

The Visions of Canadian Federalism: An Overview

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DRAFT

Introduction

The condition of Canadian federalism is one of competing visions for the accommodation of territorially-based diversity, and more recently, with the constitutional entrenchment of a Charter of Rights and Freedoms in 1982, for the formal recognition of non-territorial identities as well. Indeed, the one certainty of Canadian federalism is that any one conception of political community is accompanied by a chorus of dissent – by competing visions about the principles upon which the federal system should be constructed. Jane Jenson describes the breadth of clashes over the construction of political community in Canada,

In Canada, three sets of collective identities have contended: individuals in a pan-Canadian community; regional and linguistic communities defined by territory; and a variety of other collectivities defined on bases other than territory – class, gender, ethnicity and so on. In addition, given these collectivities, a second debate has been about where and how they will be represented: in the institutions of the federal government and party system, in provincial institutions, or in the institutions of federalism itself – the Senate, Supreme Court, and the machinery of intergovernmental relations.¹

As such, as Alan Cairns has noted, the process of finding a working balance between unity and diversity in Canada has been characterized by “blunt and brutal compromises”.² Traditionally, the most distinctive features of Canadian politics are that its primary cleavages have centered on regional and linguistic divisions and its political clashes have been fought between federal and provincial governments. Since the repatriation of the constitution in 1982, governance in Canada has been characterized by an assortment of socio-political issues ranging from questions of territorial national sovereignty, recognition and group-protection of various non-territorial identities, and fundamental individual rights on a pan-Canadian level. While many historical accounts of Canadian federalism have centered on classifications of relative power relations between the levels of government,³ including constitutional positions and non-

¹ J. Jenson, “Citizenship Claims: Routes to Representation in a Federal System”, in K. Knop, S. Ostry, R. Simeon, and K. Swinton, eds., *Rethinking Federalism: Citizens, Markets and Governments in a Changing World*, (Vancouver: University of Columbia Press, 1995), p. 103.

² A. Cairns, “The Politics of Constitutional Conservatism”, in K. Banting and R. Simeon, eds., *And No One Cheered*, (Toronto: Methuen, 1983), p. 46.

³ See, for example, J. R. Mallory, “Five Faces of Federalism”, in J. Peter Meekison ed., *Canadian Federalism: Myth or Reality?*, 3rd edition, (Toronto: Methuen, 1977);

constitutional intergovernmental relations, Francois Rocher and Miriam Smith aptly point out that this approach is inadequate for grasping modern constitutional developments, particularly since 1982, when Canada's constitution was repatriated. For these students of federalism, the very rules of the game have been called into question due to fundamentally diverging political identities.⁴ In short, Canadian federalism – the challenges it faces and the conflicts that surface – stem more from existential questions relating to the status of particular collective actors within the structure of federalism than actual policy outcomes, where there may or may not be disagreement about substantive matters related strictly to governance issues.

On the face of it, Canadian federalism follows the basic institutional and legal configuration of all federations. As Ronald Watts has demonstrated in a comparative study, federations express self-rule and shared-rule through the distribution of powers as provided for by a constitution. Central governments are charged with addressing issues common to all constituents while member-states govern for the purposes of local autonomy with particular identities, interests and policy preferences. Federal systems across the board must consist of at least two orders of government, each with an independent base of political legitimacy in the electorate, and independent sources of revenue. There is a written constitution that is endowed with stringent amendment procedures and some form of judicial review for the resolution of conflict in matters relating to the division of powers.⁵ This institutional approach, however, tells very little about how federations actually function – the key sources of conflict, justifications for unity, etc. – particularly in their omission of political processes and social composition.

Indeed, federal systems differ markedly in their mechanisms for resolving intergovernmental disputes in shared and overlapping jurisdictions, particularly in the Canadian case where formal institutions provide only a partial picture of the evolution of intergovernmental relations. While Canada can be classified as a federation by the general indicators highlighted above, two key features of intergovernmental conflict management must be highlighted. First, since its inception, Canadian federal institutions have been consistently influenced by the twin

⁴ F. Rocher and M. Smith, "The Four Dimensions of Canadian Federalism", in Rocher and Smith, eds., *New Trends in Canadian Federalism*, 2nd Edition, (Toronto: Broadview Press, 2003).

