996: 113). With this in mind, there are various forms that Canadian federalism could take to respond to the varied interpretations and visions of federalism- including asymmetrical federalism[15].

Currently, a number of Canadians are attempting to "reimagine Canada" in an effort to uncover a theory of federalism that better accommodates diversity (LaSelva, 1996: 196). Reclaiming the respect for diversity and flexibility in a theory of federalism is vital for the future of Canadian federalism (Lenihan et al, 1994: 154). Indeed, many have linked the survival of the Canadian federation on its ability to adapt to profound diversity.

Today we must look to a federalism that recognizes and *accommodates* diversity. A federalism based on such diversity is closer to asymmetrical federalism. In all likelihood, however, political change vis-à-vis asymmetrical federalism will be difficult to accept, especially for those Canadians content with their place in the current federal system. To persuade Canadians, especially English-speaking Canadians, to seriously consider the

asymmetrical alternative will, no doubt, be challenging. This, however, does not mean that we should abandon the asymmetrical alternative outright.

Until recently, asymmetrical federalism has largely been relegated to the margins of Canadian political discourse. As will be examined throughout this thesis, arguments favouring asymmetry have not only been put forth by francophone Quebecers. Many Aboriginal nations have also demanded the recognition of their distinctiveness. Increased (and more vocal) demands for a new division of powers (i.e. decentralization or special status for Quebec or Aboriginal nations) are a reflection of the need to recognize that some communities, because of their minority status, may need particular political levers to ensure their development (Rocher & Smith, 1995a: 56). In this view, asymmetry has been suggested as the path to follow[16]. Similarly, LaSelva argues "a federal and pluralistic Canada means the accommodation of the new nationalism in Quebec and the acceptance of a measure of self-government for Aboriginal communities[17]. The existence of Canada requires Canadians to come to terms with asymmetrical federalism (LaSelva, 1996: 195)." Others, meanwhile, stress the improbability or impossibility of coming to a compromise or accommodating diversity based on this principle (Rocher & Smith, 1995a: 54).

Conclusion

While Canadians disagree about the nature of their country, it must not be forgotten that Canadians do share a history- a history which suggests that the very existence of Canada

depends on the ability to compromise and respect diversity. In the future an even greater effort must be made to attain a mutual recognition and understanding between the diverse political communities living together in Canada. This will require greater flexibility in acknowledging a diversity that goes beyond the issue of institutions (Rocher & Smith, 1995b: 9). As this chapter argues, an important step towards approaching a mutual recognition and accommodation of diversity requires a significant examination of the asymmetrical alternative within Canadian federalism.

Clearly there is no way to end all conflict and disagreement once and for all within the Canadian political system- for at the heart of the matter lies a clash of visions, assumptions and identities (Laforest, 1998a: 65). While Canadians may agonize over the difficulty of coming to terms with diverse visions within their federal system, many still fail to realize that it is beyond the capacity of federalism to completely eliminate this diversity. Diversity is an inherent feature of the Canadian federal system- and is central to any understanding of Canadian federalism. It always has been; it always will be. If Canadians refuse to accept and recognize this basic presupposition of federalism, then Canada may eventually dissolve into new associations in the years to come.[18]

CHAPTER 2

Asymmetrical Federalism and the Equality of Provinces Principle: A Clash of Visions?

It has been argued that a federal structure- and an asymmetrical structure at that- is most consistent with the actual shape of political community and political allegiance in Canada (Webber, 1994: 254). Kenneth McRoberts suggests "asymmetrical federalism would seem to be tailor-made for a political system such as Canada's in which the accommodation of societal diversity has been an endemic problem (McRoberts, 1985: 121)." Asymmetrical federalism, however, often comes up against the principle of equality of provinces. In recent years, the principle of equality of provinces has become a powerful rallying cry against any form of asymmetry in the Canadian federal system. The following chapter will examine both the principles of asymmetrical federalism and equality of the provinces. This chapter will essentially argue that the principle of equality of provinces seems to impose on Quebec and Aboriginal nations a domination that they both fundamentally reject (Gagnon, 1994: 96). Although several students of Canadian federalism adhere to the principle of equality of provinces, Canadian federalism has never required the idea of the equality of provinces. Canadian federalism, rather, is based on a diversity which is closer to asymmetrical federalism than to the equality of provinces.

What is "Asymmetrical Federalism?"

Federal political systems vary in many of their dimensions. The phrase "federal arrangements" properly suggests that there is more than one way to utilize federal principles (Elazar, 1994: 22). Simeon and Swinton argue "federalism provides opportunities for innovation and experiment, for diverse responses to different needs (Simeon & Swinton, 1995: 9)." As the preceding chapter has argued, the term "federalism" suggests the coming together of communities for some purposes and underscores a deep respect for their differences (Gagnon, 1994: 95).

Many students of federalism point out that the existing federal system in Canada has always been "asymmetrical" in practice. Historically, federalism was used to accommodate diversity rooted in political units. This was recognized by most of the Fathers of Confederation in 1867. They believed that the adoption of a federal structure must be accompanied by the recognition of asymmetry, even though a centralist will was clearly expressed from the outset (Pelletier, 1998: 326). The Constitution Act, 1867, for example, recognized the particular character of Quebec by including some recognition of asymmetry in provisions relating to language, education and civil law. While the federal structure adopted attempted to take into account the territorial, cultural and linguistic diversity that characterized the era, efforts within the last three decades, in particular, to formally recognize the reality of Quebec's distinctiveness, as well as efforts to fully realize Aboriginal self-government, have proven to be very problematic (Watts, 1996: 22).

Several political scientists differ in the meaning they attach to the concept "asymmetrical federalism". Clearly, there is no one consensus on its meaning. In a discussion of asymmetrical federalism a great deal hinges on how the issue is framed, how many options are on the table, and how these options are labelled (Blais, 1994: 188). For instance, Richard Simeon argues: "asymmetry suggests that the federal system should be designed to ensure each provincial community [the] powers suited to its particular need[s] (Simeon, 1995a: 258)." Kenneth McRoberts, meanwhile, defines asymmetrical federalism as "variations among provinces in the respective roles assumed by the federal and provincial governments (McRoberts, 1985: 120)." While these definitions may provide useful conceptualizations of asymmetrical federalism, they are, however, based on the assumption that there are *only* two orders of government in Canada- federal and provincial. Although, for the time being at least, this may be true, we are gradually moving toward the realization of aboriginal self-government which will entail the creation of a third order of government in Canada. Fafard argues while the precise meaning of this concept has yet to be worked out, aboriginal self-government is being discussed in greater detail vis-à-vis agreements between Aboriginal peoples and the federal and provincial governments (Fafard, 1996: 15). Thus, attempts to "define" asymmetrical federalism in the future should acknowledge the potential for a third order of government in the Canadian political process.

For the purposes of this analysis, asymmetrical federalism will be described as a system in which some federal units have greater autonomy than others. This is present not only in Quebec's demands, but also in the demands of Aboriginal nations. The principle of *asymmetry* recognizes that the unity sought through federalism is not synonymous with

uniformity and, therefore, must respect diversity. As Réjean Pelletier argues, this may result in powers being granted, if not exercised, through a variety of channels which are a reflection of this diversity. In effect, asymmetry would create a formula that would allow us to rediscover the very origins of federalism since the application of these principles would help maintain Canadian unity while respecting the federation's diversity (Pelletier, 1998: 323-4).

In a classic study of asymmetrical federalism, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation", Charles D. Tarlton defines "symmetry" as the level of conformity and commonality in the relations of each separate political unit of the system to both the system as a whole and to the other component units (Tarlton, 1965: 867). He argues that an "ideal symmetrical federal system" would be one composed of political units comprised of equal territory and population, similar economic features, cultural patterns, social groups and political institutions. Each state would, because of its basic similarity, be concerned with the solution of the same sorts of problems and with the development of the same sorts of potential. There would be no significant differences from one state to another in terms of the major issues about which the political organization of a state might be concerned. Tarlton continues to argue, in a model symmetrical federal system, each state would maintain essentially the same relationship to the central authority. The division of powers between the central and state governments would be nearly the same in every case. Representation in the central government would be equal for each component polity, and support of the activities of that central government would also be equally distributed (Tarlton, 1965: 868). Essentially, no significant diversity would exist which might demand special forms of protection or representation.

In no federation, however, are the units completely symmetrical. They vary in size, shape, economy, geography, population, wealth- if not in history, culture, language, and so on. According to Tarlton, the "ideal asymmetrical federal system" would be one composed of political units corresponding to differences of interest, character, and make-up that exist within the society. The asymmetrical federal system would be one in which, as Livingston argues of political systems in general, the diversities in society find political expression through varying degrees of autonomy and power[19]. An asymmetrical federal government, then, is one in which political institutions correspond to the real "federalism" beneath them (Tarlton, 1965: 869).

In Comparing Federal Systems in the 1990s, Ronald L. Watts argues there are many examples of asymmetry, either *de facto* or *de jure*, in the status and powers of constituent units in federal systems[20]. In his delineation of asymmetrical federalism, he argues that two kinds of asymmetry among constituent units may affect the operation of federations: political and constitutional. Political asymmetry, which is characteristic of all federations, arises from the impact of cultural, economic, social and political conditions affecting the relative power, influence, and relations of different units with each other and with the federal government. Constitutional asymmetry, which exists in some but not all federations, relates specifically to the degree to which powers assigned to constituent units by the constitution of the federation are not uniform (Watts, 1996: 57).

Among major factors of political asymmetry are variations in population, territorial size, economic character, and resources and wealth (Watts, 1996: 57). Generally speaking, some degree of political asymmetry has existed in every federation but where it has been

extreme, Watts argues, it has often been a source of tension and instability. Consequently, political asymmetry has sometimes induced efforts at corrective measures, such as moderating the political influence of larger regional units at the federal level by establishing a federal second legislative chamber with representation weighed to favour smaller units, as well as assisting less wealthy units by redistributive equalization transfers (Watts, 1996: 59-60).

Constitutional asymmetry, on the other hand, refers specifically to differences in the status of legislative or executive powers assigned by the constitution to the different constituent units. There are some instances where the constitution explicitly provides for constitutional asymmetry in the jurisdiction assigned to member states. Where this has occurred, the reason has generally been to recognize significant variations among the constituent units relating to geographic size and population or to their particular social and cultural composition and economic situation (Watts, 1996: 60). Proposals for constitutional asymmetry have sometimes, most notably in Canada, raised the question of whether greater autonomy of jurisdiction for some member states should affect the representation of those units in federal institutions[21]. In any case, in no federation to date have adjustments actually been made to federal representation or voting by state or provincial representatives within the federal institutions on such grounds. While in some federations it appears that the recognition of constitutional asymmetry has provided an effective way of accommodating major differences[22], in others, meanwhile, it has induced counter-pressures for increased symmetry (Watts, 1996: 62).

A number of Canadian academics and opinion leaders have recognized the merits of an asymmetrical federal system. Jeremy Webber, for instance, argues that asymmetry is one way of responding to the varying perceptions of political community in Canada. He suggests that asymmetry allows for some form of accommodation for diverse political communities. But, not every difference, not every identification, demands the same kind of accommodation. The precise nature of that accommodation depends on the specific character of the community, the reasons for its significance to its members, the extent of its significance, and the need for a workable balance between communities (Webber, 1994: 227).

Much of the resistance to asymmetry seems to be prompted by a much more visceral opposition to differences in treatment- a feeling that any difference, among provinces or individuals, is inherently unequal, and is perhaps the product of special privilege (Webber, 1994: 314). Unfortunately, a number of Canadians reject the idea of "special status", in particular for Quebec. It has been argued that to grant special rights to one province somehow denigrates the other provinces[23]. Referring to asymmetrical federalism, Tom Kent argues "the idea suffers from association with past talk of special status, which seemed to denote privileges for Quebec (Kent, 1991: 4)." While an asymmetrical solution where some provinces exercise more powers than others might satisfy some Canadians, asymmetry, however, runs headlong into another objection: many English-speaking Canadians reject, on symbolic grounds, any arrangement under which one province would be treated differently from others (Webber, 1994: 167).

The concept of asymmetrical federalism asks Canadians to consider a federalism that would not only recognize natural differences (i.e. size, population, and so on) among the units of a federation, but also formal differences in law among the units either with respect to jurisdictional powers and duties, the shape of central institutions, or the application of national laws and programs. Canadians have long been participants in these types of discussions, for example, when deciding the nature and powers of Quebec historically, or the legal status of newly emerging provincial communities in the Canadian West and elsewhere. In these instances, Canadians have not hesitated to make special arrangements where necessary- asymmetrical elements in law and policy- but, as David Milne has argued, these have had to be balanced against claims of equality of provinces (Milne, 1991: 285-6).

The Principle of Equality of the Provinces

While asymmetry may seem well-suited to the shape of political commitment in Canada- and even though Canadians have often arranged their political structures in ways that recognize, at least implicitly, the value of asymmetry- there still remains widespread suspicion of it. In general, the argument against asymmetry is largely based on the fact that "provinces are treated differently." It is often assumed that the very fact of differentiation must create inequality: if provinces are treated differently, then, almost by definition, one must be treated better and the others worse (Webber, 1994: 232). Although the principle of equality of provinces may be useful as a bargaining position- it is a simple concept, and it

(at least at first glance) appears to give maximum representation to its principle advocates- would it really create the desired balance of representation in the Canadian federal system? Would it create a balance at all (Webber, 1994: 294)?

During the historical struggle for provincial equality, it was initially Ontario and Quebec, not the provinces in the periphery, that first championed the notion of provincial equality. Milne claims that what we see in the provincial rights movement is a common effort of these provinces to resist the imposition of "a centralized quasi-imperial form of federalism from Ottawa (Milne, 1991: 293)." As Peter Russell argues, "the first objective of the provincial rights movement was to resist and overcome a hierarchical version of Canadian federalism in which the provinces were to be treated as a subordinate or junior level of government (Russell, 1993: 37)." It was in this given political situation that Oliver Mowat of Ontario and Honoré Mercier of Quebec began to articulate a provincial rights rhetoric from which other provinces would draw benefit[24] (Milne, 1991: 293). Similarly, the federal Liberal Party also supported the sanctity of provincial status against Macdonald's centralizing federalism. Ultimately, the ideas of greater provincial autonomy prevailed in law when the Judicial Committee of the Privy Council (JCPC) in Britain declared that all provinces enjoyed a "quasi-sovereign" authority in no way inferior to Ottawa[25] (Milne, 1991: 293-4).

It is testament to the power and tenacity of the equality principle that despite an unpromising beginning with the presence of real and substantive differences among provinces, the Canadian federation has seen a steady and growing movement towards that idea (Milne, 1991: 292). This was demonstrated during the constitutional negotiations

surrounding the Meech Lake and Charlottetown Accords. In these constitutional debates, one of the main obstacles to a settlement meeting Quebec's concerns was a conception of federalism expressed in the rhetoric of provincial equality.

The equality of provinces principle was explicitly affirmed in the Canada Clause of the Charlottetown Accord and in the proposal for a reformed Senate[26] (Cairns, 1994): 55). Under the pretence that it was necessary to have a more equitable process, many were prepared to renounce the principle of representation by population of the member states for a reformed Senate (Gagnon & Rocher, 1992: 120). After all, it has been suggested, what Clyde Wells and Westerners such as Preston Manning were seeking was assurance that the interests of their provinces would not be overshadowed. They were reacting to an uneven distribution of population which, they claimed, gave Central Canada too much control over federal decision-making power (Lenihan et al, 1994: 130). In a rectifying manner, a Senate in which each province had equal representation was advanced on the principle of equality and as the means of blocking further domination (Tully, 1994: 188-9).

Despite the argument advanced by proponents of provincial equality for a "reformed" Senate, in a country like Canada, with its historical compromises, Senate reform based on the principle of equality of provinces would be unacceptable for Quebec because it would diminish its presence and influence in the Upper House (Gagnon & Rocher, 1992: 120). Clearly, in light of Canada's history and the concentration of one of our official language groups in a single province, provincial equality is not appropriate. To insist on the equality of the provinces would not only put Prince Edward Island on an equal footing with Ontario, but would also reduce the representation of Quebec- nearly a quarter of Canada's population-

to a mere 10 percent share of Senators. This would require francophone Quebecers to endorse a basis for representation that essentially ignores their own distinctiveness (Lenihan et al, 1994: 155-6). While the House of Commons is based on the principle of representation by population, Lenihan, Robertson, and Tassé argue the Senate should be based on the federalist principle of respect for diversity. The goal of Senate reform, they argue, should be to protect the major territorial, linguistic and cultural forms of diversity in the federation (Lenihan et al, 1994: 156).

While the principle of provincial equality may mean different things to different people, one of the most influential formulations of this principle was advanced by former Newfoundland premier Clyde Wells during the Meech Lake proceedings. Wells initially interpreted provincial equality as requiring uniformity with regard to both individual rights (so that people had the same basic rights, no matter where they lived in Canada) and provincial powers (so that no province had special jurisdictional authority) (Carens, 1995: 10). Making reference to the Canadian value of individual equality in an attempt to justify the equality of the provinces was thus inspired by a new perception of these values. It was ultimately rooted in the questioning of the validity of a province, and in particular, Quebec, to promote goals rooted in a logic different from other provinces (Rocher & Smith, 1996: 21). By appealing to formal equality, proponents of the principle of provincial equality attempted to stand on the high ground of principle: equal rights for every citizen, equal powers for every province (Russell, 1993: 148).

Often the argument against asymmetry is based on the belief that provincial equality requires uniformity with regard to provincial powers. Clyde Wells, for instance, insisted that

no province should have a "special status," in the sense that it exercises constitutional powers or rights not available to the others. During the Canada Round, Wells appealed to the principle of provincial equality as a reason for objecting to proposals for an asymmetrical arrangement of powers for Quebec (Lenihan et al, 1994: 128). Even in instances where the argument for formal recognition of Quebec's distinctiveness is overwhelming, i.e. culture, the tendency was to negotiate as if Quebec were like all the others, or all the others like Quebec (Whitaker, 1993: 113). Indeed, it can be argued that the ideal of equality provided a powerful basis for criticizing anything that smacked of special treatment (Carens, 1995: 11).

Canadian federalism, according to Alain-G. Gagnon, was never based on the equality of provinces principle. At the time of Confederation there was a decision to divide power according to the federal and provincial orders of government- not according to the equality of provinces principle (Gagnon, 1994: 96). In 1867, the Fathers of Confederation assigned to the provinces those legislative powers viewed as necessary to address the specific forms of "difference" most cherished in the regions that became Canada. All received the same powers. In no other respect, however, was equality identified as a feature of provincehood (Lenihan et al, 1994: 154). Provinces were equal in terms of the way in which they could administer internally their territory, but never in relation to each other; never in relation to the central government. This was not the intention of the Fathers of Confederation (Gagnon, 1994: 96). In the words of Peter Russell, "the Fathers of Confederation were not strict believers in the principle of provincial equality (Russell, 1993: 26)."

Adherents to the equality of provinces theory find little support in the BNA Act of 1867 for their claims. In the BNA Act, for example, the number of senators was defined in terms of regional rather than provincial representation; representation in the House of Commons follows demographic distribution; the federal Parliament was granted the powers of reservation and disallowance, clearly giving it a dominant role vis-à-vis the provincial legislatures (Rocher & Smith, 1995a: 49). Quebec was also recognized as "different" under the Act, with unique provisions for language, property and civil rights, and Senate appointments. Special financial provisions applied to Nova Scotia and New Brunswick. Each of the next three provinces to join Confederation- Manitoba in 1870, British Columbia in 1871 and Prince Edward Island in 1873- was granted its own special provisions, tailored to its particular economic, social or geographical circumstances. When Alberta and Saskatchewan became provinces in 1905, the most notable difference was that they did not, as did the other provinces, acquire control of their Crown lands and natural resources, a grievance that was remedied only in 1930. The terms of Union with Newfoundland when it became a province in 1949 were also "special" and detailed. They covered denominational schools, transportation, economic development and detailed financial arrangements[27]. In short, historically the establishment of the provinces has not been based on "equality"; nor has "identical treatment" ever been the case. Indeed, the reverse is true: recognition of the provinces' differences and accommodation of them in appropriate, specific ways have been essential to the country's success (Lenihan et al, 1994: 154).

The importance accorded to the concept of the equality of the provinces, which informs the discourse of many politicians outside central Canada, stems from a

reinterpretation of the principle of federalism (Rocher & Smith, 1996: 20-1). Proponents of the equality of provinces principle argue, for instance, that provincial equality is an underlying principle of the Canadian federation. Barry Cooper argues: "A ... formal element of rethinking what the constitution is entails the equality not of citizens but of provinces. This is the underlying formal principle of federalism (Cooper, 1994: 107)." Canadian history, Milne also argues, has shown the gradual struggle and triumph of the equality principle against different forms of asymmetry in Canadian life (Milne, 1991: 286).

In Canada: Reclaiming the Middle Ground, Lenihan, Robertson and Tassé argue that the idea that the principle of provincial equality is a feature of the Canadian federation has no foundation; and the claim that it is a "principle of federalism" is without ground (Lenihan et al, 1994: 154). They suggest that "those who argue this way seem to confuse the (sound) claim that the federal government should treat the interests of all provinces with equal concern and respect with the (unsound) claim that all provinces should be treated the same (Lenihan et al, 1994: 132-3). While provinces are equal juridically, in practical terms the nature and extent of their responsibilities already vary to some degree- as was acknowledged at the time of Confederation. It was to adapt to these different needs that Canada adopted a federal system. The concept of formal equality of the provinces thus breaks with the Canadian tradition which recognizes the need to come to terms with its differences as seen in the BNA Act of 1867 (Rocher & Smith, 1996: 21). Clearly, the idea of equality of provinces does not convey either the complexity of the Canadian political reality or the recognition in the constitution of the specific needs of many provinces, including Quebec (Rocher & Smith, 1995a: 54).