⁵ See Ronald Watts, *Comparing Federal Systems, second edition*, (Montreal and Kingston: McGill-Queen's University Press, 1999).

processes of state-building and national integration – resulting in a push and pull of institutional centralization and subsequent resistance by various socio-political forces, both territorial and non-territorial. Consequently, any portrait of Canadian federal practices cannot be assessed without a full appreciation for both process and substance of policy outcomes. Otherwise stated, much political squabbling as a result of the condition of federalism has been centered around division of power considerations – who delivers public policy, who represents constituents, how are political communities formally demarcated etc., along with ‘normal’ political questions based functional criteria and policy substance. Second, centralizing tendencies from both constitutional and non-constitutional sources have done more to de-stabilize the country than demands placed by the various layers of social diversity in Canadian political life. From the very founding debates on the institutional arrangements between the orders of government, the central state has been unable to cement a vision for the federation that would legitimate a concentration of power in Ottawa. Indeed, while constitutionalism has been set aside since the Liberal government has come to power in 1993, the only remaining certainty in Canada is that its defining constitution remains unfinished business. Central institutions cannot wipe away federal societies – politics will continue to be defined by the condition of federalism in the Canadian context.

Assessments of mechanisms for conflict management within federations thus cannot be focused exclusively on formal constitutional arrangements and power-sharing configurations. Federalism structures and informs the relative salience of political issues. This study will employ an approach consistent with Preston King’s⁶ conceptual differentiation between federalism and federation in assessing intergovernmental disputes in federal states. The key contribution of this perspective is that “federalism” is understood not only in its institutional arrangements but encompasses a sociological/ideological dimension and need not necessarily take concrete form in strict federation. As such, we can speak of “federal societies”⁷ and evaluate inter-community political dynamics without strictly focusing on institutions as though they have been ‘settled’. Federalism in this sense is conceptualized as a political device for establishing viable institutions and flexible relationships capable of facilitating inter-state relations (e.g. division of powers

⁶ Preston King; *Federalism and Federation*, (Baltimore : John Hopkins University Press, 1982).

⁷ William Livingston was among the first to note that federalism involves more than formal institutions – contending that institutional outcomes, or policy fields, can in some part be explained by federalism as a characteristic of

between orders of government), intra-state linkages (e.g. states' representation at the central level), and inter-community cooperation (e.g. nation to nation treaties, intergovernmental relations, etc.). Through an emphasis on process, institutions are taken to arise out of political conflicts and power struggles between economic, social and political actors. This approach thus moves principally between two planes of analysis – institutional and sociological. The institutional level will focus on arrangements that structure community or regional relations between orders of government. The sociological level focuses on issues of homogeneity and diversity, as witnessed in several federal practices that address questions of territorial sovereignty and political identity – or matters of self-definition – and the reaction of groups or communities that feel threatened or see greater potential in alternative arrangements that give broader expression to community or regional interests.

The conceptual difference between “federalism” and “federation”, which refers to the institutional sharing of sovereignty between various orders of government, bears relevance here because federal traditions and their impact on public policy systems do not stop short at a cursory reading of constitutional arrangements as a generic conceptual tool. This understanding allows for the conceptualization of ‘federal entities’ as sociological units of study, and as ‘spatio-temporal’ constructions that take form across relationships of power and are constantly evolving. If state actors employ the instruments of public policy towards the forging of communities of allegiance – or identities – then we must be aware of the legitimate representation of particular collective identities in the delivery of public policy (which order of government is accountable?), which is in the realm of politics, prior to delving into issues concerning which government can get better results. The latter approach is outcome-oriented, functional, implies that politics have been ‘solved’, and finally, assumes a pre-existing “community of allegiance” as a target for public policy. Such a focus in and of itself represents a methodological bias towards a single polity and disregards the variable of federalism as it is understood here. Issues relating to sovereign prerogatives between territorially delimited communities are real – they are political – and they reflect potentially divergent preferences or choices for society and distinct views on the

society; see William S. Livingston, *Federalism and Constitutional Change*, (New York: Oxford University Press, 1956).

boundaries of political community. The challenge for federalism, and public policy systems within it, is to factor politics in, not to wish it away.⁸

Will Kymlicka's conceptual differentiation between 'multinational' and 'territorial' federations merits attention here.⁹ Kymlicka's typology makes room for a more sociological/ideological understanding of intergovernmental relations and the power dynamics at work between federated entities, as it sidesteps the analytical temptation to treat all federations as a generic category, where federal sub-units are taken as mere administrative units.¹⁰ Without such a conceptual distinction, analyses of policy jurisdictions in federal states may be prone to a 'bias towards the center', as territorial federations are more likely to be centralized. Watts has also observed this tendency, "the more degree of homogeneity within a society the greater the powers that have been allocated to the federal government, and the more degree of diversity the greater the powers that have been assigned to the constituent units of government."¹¹ Federation exists due to the need to structure and institutionalize difference and diversity. With so many regular "interests", socio-economic and cultural, territorial demands sometimes get lost in the shuffle. With federal societies, political elites are in position to draw upon the very *raison-d'être* of the polity to make demands for constitutional change – since the purpose of the polity is based on the idea of shared and separate sovereign spaces. Groups also organize, and the polity can sometimes move away from normal political disagreements to fundamental, constitutional, defining struggles over political community in which the stakes are much higher. Changing a constitution in a 'federal society' is distinctly difficult and could tear the country apart. Both substance and process become daunting issues. In Canada, constitutional wrangling was followed by much criticized non-constitutional renewal partly because of misgivings with regards to process.

⁸ For a more developed treatment of this approach, see Michael Burgess and Alain-G. Gagnon, *Comparative Federalism and Federation : Competing Traditions and Future Directions*, (Hemel Hempstead : Harvester Wheatsheaf, 1993).

⁹ For more on the emerging field of multinational democracies, see A.-G. Gagnon and J. Tully, eds., *Multinational Democracies*, (Cambridge: Cambridge University Press, 2001); and A.-G. Gagnon, M. Guibernau, and F. Rocher, eds., *The Conditions of Diversity in Multinational Democracies*, (Montreal: The Institute for Research on Public Policies, 2003).

¹⁰ Will Kymlicka; *Finding Our Way: Rethinking Ethnocultural Relations in Canada*, (Oxford: Oxford University Press, 1998).

¹¹ Watts, *Op. Cit.*, p. 35.

This essay will provide a brief overview of some distinct visions for Canadian federalism that have characterized debate over the course of the country's history. This will provide a contextual understanding of the challenges associated with defining the contours of governance in Canada. It will then proceed to demonstrate how Canadian federalism has been characterized by centralizing tendencies on both constitutional and non-constitutional fronts, as part of a larger strategy for national integration on the part of the central government. In the final analysis, conflict management in Canada is an ongoing process that will eventually return to constitutional discussions – particularly in areas of Quebec specificity and Aboriginal self-government, which remain largely unresolved.

Diverging Federal Visions in Canada

The founding moments of the Canadian federal system have not been interpreted with unanimity. Beyond the rough guide provided by the division of powers, the intentions of the framers continue to inform debates about the principles upon which federalism was adopted. Moreover, subsequent developments have continued to exhibit an uneasy sense of ambiguity about the grand ideas that legitimate Canadian federalism, as evident in the ongoing tensions between identity claimants. In the end, federalism is impossible to evaluate outside of specific political contexts. Franz Neumann went as far as to conclude that evaluating federal systems in general is futile – federalism could be good, bad or indifferent depending on particular circumstances and the positions of key participants.¹² Several interpretations of federalism have emerged in the course of Canada's history as a federal state.¹³ The following sections will offer an overview, though not exhaustive, of the main conflicting visions of Canadian federalism.

I-Visions of De-Centralization

i-The 'Compact' Theory:

¹² F. Neumann, "On the Theory of the Federal State", in *The Democratic and the Authoritarian State*, (Glencoe: Free Press, 1957).