The *Citizens' Forum on Canada's Future*[28] also came to a similar conclusion. Several participants stressed the importance of equality among the provinces- apparently without recognizing that provinces are not perfectly equal. The Citizens' Forum demonstrated that

> few participants knew that the provinces are in fact not perfectly equal- that their various special needs were recognized when they joined Confederation. Nor did they necessarily consider whether other parts of Canada might have special needs in the future...so we have weighed the options and concluded that perfect equality does not exist between provinces and never has, for the excellent reason that special needs must be met (Canada, 1991: 123).

The Citizens' Forum also noted that given provinces entered Confederation on different terms and operate under different provisions, it can be argued that special arrangements in provinces based on special needs are a fundamental principle of Canadian federalism (Canada 1991: 124). Thus, the Commission concluded: "the notion of equality of the provinces is neither as absolute nor as unbending as some of the participants seem to believe (Canada, 1991: 117)."

The argument that provincial equality implies sameness of treatment or "identical treatment" is debatable. The idea that equality requires sameness of treatment rests on what is often called formal equality. Formal equality, however, fails to take into account the very different *consequences* that sameness of treatment might have for different provinces. It ignores the fact that provinces (like individuals) sometimes have special needs or may be burdened by circumstances. Rocher and Smith maintain that the argument for provincial

equality does not consider the fact that "provinces may have particular needs which require different action plans to which the federal government must adjust[29] (Rocher & Smith, 1996: 21)." For example, Quebec stands out by virtue of its distinct linguistic composition as the home of the only majority francophone province in Canada- or, indeed, the only independent majority francophone jurisdiction in all of North America (Milne, 1991: 287). Ironically, by Clyde Wells' logic, the fact that provincial needs are unique becomes a reason to prevent the federal state from adjusting to respond to them. This assumption flies in the face of the fundamental reason for the commitment to federalism- respect for diversity (Lenihan et al, 1994: 133).

Equality & Asymmetry: Transcending the Debate?

Students of Canadian federalism have often argued Canada is a tolerant society, based on mutual accommodation, which allows many ways of life to coexist. Confederation, for instance, accepted that Canada was to be a country made up of peoples with different ways of life (LaSelva, 1996: 11). While Canada is a country in which many ways of life may flourish, it is also a country that has attempted to create a "single way of life" (LaSelva, 1996: 29). For instance, Trudeau dreamt of a unitary federalism which would have established the principle of the equality of provinces in order to put an end to any pretensions Quebec had about its distinct character (Gagnon & Rocher, 1992: 119). It should also be noted that Aboriginal nations had no distinct place in the "Trudeau vision" of the Canadian

community. The future offered to Aboriginals in the government's 1969 White Paper was that of undifferentiated individuals enjoying the equal rights of all Canadian citizens[30] (Russell, 1993: 94).

In The Moral Foundations of Canadian Federalism, LaSelva argues that the Confederation arrangement created a "tenuous common identity" (LaSelva, 1996: 192). Not only was the "Canadian political nationality" fragile to begin with, he argues, but Canadians had also recently witnessed the failure of two constitutional initiatives, each with the stated objective of creating a more harmonious country. The declared objective of the 1987 Meech Lake Constitutional Accord was the reconciliation of Quebec to changes introduced by the 1982 Constitution Act[31] without the consent of its government. The objective of the failed 1992 Charlottetown Accord was to accommodate Quebec, Aboriginals, and other groups within a more pluralistic and decentralized Canada (Russell, 1993: 154; LaSelva, 1996: 192). These initiatives, however, failed to bring about their desired objectives. Rather than accommodating diversity, the Meech Lake and Charlottetown Accords revealed the magnitude of contrasting "visions" within Canada- in particular, that of the principle of equality of provinces and the principle of asymmetry. If anything, these constitutional initiatives served to indicate just how deeply engrained much of the Canadian psyche had become with the principle of the equality of provinces.

Canada has been built on many competing, but reinforcing, identities (Gagnon & Laforest, 1993: 491). It has been suggested that one feels tied to a collective project in which one is accepted. Quebecers and Aboriginals feel they belong when the rest of Canada truly *understands* their collective project; they feel excluded when their own understanding of

themselves as a people is rejected or diminished. To require, for example, that Québécois and Aboriginal peoples put the principles of provincial equality, pan-Canadian uniformity, and individual rights above everything else is, by definition, to relinquish the premises of federalism (Gagnon & Laforest, 1993: 491). To the extent that a country insists on denying one's feeling of attachment or one's right to exist, loyalty is diminished (Jenson, 1998: 233).

Traditionally, we have attempted to accept that tolerance of our diverse attachments is one of the things that makes our society valuable. Responding to diversity within today's society, however, requires increased sensitivity to differences. The recognition of Quebec's status as a nation or distinct society, poses the problem of recognizing a province as "different" at the very point at which non-territorial political identities are also making their own claims. It is not clear how Quebec's distinctiveness, Aboriginal self-government, women's rights and representation, and the place of ethnic minorities in a Canadian society can be given equal places. Each claim is a different type, and, at times, they require conflicting sets of arrangements (Rocher & Smith, 1996: 22). In essence, a recognition must be made that not all political projects face the same challenges; not all have the same aspirations. If we are to develop the proper recognition for each group within the structure of the whole, we have to recognize that different kinds of difference may require different kinds of accommodation (Webber, 1994: 26). Quebec and Aboriginal nationalisms, in particular, demand to be accommodated in a revamped federal system that will be capable of facing the difficult and rewarding challenges that diversity, and its entrenchment, present to all Canadians.

Conclusion

In recent years many Canadians have fallen into an increasingly rigid manner of thinking and talking about the nature of Canadian federal system. There are, however, alternatives to the present impasse. The basis for accommodation within the federal system exists in an alternative strategy based on asymmetry. Asymmetrical federalism currently offers an alternative for accommodating Quebec in the Canadian federation; the same is true for the Aboriginal peoples who are calling for self-government and a third order of government. A number of students of Canadian federalism have also recognized the merits of an explicitly asymmetrical federal system in which constituent units could possess varying degrees of autonomy. For some, this is entirely consistent with the evolution of the Canadian federal system. For others, however, this violates their belief that the principle of equality of provinces forms the basis of federalism. In the future, divergent conceptions over the nature of the Canadian federation will continue to persist- divergences which are not likely to be resolved any time soon.

CHAPTER 3

The Evolution of Asymmetrical Federalism in Canada

A number of students of Canadian federalism have recognized the merits of an explicitly asymmetrical federal system in which constituent units would possess varying degrees of autonomy. Asymmetrical arrangements have been of particular interest to Quebec and Aboriginal nations. In the preceding chapter, "asymmetrical federalism" was described as a political system in which some federal units have greater autonomy than others. The principle of asymmetry recognizes that the unity sought through federalism is not synonymous with uniformity and, therefore, must respect diversity. In order to understand the current debates with respect to asymmetrical federalism, this chapter argues we must first examine the larger historical context from which asymmetrical federalism is derived. With this in mind, the following chapter begins by offering a brief outline of some of the asymmetrical provisions already found in the Canadian federal system. Focusing in particular on the contextual origins of asymmetrical federalism as it relates to Quebec and Aboriginal nations, this chapter, then, proceeds to examine the historical evolution of asymmetry in Canada as it pertains to these political communities. Finally, this chapter explores the principle of asymmetrical federalism as it has emerged in various constitutional

initiatives in recent years. While asymmetrical federalism is certainly no panacea, an examination of its historical background in the Canadian federal system provides a valuable starting point for a future investigation into the contemporary challenges facing asymmetrical federalism in the current political realm.

HISTORICAL BACKGROUND

Asymmetrical Illustrations: An Outline

Asymmetrical federalism is a term that has been employed a great deal in recent years. It was raised as an explicit option most notably in the lead up to the Charlottetown Accord at the constitutional conferences in Halifax, Nova Scotia, where it received considerable support (Resnick, 1994: 78). To a significant extent, however, a degree of asymmetry already exists in the Canadian federal system. In fact, Peter Russell argues that "asymmetrical federalism...has always been a feature of the Canadian federation (Russell, 1993: 178)." The response to different needs of different members, the weighted representation of the provinces in the Senate, as well as the recognition of common law and the civil code in the exercise of justice, all serve to confirm the existence of asymmetrical federalism in Canada[32]. The use of an asymmetrical formula was also found in the administration of many governmental policies, as in the case of immigration, regional development, telecommunications and the management of the pension program (Gagnon & Rocher, 1992: 121).

Asymmetry was widely recognized in the Constitution Act, 1867, especially with regard to Quebec (i.e. civil law, bilingual legislative regime, different conditions for Quebec senators, etc) (Pelletier, 1998: 320). Asymmetrical arrangements were also found in the orders-in-council or laws setting down the conditions under which the remaining provinces (other than the initial four) could join the Canadian federation[33]. Other differences in the treatment of provinces under the Constitution Act, 1867, included the guaranteed use of English and French in the provincial legislatures of Quebec, Manitoba, and New Brunswick. As well, denominational schools enjoyed constitutional protection only in some parts of the country, and where protection did exist, it varied in extent (Milne, 1991: 288).

Asymmetry is also present in the Constitution Act, 1982. Under section 6(4) of the Charter of Rights and Freedoms, the mobility rights of Canadian citizens can be abridged in any province with above-average unemployment rates. Asymmetry is found in the differentiated use of the "notwithstanding" clause permitting provinces to insulate themselves from the scope of certain sections of the Charter under section 33. Opting-out of constitutional amendments transferring provincial powers to Ottawa under sections 38 and 40 without compensation is another asymmetrical feature of the constitution. While such clauses are extended equally to all provinces, they provide a basis for asymmetrical constitutional outcomes (Milne, 1991: 288).

Peter M. Leslie agues that asymmetry has been "constitutionally imposed" on certain provinces in a number of different ways- that is, some provinces have been denied powers that have been vested in other provinces, or the exercise of their powers has been constrained in ways not applying to other provinces (Leslie, 1994: 321). A more extreme case is that

of the three Prairie provinces which were unable to control the development of Crown lands until 1930. When British Columbia entered Confederation in 1871, the province was given the same powers as those extended to the four original provinces of Ontario, Quebec, Nova Scotia and New Brunswick; yet the three Prairie provinces were denied control over crown lands on the grounds that the federal government "needed" to retain control over crown lands to ensure the orderly flow of immigration into the region (Elton, 1988: 349). These provisions, argued Leslie, essentially *narrowed* the legislative competence of the specified provinces (Leslie, 1994: 321).

The asymmetrical treatment of Manitoba, Saskatchewan and Alberta created considerable friction between the three provincial governments and Ottawa. During most of the first three decades of this century, and particularly during the decade following the First World War, the demand for control over property and natural resources was a controversial centrepiece of federal-provincial relations between the three Prairie provinces and Ottawa. The federal government's decision to retain this control for "the purpose of Canada" proved to be very contentious. While the federal government's decision in 1930 to transfer control over property and natural resources back to Manitoba, Saskatchewan and Alberta placed them on an equal footing with British Columbia and the other provinces, Ottawa's asymmetrical treatment of the three provinces in this situation was a key factor in the development of a legacy of distrust and animosity which has not dissipated (Elton, 1988: 349).

Asymmetry is also found in various administrative arrangements concluded between the federal government and the provinces (Pelletier, 1998: 321). In recent times, a variety

of administrative arrangements have meant that especially in shared-cost programs (programs in which the cost is divided between Ottawa and the provinces) the balance of federal and provincial involvement can differ from province to province. In 1964, the controversy over a national pension plan resulted in the establishment of separate (though coordinated) plans in Quebec and in the rest of the country. In the field of immigration, Quebec has also been much more active than other provinces although its constitutional authority (full concurrency with the federal Parliament) is nominally the same[34].

Asymmetrical Federalism & Quebec

From its origins, the Canadian federal system has had to cope with the existence of deep territorial, cultural, and linguistic differences. Indeed, the distinctiveness of Quebec was already evident at Confederation. This was acknowledged in the Constitution Act, 1867, under various asymmetrical provisions. The sense of distinct nationality that francophones brought to Confederation had taken form decades before, borne of the struggles between francophones and anglophones in Lower Canada. It was based on a collective identity as *Canadiens* that had been firmly established during the French regime (McRoberts, 1997: 3).

Prior to Confederation, under the terms of the Royal Proclamation of 1763, the Catholic Church would have lost its legal status and privileges, the seigneurial system would have been eliminated, and common law would have replaced civil law. Eleven years later, however, the colonial authorities switched to the policy of formally recognizing and legally

entrenching the distinctive *Canadien* institutions. Under the Quebec Act, 1774, the Church's legal privileges were restored, the seigneurial system was re-established, and the civil law was adopted (McRoberts, 1997: 4). Nonetheless, at the symbolic level, the Royal Proclamation would not be forgotten in the hearts and minds of *Canadiens*.

By 1838, Lord Durham had hoped that the imposition of a single set of political institutions would lead to the assimilation of the French-speaking population (Webber, 1994: 206). Lord Durham and the British colonial officials had incorrectly assumed that the English-speaking Canadians in the new legislature would be sufficiently cohesive to exploit their numerical preponderance and form a reliable government (McRoberts, 1997: 6). However, the sense of collective identity among the *Canadiens* and their attachment to their cultural distinctiveness were sufficient enough to frustrate Durham's plans for the new colony. It was concluded that this assimilationist strategy could not succeed, and the Durham Report was never enforced (McRoberts, 1997: 4).

During the Union period, French Canadians resisted the danger of assimilation, but most recognized that Durham had a point: a single governmental structure, with anglophones in the majority, would create enormous pressure for assimilation. They, therefore, placed great importance on the institutional autonomy of Quebec as the guarantee of their sense of political community. Throughout Canadian history, the province of Quebec has remained central to the political identity of francophone Quebecers, despite the gradual tendency of many Canadians to shift their allegiance Ottawa (Webber, 1994: 206).

According to Gagnon and Montcalm, in Quebec: Beyond the Quiet Revolution, Confederation was the sixth (and most enduring) attempt to have French and English-

speaking Canadians live peaceably together in Canada. None of the previous arrangements- the Conquest with its military regime in 1760, the Royal Proclamation of 1763, the Quebec Act of 1774, the Constitution Act of 1791, or the Union of 1841- had provided political stability (Gagnon & Montcalm, 1990: 135). Confederation assumed with certain guarantees French and English could put the Conquest behind them and live amicably together (LaSelva, 1996: 128). Thus, mutual recognition became a key presupposition of the Confederation agreement. It was also believed that Confederation, with the addition of other provinces, seemed likely to dissipate hostilities between Canada East and Canada West while at the same time ensuring Quebec's autonomy (Gagnon & Montcalm, 1990: 135).

In the pre-Confederation era, Quebec's political elite, for the most part, defended the need to preserve Quebec's autonomy within Confederation. George-Etienne Cartier, for instance, argued that strong federal powers would only be exercised in rare situations, and that the agreement assured wide autonomy for Quebec (Gagnon & Montcalm, 1990: 137). Partly to protect its own provincial autonomy, Quebec respected the autonomy of other provinces and expected the same of them. In Quebec, a major selling point of the 1867 constitutional agreement was that it transferred a degree of political sovereignty to Quebec's French majority (McRoberts, 1997: 11-12). Under the terms of the BNA Act, 1867, the new regime gave Quebec a government of its own. This "concession" to French Canadian demands, however, was restrained by a division of powers that was weighed heavily in favour of the federal government (McRoberts, 1997: 11-12).

For the first few years of Confederation, Quebec, like the other provinces, was subjected to Macdonald's limited view of provincial sovereignty. Federal interpretation of

the BNA Act and the centralizing tendencies of John A. Macdonald were challenged strenuously. Federal actions were perceived as overstepping assigned federal authority (Gagnon & Montcalm, 1990: 139). By the 1880s, Ramsay Cook argued, the majority of provinces were in full revolt against the paternalism of the federal government (Cook, 1969: 37). In those early years the call for provincial rights was heard throughout the country, especially in Quebec. Quebec politicians were responsible for some of the earliest and clearest statements of provincial resistance against Ottawa's centralism. Quebec Premier Honoré Mercier, for example, helped to organize the first coordinated provincial attack against Macdonald's interpretation of the constitution[35].

During the first thirty years of Confederation, the provinces made their most tangible constitutional gains through litigation in the courts. The judicial victories of the provinces were anchored in London, England, before the Judicial Committee of the Privy Council (JCPC)[36] (Russell, 1993: 40). As Guy Laforest argues, "The central government's imperial temptation, present in the legal edifice, was offset by the jurisprudence of the JCPC in the first half of the twentieth century[37] (Laforest, 1998a: 61)." Between 1880 and 1896, for instance, the JCPC decided eighteen cases involving twenty issues relating to the division of powers. Fifteen of these issues (75 percent) it decided in favour of the provinces (Russell, 1993: 42). Peter Russell argues that the JCPC went beyond the details of the division of powers to articulate a conception of federalism that was contrary to John A. Macdonald's vision. For the tribunal which had final say in the interpretation of the Canadian Constitution, the provinces were not a subordinate level of government. The federal and provincial government were coordinate levels of government, each autonomous within the

spheres allotted to them by the Constitution. This theory espoused by the JCPC is often called the theory of "classical federalism"[38] (Russell, 1993: 42-3).

Federal-provincial relations, specifically Quebec-Canada relations, were affected by World War One. With the passage of the War Measures Act and other emergency legislation, the wartime period involved extensive centralization as, once again, the federal government exercised major economic and political powers (Gagnon & Montcalm, 1990: 144). By the time the Second World War broke out, Ottawa had already assumed unprecedented prominence over the provinces. Citing the demands of the war, it had deployed emergency powers and persuaded the provinces to allow it to monopolize personal and corporate income tax (McRoberts, 1997: 24). Under the plenary power the federal government enjoys during a wartime emergency, the majority of the provinces were convinced to let the federal government collect all direct taxes in the country in return for "tax rental" payments. Similar federal-provincial tax agreements were negotiated after the war. Quebec stood alone in defiance of this federal encroachment between 1947-1957 (Russell, 1993: 69). According to J.A. Corry, these arrangements had "a strongly centralizing effect, increasing the leverage of the national government on the policies of the provincial governments as well as on the economy of the country (Corry, 1958: 103)."

The post-war years witnessed a tremendous increase in federally initiated shared-cost programs with the provinces. Federal grants to universities that began in 1951, the hospital insurance program introduced in 1958, and an array of social service and income support programs, would enable the federal government to have a major and long-term influence on how provincial governments allocate resources in what, constitutionally, are their exclusive

legislative responsibilities (Russell, 1993: 69). According to Kenneth McRoberts, the Keynesian doctrines of economic management and elaboration of a welfare state provided a rationale for Ottawa to remain the primary government (McRoberts, 1997: 24).

Major resistance to these developments came from Quebec. Several Quebec premiers from Mercier to Duplessis, had pursued Quebec autonomy and had resolutely fought federal pre-eminence in both practical and philosophical terms. For example, after 1953, at considerable cost to the province, Quebec refused federal grants to universities. The Quebec government argued that the federal level had no business offering such grants, since education was clearly a provincial jurisdiction (Gagnon & Montcalm, 1990: 145). Despite its initial general inactivity toward federal activism, the Quebec government did move to adopt initiatives that symbolically and materially asserted both Quebec's distinctiveness and its case against federal centralism: it adopted a provincial flag (1948), proposed the establishment of Radio-Québec (1945), and imposed a provincial income tax (1954). As well, the province's unswerving opposition to federal intervention was systematically articulated in a provincially established royal commission- the Tremblay Commission[39] (1953) (Gagnon & Montcalm, 1990: 145).

In short, during the post-war years the federal government challenged in a way it never had before the established French-Canadian understanding of Canada. In the name of its new self-imposed role as the seat of the Canadian nation, the federal government attempted to develop the symbols of a distinctly Canadian nation, to construct an edifice of social, economic, and even cultural programs designed to develop and strengthen this Canadian nation, and to establish national standards and social services. By and large,

English-speaking Canadian élites and public opinion seemed to welcome the new power that Ottawa was assuming. In Quebec, however, there was resistance to the federal government's intrusion as francophone élites defended the historical notion of a distinctly French-Canadian nation and of the Quebec government as protector of that nation (McRoberts, 1997: 29-30).

With the gradual decline of a more passive provincial government after 1960 and its replacement by a new étatisme, and an increasing willingness to challenge the federal system itself, Quebec-Canada dealings entered a new phase in the post-1960 Quiet Revolution. This new era would be marked by increased confrontation between Quebec and the federal government, especially over constitutional issues. As well, Quebec provincial governments, as part of their overall strategy, would seek to expand their scope in a number of policy sectors and to increase their fiscal capacity (Gagnon & Montcalm, 1990: 146). Not only did the project of a modern Quebec require the formal recognition of the distinctiveness of Quebec society within the federal system, but it also entailed the expansion of the government's powers and resources so that it could assume its new responsibilities. Increasingly, then, this translated into calls for asymmetry in the Canadian federal system to better recognize and accommodate Quebec's concerns.

The Post-War Years: Quebec and the Concept of Distinct Society

Although most people tend to associate the concept of distinct society with the Meech Lake Accord, the roots of the distinct society concept can be traced back in time by referring

to major events marking the history of Quebec. At the root of this attachment to Quebec was the fact that a majority of francophones were concentrated in Quebec. Nothing the Canadian government could do would change that fact. To be sure, the federal government's efforts to persuade Quebecers to adopt a new pan-Canadian identity, in the post-war years in particular, were countered by the efforts of the Quebec government to promote the distinctly Québécois identity (McRoberts, 1997: 258-9).

While Prime Minister Louis St. Laurent flatly rejected Quebec's claim to distinctiveness in the early 1960s, Liberal leader Lester B. Pearson actively sought to fashion a means of accommodating Quebec's concerns. He believed that conflict could be resolved through conciliation and accommodation (McRoberts, 1997: 38-9). Essentially, he attempted to accommodate Quebec's concerns through an asymmetrical arrangement in the federal system. After forming their first minority government, the Pearson Liberals began to lay the groundwork for a new federal constitutional initiative, by establishing, in 1965, the Royal Commission on Bilingualism and Biculturalism (McRoberts, 1997: 78).