¹³ For earlier assessments of distinct visions of the federal principle in Canada, particular in the period preceding repatriation in 1982, see J. R. Mallory, "The Five Faces of Canadian Federalism", *Op. Cit.*; E. Black, *Divided Loyalties: Canadian Concepts of Federalism*, (Montreal: McGill-Queen's University Press, 1975); and G.

This notion pertains to a classical theory of federalism and in its basic formulation implies that Canada is fundamentally a creation of the provinces. Theoretically, it implied that each province was sovereign in its area of jurisdiction. Otherwise stated, the very existence of a federal regime was deemed to be the result of a contract between pre-existing states. This conception of federalism defines allegiance along provincial lines – the first order of representation for citizens are provincial governments. An early interpretation of this conception was provided by Justice Thomas-Jean-Jacques Loranger¹⁴ soon after Confederation in 1867. Judge Loranger's views were summarized in the preliminary report of the Royal Commission on Aboriginal Peoples in 1993. Its main premises are as follows:

1-The confederation of the British Provinces was the result of a compact entered into by the provinces and the United Kingdom.

2-The provinces entered into the federal Union with their corporate identity, former constitutions, and all their legislative powers intact. A portion of these powers was ceded to the federal Parliament, to exercise them in common interest of the provinces. The powers not ceded were retained by the provincial legislatures, which continued to act within their own sphere according to their former constitutions, under certain modifications of form established by the federal compact.

3-Far from having been conferred upon them by the federal government, the powers of the provinces are the residue of their former colonial powers. The federal government is the creation of the provinces, the result of their association and of their compact.¹⁵

In looking at the period from Confederation to 1921, Ramsay Cook has argued that the compact theory, in its earliest and most lasting formulation, has always consisted of a variation between two versions: a compact between two cultural groups and a compact between provinces.¹⁶ For Quebec, the importance of the distinction would surface much later, since it was

Stevenson; *Unfulfilled Union: Canadian Federalism and National Unity*, Revised edition (Toronto: Gage Publishing Limited, 1982)

¹⁴ Judge Loranger was an influential jurist who published a series of constitutional texts in 1883, in which he gives form to the compact theory as a lasting constitutional interpretation. His ideas were also referred to in the Royal Commission on Aboriginal Peoples, published in 1993.

¹⁵ Royal Commission on Aboriginal Peoples (RCAP), *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution*, (Ottawa : Minister of Supply and Services, 1993), p.22-23.

¹⁶ R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory*, Study no. 4 of the Royal Commission on Bilingualism and Biculturalism, (Ottawa: Queen's Printer, 1969).

clear soon after the birth of federalism that it was an original party to the agreement, whether or not it was defined as a province or as a distinct cultural grouping. By implication, this approach assumed that no substantive changes could be effected to federal-provincial jurisdictional lines without the consent of the provinces.

For early French-Canadian nationalist intellectuals, the notions of provincial autonomy and clearly-defined cultural groupings were already beginning to take shape as the driving forces behind federalism. The idea of federalism was credible insofar as it respected provincial – and by extension – cultural autonomy. This would be a near-universal theme from Quebec representatives up to today – with variation among Quebec elites stemming only from the degree of autonomous action vis-à-vis the central government, but not with the issue of full jurisdictional integrity itself. Quebec governments from all parties have always held the original division of powers as a minimal condition of membership. Proponents of provincial autonomy were given much credence from the Judicial Committee of the Privy Council (JCPC) in the United Kingdom, which interpreted the general “Law for the peace, order and good government of Canada” (POGG) provision of the BNA act merely as an emergency power of the central government; interpreted property and civil rights generously in favour of the provinces, and by implication, offered a limited definition of the federal government’s ability to expand its competency over trade and commerce. In short, as Stevenson notes, the JCPC

(...) fundamentally altered the whole nature of Canada’s federal constitution. It appeared to lend credence to the argument that the purpose of Confederation had been to protect and promote provincial interests, rather than to create a new nation, and it did so just as the generation that had direct memories of the Confederation negotiations and debates was passing from the scene. Henceforth, the ideological weight of Imperial authority was placed on the side of those who espoused provincial autonomy (...).¹⁷