As one of the most thorough contemplations of the notion of distinct society, the Preliminary Report of the Royal Commission on Bilingualism and Biculturalism originally coined the phrase "distinct society" to refer to the autonomous character of the two dominant linguistic groups in Canada, especially Quebec's French-speaking society (Laforest, 1998a: 73; Webber, 1994: 54). André Laurendeau, one of the report's principal authors, stressed the following elements with reference to the existence of a distinct society in Quebec:

> French Quebec, in fact, has more than four million inhabitants. It has legal institutions- including its own Civil Code- and its political

> institutions which a number of people sum up in the expression: "the State of Quebec." The powers of Quebec are considerable; they enable the French population to exercise an important influence over its own economic and social life, and to manage education... Nevertheless, their control of political institutions and the powers they exercise seemed insufficient to a large majority of Quebecers we met.
>
> This is not all: Quebec has an autonomous network of social institutions: a system of hospitalization, trade unions, voluntary associations of many kinds, and so. It owns or influences a complex of mass media of communication by which it expresses itself in its own language...Lastly, it has a considerable number of economic institutions...
>
> This, then, seemed to us to be the root of the problem: a unique, functioning society that does exist, but many of its members consider it to be deficient and want to make it more or less complete (Canada, 1965: 169-70).

From the beginning of the 1960s, the Government of Quebec has defended the idea that the province is nothing less than a political entity whose linguistic, cultural, and social specificities are unique in North America (Gagnon & Rocher, 1992: 120). Successive Quebec governments have demanded recognition of this distinctive role in the Canadian federal system. Quebecers are concerned not only with a symbolic recognition of the distinct nature of their society, but also with the capacity to act in order to assure the development of this society (Rocher & Smith, 1995a: 55). Gagnon and Rocher argue that political and economic tools are, therefore, required to allow for the preservation and promotion of these essential characteristics (Gagnon & Rocher, 1992: 120). In a similar vein, Daniel Latouche argues, "the objective, where Quebec is concerned, is not all that difficult to define: to obtain the status of a distinct nation and thus obtain all the symbolic, political, and financial resources needed to ensure that its status in indeed recognized by Canada (Latouche, 1998:

335)."

Increasingly, a number of Quebec political and intellectual élites became committed to the argument that the terms of Canadian federalism had become outmoded. As times changed, so had the powers that the Quebec government needed to pursue its historical role. During the 1960s, the Lesage government, for instance, embraced a much more interventionist strategy in an effort to enhance the role and powers of the provincial government. This initiated a period in which the provincial government undertook a large number of public programs that required increased activism in federal-provincial relations in order to widen the province's scope for activity (Gagnon & Montcalm, 1990: 152). The provincial government not only exercised its right to "opt out" of several federal-provincial shared cost programs, but also established provincial social programs, such as the Quebec Pension Plan. Perhaps, more significantly, the Lesage administration successfully convinced the Pearson government to pass legislation granting to Quebec and all other provinces the right to opt out (with some form of compensation) from all social programs. In 1965, when the legislation came into effect, Quebec opted out of all major programs in exchange for a substantial increase in its share of personal income tax, thus creating a form of *de facto* asymmetry in the political system. At that time, no other province expressed an interest in such an arrangement, despite federal enticements to prompt their participation (Stevenson, 1989: 164; Gagnon & Montcalm, 1990: 154).

Not all English-speaking Canadian political and intellectual élites, however, supported these efforts to accommodate Quebec through an asymmetrical distribution of powers within the Canadian federal system (McRoberts, 1997: 55). For instance,

Diefenbaker championed the ideal of an "unhyphenated" Canadianism in which cultural differences were, by definition, immaterial. Rather than attempting some form of accommodation for Quebec in the Canadian federal system via asymmetrical arrangements, Diefenbaker articulated a vision of Canada that essentially rejected any notion of distinctiveness for Quebec (McRoberts, 1997: 46). As well, Trudeau made considerable efforts to preclude any semblance of special status for Quebec. For instance, Trudeau refused to assign Quebec special roles and status in the Constitution Act, 1982, which eventually led to the repudiation of the 1982 settlement by the Quebec National Assembly.

In an effort to find a solution to Quebec's refusal to endorse the Constitution Act, 1982, and to meet the conditions laid out by Quebec for its consent, the federal and provincial governments, in 1987, drafted the Meech Lake Accord. It explicitly recognized Quebec as a "distinct society" in Canada, an acknowledgement that was to be a rule of interpretation for the Canadian Constitution[40]. At the same time, the agreement granted the Quebec legislature and government the role of protecting and promoting Quebec's distinct character. For the first time in the twentieth century, Guy Laforest argues, Canada explicitly recognized, through this clause, that the distinctiveness of Quebec within North America should have a real impact on the functioning of the political system (Laforest, 1998a: 71). In other words, it formally recognized the Quebec government's responsibility to protect and promote Quebec's distinctiveness. The failure of the Meech Lake Accord, however, profoundly changed the terms of the constitutional debate. For many, the failure of Meech represented a rejection of Quebec within Canada. It was bitter confirmation that many English-speaking Canadians would not accept Quebec's distinctiveness within Canada

(Webber, 1994: 4). For its part, the Bourassa government announced that since the rest of the country had not honoured its commitment to the Meech Lake Accord, Quebec was withdrawing from any further constitutional talks (McRoberts,1997: 205).

The demands of Quebec for recognition as a "distinct society" have been experienced as confusing, if not threatening to some Canadians' own definitions of Canada and their identity as Canadians, in particular, to those Canadians who adhere to the principle of equality of provinces. In this case, there is no terminology that will be acceptable to Canadians who oppose the very notion of recognizing distinctiveness *within* Canada. Yet, there is little to be gained from formulas that, in trying to avoid such opposition, afford no meaningful recognition at all. To be effective, then, recognition, whether of Quebec or Aboriginal nations, must be open, acceptable, and meaningful to those distinctive units.

Asymmetrical Federalism & Aboriginal Peoples

Arguments favouring asymmetry have not only been put forth by francophone Quebecers. Aboriginal groups have also demanded the recognition of their differences by the federal government. Centred on the notion of the inherent right to self-government, the asymmetry demanded by Aboriginal groups refers to a different conception of the political community as defined elsewhere in Canada (Rocher & Smith, 1995a: 55). According to Radha Jhappan, the mobilization of Aboriginals "is characterized by an emerging sense of nationalism which presents a number of challenges to traditional notions about the nation-

state in Canada...[including] the legitimacy of a constitutional order based upon a division of powers between the federal Parliament and the provincial legislature (Jhappan, 1993: 232)." In contrast to the disagreement between Quebec and Ottawa, which is framed in the traditional discourse of federalism, the Aboriginal nations want a new order of government in the constitution, although its institutions, powers and financing remain to be defined. Thus, Aboriginal claims have greatly altered our understanding of the idea of asymmetry. Viewed from an Aboriginal perspective, it is less a question of the devolution of powers from the central government to already existing political entities than the creation of a new order that would force the federal and provincial governments to recast the government of Aboriginal communities (Rocher & Smith, 1995a: 56).

From the beginning, the Europeans who colonized North America proceeded on the assumption that the continent was *terra nullius* (uninhabited)[41]. This was despite the fact that estimates of the Aboriginal population north of the cities of Mexico in the early sixteenth century range from 4.5 to 18 million who governed themselves according to their various cultural and political traditions[42] (Jhappan, 1995: 157). Prior to European contact, Fleras and Elliott argue, Aboriginal peoples were organized in politically autonomous structures with sovereign control over their territories. European colonization and settlement, however, attempted to erode this autonomy and transfer substantial control away from Aboriginal peoples to government institutions (Fleras & Elliott, 1992: 24).

Governmental policies toward Aboriginal peoples have often led many Canadians to assume that Aboriginals adhere to and subscribe to the institutional structures upon which the current political system is based. The political revitalization of traditional beliefs and

values inside Aboriginal communities, as well as the relatively weak legitimacy that many Aboriginal peoples accord governmental institutions demonstrate nothing of the sort (Salee, 1995: 291). Aboriginals wish to have their membership in the Canadian political community recognized as flowing from their freely given consent. That consent must be recognized as deriving from their inherent right to self-government, not from the "goodwill" of other Canadians and their governments[43] (Russell, 1993: 131-2). Rejecting the colonialist-assimilationist mentality of the past, embedded in such policies as the Indian Act, 1876 and the White Paper of 1969, many of today's Aboriginal leaders propose asymmetrical arrangements based on the recognition of Aboriginal peoples as "nations within" the Canadian federal system[44].

The starting point of a discussion of Aboriginal rights and claims must be the diversity in the traditions and circumstances of Aboriginal peoples. The unity of Aboriginal peoples should not be exaggerated. They are not one people. They are a number of peoples, each with their own language, traditions, histories, structures of government, and so on. The differences between status Indians, non-status Indians, Métis, and Inuit are profound in terms of their histories, their cultural identities, and their status under Canadian law. It should also be noted that within each Aboriginal community, as in any community, there are deep disagreements (Webber, 1994: 66). For example, there is debate about the demands of Kwakiutl or Blackfoot or Innu nations, especially about how to reconcile that culture with non-traditional ways of understanding. Within each nation, there are fundamental differences making each entity distinct in itself. Despite these differences, however, Aboriginal peoples share the distinction of being the first inhabitants of North America,

holding fast to their cultural identities and striving to fashion a place for those identities within the framework of a predominately non-Aboriginal Canadian state (Webber, 1994: 220).

Historically, Aboriginal peoples have had a special relationship with the federal government in Canada. This relationship was set forth in section 91(24) of the Constitution Act, 1867, which states that the federal government has jurisdiction over "Indians", and land reserved for Indians. In practice, however, the jurisdictional profile is not as simple as section 91(24) would indicate (Jhappan, 1995: 163). Although this section of the constitution confers legislative power over Indians and lands reserved for Indians on the federal government, it does not compel that government to legislate, spend money on, or provide services to Indians or their lands. Nor does it insist that the federal government assume responsibilities for all Aboriginal peoples. Instead, the federal government has been able to define "Indians" through an Act of Parliament in narrow terms that have nothing to do with Aboriginal peoples' self-definitions (Jhappan, 1995: 178).

For Aboriginal peoples affected by the Confederation deal, the new constitution was entirely an imperial imposition. There was no thought among the constitution-makers of consulting with Aboriginal peoples living on the territory encompassed by the BNA Act, nor did any of the legislative bodies that dealt with the constitution represent the concerns of various Aboriginal peoples (Russell, 1993: 32). As Patrick Macklem argues, "The question of indigenous peoples' consent to these arrangements...did not even arise in the minds of the Fathers of Confederation. Their consent was either merely assumed or considered irrelevant (Macklem, 1991: 415-6)." Since Aboriginal peoples had virtually no say in establishing

Canada, the legitimacy[45] of Canada as a constitutional entity has increasingly come under challenge by a number of Aboriginals (Chartrand, 1995: 126).

In The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, Menno Boldt and J. Anthony Long argue an early Confederation policy of internal colonialism was introduced by the federal government in an attempt to deal with Aboriginal peoples. The main objective of this policy, they argue, was to free land for settlement. The key mechanisms for carrying out this policy were the signing of treaties and the expropriation of Aboriginal lands. These practices were later translated into a policy of insulation and amalgamation embodied in the Indian Act. Boldt and Long argue this approach to Aboriginal policy was designed in an attempt to prepare Aboriginal peoples for assimilation into the larger Canadian society. It was assumed that assimilation could be best achieved in an insulated environment under the tutelage of the federal government (Boldt & Long, 1985: 5).

In an attempt to fulfill some of its responsibilities for Aboriginals peoples, the federal government passed the Indian Act in 1876; that act was subsequently revised in 1951 and 1985. The Indian Act established a system of land reserves that consigned Aboriginals to small, geographically dispersed land areas. Under various sections of the act, the Department of Indian Affairs established almost complete authority over Aboriginal reserves (Long & Boldt, 1988: 3). While the act did establish a form of local government for reserves, these band councils had limited powers, and the exercise of those powers was frequently subject to prior approval or after-the-fact nullification by government officers. Even certain actions by individuals- the making of a will, for example- were subject to the

discretion of the government's agent. Aboriginal peoples attacked the act for giving them little control over their own destiny, little ability to shape their societies in accordance with their customs (indeed, for areas outside the bands' jurisdiction, none at all), and for placing them at the mercy of non-Aboriginal officials (Webber, 1994: 67).

The philosophy behind the Indian Act paved the way for the Trudeau government's 1969 White Paper on Indian policy[46]. The White Paper argued that the federal government should attempt to phase out the special status of Aboriginal peoples under legislation and the constitution, and work towards the complete integration of Aboriginal peoples into the society at large, on the basis of individual equality. Aboriginal rights would not be recognized. Under the White Paper, reserves would be abolished and Aboriginal peoples would become "Canadian citizens". Essentially, they would not be subject to any unique federal regime (Webber, 1994: 67-8). Trudeau argued: "the time is now to decide whether the Indians will be a race apart in Canada or whether it [*sic*] will be Canadians of full status." In Trudeau's view, this was not just a choice for Aboriginal peoples, but for Canadians generally. He asked: did Canadians want to have, within their country, "a group of Canadians with which we have treaties, a group of Canadians who have as the Indians, many of them claim, aboriginal rights or whether we will say well forget the past and begin today? (Cumming & Mickenberg, 1972: 331-32)" For Trudeau, the Canadian Constitution must not recognize the distinct character of Aboriginal peoples. In other words, it must not accord Aboriginal peoples any form of asymmetry. In refusing to recognize Aboriginal rights, Trudeau believed those rights would simply "disappear" through time.

Although differences exist between and among Aboriginal peoples, their reaction to the government's 1969 White Paper was one of unanimity- they vehemently rejected the proposal. In the words of Jeremy Webber, "they did not want their aboriginal identity washed out in a sea of undifferentiated Canadian citizenship (Webber, 1994: 68)." While Aboriginal peoples wanted to find a place in Canadian society, this was not to be at the expense of their identities. They wanted to find a role within the broader society, but they also wanted to preserve a sphere in which their distinctive identities could flourish (Webber, 1994: 69). Encountering vigorous opposition from Aboriginal peoples, the White Paper was withdrawn by the federal government in 1971. Recognizing that Aboriginal peoples did not want to give up their unique status and their historic claim to land and other rights, the federal government began to explore alternative approaches to accommodating Aboriginal demands (Boldt & Long, 1985: 5).

The introduction of Aboriginal nations into the political arena- with their own insistent claims for national recognition- became stronger and more formalized during the 1970s and 1980s. Peter Russell argues that the next two decades would witness the strengthening of the Aboriginal peoples' political organizations and expectations (Russell, 1993: 95). Along with their increased activity in the political arena, Aboriginal leaders also began to press their distinct claims to Aboriginal title through the court system. Aboriginal peoples, however, have had mixed results in gaining judicial acceptance of their claims. The Supreme Courts' judgement in the *Calder* case (1973), for example, based on a claim for Aboriginal title by the Nishga of British Columbia, is noteworthy[47]. Although the Nishga suit was dismissed on a technicality, the Supreme Court divided on the question of whether

Aboriginal title still existed. In effect, in splitting its decision the court did not reject the doctrine of Aboriginal title to land. In fact, the court's indecision spurred the federal government to develop a policy of negotiating land claims based on historical claims to Aboriginal title (Boldt & Long, 1985: 9-10). Jhappan, however, cautions that in the 1981 government document, In All Fairness, Aboriginal rights would be extinguished in exchange of limited ownership and resource rights. It also held that only six claims would be negotiated at a time. With such resistance, Jhappan concludes, it is not surprising that few agreements have been concluded (Jhappan, 1995: 170).

When the decision was made to repatriate the Canadian constitution and add to it a Charter of Rights, none of the key political actors involved initially contemplated any changes to the constitutional status of Aboriginal peoples. There was no thought that the system that had deprived Aboriginals of their rights and titles needed to be overhauled to meet their needs and aspirations. The repatriation of the constitution, however, provided an opportunity for Aboriginal peoples to restructure their relationship with the Canadian state (Jhappan, 1995: 172). Aboriginal leaders demanded that their unique status as Canada's first peoples, as well as their Aboriginal rights, be entrenched in the constitution. Moreover, they demanded full, ongoing and equal participation in the discussion of issues affecting them. When these demands were denied, some Aboriginal leaders protested by boycotting the constitutional deliberations altogether (Boldt & Long, 1985: 10).

A combination of factors, including extensive public lobbying on the part of the Aboriginal groups inside Canada and in the British Parliament, forced the federal government and the provinces to concede to a space for Aboriginal issues and for a

recognition of their unique status. Under sections 25 and 35 of the Constitution Act, 1982, Aboriginal and treaty rights of Aboriginal peoples were secured for the first time in Canadian history. Section 25 provides that Aboriginal and treaty rights (including those recognized by the Royal Proclamation or by land claims agreements) should not be derogated by rights and freedoms guaranteed in the Charter. Section 35 recognizes and affirms the "existing aboriginal or treaty rights" of the Indian, Inuit and Metis peoples, and guarantees those rights equally to male and female persons (Jhappan, 1995: 173).

When the Constitution Act, 1982, was proclaimed, Aboriginal peoples were elevated to a special constitutional status; their existing Aboriginal rights were recognized and reaffirmed. As well, the constitution guaranteed an ongoing forum in which these new relationships could be defined and specified (Boldt & Long, 1985: 10-11). Boldt and Long argue the significance of the entrenchment of existing Aboriginal rights lies not so much in any major policy shift on the part of the government, but rather in the fact that the constitution placed Aboriginal peoples on a new footing in their relationship to the Canadian state (Boldt & Long, 1985: 14). Moreover, the constitutional entrenchment of existing Aboriginal rights in the constitution stands as a commitment from which the Canadian state cannot retreat.

Are recent changes in Aboriginal-state relations more symbolic than real? Despite modest improvements, Jhappan argues a gap still remains between Aboriginal aspirations and political concessions. Although the exact nature and content of the Aboriginal and treaty rights so recognized and affirmed have not been explicitly interpreted by the courts, Aboriginal peoples generally see these clauses as "a full box of rights", while governments

have tended to see them as an empty box to be filled via negotiation (Jhappan, 1995: 173)." Critics, however, often point to the obvious imbalance of power in "negotiations" between Aboriginal peoples and the federal government. Chartrand, for instance, argues that endeavours to develop broad-based decision-making structures that might match Aboriginal consensus methods more closely come up against federally established structures that tend to refashion Aboriginal decision-making in the image of Canadian institutions (Chartrand, 1995: 128). In recent times, government strategy has tended to be based on the need to settle the legal question of who controls the land, while often postponing other issues, such as self-government and Aboriginal control over resource development, for later negotiations (Fleras & Elliott, 1992: 35). Although the Constitution Act, 1982, recognized and affirmed Aboriginal and treaty rights, the Act did not change the division of powers to accommodate Aboriginal governments. This is precisely what the Charlottetown Accord proposed to do (Jhappan, 1995: 179).

While Aboriginal organizations insist that self-government is one of the Aboriginal rights recognized and affirmed by section 35 of the Constitution Act, 1982, the lack of specificity in the wording led to unsuccessful attempts to secure an amendment on self-government during the three First Ministers' Conferences on Aboriginal Matters held between 1983 and 1987. In fact, within a month of the failure of the last conference, the federal and provincial governments, with the exclusion of Aboriginal organizations, signed the Meech Lake Accord. Although the Meech Lake Accord essentially ignored Aboriginal demands, Aboriginal organizations, to be sure, would not let this happen again. By the time the 1991-92 round of constitutional talks rolled around, Aboriginal organizations were

determined that their inherent right to self-government would, indeed, be explicitly recognized in the constitution (Jhappan, 1995: 173). The 1991-92 process had at least impressed upon governments Aboriginal peoples' dissatisfaction with current arrangements (Jhappan, 1995: 180).

While the formal division of powers has not yet changed to accommodate Aboriginal governments, non-constitutional initiatives are possible. These can vary considerably in scope and approach, from devolutionary models of self-government to land claims/self-government settlements, to specific legislation that displaces Indian Act provisions by increments (Jhappan, 1995: 180). Jhappan argues, for example, in the absence of progress on the constitutional front, self-government for land-based status Indians has been an emerging reality as more bands take over the administration and, in some cases, the design of services such as education, child welfare, and policing. In two notable, but very different cases, special legislation has authorized the Inuit, Cree, and Naskapi of James Bay, as well as the Sechelt Indian band of British Columbia to exercise various powers[48] (Jhappan, 1995: 175; 178).

In August 1991, under the Mulroney government, the *Royal Commission on Aboriginal Peoples* was established[49]. This commission, co-chaired by Georges Erasmus, former Chief of the Assembly of First Nations, and Quebec judge, René Dussault, was given a broad mandate to examine all aspects of the Aboriginal peoples' condition and was empowered, as it went along, to comment on constitutional reform (Russell, 1993: 169). The final report, containing over 440 recommendations, was released in November 1996. The report's recommendations covered a wide range of Aboriginal issues, including "the reality

of societal and cultural difference, the right to self-government, and the requirement for adequate land, resources and self-reliant Aboriginal economies (Dussault & Erasmus, 1996: 3)." Clearly, the report was intended to have long-term and far-reaching implications that would require cooperative efforts across governments by all interested parties ("Final Report", 1996: 1). While still a relatively recent document, it is generally hoped that the royal commission's report will provide a basis for a more comprehensive strategy to Aboriginal self-government.

While non-constitutional initiatives are seen as a potential way of addressing some of the demands of Aboriginals, a primary concern of Aboriginal peoples is to assert the legitimacy of their claims and secure formal acceptance of them in the constitutional and institutional arena. In the constitutional negotiations leading up to the Charlottetown agreement, two phrases became particularly important regarding the status of Aboriginal governments: first, the idea that Aboriginal peoples possess an "inherent" right of self-government; and, second, the recognition that Aboriginal governments would constitute "one of three orders of government" in Canada. These phrases (or ones like them) are likely to remain central to future discussions as they provide a useful framework through which to approach the status of Aboriginal governments under a right of self-government (Webber, 1994: 264).

Aboriginal peoples' claims to a special place within the Canadian federation are supported by past practice, as well as by treaties, common law and the Royal Proclamation of 1763 (Lenihan et al, 1994: 95). Indeed, Aboriginal peoples have their own distinctive sets of references, traditions, and histories. They want to preserve a space which they would

control, whereby discussion and decision would occur through institutions of their own communities, not through those of a much larger society in which they formed a small minority (Webber, 1994: 73). In short, Aboriginal peoples want to be recognized as distinct societies with their own distinct character. They want to be recognized as having an inherent right- not a right conferred by others- to shape the development of that character through time.

ASYMMETRY AND RECENT CONSTITUTIONAL INITIATIVES

A Brief Sketch

Asymmetry has often been resisted in Canadian constitutional reform. In the late 1960s and 1970s, when asymmetry could have played a crucial role in the Canadian political system, its potential was challenged by the growth of support for the principle of equality of provinces, particularly in Western Canada. A thumbnail sketch of recent constitutional initiatives suggests that the underlying potency of the principle of provincial equality has largely served to hinder the development of any satisfactory constitutional proposal embracing a measure of significant asymmetry acceptable to all parties, in particular, Quebec and Aboriginal nations.

A failure to agree on modest constitutional changes in the Victoria Charter in 1971 was followed in 1976 by the election of the Parti Québécois and the subsequent 1980 referendum seeking a mandate to negotiate sovereignty-association with the rest of Canada.

The defeat of the referendum, and the promise by the Trudeau government of a "renewed federalism," led to another round of constitutional debate, culminating in the passage- without the consent of Quebec- of the Constitution Act, 1982. In 1984, the government of Conservative Prime Minister Brian Mulroney sought to bring Quebec back into the Canadian "constitutional family (Simeon, 1995a: 255)." The result was the 1987 Meech Lake Accord, with the exclusion of Aboriginal organizations. As is well known, the Accord failed. But, more generally, the Accord generated broad and intense opposition throughout the rest of Canada, particularly in English-speaking Canada, on the grounds that it might have resulted in Quebec having different powers from other provinces (Webber, 1994: 227-8). In Quebec, its failure was widely regarded as a profound rejection of its fundamental objectives. The resulting sense of betrayal led to a rise in indépendantiste sentiment, an escalation in the demands for increased autonomy, even among federalists, and a new strategy designed to force the rest of Canada to respond. This included a commitment to a referendum on sovereignty in the fall of 1992, combined with a refusal to participate in further intergovernmental constitutional discussions (Simeon, 1995a: 255). Aboriginal peoples, too, were committed to having their inherent right to self-government explicitly recognized in the Constitution (Jhappan, 1995: 180). The result was yet another round of constitutional negotiations culminating in yet another accord- the Charlottetown Accord.

The Halifax Constitutional Conference

As a basis for responding specifically to Quebec's demands, asymmetrical federalism had been endorsed at the first of five public conferences organized by the federal government leading up to the Charlottetown Accord. The first conference, held in Halifax, Nova Scotia, during the winter of 1992, was on the division of powers. This conference brought together participants from many walks of life and from across Canada to discuss issues in depth. In the end, the participants came out in favour of an asymmetrical distribution of powers for Quebec (Delacourt, 1992: A1). The majority of delegates recognized what had been becoming increasingly obvious- that Quebec and the rest of Canada could not reach a constitutional accord on the basis of strict adherence to the principle of provincial equality. The country now became familiar with a concept the experts had been tossing around for some time: asymmetry (Russell, 1993: 178).

Conducting hearings in provincial capitals and attending special conferences, the Beaudoin-Dobbie Committee concluded:

> The majority feeling about the evolution of Canadian Division of Powers appeared to be that Canada should support Quebec by accepting the need for the government of the provinces to exercise a wider range of provincial powers, but in a constitution flexible enough to allow for the desire of citizens in other provinces for a federal government able both to maintain national standards and to address diversity and regional disparities (Atlantic Provinces Economic Council, 1992: 12).

Indeed,

> The terms [asymmetry] was used recurrently, especially (but not exclusively) when discussion turned to the implications of Quebec's

> possible assumption of powers that would remain in federal hands for the rest of Canada. There was a belief that diversity needs to be allowed regardless of whether asymmetry is the result (Atlantic Provinces Economic Council, 1992: 10).

The Conferences' executive summary seemed to have asymmetry in mind when it stated: "There was a strong view that asymmetry in the take-up and administration of federal and provincial powers by Quebec, and where desired, for the other provinces and territories was not a problem (Atlantic Provinces Economic Council, 1992: 21)." While there apparently was clear agreement on Quebec assuming an asymmetrical status, the Conference Report did not take a definitive position on just how that was to be accomplished.

The Halifax conference also ignored certain problems that are often associated with asymmetrical solutions. For example, in most cases there is usually some transfer of revenues to support any province taking over program responsibilities from Ottawa. Philip Resnick suggests that if the list of areas that Quebec alone takes over from Ottawa is long, either in law or in practice, then the question arises, as Philip Resnick suggests, as to whether Quebec participation in the institutions of central government should be reduced[50]. There appears to have been no serious discussion of this possibility. While the conference did not settle the issue of asymmetry, it did, however, create some legitimacy for a constitutional solution that is closer to an optimum fit than a general decentralization of powers or a failure to respond at all to Quebec's demand for more autonomy (Russell, 1993: 178).

Although the Halifax conference on the division of powers generated some spontaneous support for asymmetrical federalism, this optimism for asymmetry disappeared

when political "powerbrokers" took charge of the final negotiations (Cairns, 1994: 35). Apparently, McRoberts argues, federal Constitutional Affairs Minister, Joe Clark, simply canvassed fellow politicians on the issue of asymmetrical federalism. Many, however, were intimidated by English-speaking Canada's attachment to the principle of equality of the provinces, which was partly a legacy of the Trudeau era. Once they had told him that asymmetry would be unpopular in English-speaking Canada, it was not pursued any further (McRoberts, 1997: 215). Despite its dismissal as a viable constitutional option, many participants at the conference "expressed regret at the passing of asymmetrical federalism (Whitaker, 1993: 107)."

The Charlottetown Accord

On 28 August 1992, the Prime Minister, the premiers, the territorial leaders, and the representatives of four national Aboriginal organizations all agreed on a new set of amendments, dubbed the "Charlottetown Accord." The contents of the Accord represented a delicate compromise among conflicting constitutional visions and values (Russell, 1993: 222). This most recent round of "mega constitutional politics"[51], however, ultimately ended in failure.

From the outset, the Charlottetown Accord was attacked in Quebec for failing to address the essence of Quebec's demands: additional powers (McRoberts, 1997: 216). As it was, Quebec had entered into the negotiations seeking asymmetry in powers. Through

asymmetry in government powers, the Accord might have satisfied some of Quebec's concerns without violating English-speaking Canada's continued desire for a strong "national" government (McRoberts, 1997: 220). Rather than a trade-off between Quebec's demands for additional powers and Western Canada's demands for a Triple-E Senate, the Charlottetown Accord did not meet either demand. Instead of applying asymmetry to federal-provincial relations, the Charlottetown Accord applied it to representation in the House of Commons, guaranteeing Quebec 25 percent of the seats (along with the Senate double majority on French language and culture), which was of little consequence to Québécois but of enormous consequence (all negative) to the rest of the country (McRoberts, 1997: 215; 218).

Many rejected the Charlottetown Accord because it did not meet their expectations of constitutional renewal. First, it did not offset Quebec dissatisfaction with the failure to address significantly the division of powers, and, second, it served to alienate much of English-speaking Canada (especially Western Canada) from the package (McRoberts, 1994: 155). These expectations in Quebec and in the rest of Canada were animated by very different conceptions of how Canada should be defined and organized (Russell, 1994: 229).

According to James Tully, one of the biggest impasses to agreement on the Accord was the perceived incompatibility of provincial equality and Quebec's demand for asymmetrical federalism. On closer inspection, the incompatibility seemed to stem from the way these two characteristics were envisioned. It should be noted that most of the powers Quebec requested were provincial powers were taken over by the federal government through the expansion of the federal spending power, especially since 1945. Quebec,

therefore, wished to limit federal expansion and regain exclusive or paramount jurisdiction over at least six provincial powers: forestry, mining, tourism, housing, recreation, and municipal and urban affairs (Tully, 1994: 190).

Rather than limiting federal spending power, however, the Charlottetown Accord would have validated federal spending in exclusive provincial jurisdictions, something the provinces have never agreed to in the past. Essentially, Ottawa would agree to provide the money necessary for a province if it wished to offer its own program as an alternative to a national program, so long as that program met the "national" objectives set down by the federal government. This compromise solution, which the leaves the federal government with considerable control over provincial jurisdiction, is misleadingly called provincial "opting out" (Tully, 1994: 190). All in all, the federal government, far from withdrawing totally from jurisdictions granted exclusively to the provinces since 1867, would not guarantee that its withdrawal would be irreversible and complete (Rocher & Rouillard, 1996: 117).

The distinct society clause in the Charlottetown Accord was also criticized because it was allegedly irreconcilable with the characteristic of provincial equality. As controversial as in 1992 as it was in 1987, the distinct society clause was inserted in the broader Canada clause. In an effort to weaken the recognition of Quebec as a "distinct society", the framers of the Accord inserted a reference to distinct society in a "Canada Clause" that would "express fundamental Canadian values." There, "distinct society" was to appear as one of the list of "characteristics" (including the recognition of the equality of provinces) that would guide the courts in interpreting the constitution (McRoberts, 1997: 209). The framers had

hoped that this combination would both satisfy the advocates of a more inclusive definition Canada and preserve the kind of recognition Quebecers found appealing. It did not work (Webber, 1994: 165).

With respect to arrangements to accommodate Aboriginal peoples, the Charlottetown Accord, had it been passed, would have also transformed the relationship between Aboriginal communities and the federal and provincial governments. The Charlottetown Accord proposed to entrench Aboriginal peoples' "inherent right of self-government within Canada." For the first time in Canadian history, Aboriginal governments would have been recognized as a third order of government. The inherent right, however, was to be limited by the application of the Charter of Rights, and federal and provincial laws of general application would continue to apply until self-government agreements were concluded. The Accord would have also greatly expanded the rights under section 23 and 35 of the Constitution Act, 1982. It would have given Aboriginal peoples a degree of constitutional security as it acknowledged that their pre-existing rights could not be erased at will by other levels of government (Jhappan, 1995: 173).

The precise responsibilities of the new Aboriginal governments were to be defined over a period of up to five years through negotiations among Aboriginal leaders and federal and provincial governments. It was generally understood that there would be enormous variation in the powers and responsibilities of governments that would make up this new third level. Not only is there great diversity between and among Aboriginal peoples, but the socio-economic conditions and desire for autonomy of the bands vary widely[52] (McRoberts, 1997: 265). By the same token, there would be great variation in how much authority and

responsibility for Aboriginal peoples would remain with federal and provincial governments (Webber, 1994: 267). It is interesting to note that these very pronounced forms of asymmetry, as opposed to the asymmetry demanded by Quebec, were not of major concern in the public debate over the Charlottetown Accord.

Asymmetrical federalism is seen as one way of recognizing and affirming the diversity of Quebec and Aboriginal nations. In the Canada round all Canadians were initially invited to "recognize and affirm the diversity of the federation as a fundamental characteristic itself (Tully, 1994: 196)." In this case, however, asymmetrical arrangements, where some federal units have greater autonomy than others, ran headlong into the notions of symmetrical federalism and the equality of provinces, which, in the end, rendered the Charlottetown Accord inoperable.

The Calgary Declaration

In September 1997, the provincial premiers, with the exception of Lucien Bouchard, presented Canadians with their latest initiative, the Calgary Declaration. The *Framework For Discussion On Canadian Unity* was an attempt to reconcile the "uniqueness" of Quebec with the principle of the equality of provinces. The framework stated: "In Canada's federal system where respect for diversity and equality underlies unity, 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. Consequently, the legislature and

Government of Quebec have a role to protect and develop the unique character of Quebec society within Canada." Within this same initiative, however, the framework also stated: "All provinces, while diverse in their characteristics, have equality of status ("Premiers Agree", 1997: 2)."

By adopting the new "uniqueness" principle of the Calgary Declaration, political leaders seemed to be consciously moving away from the concept of "distinct society" which held a prominent place on the constitutional agendas of both the Meech Lake and Charlottetown Accords. The "uniqueness" principle does not, however, effectively recognize and secure Quebec's distinctiveness in the Constitution. Implicitly, the declaration views the differences between Quebec and Ontario, for instance, as no more significant than differences between the other provinces. Because Quebec is not "a distinct society", so the declaration implies, it can have no claim for any special powers or rights. By failing to recognize the fundamental distinctiveness of both Quebec and Aboriginal nations, the principles of the Calgary Declaration are neither acceptable nor plausible as a framework for lasting union.

Conclusion

This chapter has emphasized that Quebec and Aboriginal nations can and should be recognized and accommodated via asymmetrical arrangements, as distinct societies with their own autonomy in the broader Canadian political system. Beyond recognition, Quebec and

Aboriginal nations want their governments to have the necessary autonomy, as well as the requisite powers, for the enhancement and preservation of their distinct space on the Canadian political landscape. This requires a vision of Canada that accepts greater asymmetry and allows diversities to flourish. Critics, however, frequently reject asymmetry because it clashes with their all-encompassing pan-Canadian vision of Canada. Nevertheless, historically, asymmetrical federalism is a concept that has deep roots in Canadian history. Indeed, asymmetry was widely recognized in the Constitution Act, 1867. In the current political climate there is still the lingering belief among some Canadians that in our country all political entities *must* be treated the same. This belief is fundamentally at odds with the spirit of accommodation underlying Canadian federalism, a spirit that has long recognized the centrality of asymmetry within the Canadian federation.

CHAPTER 4

Evaluating Asymmetrical Federalism: Current Debates in the Canadian Political Realm

There are many diverse political communities living together in Canada. These entities regard themselves as provinces, distinct societies, and nations. Many people have linked the survival of the Canadian federation to its ability to adapt to this profound diversity. Seeing Canada as a diversity dissolves the earlier puzzle of envisioning the federation without at the same time imposing one point of view over the others (Tully, 1994: 196). Gibbins and Laforest argue that "No hegemonic vision should reign supreme (Gibbins & Laforest, 1998: 432)." In other words, room must be made for competing visions of political community. Asymmetrical federalism essentially creates a formula that would allow Canadians to rediscover the origins of federalism, for it would maintain Canadian unity, while, at the same time, respect the federation's diversity. For the purposes of this analysis, the primary focus will be on the diversity of both Quebec and Aboriginal nations. This chapter will examine the various options for asymmetry within the current federal system, looking at both constitutional and non-constitutional initiatives. As well, this chapter will examine how and, more importantly, if asymmetry can be accommodated within the present federal system. While asymmetrical options present a viable alternative for

recognizing and accommodating diversity within Canada, acceptance within the current federal system is not without difficulty.

As has been previously suggested, the crisis of Canadian federalism involves a clash of competing identity projects (Rocher & Smith, 1995b: 9). A number of English-speaking Canadians, for instance, see Canada as a single nation which includes the Québécois and Aboriginal peoples. They do not tend to define their national identity in terms of some subset of Canada, such as a particular province or ethnolinguistic group. Rather, they simply see themselves as members of a "Canadian" nation which includes all citizens, whatever their language or culture. Their loyalty to Canada is premised, in part, on the view that all Canadians form a single nation, and that the federal government should act to express and promote this common national identity. According to this view, differences among Canadians due to language, ethnicity or region should be respected, but not viewed as dividing Canadians into separate national groups (Kymlicka, 1998: 25).

The fact that many English-speaking Canadians equate federalism with a strong central state, however, has led to a deep frustration among many Quebecers who insist, above all else, that a way be found to respect the diversity upon which Canada was founded (Gagnon & Rocher, 1992: 118). Having developed a strong sense of national identity, Quebecers want to act together as a political community- to undertake common deliberations, make collective decisions and cooperate in political goals. They want to make these decisions with each other, not because their goals are different from other Canadians, but because they have come to see themselves as members of the same society, and, hence, as having responsibilities to each other for the on-going well-being of that society. Kymlicka

argues that the failure of many English-speaking Canadians to appreciate this point is one of the crucial barriers to resolving the current political impasse (Kymlicka, 1998: 31-2).

Indeed, Canada contains distinct collectivities that see themselves as nations. A number of people see Quebec as a nation; many others see Canada as one. The Aboriginal peoples are also seen as nations (Laforest, 1998a: 66). Because Canada contains internal "minority nationalisms"[53], namely Québécois and Aboriginal peoples, Kymlicka argues it is usefully seen as a multinational state (Kymlicka, 1998: 15). McRoberts also argues that Canada might be better understood as a "multinational" entity whereby the needs of Québécois and Aboriginal peoples can be met through arrangements that give them autonomy for certain purposes- in other words, federalism. Within such a Canada, "unity" is not achieved through the solidarity of a single nation, as in "national unity". Rather, it involves accommodation and consensus among the collectivities that make it up (McRoberts, 1997: 261). The critical question facing the Canadian federation today is how and, indeed, if it is still at all possible to reconcile these divergent nationalisms within a single state.

For a federal system to qualify as genuinely multinational it must be seen, not just as a means by which a single national community can divide and diffuse power, like the "territorial" model of federalism[54], but as a means for accommodating the desire of national minorities for self-government. This is partly a matter of the structure of the federal system, for example, whether the constitutional provisions regarding the boundaries and powers of federal subunits reflect the needs and aspirations of minority groups. But, it is also a matter of the underlying ethos of the political culture, for example, whether there is a general commitment to the spirit of the federal constitution. While the Canadian federation has

many of the hallmarks of a genuinely multinational federation, the decision in 1867 to create (or more accurately, to re-establish) a separate Quebec province within which the French formed a clear majority was the crucial first step, Canadians have not, however fully adopted or internalized a multinational model of federalism in Canada (Kymlicka, 1998: 23). This is reflected, for instance, in debates over "special status" for Quebec and Aboriginal self-government for Aboriginal nations.

The idea that Canadians form a single nation, and that the federal government should define and promote this common nationhood, increases the mobility and political power of English-speaking Canadians. It is not surprising, therefore, that English-speaking Canadians have so strongly adopted this pan-Canadian nationalism. Pan-Canadianism, however, is a threat to the interests of Québécois and Aboriginal peoples. The Québécois and Aboriginal peoples, therefore, insist that Canada must be seen as a multinational federation. This, in turn, requires recognizing the differences between the purely "territorial-based units" of English-speaking Canada and the "nationality-based units" of Quebec and Aboriginal nations. If anything, this demand has intensified in recent years (Kymlicka, 1998: 30-1).

The notion of asymmetry has failed to develop any resonance as a viable federal alternative in the wider English-speaking Canada. In the Meech Lake debate, for example, asymmetry was decisively trumped by Clyde Wells' competing notion of the "equality of provinces." Pierre Trudeau saw asymmetry leading inexorably down a slippery slope to Quebec independence, as Quebec, it was claimed, would seek even greater powers in an open-ended process with no logical stopping place until Quebec's ties with Ottawa were progressively cut (Simeon, 1995b: 4).

One form of this argument claims that, in effect, *no* strategy would have been effective: once the idea of independence takes hold, it becomes an irresistible force and a population will settle for nothing less (McRoberts, 1997: 253). Although this purports to be a purely instrumental argument, concerned with the practical viability of an asymmetrical arrangement, it often is disguised as a substantive nationalist argument. For most of its supporters, the concern is not simply that the country might one day slip towards dissolution, but that asymmetry *is* (allegedly) a partial dissolution- a surrender of their idea of the Canadian nation. This instrumental argument is essentially founded on the empirical claim that asymmetry would create increased particularization and tension, eventually causing the whole country to crumble. Like most predictive claims, it is also very difficult to meet head on. How does one prove conclusively that in our specific situation an asymmetrical structure is likely - or unlikely- to succeed?[55] The different forms this institutional argument takes are often vague on the precise mechanism generating instability[56] (Webber, 1994: 252).

There are a wide range of possibilities between full sovereignty for Quebec at one end and the status quo at the other. To restrict consideration to only those two alternatives is to limit the potential for a multitude of possible arrangements, not to mention innovations within the Canadian political system. In terms of the range of alternatives available, it would not appear that equality or symmetry in the powers and relationship of constituent units is inherent since there are numerous examples involving asymmetrical relationships among federations. The issue, then, is not whether asymmetry is possible but, rather, what arrangements are necessary to make it workable (Watts, 1996: xi; Watts, 1998: 389).

OPTIONS FOR ASYMMETRY

In "Asymmetry: Rejected, Conceded, Imposed", Peter M. Leslie asks the question: why consider asymmetry at all? He answers: "Because it is an obvious response when some members of a federation want a relatively centralized system, and others do not want to go along- at least, not all the way." He argues that asymmetry is essentially a concession to those constituent units that do not share certain purposes common to the other members (Leslie, 1994: 50). Asymmetrical federalism currently offers a viable alternative for accommodating Quebec and Aboriginal nations within the Canadian federation. The following section will focus on possible asymmetrical arrangements that could develop within the present federal system, ranging from non-constitutional to constitutional arrangements. It should be noted that the objective of this section is not to examine every option in exhaustive detail but, rather, to outline the broad contours of each potential arrangement.

I. Non-Constitutional Initiatives- The Status Quo Option

The first alternative to be examined is federalism itself. This, pending formal amendment, is the *status quo* option: evolution within the existing framework (Leslie, 1994: 60). A number of federalist arguments stress that the status quo is not static. Rather, it means the continuing evolution of the federal system within the confines of an unamended

constitution (Leslie, 1994: 42). Richard Simeon, for instance, argues that the existing constitutional framework has been enormously adaptable and changeable in the past and there is no reason not to expect this to continue into the future (Simeon, 1995b: 5). As history has shown, Jeremy Webber argues, much can be done without changing a word in the constitution (Webber, 1994: vi). Katherine Swinton also maintains that even without the formal amendment of the Constitution, the status quo does not mean there will be no change to Canada's *de facto* Constitution. Such an assumption, she argues, essentially ignores the dynamism of the current Constitution, which is continuously being restructured through various mechanisms such as intergovernmental agreements, tax and spending policies and judicial decisions ("Concluding Panel," 1994: 203). Even under the constitutional *status quo*, according to Leslie, the federal system will continue to change and evolve. One of the many ways it may do so is by becoming more asymmetrical (Leslie, 1994: 41). Does the existing Constitution, however, permit enough realignment of governmental roles so as to respond to Quebec's and Aboriginal peoples' desire for greater autonomy and respect for its existing jurisdiction under the Constitution? In other words, is there room for some further degree of asymmetry ("Concluding Panel," 1994: 203)?

It has been argued that many of the basic concerns of Canadians can be met by means other than formal constitutional amendment. Considerable movement on many issues, including the rebalancing of federal and provincial roles, can be made by means of legislative and administrative action by intergovernmental agreements (Watts, 1996: 114). Rocher and Smith argue that informal changes to the division of powers have been made either through administrative agreements between the federal government and the provinces or,

alternatively, through the federal government's *de facto* capacity to shape policy in areas of provincial jurisdiction via the use of its spending power (Rocher & Smith, 1995b: 8). In effect, the structure of Canadian federalism has become significantly altered over the years.

Advocates of the non-constitutional approach to asymmetry contend that the present federal system affords sufficient flexibility to allow the Quebec government greater authority in certain areas of jurisdiction it considers central to protecting that province's distinctiveness but that are now shared with the federal government (i.e. labour market training, regional economic development). While other provinces could also be offered enhanced practical authority in such areas, they need not accept it- for example, if they opposed such decentralization for political reasons or because of the extra spending entailed (Seidle, 1994: 9).

One of the primary disadvantages of administrative agreements, as a non-constitutional route for the accommodation of asymmetry, is that they fail to provide any direct form of constitutional recognition. As well, with administrative agreements, no distinctive recognition is provided for Quebec in the constitution or in the structure of parliamentary institutions different from that provided for the provinces. While this, undoubtedly, strengthens the appeal of administrative agreements outside of Quebec, they are, at best, "Meech minus," designed to ward off rather than come to terms with nationalist sentiment in Quebec (Gibbins, 1998b: 277). Gibbins, therefore, maintains that administrative agreements alone are unlikely to provide a stable or durable solution to the national unity impasse. While the spirit of intergovernmental cooperation with which they are associated may be part of the answer, they do not take us far enough (Gibbins, 1998b:

278).

Katherine Swinton argues that there is reason for concern about the legal status of administrative agreements. The Supreme Court's case in *Reference re: Canada Assistance Plan* [(B.C.) (1991), 83 D.L.R. (4th) 297], made it clear that the federal Parliament can, by valid legislation, change or abrogate its obligations under a federal-provincial agreement. Moreover, unless implemented by legislation, such agreements do not have the legal force to bind the legislative branch or affect the rights of third parties. The provinces, too, can override their intergovernmental agreements, provided they do not run afoul of the constitutional requirements that they cannot legislate to affect rights outside the province. From a legal point of view, then, there is a lack of security about intergovernmental agreements ("Concluding Panel," 1994: 209).

Beyond legal concerns, there are important symbolic considerations with respect to intergovernmental agreements. Such agreements do not offer the symbolic satisfaction of enshrinement in the Constitution, as would have been the case with the immigration agreement with Quebec had the Meech Lake Accord been ratified. A constitutional amendment would not only give the ongoing protection of the arrangement, but, in this case, would also affirm the principle of asymmetry ("Concluding Panel," 1994: 209). With sufficient political good faith, these difficulties associated with administrative agreements are not all that serious. However, commitments to agreements may change with time and political circumstance, which is of particular concern, especially for minority nationalisms. Thus, administrative agreements can best be seen as "band-aids applied to deep structural problems that remain to be addressed (Gibbins, 1998b: 278)."

II. Concurrency with Provincial Paramountcy

In practice, a great deal of overlap has developed between federal and provincial jurisdictions as Canadian states (federal-provincial) have enlarged their roles and responsibilities in the post-war era (Rocher & Smith, 1995b: 20). Lenihan, Robertson and Tassé argue that the contemporary practice of federalism requires increased flexibility in how roles and responsibilities are allocated, and more coordination- not less- of federal-provincial policy and action. For this reason, if constitutional changes are needed, they believe, in general, it would be better to rely on a greater use of concurrency than to create new exclusive powers- though, they caution, there may well be exceptions[57] (Lenihan et al, 1994: 140).

Canada has made less use than most federations of concurrent jurisdictions. In 1867, the Constitution contained only two examples of concurrency: agriculture and immigration. In both cases, the federal government was given paramountcy (Lenihan et al, 1994: 140). Section 94A (added to the Constitution in 1951 and extended in 1964), also provided that both Parliament and provincial legislatures may make laws in relation to old age pensions. In the case of conflict in this area, however, the general rule of federal paramountcy would be reversed so that provincial law would prevail over federal law. This is the sole case under the Constitution where the provinces have paramountcy[58]. Although the option of concurrency with provincial paramountcy, with respect to a pension scheme, is available equally to all the provinces, to date, Quebec has been the only province avail itself of the power under this section and, subsequently, has taken the initiative to develop its own public

pension scheme.

Over the last thirty years it has become clear that the sense of where the proper federal-provincial balance lies is different in Quebec than it is for most in the rest of the country. It has been suggested that concurrency may be a way of responding to these concerns (Lenihan et al, 1994: 142). According to Peter Russell, constitutional amendments giving Quebec (and only Quebec) additional powers would be a form of "hard, direct asymmetry (Russell, 1993: 178)." Meanwhile, a "softer, indirect form of asymmetry", Russell contends, could be achieved via a section 94A-type of solution. In case of conflict in these areas, the general rule of federal paramountcy could be reversed so that provincial law could prevail over federal law. In the future, Russell adds, if areas of jurisdiction demanded by the Allaire report were added to section 94A, Quebec, too, might be the only province to exercise all the powers available under this section[59] (Russell, 1993: 178).

Reflections on the division of powers have convinced a number of political and intellectual élites that more emphasis on concurrency might help governments better manage some of the problems resulting from further interdependence. Lenihan, Robertson and Tassé suggest that examples of matters where this approach might be used include broadcasting, telecommunications, interprovincial and international trade, and criminal law. In these matters the federal government would have paramountcy. Concurrency with provincial paramountcy, they continue to argue, might also be desirable in the areas of labour market training, consumer protection, regional development, culture, forestry, mining, recreation, tourism, municipal affairs, housing and family policy. Arguably, a greater use of concurrent powers could allow for more flexibility in the articulation of the roles and responsibilities

of each order of government and allow each province, including Quebec, to better meet its special needs (Lenihan et al, 1994: 140).

Devices such as concurrency with provincial paramountcy appeal to a number of Canadians, in particular, English-speaking Canadians, because many believe it might help facilitate the acquisition of distinct powers by Quebec, while maintaining the principle of provincial equality. Critics, however, argue that other provinces might also choose to exercise additional powers, thus rendering Canada, in the words of Richard Simeon- "a diverse chequer-board of different regimes (Simeon, 1995a: 258)." Kenneth McRoberts also argues that if Quebec is to have extensive rights to enter into arrangements via concurrency with provincial paramountcy, then the Canadian public would probably insist that all provinces have the same rights. To ensure that a provincial government was asserting paramountcy as an expression of a clear preference within the province, rather than for frivolous reasons, McRoberts argues the constitution might require approval by a two-thirds legislative vote or a popular referendum (McRoberts, 1997: 263-4). At the end of the day, however, asymmetry accomplished by instituting a general rule of concurrency with provincial paramountcy would do little to change demands emanating from both Quebec and Aboriginal nations for formal constitutional change.

III. Representation in Central Institutions

The desire for greater autonomy by constituent units, in particular, Quebec and

Aboriginal nations, cannot be simply ignored. Greater autonomy (in both substance and form) via asymmetrical arrangements for Quebec and Aboriginal nations, however, might prove to be unacceptable to other parts of the country, in particular, English-speaking Canada, particularly if it is somehow perceived to unequally "benefit" Quebec and Aboriginal nations. As a result, various arguments have been put forth recommending, for example, restricted voting by MPs on particular measures (McRoberts, 1997: 218). Reg Whitaker argues: "asymmetry in powers must require asymmetry in representation in the central institutions of government. If Quebec has a much greater degree of autonomy than other provinces it can hardly be fair that Quebeckers should have "representation by population" in Parliament- and even less fair that they should continue to enjoy some of the vestiges of dualism that persist in the various forms of elite accommodation in Ottawa[60] (Whitaker, 1993: 108)."

Some advocates of asymmetry argue that the question of representation within central institutions is unavoidable in a discussion of asymmetrical federalism, particularly in English-speaking Canada. As we have seen, it has been argued that asymmetrical arrangements raise the prospect of MPs voting on measures that do not apply in their province, and cabinet ministers having responsibilities that are not exercised in their province. Asymmetry, in fact, raises an interesting institutional question that Pierre Trudeau used to pursue with some relish: how could Quebec MPs, for example, vote on measures that, under asymmetry, did not apply to Quebec? How could they hold cabinet portfolios that involved programs that did not function in Quebec? This problem, McRoberts argues, should not be exaggerated: after all, Quebec MPs have voted on laws dealing with the

Canada Pension Plan and three Quebec MPs (Monique Bégin, Marc Lalonde, and Benôit Bouchard) have been responsible for these programs as ministers of health and welfare. In any case, various commentators, including Peter Leslie and Philip Resnick, have suggested ways in which the question of representation within central institutions could be handled[61] (McRoberts, 1997: 215).

Many advocates of asymmetry now propose what one commentator has called "*quid pro quo* asymmetry (Leslie, 1994: 59)." According to Peter M. Leslie, under *"quid pro quo* asymmetry", Quebec would obtain enhanced status on the division of powers, but would have to "pay for it". He argues, to the extent that Quebec would gain power in Quebec City, it would automatically lose power in Ottawa. While Quebec would have broader jurisdiction than other provinces, and a correspondingly larger share of tax revenues, Quebec MPs would not be permitted to vote on bills that did not apply to that province[62]. The mechanisms of this *quid pro quo* arrangement, however, are not entirely clear, and its acceptability to Quebec is, to say the least, dubious (Leslie, 1994: 62).

Philip Resnick, another supporter of the *"quid pro quo"* approach, describes it this way: "For every transfer of power to Quebec , there must be a corresponding reduction in the power of MPs, ministers and civil servants from Quebec where the rest of Canada is concerned (qtd in Lenihan et al, 1994: 134)." Thus, in exchange for exclusive control over a significant number of new powers, Quebec's MPs would no longer vote on matters in these areas raised in the House of Commons. Resnick notes that this option might require the development of a "Monday-Wednesday-Friday" style of governance. In his scenario, three days of the week, Quebec MPs and Aboriginal representatives from self-governing

Aboriginal communities would meet with the rest of the House of Commons to debate and vote on common matters. Two days a week, only Members from the rest of Canada would meet. The agenda of Cabinet meetings would distinguish between pan-Canadian issues in which all ministers would deliberate, and those in which Quebec or Aboriginal ministers would not. For certain purposes, the government of Canada would be that of all Canadians; for others, more specifically that of English-speaking Canada (Resnick, 1994: 81). In effect, there would be two Houses of Commons, and quite possibly two Cabinets (Lenihan et al, 1994: 134).

While there are some observers who believe that *quid pro quo* asymmetry could be implemented without much difficulty, others maintain that this option would raise a number of problems. What are some of the potential problems with such an arrangement? First, there would be the question of delineating areas of jurisdiction. What about the "grey areas" where there was perhaps some Quebec or Aboriginal stake in an issue being discussed, though a good deal less compelling than that of English-speaking Canadian parliamentarians or Cabinet ministers? Would they still have some voice? Would they have the same voice as English-speaking Canadian representatives? Where would majority support for a government have to lie- with the MPs from English-speaking Canada alone, or with all MPs, including those from Quebec? Would it be acceptable to have a federal government making decisions for English-speaking Canada with only a minority of MPs from outside Quebec, but with a majority or plurality of all MPs when Quebec was included (Resnick, 1994: 81)?

Acknowledging these difficulties, Resnick suggests: "if the number of policy areas from which Quebec has withdrawn is kept fairly limited, then there should not be any

insurmountable problem." As long as major economic, social or judicial matters remain under federal jurisdiction, Resnick believes we should be able to carry on with a federal system in which Quebec MPs have the same weight as others in calculating party strength for purposes of confidence. He also argues that if votes of non-confidence are limited to major areas such as the budget or treaties, this would allow English-speaking Canadian parliamentarians to amend or defeat government bills in other areas, without triggering the government's downfall (Resnick, 1994: 82-3).

Although Resnick raises some interesting questions with respect to *quid pro quo* asymmetry, he fails to specify which policy areas he thinks should be kept "fairly limited" if Quebec decides to withdraw from a number of policy sectors. He also does not attempt to provide any justification as to why he believes "major economic, social or judicial matters" should "remain under federal jurisdiction." Furthermore, Resnick does not discuss the fact that even if, as a condition of opting out, Quebec has to establish a program compatible with "national objectives", its MPs, for the most part, would still continue to have an interest much like that of other provinces' MPs (Webber, 1994: 281-2). In the end, Resnick leaves these concerns, as well as the majority of questions he raises in his analysis unaddressed. Lenihan, Robertson, and Tassé argue that any attempt to come to grips with Quebec's demand for more powers must be sensitive to the ever-increasing interdependence of federal and provincial governments in modern Canada. A *quid pro quo* arrangement, such as Resnick's, fails this test. On the contrary, it distracts attention from the challenges posed by interdependence and, as such, may prevent the emergence of much-needed reforms in the way Canadians practice federalism (Lenihan et al, 1994: 134).

While some commentators propose that MPs simply not vote on measures that do not apply within their province, and that this arrangement should be formalized in the operations of Parliament, others, such as Jeremy Webber, maintain that this argument has "an air of unreality about it, exhibiting little awareness of what actually happens in Parliament (Webber, 1994: 281)." Webber argues that currently MPs have radically different degrees of interest in federal legislation. For instance, MPs from Newfoundland may vote on bills dealing with the international marketing of grain; MPs from Saskatchewan may vote on matters dealing with the cod fishery; and MPs from Ontario may vote on pollution control in the Northern Territories. It is expected that those powers will be exercised in a manner responsive to the people directly affected. Justifiably, constituents may become upset when Parliament is perceived as behaving in an insufficiently sensitive manner to their concerns and interests, but no one suggests that the right to vote should be limited strictly to MPs from grain-growing, cod-fishing, or northern oil-drilling constituencies (Webber, 1994: 281).

There are many measures that are structured so that they only affect particular sections of the country, yet the whole legislature votes on them. One example is the Royal Canadian Mounted Police (RCMP). The RCMP's role varies dramatically from place to place within Canada. In many areas of the country it is the sole police force. Nevertheless, all MPs currently have an equal say in its governance (Webber, 1994: 281). Presumably, then, most MPs can respond sensibly to interests beyond their immediate constituency. In effect, many legislative measures have a differential impact in different parts of the country, and elected representatives are expected to be able to act appropriately, even when their constituents are not directly affected.

IV. Avoiding the Issue

Apart from the initial flurry of activity with respect to a distinct society clause and regional vetoes following the most recent Quebec referendum, and subsequent "declarations" in the Speech from the Throne, many observers feel the federal government has not done enough or, alternatively, that which it has done has been ineffectual if not misdirected (Fafard, 1996: 17). Gibbins and Laforest argue that the recent combination of the Calgary Declaration and the Plan-B- oriented reference case to the Supreme Court will not resolve anything. These actions essentially leave untouched the problems associated with the federal constitution, as well as those problems that stem from the incomplete character of institutional reform exercises of the 1970s and early 1980s. Moreover, these initiatives will be insufficient to re-ignite any significant trust in the Canadian federal adventure (or "misadventure") in Quebec. A vague statement recognizing the "unique character of Quebec", in a political environment dominated by threats of partition and claims of moral superiority, will not bring political and constitutional peace to the land (Gibbins & Laforest, 1998b: 431-2).

A number of students of Canadian federalism argue that one of the reasons why asymmetry has not been well-received and widely endorsed was because it was believed that it was going to be "troublesome". Asymmetry presented difficulties that would not be easily resolved (Gagnon, 1994: 99). It is assumed by observers that it would be far easier to simply avoid the issue of asymmetry rather than begin a "gut-wrenching" journey to the root of the crisis of federalism- a clash of competing identity projects. In fact, a number of political and

intellectual élites come to similar conclusions, arguing that asymmetrical federalism has no future- or at least not until "pigs fly"[63] .

Given the presumed "unbridgeable and apparently widening gulf" between conflicting identities within the Canadian political system, as Kymlicka describes, it might seem that the only hope for Canada is to avoid the issue of "national recognition" via asymmetrical federalism as much as possible. Perhaps, it is suggested, we can concoct a constitutional formula that is so vague and ambiguous that it allows each side to interpret it in diametrically opposite ways, in accordance with their particular conceptions of Canadian federalism. This is one way of interpreting the federal government's strategy regarding the "distinct society clause," particularly during the Charlottetown Accord. The framers of the Accord essentially designed this clause to be sufficiently vague so that English-speaking Canadians could view it as merely a symbolic gesture which basically left untouched the principle of equality of provinces (Kymlicka, 1998: 28). However, avoiding the issue or constructing proposals that are so vague as to lack any measure of substance will not settle anything.

The federal government has encouraged, or at least done nothing to discourage, these differing interpretations. It has neither affirmed nor denied that Canada is a multination state but, rather, has tried to avoid directly addressing the issue at all. The recent failures of the Meech Lake and Charlottetown Accords, however, prove such a strategy will not work. Clearly, in today's political climate the stakes are too high and the sensitivities too great to "paper over these differences (Kymlicka, 1998: 28)." The call to action issued by Gibbins and Laforest in Beyond the Impasse Toward Reconciliation rests on the belief that an

alternative strategy based on waiting-out or ignoring the impasse in a non-starter. Although there is expectation of some decisive outcome to the present impasse, in the future- as in the past, the question may be simply postponed or left unresolved.

FACING THE CHALLENGES

What Needs to Be Done?

The challenge for all federations that want to survive into the next century is to accommodate diversity and enrich it while, at the same time, maintaining unity. In almost all circumstances, it has been suggested, federalism will function best if it is asymmetrical. In fact, many successful federations embrace special arrangements to suit the unique requirements of some members (Meisel, 1995: 343). Currently, Quebec and Aboriginal nations demand to be accommodated in a revamped federal system that will be capable of facing the difficult and rewarding challenges that diversity, and its entrenchment, present to all Canadians (Gagnon & Laforest, 1993: 487). The following section of this chapter argues that an examination of the concept of asymmetry will help us to discover relationships that could conceivably arise between Quebec, Aboriginal peoples, and the rest of Canada.

Canada has been built on many competing identities. Rocher and Smith argue that it is very difficult to compromise about issues and interests that have come to be defined as affecting one's core political identity (Rocher & Smith, 1995a: 64). As the debates surrounding the Meech Lake and Charlottetown Accords demonstrated, Canadians have very

different visions of the country, its communities, and the primacy of certain values and principles (Seidle, 1994: 9). To require, for instance, that Quebecers and Aboriginal peoples put the principles of provincial equality and pan-Canadian uniformity above everything else is, by definition, to relinquish the premises of federalism among complex societies.

The inability to appreciate other ways of participating within the federation has proven to be a problem for many Canadians. The first step in addressing this problem requires an act of the imagination- the ability to imagine the federation from other points of view- in an attempt to overcome, as Tully calls it, "diversity blindness (Tully, 1994: 184)." Charles Taylor insists:

> For me to assume the political identity in which I am evolving as a citizen, I must feel that my voice can be heard and that I am part of the whole. If, in a given situation, what is specific to a certain minority is not accepted by others, the members of the minority will rightly feel that what they are claiming is held in contempt or being ignored...For people to feel responsible for the future of a country and thus to participate in it, they must still be recognized for what they are (qtd in Jenson, 1998: 217-8).

Essentially, the pluralist nature of Canadian society must be recognized in order to move Canadians beyond the current impasse. In other words, Canadians need to acquire the ability to imagine and appreciate Canada from the point of view of diversity.

As has been suggested, in order to make our way out of the impasse, we must think of approaches to renewal that will "shake the current framework to its very foundations (Pelletier, 1998: 326)." This will inevitably displease some since it is not easy for many people to accept change, as was evident from previous attempts to reform the Canadian

federal system. As John Locke argued, human beings, as citizens, do not readily part with their political customs (Laforest, 1995: 150). For Locke, it was very difficult to get a people to change its political system. He noted: "tis not an easie thing to get them changed, even when all the World sees there is an opportunity for it (Locke, 1965: 462)." Moreover, moving "beyond the impasse" does not lie in a renewed effort by the federal government to take charge and lead (Fafard, 1996: 18). A significant discussion of asymmetry, then, is most likely to occur in settings where the federal government is not the dominant player- where it will be unable to impose its political will on other federal units. Clearly, the need exists to restore the federal principle whereby "neither order of government is subject to the effective control of the other (Leslie, 1994: 65)."

A number of English-speaking Canadians today would agree that conceptions of pan-Canadian nationalism endorsed by various governments and political leaders have been unacceptably biased against the interests of the Québécois and Aboriginal peoples. According to Kymlicka, many English-speaking Canadians are now willing to "...accept that any legitimate form of pan-Canadian nationalism must provide some accommodation for the Québécois or Aboriginals, and cannot just be a vehicle for increasing their own opportunities for political power (Kymlicka, 1998: 35-36)." While an increasing number of English-speaking Canadians may recognize the need for greater "accommodation" of national minorities within the federal system, this accommodation, however, is usually heavily circumscribed. For instance, the promises of "renewed federalism" to Quebec, which emanated from federal and provincial governments and were advocated by English-speaking Canada, would mean only superficial alterations of the role and powers of the central

government. In the end, the suggested reforms did not lead to the recognition of the Québécois "nation", nor did they give Quebec a special place in the federation (Rocher & Smith, 1995a: 55).

Likewise, in endorsing a "decentralization"[64] of power to all the provinces, many English-speaking Canadians hoped to accommodate the concerns of Québécois for greater autonomy, while, at the same time, maintaining a unitary conception of Canadian nationhood. This type of decentralization attempts to preserve the "ideal" of common citizenship and symmetrical federalism (Kymlicka, 1998: 36). While English-speaking Canadians may be willing to accept increased provincial autonomy within the federal system, provided it was offered to *all* provincial units, this still falls far short of the demands by Québécois and Aboriginal peoples for greater autonomy[65].

Proposals for " across-the-board" decentralization fail to explicitly acknowledge that the demand for special status is a demand not just for additional power, but also for *national* recognition (Kymlicka, 1998: 27). Quebec nationalists, Resnick argues, "want to see Quebec recognized as a nation, not a mere province; this very symbolic demand cannot be finessed through some decentralizing formula applied to all provinces (Resnick, 1994: 77)." Proposals for "across-the-board" decentralization disregard the fact that Québécois and Aboriginal peoples also want asymmetry for its own sake- as a symbolic recognition that Québécois and Aboriginal peoples make up nationality-based units within the federation[66] (Kymlicka, 1998: 27). In short, any form of *symmetrical* federalism- even a radically decentralizing one applying to all the provinces- is unlikely to be acceptable to the majority of Québécois and Aboriginal peoples.

Given the current political climate, especially with regard to English-speaking Canadians and Québécois, it is unlikely that in the near future we will be able to reach an agreement on a division of powers satisfactory to each party, as their national identities are simply too much in conflict. Since English-speaking Canadians largely act on their national identity through the federal government, they tend to reject any form of asymmetry which they see as reducing the federal government's ability to express a common national identity and further develop "national programs". By contrast, Québécois generally act on their national identity through the provincial government, and will tend to reject any constitutional proposal that does not block, and indeed reverse, federal intervention in areas of primary provincial jurisdiction. To many commentators, this is the dilemma at the heart of Canadian political life. Yet, as Kymlicka argues, this dilemma is only unsolvable if we insist on a purely symmetrical form of federalism (Kymlicka, 1998: 39).

It should not be surprising that asymmetry has emerged as an alternative to a symmetrical form of federalism as governments have sought to reconcile competing objectives and concerns (McRoberts, 1985: 121). Despite well-known opposition to this concept, an arrangement based on asymmetry within the federation is a scenario that can produce a win-win outcome. The advantage of thinking about the union in asymmetric ways, Jenson argues, is that it opens space for the recognition of both Quebec and the Aboriginal nations living in Canada. Indeed, she suggests this is the vision which Andre Burelle promotes, as he calls for a return to the ideas of 1867 of Canada as a country-building project, uniting several nations (Jenson, 1998: 231).

As noted earlier, defenders of asymmetry typically claim that asymmetry is needed to enable national minorities to pursue their interests and identities. This claim, however, has had virtually no success in the past in persuading English-speaking Canadians to support asymmetry. Advocates of asymmetry argue that some form of asymmetrical federalism, which recognizes the multinational character of the Canadian federal system, needs to be found that would enable Quebec to act on its sense of national political identity, without preventing English-speaking Canadians from acting on their deeply felt desire to act as a collectivity, and not simply as discrete provinces (Kymlicka, 1998: 42). According to McRoberts, this means differentiating between Quebec and the rest of Canada. Under schemes of asymmetry, any decentralization of powers could go to Quebec alone; Ottawa would continue to perform these functions in the rest of the country. In effect, English-speaking Canada could continue to have as strong a federal government as it wished (McRoberts, 1994: 213).

Roger Gibbins argues the principle reason why asymmetrical federalism has not found a significant audience outside Quebec is that it presupposes greater autonomy for Quebec combined with a continuation of Quebec's present role in the federal government. He claims that the most important selling point of a reconfigured union in English-speaking Canada is the notion that it would also provide Canada with greater autonomy from Quebec. Likewise, Quebec would have greater autonomy from Canada (Gibbins, 1998a: 401). As Reg Whitaker argues, "Quebec gets exclusive powers that no other province wants or needs, while the rest of Canada gains an effective national government that is not resisted by Quebec (Whitaker, 1993: 108)." Essentially, asymmetrical federalism would enable English-

speaking Canadians to continue to use, for example, the spending power in areas of provincial jurisdiction, and even to discuss whether they wished to expand the jurisdiction of the federal government in areas such as the environment or post-secondary education. Of course, Kymlicka asserts, there is a price to pay for this- namely abandoning the dream that Canada is (or ever was) a "uni-national state" (Kymlicka, 1998: 41).

Perhaps it might be asked how anyone could seriously propose greater centralization of powers in Canada when so many Quebecers and Aboriginal peoples find the existing level of centralization totally unacceptable? According to Kymlicka, it would only be legitimate for English-speaking Canadians to pursue this centralizing form of politics if Aboriginals and Québécois could "opt out" and preserve their collective autonomy. In other words, English-speaking Canadians would have to accept once and for all that Canada is truly a multinational state (Kymlicka, 1998: 39). According to Gagnon, accepting that the complexion of Canada is, indeed, multinational, means assuming that the First Nations, the Quebec nation and the rest of Canada- a nation, it has been argued, that is imagining itself at the moment- can come to terms with this reality (Gagnon, 1994: 98). Of course, this does not preclude the possibility that a recognition of the multinational character of federalism will eventually prove to be a stepping stone to secession. But no proposal can entirely rule out the threat of secession.

McRoberts argues one of the main obstacles to the realization of an asymmetrical federalism based on multinationalism, is that English-speaking Canada, for the most part, does not see itself as a distinct nationality. Even in the 1960s, English-speaking Canadian political and intellectual élites who were prepared to see Quebec as a distinct entity within

Canada had trouble with the idea of an English-Canadian counterpart. Within the Trudeau vision, for instance, in which there could be no distinct entities of any kind, the notion of an "English-Canadian nation" was totally beyond comprehension (McRoberts, 1997: 267). While the grounds for treating Quebec and Aboriginal peoples as nations are justifiable, Webber argues there is no justification for treating "English Canada" or any other subset of Canada as the "nation" of English-speaking Canadians. He insists their allegiance is clearly focused on the entirety of Canada, including Quebec (Webber, 1994: 278).

On the other hand, Resnick argues that English-speaking Canadians "must get on with it and begin to address the question of [their] own identity within Canada- to disaggregate the pan-Canadian from the English- or English-speaking Canadian dimension as [their] contribution to rethinking Canada[67] ("Concluding Panel," 1994: 216)." It has been that a way needs to be found to persuade English-speaking Canadians to adopt the multinational conception of Canada, even if they, themselves, continue to define their national identity in pan-Canadian terms (Kymlicka, 1998: 41). Resnick concludes, unless and until English Canadians are prepared to come to terms with their own identity as a distinctive national community, sociologically speaking, within a larger Canada, there will be no peace on the constitutional front (Resnick, 1994: 74-5).

All this argues for some form of institutional accommodation of our diverse political communities. Clearly, different communities have diverse needs and aspirations which require accommodation. The precise nature of that accommodation depends on the specific character of that community, the reasons for its significance to its members, the extent of its significance, and the need for a workable balance between communities. Can Quebecers

decide in Quebec City what other Canadians decide in Ottawa? Can Aboriginal peoples decide at the level of their communities matters which, for the rest of the population, are dealt with in Ottawa? This would mean, of course, an asymmetrical constitution,[68] one in which the powers would be apportioned differently between different provinces and the federal government, or between Aboriginal peoples and the two existing levels of government (Webber, 1994: 227).

Constitutional Asymmetry

What exactly is meant by "constitutional asymmetry"? In recent years, the term has been applied to proposals that provided that one constituent unit should be treated differently from others. In practice, the debate has focused on the treatment of Quebec. A constitutional provision might be adopted expressly recognizing Quebec's distinctiveness and providing that the constitution should be interpreted in a manner compatible with that recognition. The distinct society clause is an example of this approach. Alternatively, the allocation of specific legislature powers might be changed so that Quebec would make laws (with respect to Quebecers) on matters now controlled by Ottawa (Webber, 1994: 229). Under certain kinds of asymmetry, the Quebec legislature would be able to make laws that other provinces could not make. But, as Webber warns, we should be careful not to confuse this with the idea that Quebecers would get more clout at the federal level or more clout over the affairs of the others provinces, as politicians such as Clyde Wells and Preston Manning so eagerly

point out. Constitutional asymmetry is not so much about citizens getting *more* power as about where they exercise power. Quebecers, like Canadians in other provinces, would still have a say over the same kinds of political decisions- it is just that they would exercise that say in a provincial rather than federal forum (Webber, 1994: 229).

Webber argues that asymmetry is more about *where* decisions are made than about *what* decisions are made. It is about which level of political community makes decisions. For instance, Quebecers' greater commitment to their provincial community might be accommodated through an asymmetrical structure: some things decided at the federal level for other Canadians could be decided at the provincial level for Quebecers. The same approach is implicit in proposals for Aboriginal self-government. There, too, the structure of governmental authority would be asymmetrical: matters decided for most Canadians at the federal (or provincial) level would for Aboriginal peoples be decided within Aboriginal institutions (Webber, 1994: 231). In short, constitutional asymmetry is one way of responding to the varying perceptions of political community in Canada.

Even though constitutional asymmetry may seem well-suited to the shape of political commitment in Canada- and even though Canadians have often arranged their political structures in ways that recognize, implicitly at least, the value of asymmetry- there still remains widespread suspicion of it. For the most part, the majority of Canadians seem to have little difficulty accepting that economic conditions may differ from place to place, resulting in justifiable differences in economic regulations, or that provincial differences may exist between traffic rules or rental legislation in different provinces. There is little trouble, in other words, in accepting differences that are a direct result of the existence of different

provinces, each with its own legislative authority. Many within English-speaking Canada, however, are much more sceptical when it comes to government action premised on, for instance, cultural concerns. When discussing these forms of differentiation, many Canadians slip back into the old rhetoric that "all citizens must be subject to the same rules (Webber, 1994: 235)."

Although a majority of English-speaking Canadians may be perfectly content with the current federal system and the types of constitutional agreements they have known until now, in reality, however, neither the Québécois nor Aboriginal peoples are completely satisfied with these arrangements. Many argue that the federal political system essentially fails to address the deeper concerns of their peoples as distinctive nationalities within Canada (Resnick, 1994: 75). Within the federal system, the acceptance of these collective projects requires installing the belief that a single country may accommodate a variety of collective projects without threatening either the country's existence or the well-being of its members (Jenson, 1998: 232).

The province of New Brunswick, for example, without a great deal of fanfare, in the early 1980s, constitutionally recognized the equality of the English-speaking and Acadian *communities*, despite the fact that the former is twice the size as the latter. In other words, the province is more than officially bilingual. In 1981, it passed an *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.* The legislation has not solved all the Acadians' problems, to be sure (Jenson, 1998: 232). Nevertheless, it does serve as a Canadian-model for the formal recognition of distinct communities within the Canadian federal system.

It should also be noted that in November 1982, the people of the Eastern Arctic, 85 percent of whom are Inuit, voted in a referendum to support a lands-claims settlement under which their region will be separated from the Northwest Territories and organized as the largely self-governing territory of Nunavut in the year 1999. The Nunavut arrangements were established in law through an Act of Parliament in July 1993. A constitutional amendment, section 35 (3) of the Constitution Act, 1982, ensures that rights contained in these land-claims agreements are constitutionally entrenched and cannot be changed without the consent of the people concerned (Russell, 1994: 231). The agreements give the Inuit title to 350,000 square kilometres of land; a cash settlement of $1.15 billion over fourteen years; and the right to hunt, fish, and trap in the whole area. These rights, however, come at the expense of extinguishment of general Aboriginal rights, which are exchanged for more specified, limited rights (Jhappan, 1995: 177). While the government of Nunavut will in no way represent either traditional Inuit government or a third level of Aboriginal government, it does offer a model for the formal constitutional recognition of Aboriginal land-claims agreements[69].

For Quebec, Aboriginal nations, and any provincial unit interested in assuming responsibility for a policy area, there is a world of difference between relying upon administrative agreements, which are subject to unilateral abandonment by Ottawa, and a constitutionally based capacity to assert primacy over a jurisdiction. Thus, in any effort to render Canadian federalism more attractive to Quebec and Aboriginal nations, a limited degree of asymmetry with a firm constitutional basis for strategically important areas might be much more significant than a wide-ranging asymmetry that resides in administrative

agreements (McRoberts, 1994: 157). In any event, McRoberts acknowledges without constitutional entrenchment, not only does asymmetry lack symbolic visibility, but there is no guarantee it will persist (McRoberts, 1994: 155).

While a reorganization of the institutions of federalism might begin with administrative agreements among governments- to a certain extent that is already happening- the recognition of the country's multinational character, however, requires the constitution to be amended (McRoberts, 1997: 267). Similarly, Webber argues that the Canadian Constitution should be modified. He believes that Canada needs to accommodate its own diversity by acknowledging the distinctive aspirations of its people. Part of the solution, he maintains, is to adopt an asymmetrical constitution (Webber, 1994: 318, 314). With the result of the last referendum in Quebec and the consequent heightening of expectations, the Canadian polity might have to be reorganized much more than was envisaged in the past. The question that remains is whether or not the political will exists to take on this challenge.

Beyond the Constitutional Question

Constitutions are not meant to resolve all our conflicts. They merely suggest "a framework through which we can wrestle with them through time (Webber, 1994: 29)." While it is doubtful that the kind of recognition needed within the present political system can be achieved by any means other than constitutional change, largely due to the continuing presence of conflicting visions of the country, we should not, however, become so

preoccupied with the lack of formal recognition that we miss the practical dynamics of this country (Webber, 1994: 288).

According to Ronald L. Watts, it has only been in the last thirty years that Canadians have become preoccupied with comprehensive constitutional change as a way of trying to resolve the country's political problems. Canada's history, as a federation, illustrates that much of the adjustment in the direction of both decentralization and centralization were the product of political rather than constitutional action. Furthermore, in recent decades far-reaching changes in the structure and operation of the Canadian federation have come through the impact of fiscal circumstances and the interactions of the policies of federal and provincial governments rather than through formal constitutional amendment. In short, Watts insists many of the basic present concerns of Canadians can be met by means other than formal constitutional amendment (Watts, 1996: 114).

Canada's contemporary political dilemma, however, clearly goes beyond the constitutional question. Whether for francophone Quebecers or for Aboriginal peoples, the idea of asymmetry extends well beyond the legal dimensions of the division of powers of the institutional dimension related to changes to federal political institutions. If the constitutional debate was simply about legal and institutional rearrangements, Rocher and Smith argue, these differences would eventually be worked out. When it is a matter of agreeing on matters of political identity, however, it is very difficult to come to some sort of agreement (Rocher & Smith, 1995a: 56). For supporters of a quasi-unitary and undifferentiated Canada, the compromise required by such an arrangement would be very great (Noël, 1998: 265).

The task at hand is to identify the political locales in which democratic dialogues between political communities can occur. Noël argues the issue is accepting the idea of working together to preserve the autonomy of each of these entities while at the same time fostering convergence through an open debate (Noël, 1998: 265). To have the capacity to get along and find a solution together presupposes some conditions. For one thing, there will have to be a better understanding on each part. One of these conditions could be to understand, first, that the Quebec and Aboriginal nations will to have political power and autonomy is not an unamicable movement against Canada ("Concluding Panel," 1994: 211, 217).

Existing institutions, especially the brokerage parties that often seek *not* to discuss difficult political questions during election campaigns, are ill-designed to provide the routes to representation (Jenson, 1998: 233). Latouche also argues that the usual instruments for resolving political conflicts (referenda, tribunals or courts, elections, conferences) are liable to be of little use since they do not in any way have unanimous support (Latouche, 1998: 335). Conflicts can only be overcome when the principal interlocutors are ready to make mutual concessions (Laforest, 1998b: 426). Indeed, Gibbins and Laforest argue in order to break new ground and to find a durable solution to the impasse at hand, the key political players will have to make real, significant and reciprocal concessions to one another (Gibbins & Laforest, 1998: 433). In other words, real discussions must take place and real concessions must be made to both Québécois and Aboriginal peoples.[70]

Although political will is needed to get beyond the current impasse, no such will is in evidence at the moment. It is absent among the current political players- at both the

federal and provincial levels- who are reluctant to start down the path of reform, simply to end up failing once again. Pelletier argues that an absence of political will is even more pronounced among a number of Canadians outside Quebec and among English-speaking and allophone Quebecers, who often prefer to take a hard line toward changes likely to accommodate Quebec. In short, the impasse will only be resolved if and when Canadians truly want to find a solution. At the present time, however, the will to do so does not appear to exist (Pelletier, 1998: 327).

Despite the lament over Canada's current constitutional crisis, it cannot be said that the country has lacked either the asymmetrical tools or the intellectual imagination to refashion these to meet our current needs. The question is not one of constitutional architecture, but, rather, the political will and statecraft to manoeuvre in the face of increasingly rigid and polarized nationalisms. In short, asymmetrical tools exist but we are less and less able to use them (Milne, 1994: 117). Therefore, it seems that the potential for asymmetry is indeed limited.

The failure to reach a Canada-wide consensus should relieve Canadians of any illusion that it is easy to reach a popular consensus on constitutional change. The real lesson to be learned from the Canada round is to understand the huge gulf that separates the most ardent constitutional reformers in Canada (Russell, 1993: 228). Against the backdrop of competing and conflicting visions within the Canadian federal system is a deep-seated desire for the recognition of asymmetry, which is fundamentally at odds with the principle of the equality of provinces. Can we realistically expect greater autonomy, along the lines of asymmetrical federalism, for Quebec and Aboriginal nations within the Canadian political

system? In the future, no doubt it will be essential to think about not only how much we *can* achieve but also how much we *want* to achieve asymmetry.

Conclusion

Why can't our diverse communities find expression through the institutions of a single national state? Canadians do not share a common vision about an alternative structure for the Canadian union or even, for that matter, about what now constitutes the essence of Canadian federalism. We all have different attachments, define our communities in different ways, and belong to a host of overlapping and intersecting groups (Webber, 1994: 193). A reconception will not settle things once and for all. For one thing, political attitudes often persist long after the conditions that created them have disappeared. And, of course, in a society of different people, opinions will continue to differ (Webber, 1994: 258-9).

Today more and more people have come to see some form of federalism, combining a shared government for specified common purposes with autonomous action by constituent units of government for purposes related to maintaining their distinctiveness, as allowing the closest institutional approximation to the multinational reality of the contemporary world (Watts, 1996: 4). The main formula for reorganizing political institutions so as to better reflect a "multinational" Canada has been asymmetry. Asymmetry creates a formula that would allow Canadians to rediscover the very origins of federalism. Asymmetry would essentially give the Québécois and Aboriginal peoples the powers that follow from their

responsibility for supporting and promoting the distinctiveness of Quebec and Aboriginal nations, without undermining the ability of the federal government to assume the responsibilities expected of it in the rest of the country (McRoberts, 1997: 263). This would benefit both the central government, which is fighting to keep the country together, and the national minorities, which are struggling to have their diversity respected. Thus, each would gain under this formula, even if some might see these gains as being of little significance (Pelletier, 1998: 324).

In sum, there is an important political space between the status quo and sovereignty for asymmetrical alternatives. Today a case still remains for an asymmetry that, while more limited, is constitutionally entrenched. Yet, precisely because of the latter requirement, asymmetry seems destined to remain an option that is intellectually intriguing but politically irrelevant. Facing this reality, Canadians must, therefore, try to do the manageable, without attempting to resolve all differences at one time ("Concluding Panel," 1994: 219). While asymmetry would tend to intensify the political process in Canada, in the aftermath of the last round of "mega constitutional politics" it appears there is little opportunity, at least at the present time, for political and constitutional creativeness on the asymmetrical front.

CHAPTER 5

CONCLUSION

When asked the question- *Is asymmetrical federalism a viable option for the future?*- the answer throughout this thesis has been "yes". However, given the current Canadian political climate, it is not a viable option at the present time. While asymmetrical federalism offers a viable alternative for recognizing and accommodating the demands of Quebec and Aboriginal nations within the Canadian federal system, its usefulness as a political option remains limited by the adherence of many Canadians to the principle of equality of provinces. Indeed, some commentators have even gone so far as to suggest that provincial equality is a foundational principle upon which the Canadian federation rests. This divergence of conceptions or "clash of visions" between asymmetry and provincial equality lies at the core of much of the contemporary debate and discussion surrounding asymmetrical federalism. Broadly speaking, the viability of asymmetrical federalism as a political option within the Canadian federal system was the issue that the preceding analysis attempted to address. Looking at why asymmetry was deemed necessary to accommodate the diverse characteristics of the Canadian federal system, in particular- that of Quebec and Aboriginal nations, this thesis, then, moved on to discuss various options for asymmetry within the Canadian federation. More specifically, this thesis attempted to address how, and, more

importantly, if asymmetry could be accommodated within the current federal system.

The main argument throughout the body of this thesis was that while asymmetrical federalism provides a viable option for accommodating the diversity of Quebec and Aboriginal nations within the Canadian federal system, in the near future it is doubtful that a majority of Canadians, in particular, English-speaking Canadians, will be convinced to embrace greater asymmetry given today's political climate. While federalism requires political ingenuity to survive and flourish, at this time the ingenuity required to move Canada beyond the current political impasse appears to be in short supply.

Throughout this thesis I have argued that the challenge facing the Canadian federation, if it wants to survive into the next century, is to accommodate and enrich diversity while, at the same time, maintaining unity. As Ronald Watts argues, federalism "is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union (Watts, 1996: 6)." Asymmetrical federalism essentially attempts to accommodate the diversity rooted in federal units. This was recognized by most of the Fathers of Confederation. In 1867, the Fathers of Confederation assigned to the provinces those legislative powers viewed as necessary to address the specific forms of "difference" most cherished by the constituent units that became Canada (Lenihan et al, 1994: 154). Essentially, the concerns over diversity remain as central to Canadian politics today as they did in 1867.

Asymmetry, then, creates a formula that would allow us to rediscover the very origins of federalism as the application of these principles would help maintain Canadian unity,

while respecting the federation's diversity. This would, as was argued in Chapter 4, benefit both the federal government, which is presently struggling to keep the country intact, as well as Quebec and Aboriginal nations, which are struggling to have their diversity respected and recognized within the larger federal union. Under the formula proposed in Chapter 4, each political entity- English-speaking Canada, Quebec, and Aboriginal nations- would be able to maintain their own political project. Thus, each would, in effect, gain under an asymmetrical formula, even if some Canadians might see these gains as being of little overall significance. According to this argument, Canadians must begin to accommodate the multinational reality of the federal political system. Recognizing that Canada is a multinational entity, composed of Quebec and Aboriginal nations, ought not to be viewed as a threat to the existence of the Canadian state. Rather, viewing Canada as a collection of diverse nationalities would perhaps, in the long run, strengthen the chances for the survival of the country.

Clearly, a recognition must be made within the Canadian federation that different kinds of difference may require different kinds of accommodation. As we have seen, the structure of our various political communities in Canada is not symmetrical. However, in Canada, as Chapter 2 argued, there still remains a lingering belief that all provinces must be treated in precisely the same way, and that the same rules must apply to all Canadians. This belief is fundamentally incompatible with the spirit of the accommodation of diversity underlying federalism. As this thesis argued, the idea that equality of the provinces is a foundational feature of the Canadian federation is without ground.

Despite the difficulties I have noted throughout this thesis, asymmetrical federalism is still an attractive option within the federal system. However, too many Canadians today feel if something is troublesome and presents too many difficulties that might not be resolved quickly and easily, then why should they try to work out some sort of acceptable compromise solution. Many assume that asymmetry complicates matters. While asymmetry may potentially complicate matters by forcing Canadians to move beyond the comfort of the status quo, asymmetry would probably deepen and intensify democracy (Gagnon, 1994: 99). Therefore, asymmetry is not destabilizing. In fact, it provides us with a means by which it is possible to find stability within the Canadian federal system. In short, asymmetry would tend to intensify the political process, while providing Canadians an opportunity to sustain their federal union.

In a federal state like Canada, are we likely to ever find a solution satisfactory to all political communities once and for all? Increasingly, a number of political and intellectual élites have become sceptical. But, does this mean we must abandon the prospect of asymmetry altogether? Despite the lament over Canada's present impasse, it cannot be argued that Canadians have lacked the intellectual imagination to refashion political arrangements to better meet the current needs of some Canadians. The question, therefore, is not one of political or constitutional architecture to maintain asymmetry, but, rather, of political will to manoeuvre in the face of increasingly polarized visions.

As this thesis demonstrated, it hardly seems a propitious political climate for asymmetrical options, whether constitutional or non-constitutional in nature. There is also no guarantee that the future will be any less fractious than the past. Given our current

political climate, asymmetrical federalism must not be perceived as some sort of high-stakes gambit with winners and losers. In other words, asymmetry in federal arrangements must not be perceived as some sort of "zero-sum game". Instead, we must endeavour to move beyond the present impasse by seeking to create a more inclusive federal regime capable of accommodating the diverse needs and desires of Quebec and Aboriginal nations, while, at the same time, acknowledging that membership within the federal union does not entail the uniformity of beliefs, values, and allocation of powers. Perhaps, then, as was argued in Chapter 1, we need to be realistic and acknowledge that diversity within the Canadian federal system is inherent.

According to Réjean Pelletier, the principle of asymmetry may result in power being granted, if not exercised, through a variety of channels which are the very reflection of the diversity of the Canadian federal system (Pelletier, 1998: 321-2). As I have argued in Chapter 4, potential avenues for the emergence of a greater degree of asymmetry include concurrency with provincial paramountcy, representation within central institutions, as well as a variety of non-constitutional initiatives, such as administrative agreements. Currently, however, the Chrétien government appears reluctant to embark on a serious discussion and consideration of asymmetrical alternatives, particularly constitutional asymmetry. Provincial premiers, too, generally appear to lack the necessary political will to journey down the path of constitutional reform or, for that matter, asymmetrical reform- with the exception of "across-the-board" decentralization proposals, recently advocated by some of the premiers.

Today the future of the Canadian federal union is once again on the national political agenda. The Parti Québécois government, under the leadership of Lucien Bouchard, is

committed to holding another referendum on sovereignty-association. Under Quebec's referendum law, a new referendum on sovereignty cannot be held until after the next provincial election. With the result of the last referendum and the subsequent heightening of expectations in Quebec, it is hypothesized that the Canadian polity might have to be reorganized much more than was envisaged in the past (McRoberts, 1997: 267). One possible route for reorganization is through asymmetry. As this thesis argued, this is no easy matter for many Canadians to accept, especially English-speaking Canadians. Increasingly, there must be a realization that special institutional arrangements are consistent with our history, and are frequently desirable in order to accommodate differences. While a reorganization of the institutions of federalism might begin with administrative agreements among governments (to a certain extent this is already happening), and, as political scientists such as Philip Resnick and Peter M. Leslie argue, might continue with a reorganization of central institutions, such as the House of Commons, in the end, the recognition of Canada's multinational character will, in all likelihood, require that the constitution be amended. However, now that sovereignty for Quebec has become a distinct possibility, it is conceivable that what might have seemed satisfactory only a few years ago may today be simply too little, too late (McRoberts, 1997: 268).

As was evident in Chapter 2 of this thesis, in Canada there are various competing visions of what the country is and what the country should be. In many ways Canadians are still struggling to deal with contrasting political visions within their federal system. One vision, often espoused by proponents of the principle of provincial equality, emphasizes the unity of the country and insists that to have unity all constituent units have to be in the same

relationship to the Canadian federation. Within this perspective, it is difficult to recognize national minorities within the country largely due to the belief that any recognition will set Canada on the road to disintegration. Another vision, often advanced by Québécois and Aboriginal peoples, is concerned with the recognition and accommodation of minority nationalisms vis-à-vis asymmetrical federalism. This vision emphasizes that the distinctiveness of Québécois and Aboriginal peoples can and must be guaranteed through greater autonomy within the broader Canadian state.

As the debates over the Meech Lake and Charlottetown Accords recently demonstrated, Canadians have very different visions of the country which extend well beyond the constitutional realm. In other words, our problem runs deeper than merely this or that clause in the constitution. It is essentially a problem of differing perceptions of political identity. In effect, we have to seriously consider whether these "visions" can be accommodated within our current federal system. This involves understanding how our differences might fit within a coherent sense of the whole. As Jeremy Webber argues, "Our problem is not how to live apart, but how to live together (Webber, 1994: 22). Clearly, room must be made for competing visions of the political community. After all, political modernity has room for multiple senses of belonging (Laforest, 1998b: 415). No doubt, whatever shape Canada takes in the future, it will be necessary to accommodate more than one vision of the Canadian federal union. As this thesis maintains, those who advocate the triumph of one particular vision at the expense of others are bound to be disappointed.

The task before us, then, is a reorientation of the way we currently think of federal arrangements. An alternative approach to thinking about federalism, as has been argued

throughout this thesis, is to consider asymmetry. As has been suggested, an asymmetrical structure is consistent with the actual shape of political community and political allegiance in Canada (Webber, 1994: 248). Arguments favouring asymmetry have not only been put forth by francophone Quebecers. Aboriginal peoples have also demanded recognition of their differences in the constitution. However, in contrast to the disagreement between Quebec and Ottawa, which is framed in the traditional discourse of federalism, Aboriginal nations want a new order of government recognized and affirmed in the constitution (Rocher & Smith, 1995a: 55-6).

In the case of Quebec, asymmetrical federalism will, in all likelihood, require (among other things) the constitutional recognition of Quebec as a distinct society. In the case of Aboriginal nations, asymmetrical federalism will likely entail the recognition of the inherent right to self-government, along with the recognition that Aboriginal peoples constitute "one of three orders of government" in Canada. Despite the fact that asymmetrical federalism recently gained a great deal of favourable public attention at a recent Halifax constitutional conference on the division of powers, to date, however, Quebec's and Aboriginal nations' aspirations for greater autonomy still remain unmet within the larger federal system.

This thesis has argued that an essential element in any federation encompassing a diverse society has been the acceptance of the value of diversity and the possibility of multiple loyalties expressed through the establishment of constituent units of government with autonomy over those matters important to their distinct identity. For many, such as Will Kymlicka, this entails the recognition of the multinational character of the Canadian federal system. The implication of this for the future of Canadian federalism is that we

should not be constrained to traditional arrangements or theories about federalism. Rather, we should be ready to consider more imaginative and innovative ways of applying federalism as a way of combining unity and diversity. This can be accomplished, I have argued, through asymmetrical federalism.

Contemporary literature on asymmetrical federalism tends to highlight the importance of accommodating diversity within the Canadian federal system. However, there appears to be a growing gap between how political actors and students of asymmetrical federalism approach the topic of asymmetry. As spelled out in this thesis, a number of academics, such as Kymlicka, McRoberts, and Webber, acknowledge the merits of an asymmetrical system of federalism as a way to respect and accommodate diversity. A majority of federal and provincial politicians, meanwhile, seem increasingly unwilling to even consider asymmetrical federalism as a viable option for fear of the potential "difficulties" and complications it might create. What is needed, then, is a political opening for a serious consideration of asymmetrical options.

As mentioned in Chapter 4, the challenge facing Canadians is to identify political locales through which a dialogue between politicians, academics, and the Canadian public can occur. It remains my contention that to break new ground and to move beyond the current impasse, the key political players in our country will have to begin by seriously considering asymmetrical federalism as a viable alternative for the future. While the potential for further asymmetry within the Canadian political system exists, is there the political will to move in this general direction? Currently, the political will to begin this process does not seem to be in abundance. Moving beyond the impasse requires both

politicians and academics, as well as the general public, to come together to engage in a serious discussion of asymmetry. This will require a consideration of the prospects for greater asymmetry and, of course, a consideration of the possible repercussions which could follow if asymmetry is, once again, relegated to the political sidelines. In other words, in order to make asymmetry not just a viable option, but a political reality, our key political actors must be prepared to accept and recognize that asymmetry is a viable way to maintain the unity and diversity of Canada.

In this context, it has been suggested that one possible avenue to generate a real discussion of asymmetrical federalism in the Canadian political system is through the mechanism of a constituent assembly. Gibbins and Laforest argue that "a constituent assembly is required to rekindle a spirit of trust in our political institutions (Gibbins & Laforest (1998): 434)." While extra-constitutional initiatives, such as constituent assemblies, are potential venues whereby a wider interplay of ideas and alternatives may be considered, this thesis has not specifically examined them in detail. An potential area for future research might be to consider the relationship between asymmetrical federalism and constituent assemblies in the Canadian federal system to see whether they, in fact, provide a window of opportunity for a serious consideration of asymmetry. Their usefulness in this regard still remains to be seen.

Despite its apparent advantages as an alternative strategy for accommodating the diversity of Quebec and Aboriginal nations within the federal system, asymmetrical federalism, as this thesis has argued, is no panacea. In recent years, asymmetry has been challenged most notably by the principle of equality of provinces. Increasingly, many

Canadians, including a number of our federal and provincial politicians, have fallen into a rigid manner of thinking about the nature of Canadian federalism. Nonetheless, there still exists an important political space between the status quo and sovereignty for asymmetrical alternatives. While there is also room available for a form of asymmetry which is constitutionally entrenched, this thesis concludes that because of this particular requirement, asymmetry is destined to be, for the time being at any rate, intellectually intriguing yet politically inoperable.

ENDNOTES

1. While the proceeding examination by no means exhausts the literature on federalism, it does reveal that the study of Canadian federalism is not a monolithic endeavour.

2. There is every reason to believe that in the future Canadians will remain divided over how to define Canada's "diversity", as there are wide differences of interpretation over diversity. Alternative definitions of diversity may have very different implications for the organization and operation of Canadian federalism. Political actors, including governments themselves, for instance, may promote particular definitions of diversity precisely because they would justify the version of Canadian federalism they are seeking to advance. It should be noted, too, that some individuals reject Canadian federalism altogether because of the belief that the current federal system insufficiently recognizes their definition of diversity and difference in Canada. See McRoberts's elaboration of "cultural difference" in "Living With Dualism and Multiculturalism" in François Rocher & Miriam Smith (eds) New Trends in Canadian Federalism (Peterborough: Broadview Press, 1995) 109-110.

3. It has been suggested that the original Canadian federal union was exclusivist in that it allowed no role for Aboriginal populations, despite the fact that as the first arrivals to Canada they had peopled the territory for a far longer period of time. For further discussion see Jhappan, "The Federal-Provincial power grid and Aboriginal Self-Government" in François Rocher & Miriam Smith (eds) New Trends in Canadian Federalism (Peterborough: Broadview Press, 1995) 155-184; McRoberts "Living with Dualism and Multiculturalism" in François Rocher & Miriam Smith (eds) New Trends in Canadian Federalism (Peterborough: Broadview Press, 1995) 110; Patrick Macklem "First Nations Self-Government and the Borders of the Canadian Legal Imagination" McGill Law Journal 36, 2: 384-456.

4. For even though it is questionable to rely too heavily upon a purely constitutional-based definition of federalism, this is not to suggest that constitutions and constitutional features of political systems do not exercise important influences over politics, and, in the long run, over society too. An important distinction should also be made between constitutional form and operational reality. It is possible for the dynamism of a constitution to be potentially restructured through various mechanisms, such as intergovernmental agreements, tax and spending policies and judicial decisions. See, for example, Richard Vernon, "The Federal Citizen" in Olling & Westmacott (eds) Perspectives on Canadian Federalism (Scarborough:

Prentice-Hall, 1988): 3-15. Also, Ronald Watts Comparing Federal Systems in the 1990s (Kingston: Institute of Intergovernmental Relations, 1996) 14.

5. Cameron also argues that federalism "is a device designed to cope with the problem of how distinct communities can live together without ceasing to be distinct communities. See Cameron, Nationalism, Self-Determination, and the Quebec Question (Toronto: Macmillian, 1974) 107.

6. See Alain-G. Gagnon's comments in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 95.

7. Watts argues that this broad genus encompasses a whole spectrum of species which may be represented by constitutionally decentralized unions, federations, confederations, federacies, associated statehood, condominiums, leagues, and joint functional authorities. See Watts Comparing Federal Systems in the 1990s (Kingston: Institute of Intergovernmental Relations, 1996) 6.

8. In fact, it has been argued that the need to make the new regime acceptable in Quebec led its authors to dub it a "confederation". W.P.M. Kennedy stated: "Federation" and "confederation" seem to have been deliberately used to confuse the issue. It is clear that there was a certain amount of camouflage...The object was to carry the proposals." This statement was made by Kennedy, as quoted in Stanley Ryerson Unequal Union: Confederation and the Roots of Conflict in the Canadaa, 1815-1873 (Toronto: Progress, 1968) 443. See also Stevenson Unfulfilled Union (Toronto: Gage, 1989) 6-7.

9. This phase was originally coined by K.C. Wheare in Federal Government (London: Oxford University Press, 1946).

10. Both levels of government have frequently accused each other of intruding on areas of jurisdiction that are believed to be beyond the scope of their powers. The report of Quebec's Tremblay Commission in 1956 and the Western Premiers' Task Force on Constitutional Trends in the 1970s are examples of provincial perceptions of federal intrusions in this regard. In response to provincial claims, Trudeau accused the provincial governments of trespassing on federal areas of jurisdiction and "balkanizing" the country. See Garth Stevenson, "The Division of Powers" in Olling & Westmacott (eds) Perspectives on Canadian Federalism (Scarborough: Prentice-Hall, 1988) 43.

11. See "Federalization and Federalism: Belgium and Canada" in Bakvis and Chandler (eds) Federalism and the Role of the State (Toronto: University of Toronto Press, 1987) 57-81.

12. In Misconceiving Canada: The Struggle for National Unity McRoberts argues that at the time of Confederation many anglophones saw themselves as members of a British nationality

that transcended the boundaries of the new Dominion, whereas most francophones identified with a *canadien* nationality that fell considerably short of these boundaries. The attachment that many francophones feel to Canada has been mediated through their continued primary attachment to a more immediate, distinctly francophone society, itself a national community. Moreover, they have tended to see this collectivity rooted in Quebec. Indeed, the link between francophones and the territory of Quebec, it has been argued, was formalized in 1791 through the Constitution Act that established Canada as a distinct colony. See Kenneth McRoberts Misconceiving Canada (Toronto: Oxford University Press, 1997) 2-3.

13. In the years to come, George-Etienne Cartier's vision would be largely overshadowed by John A. Macdonald's pan-Canadian vision of federalism. Cartier's image of federalism would also come to be harshly criticized. It was argued that his image of federalism would not work because cooperation and mutual understanding could not simply be taken for granted. His vision was also criticized for underestimating the difficulty of creating a "Canadian political nationality", as he had termed it.

14. It should be acknowledged that such a recognition of diversity will, in all likelihood, not come easily. Recent polls continue to suggest that Canadians are still resistant to major changes to the current federal system. See Edward Greenspon & Hugh Winsor, "Hard Line on Separation Popular Outside Quebec: Poll Finds Resistance to Recognition of Distinct Society," The Globe & Mail Nov. 16 1996, A1.

15. In some cases, the search for alternatives has led to a re-examination of foreign jurisdictions such as Switzerland and the United States in the belief that they can provide an adequate framework. For a further examination of the comparative aspects of this debate see Ronald Watts Comparing Federal Systems in the 1990s (Kingston: Institute of Intergovernmental Relations, 1996) especially chapter 2, p. 19-29.

16. See, for example, Charles Taylor, "Shared and Divergent Values" in R.L. Watts and D.M. Brown (eds) Options for a New Canada (Toronto: University of Toronto Press, 1991); Kenneth McRoberts "Disagreeing on Fundamentals: English Canada and Quebec," in A-G. Gagnon (ed) Quebec. State and Society 2nd ed. (Scarborough: Nelson, 1993) 116-129.

17. Many commentators argue that federalism can accommodate Aboriginal communities, either as a "third order of government" within the federal system, exercising a collection of powers that is carved out of both federal and provincial jurisdictions, or through a form of "treaty federalism" which exists outside of, and prior to, the 1867 Confederation agreement. See J.A Long "Federalism and Ethnic Self-Determination: Native Indians in Canada," Journal of Commonwealth and Comparative Politics, 29.2 (1991): 192-211; James Henderson, "Empowering Treaty Federalism," Saskatchewan Law Review 58.2 (1994): 241-329; and Will Kymlicka "Multinational Federalism in Canada: Rethinking the Partnership," in Gibbins & Laforest Beyond the Impasse (Montreal: Institute for Research on Public Policy, 1988) 20-21.

18. See, for example, Robert Young, The Secession of Quebec and the Future of Canada (Montreal & Kingston: McGill-Queen's University Press, 1995) 287-306.

19. See William S. Livingston, "A Note on the Nature of Federalism," Political Science Quarterly 67 (1952): 81-95. See also William S. Livingston, Federalism and Constitutional Change (London: Oxford University Press, 1956).

20. For another conceptualization and classification of asymmetry within the Canadian federal system see David Milne, "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds.), Options for A New Canada (Toronto: University of Toronto Press, 1991) 283-307. Milne's typology consists of two major categories: constitutional asymmetry and programmatic asymmetry. Each of these two categories consists of two sub-categories. The constitutional asymmetry category consists of constitutional asymmetry in law and constitutional asymmetry in practice. Programmatic asymmetry, meanwhile, consists of asymmetry by design which is not available to all provinces, as well as asymmetry in practice which is available, but not used, by all provinces. A further classification of asymmetry is also identified by Ronald L. Watts in "Presentation on Types of Asymmetrical Federalism," in Richard Simeon and Mary Janigan (eds.), Toolkits and Building Blocks: Constructing a New Canada (Toronto: C.D. Howe Institute, 1991) 134-138. For a more recent delineation of various types of asymmetrical federalism see Ronald L. Watts, Comparing Federal Systems in the 1990s (Kingston: Institute of Intergovernmental Relations, 1996) 57-62.

21. For a discussion of the idea of representational rearrangement in federal institutions see Philip Resnick, "Toward A Multinational Federalism: Asymmetrical and Confederal Alternatives." in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 71-89; Peter M. Leslie, "Asymmetry: Rejected, Conceded, Imposed," in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options 37-69.

22. This is not to suggest, however, that the recognition of some degree of constitutional asymmetry will necessarily provide an effective means of recognizing and accommodating major differences in the interests and pressures for autonomy among constituent units. Rather, this analysis merely suggests that constitutional asymmetry *may* provide an avenue for accommodating significant diversity in society.

23. On English-speaking Canadians opposition to special status, see Alan Cairns, "Constitutional Change and the Three Equalities," in Ronald L. Watts and Douglas M. Brown (eds) Options for a New Canada (Toronto: University of Toronto Press, 1991) 77-110; David Milne, "Equality or Asymmetry: Why Choose?" in Watts and Brown (eds) Options for a New Canada 285-307; Andrew Stark, "English-Canadian Opposition to Quebec Nationalism," in R. Kent Weaver (ed) The Collapse of Canada? (Washington, D.C: Brookings Institution, 1992) 123-58.

24. It should be noted that much of this argument on the movement toward increased provincial autonomy within the Canadian context presupposes that the premiers of these provinces actually represent the people in their provinces on this question. As Milne argues, this is, of course, a very questionable assumption. See David Milne, "Equality or Asymmetry: Why Choose?" in Watts and Brown (eds) Options for a New Canada (Toronto: University of Toronto Press, 1991) 285-307.

25. David Milne argues that probably the most decisive case in this legal underpinning of classical federalism was *Liquidators of the Maritime Bank of Canada and Receiver-General of New Brunswick* (1892) where Lord Watson spoke of the "supreme" and "autonomous" status of the provinces with the "same authority as the Imperial Parliament and the Parliament of the Dominion" in its subject areas- "in no way analogous to that of a municipal institution." See Richard A. Olmsted (ed.), Decisions of the Judicial Committee of the Privy Council, (Ottawa: Queen's Printer, 1954) v. 1, 269-270. The same spirit continued in the *Local Prohibition Case* (1896), and in several subsequent landmark decisions. For a further discussion, see David Milne, "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds.), Options for a New Canada (Toronto: University of Toronto Press, 1991) 285-307.

26. For an introduction into the voluminous literature dealing with Senate reform see Donald V. Smiley and Ronald L. Watts, Intrastate Federalism in Canada (Toronto: University of Toronto Press, 1985).

27. For instance, Newfoundland's entry to Confederation prompted a change in the system of subsidies to less-wealthy provinces; British Columbia obtained a constitutional right to passenger service; and, Prince Edward Island received a right to ferry service. See Jeremy Webber Reimagining Canada: Language, Culture, Community, and the Canadian Constitution (Montreal & Kingston: McGill-Queen's University Press, 1994) 231.

28. On 1 November 1991, Prime Minister Brian Mulroney unveiled "A Citizens' Forum on Canada's Future", chaired by Keith Spicer. The Citizens' Forum provided an opportunity for Canadians from all regions and walks of life to speak on the future of their country. Despite its rocky start, the Citizens' Forum did engage a large number of Canadians- 400 000 in all- in discussing the future of their country. Far from resolving Canada's constitutional debate, the Citizens' Forum demonstrated just how difficult a consensual resolution would be. See Citizens' Forum on Canada's Future (Ottawa: Minister of Supply and Services, 1991), p 16. For a further discussion into the implications of the Citizens' Forum on Canada's Future, see Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, 2nd ed. (Toronto: University of Toronto Press, 1993) 154-189.

29. For example, employment insurance benefits may differ from region to region depending on the local rate of unemployment. Current federal programs to support and retrain fishermen/women in Newfoundland, as well as western grain transportation subsidies

are a response to special regional circumstances and needs. Quebec and First Nations also have unique needs and interests with respect to language and culture. See Donald G. Lenihan, Gordon Robertson and Roger Tassé, Canada: Reclaiming the Middle Ground (Montreal: Institute for Research on Public Policy, 1994) 127-145.

30. For further discussion see Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer 1969). For an analysis of this paper and reactions to it see Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-1970 (Toronto: University of Toronto Press, 1981).

31. Janet Ajzenstat argues that the Constitution Act, 1982 marked a turning point in Canadian politics for it entrenched Pierre Trudeau's pan-Canadian ideology in the constitution, essentially elevating it above the level of "ordinary politics" where it had previously competed with other visions of Canada, most notably with a vision that made a strong provincial state in Quebec. See Janet Ajzenstat, "Decline of Procedural Liberalism: The Slippery Slope to Secession" in Joseph H. Carens (ed) Is Quebec Nationalism Just? Perspectives from Anglophone Canada (Montreal & Kingston: McGill-Queen's University Press, 1995) 120-136.

32. Guy Laforest argues that Quebec's civil law, while asymmetrical in terms of legal systems within Canada, is subjected to a federal charter which is interpreted by judges appointed by the unilaterally by the central government. See Guy Laforest, "Standing in the Shoes of the Other Partners in the Canadian Union" in Roger Gibbins and Guy Laforest (eds) Beyond the Impasse toward reconciliation (Montreal: Institute for Research on Public Policy, 1998) 51-79.

33. For further elaboration, see my discussion in Chapter 2 of this thesis.

34. See David Milne, "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds) Options for a New Canada (Toronto: University of Toronto Press, 1991) 285-307.

35. Resistance to federal power coalesced in Quebec after 1887 when Mercier was elected on a platform of provincial rights. Following his election, Mercier quickly formed an alliance with other advocates of provincial autonomy and organized with Mowat the first interprovincial conference in Quebec City in 1887. This conference was an orchestration of provincial resistance to Macdonald's centralist vision of Canada, focusing as it did on provincial demands for better financial terms form the federal government and for constitutional changes aimed at restricting federal power. The preamble to the resolutions adopted at the Conference characteristically argued: "the preservation of provincial autonomy is essential to the future well-being of Canada." (Qtd in F.R. Scott, "French Canada and Canadian Federalism" in A.R.M. Lower, et al. Evolving Canadian Federalism (Durham, N.C.: Duke University Press, 1958) 68). While little concrete emerged from this

precedent-setting conference, it established Mercier as an ardent defender of Quebec's provincial interests. Moreover, as Linteau, Durocher, and Robert have observed, with Mercier "provincial autonomy became the political expression of Quebec nationalism." See Paul-André, René Durocher, and Jean-Claude Robert, Quebec: A History, 1867-1929 (Toronto: Lorimer, 1983) 261.

36. The right of appeal to the highest court in the British Empire, the Judicial Committee of the Privy Council, was retained in Canada until 1949.

37. For a further discussion, see Alan Cairns Constitution, Government, and Society in Canada (Toronto: Methuen, 1967) 4-5.

38. For a statement of the theory see K.C. Wheare, Federal Government (London: Oxford University Press, 1946).

39. For an examination of the content of the royal commission itself, see Quebec, Rapport de la commission royale d'enquêsur les problèmes constitutionnels, 1956. Kenneth McRoberts argues after years of deliberations the Tremblay Commission produced a voluminous report offering not only a diagnosis of the conflicts within Canadian federalism and an outline of the responsibilities which rightly belong to Quebec, but also a statement of the underlying nature of French-Canadian society. The recommendations concentrated on limiting the power of the federal government rather than expanding that of the Quebec government. On this basis, the constitutional framework established in 1867 was quite satisfactory, as long as Ottawa retreated from the many intrusions into provincial jurisdictions that had begun in the post-war years. See Kenneth McRoberts Misconceiving Canada: The Struggle for National Unity (Toronto: Oxford University Press, 1997) 28.

40. Two interpretative clauses already exist within the Constitution, 1982, both addressing the cultural composition of Canada. Section 27 of the 1982 act states that the Charter of Rights should be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Section 25 states that the Charter should not be interpreted "so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada." In addition, section 35 recognizes existing aboriginal rights, and section 91(24) of the 1867 act established Ottawa's special jurisdiction with respect to Aboriginal people. See Jeremy Webber Reimagining Canada: Language, Culture, Community, and the Canadian Constitution (Montreal & Kingston: McGill-Queen's University Press, 1994) 151.

41. Although the Americas were considered *terra nullius* in practice, parts were not considered so juridically under the European international law of discovery which obliged treaty-making where an area could not be considered juridically vacant and where alliances were required for trade and strategic purposes. Hence, the Royal Proclamation, 1763, which, among other things, recognized native nationalities and promised that aboriginal rights would not be held in trust by the Crown, and not disturbed unlessmodified under subsidiary

treaties. Of course, the Proclamation was ignored in subsequent practice by the BNA colonies, the Dominion government, and the courts and only to be reaffirmed with Section 35 of the Constitution Act, 1982, and more recent court decisions.

42. See Roderick C. Wilson and Carl Urion "First Nations Prehistory and Canadian History" in R. Bruce Morrison and C. Roderick Wilson (eds) Native Peoples: The Canadian Experience 2nd ed. (Toronto: McClelland & Stewart, 1995) 122-66.

43. For a collection of Aboriginal viewpoints on self-government, see Leroy Little Bear, Menno Boldt, and J. Anthony Long (eds) Pathways to Self-Determination: Canadian Indians and the Canadian State (Toronto: University of Toronto Press, 1984).

44. See Augie Fleras and Jean Leonard Elliott Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand (Toronto: Oxford University Press, 1992).

45. Andrew Vincent argues *legitimacy* etymologically derives from the Latin word for law and is of the same root as the words legislator and legislation. A legitimate authority is one which is recognized as lawful, just or rightful. The legitimacy of a political order, he suggests, is its worthiness, the sense in which it is a locus of the public will. Legitimacy involves, according to Seymour Martin Lipset, "the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate to one's society." Most states, whatever their ideological complexion- will seek legitimacy from sections, if not the whole of their populations. See Andrew Vincent Theories of the State (Oxford: Blackwell, 1987), especially p.38.

46. See Department of Indian Affairs and Northern Development Statement of the Government of Canada on Indian Policy, 1969. For a full discussion of the White Paper, see Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-70 (Toronto: University of Toronto Press, 1981).

47. See *Calder et al* v. *Attorney-General of British Columbia* SCR 313.

48. For a further discussion of these cases, see Radha Jhappan "Federal-Provincial Power-grid and Aboriginal Self-Government" in François Rocher and Miriam Smith (eds) New Trends In Canadian Federalism (Scarborough: Broadview Press, 1995) 155-184.

49. The commission's terms of reference are set out in its first report, The Right of Aboriginal Self-Government and the Constitution, A Commentary, Ottawa, 13 February 1992.

50. See Philip Resnick "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives" in F. Leslie Seidle (ed) Seeking a New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 71-89.

51. For a further discussion of "mega constitutional politics", see Peter Russell Constitutional Odyssey: Can Canadians Become A Sovereign People? 2nd ed. (Toronto: University of Toronto Press, 1993).

52. See Donald G. Lenihan, Gordon Robertson, and Roger Tassé Canada: Reclaiming the Middle Ground (Montreal: Institute for Research on Public Policy, 1994) 96-7.

53. Kymlicka calls these groups "national minorities" because they have fought to form themselves (or rather to maintain themselves) as separate and self-governing societies, and have adopted the language of "nationhood" to both express and justify this struggle for self-government. See Kymlicka, "Multinational Federalism in Canada: Rethinking the Partnership" in Roger Gibbins and Guy Laforest (eds) Beyond the Impasse Toward Reconciliation (Montreal: Institute for Research on Public Policy, 1998) 15-20. On the other hand, Jeremy Webber argues that rather than using the term "nation", it should be replaced with the term "political community" since, he argues, the term nation "carries the assumption that an individual can only have one nation." See Webber Reimagining Canada: Language, Culture, Community, and the Canadian Constitution (Kingston & Montreal: McGill-Queen's University Press, 1994) 24.

54. In some countries, federalism is adopted not as a means to accommodate the demands of "national minorities", but rather because it provides a means by which a single national community can divide and diffuse power. This is the known as the "territorial" model of federalism. Territorial federalism is clearly the dominant model in English-speaking Canada, reflected not only in the insistence that all provinces be equal in their legislative powers, but also in demands for a "Triple E" senate. See Kymlicka, "Multinational Federalism in Canada: Rethinking the Partnership" in Roger Gibbins and Guy Laforest (eds) Beyond the Impasse Toward Reconciliation (Montreal: Institute for Research on Public Policy, 1998) 15-50.

55. Some have suggested looking to answers based on comparative studies of federations. See, for example, "Czechoslovakia: The Loss of the Old Partnership" in F. Leslie Seidle (ed) Seeking a New Canadian Partnership (Montreal: Institute for Research on Public Policy, 1994) 163-169. While lessons from other nations may be enlightening, at the same time each nation's experience is affected by its own history and the context within which a particular situation arises.

56. See, for instance, David Milne "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds) Options for a New Canada (Toronto: University of Toronto Press, 1991) 285-307.

57. While offering an insightful analysis of potential areas for greater concurrency with provincial paramountcy in the Canadian federal system, Lenihan, Robertson, and Tassé, however, fail to elaborate as to what these "exceptions" would be. See Donald G. Lenihan, Gordon Robertson, and Roger Tassé Canada: Reclaiming the Middle Ground (Montreal:

Institute for Research on Public Policy, 1994) 140.

58. It is worth underlying that the courts have generally interpreted the paramountcy rule as it applies to federal paramountcy very strictly: only if there is a direct conflict between federal and provincial laws have the courts declared provincial laws inoperative to the extent of the inconsistency. In this way, the courts have ensured that the provinces' powers are not reduced unduly by too expansive a reading of the paramountcy rule. There has been no ruling on section 94A with its implied notion of provincial paramountcy and scholars are divided over precisely how the courts might interpret its meaning at law. See, for example, David Milne "Equality or Asymmetry: Why Choose?" in Ronald L. Watts and Douglas M. Brown (eds), Options for a New Canada (Toronto: University of Toronto Press, 1991) 285-307.

59. The Allaire Report listed twenty-two policy areas to be brought under exclusive Quebec authority. The principal transfers called for were unemployment insurance, agriculture, industry and commerce, communications, energy, environment, regional development, and health. Peter Russell argues that of these particular areas, only unemployment insurance was under exclusive federal jurisdiction. As well, he notes that a number of subjects on the list- i.e. municipal affairs, education, natural resources, and health- were already exclusively or primarily under provincial jurisdiction. The existing Constitution does not explicitly refer to these or most of the other subjects found in the Allaire Report. See Peter H. Russell Constitutional Odyssey: Can Canadians Become a Sovereign People? 2nd ed. (Toronto: University of Toronto Press, 1993) 159-160.

60. Ironically, Whitaker does not specify what he means by "fair" in his description of asymmetry in representation in central institutions.

61. See Peter M. Leslie "Asymmetry: Rejected, Conceded, Imposed" in F. Leslie Seidle (ed) Seeking A New Canadian Partnership (Montreal: Institute for Research on Public Policy, 1994) 37-69; Philip Resnick "Toward A Multinational Federalism: Asymmetrical and Confederal Alternatives" in F. Leslie Seidle (ed) Seeking A New Canadian Partnership (Montreal: Institute for Research on Public Policy, 1994) 71-89; Tom Kent "Recasting Federalism" Policy Options 12.3 (1992): 3-6; and, 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) 107-114.

62. Peter Leslie argues that under a *quid pro quo* form of asymmetry, bills would probably have to be drafted so that they either applied in their entirety to Quebec, or did not apply at all. He insists that no bill could contain some clauses applying in ten provinces while others applied in only nine (plus, in each case, the territories). This would make it clear which bills Quebec MPs could vote on and which ones they could not. Leslie also argues that a corollary could well be that ministerial portfolios would be of two types: those for which Quebecers would be eligible, and those that could be filled only by MPs from other

provinces. Conventions of cabinet responsibility before Parliament would have to be reconsidered. It is also likely, he suggests, that the federal budget would have to be split into two parts, one for the whole federation, and one for the federation -minus-Quebec. For example, to finance income security and equalization payments (for which Quebec would no longer be eligible), a Canadian Social Fund could be established. Earmarked taxes (essentially, the taxes that would be transferred to Quebec to finance its added responsibilities) would be paid into the fund; disbursements would be made to pay for pensions, other forms of income security and all transfers to provincial governments. Legislative control over the Fund would be vested in a committee of the House of Commons, consisting of the non-Quebec members. See Peter M. Leslie "Asymmetry: Rejected, Conceded, Imposed" in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 37-69, in particular, p. 63.

63. See Roger Gibbins "Decentralization and National Standards: 'This Dog Won't Hunt'", Policy Options 17.5 (1996) 10.

64. For the purposes of this analysis, the definition of "decentralization" employed will be that offered François Rocher and Christian Rouillard in Canada: The State of the Federation 1996. Here, the authors argue that "political or territorial decentralization refers to: (i) the capacity for institutions to take independent decisions in officially recognized sectors; (ii) the absence of a hierarchical link between different administrations; (iii) the imputablilty carried out through democratic control, with the mandate for decision making determined through direct suffrage; and (iv) the fact that these institutions possess the human, technical, and financial means necessary to fulfill their responsibilities. Decentralization also occurs when units within the central government or administration enlarge their sphere of autonomy." See Rocher & Rouillard "Using the Concept of Deconcentration to Overcome the Centralization/Decentralization Dichotomy: Thoughts on Recent Constitutional and Political Reform" in Patrick F. Fafard and Douglas M. Brown (eds) Canada: The State of the Federation 1996 (Kingston: Institute of Intergovernmental Affairs, 1996) 99-134.

65. As Rocher and Rouillard remind us, increased provincial autonomy in the implementation of various programs does not necessarily correspond to a reduction in the real control powers of the federal government. In fact, the control exerted by the federal government through the imposition of national standards thus remains full and complete. See François Rocher and Christian Rouillard "Using the Concept of Deconcentration to Overcome the Centralization/Decentralization Dichotomy: Thoughts on Recent Constitutional and Political Reform" in Patrick C. Fafard and Douglas M. Brown (eds) Canada: The State of the Federation 1996 (Kingston: Institute of Intergovernmental Relations, 1996) 127, 122.

66. Changes to the boundaries of the Northwest Territories will soon create a new nationality-based unit to be known as Nunavut.

67. In some ways, however, the trickiest issue of national identity is that of the Canadians who are neither Québécois nor Aboriginals. Who are they? The "Rest of Canada"? The "Rest of the Country"? English Canada? English-speaking Canadians? Philip Resnick argues that this seems to come closer to the mark, though not all the inhabitants of Canada outside Quebec speak English, (consider francophones minorities, first-generation immigrants). He argues that he has no problem with the term "English Canada", used in a non-ethnic, non-exclusionary sense, although not all would agree. There is a further problem of English Canada's heterogeneity, its regional differentiations of multicultural character. See Resnick "Toward A Multinational Federalism: Asymmetrical and Confederal Alternatives" in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 74.

68. See, for example, Philip Resnick, "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives," in F. Leslie Seidle (ed) Seeking A New Canadian Partnership: Asymmetrical and Confederal Options (Montreal: Institute for Research on Public Policy, 1994) 78-84; and Kenneth McRoberts English Canada and Quebec: Avoiding the Issue (Toronto: York University Press, 1991) 44-53.

69. For a valuable critique of the Nunavut arrangement and the problems it creates for Aboriginal peoples, see Radha Jhappan "The Federal-Provincial Power-grid and Aboriginal Self-Government" in François Rocher & Miriam Smith (eds) New Trends in Canadian Federalism (Peterborough: Broadview Press, 1995) 177-8.

70. For a discussion of recommendations made by both Gibbins and Laforest in the Beyond the Impasse Toward Reconciliation project, see Roger Gibbins and Guy Laforest "Conclusion" in Roger Gibbins and Guy Laforest (eds) Beyond the Impasse Toward Reconciliation (Montreal: Institute for Research on Public Policy, 1998) 431-435. See also Roger Gibbins "Getting There from Here" Beyond the Impasse Toward Reconciliation, 397-411; Guy Laforest "The Need for Dialogue and How to Achieve It" Beyond the Impasse Toward Reconciliation, 413-428.

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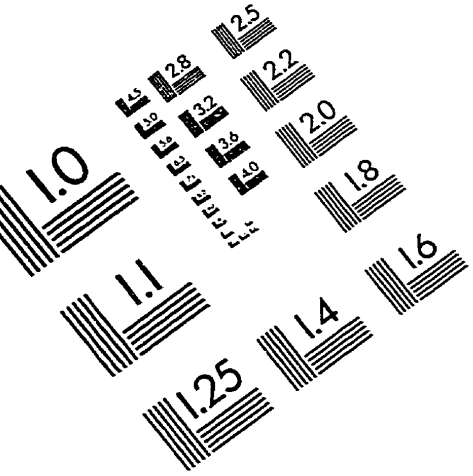

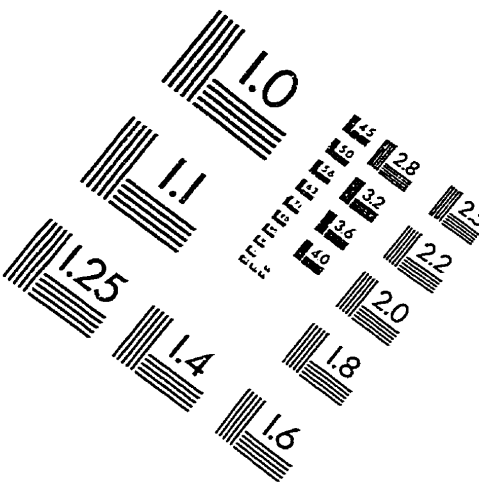

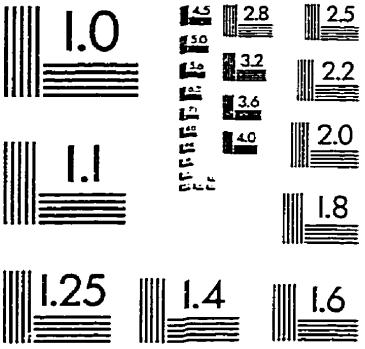

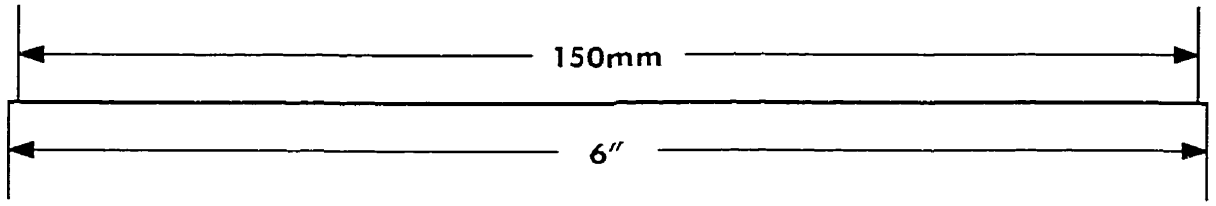

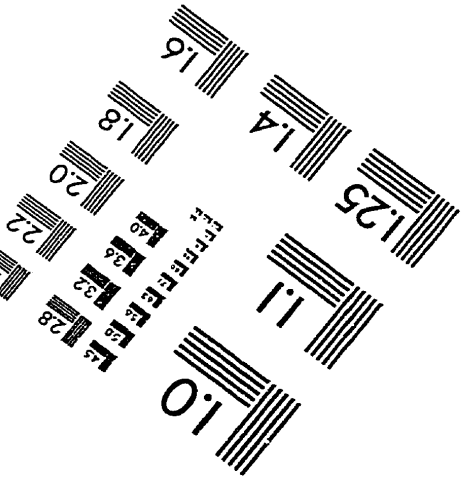

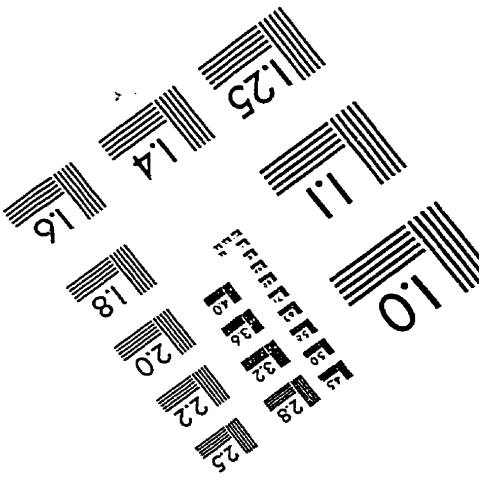

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