It was after WW2 that proponents of de-centralization in Canada began to diverge in their understanding of the founding pact. With the postwar economic boom underway and the increasing revenues allotted to the central government, English-Canada was gradually accepting a stronger central presence in policy areas that had previously been deemed strictly provincial. Quebec, however, remained steadfast in its conception of federal principles. A key document

¹⁷ G. Stevenson, *Unfulfilled Union*, p. 56.

was the provincial Royal Commission of Inquiry on Constitutional Problems, published in 1956, (otherwise known as the Tremblay Commission), which argued for the continuation of strict adherence to the division of powers because of the distinctive ‘cultural’ communities upon which Canadian federalism receives its mandate. For these proponents of decentralization, Ottawa did not represent a national government – the primary center of allegiance for French-Canadians was Quebec. This report would lay the groundwork for what was to become conventional wisdom in Quebec – and would shape the compact theory along the lines of “two founding peoples” as opposed to a strict doctrine of provincial rights. Indeed, by the time the Quiet Revolution took hold in Quebec, the ‘provincial’ compact theory was somewhat rejected, since this would allow other provinces to veto Quebec initiatives to deal directly with Ottawa for more autonomy in a setting where the scope of state intervention was growing rapidly. In the rest of Canada, the compound theory was waning in relevance by the time the Tremblay Commission was released. It would re-emerge later, in a somewhat different formulation, on the one hand as a result of Quebec’s vision for Canadian federalism and on the other, due to the perception that Canadian federalism did not accommodate interests of the western provinces.

According to Rocher and Smith, the compact theory evolved to incorporate more than the principle of provincial sovereignty and a ‘watertight compartments’ conception of the federal system. To the extent that this vision is employed outside of Quebec, it continues to accommodate some federal presence in shared fields of jurisdiction, yet in federal-provincial dynamics, it views all provinces as diverse sovereign entities, each with a ‘distinct’ nature, that are equal in their relationship to the federal government. In this ‘equality of provinces’ formulation, federal-provincial relations come to represent a zero-sum game – if one province is recognized as having special sovereign status, or more jurisdictional latitude vis-à-vis the federal government – then this implies a loss for the remaining provinces. In the final analysis, this view maintains that federalism must be symmetrical, and ‘particular’ status for one province is contrary to the original pact in which provinces are equally responsible for determining the relative levers of power in their relationship with the central government and with each other. Any changes to the federal-provincial balance must be shared equally by all provinces. For Rocher and Smith, the ‘equality of provinces’ doctrine is salient to the extent that it constitutes a formidable vision of the Canadian political community that is deeply engrained among citizens –

provinces must possess the same powers as the others in order to guarantee that they can act within their areas of competence. In other words, no province is more or less significant as a constituent unit of Canadian federalism.¹⁸

Those seeking to accommodate the diversity of provincial interests without defining Canadian federalism as a compact between two founding peoples or as a political community defined by intergovernmental bargaining espoused a vision that would reform central institutions themselves. In effect, calls for intrastate federalism, particularly in force in the 1970's, were meant to more adequately represent provincial concerns at the federal level without conceiving the polity as a loose confederation of provincial governments at the expense of a national community. Constant intergovernmental conflict, in this view, would be resolved if provincial governments were equally represented at the center – in a permanent institutional framework that would allow provincial concerns to be expressed without recourse to executive-level bargaining between the levels of government. Territorial interests in this view would not have to be invested solely in provincial governments. Cairns summarizes the thrust of this vision for Canadian federalism,

Given the hypothesized inability of the federal government effectively to incorporate and represent the primary sociological realities of Canada (...) that government was considered to be rootless. Accordingly, the provinces were viewed as having more legitimacy than jurisdiction, and the federal government as having more jurisdiction than legitimacy. (...) Since [Ottawa's] attenuated legitimacy was attributed to its inadequate contact and empathy with provincial values and concerns, the solution was to incorporate provincial perspectives into its workings, a process often described as federalizing central-government institutions (...).¹⁹

Cairns notes that this vision can be further divided into distinct provincialist and centralist variations. In the former version, the main institutional reform would be a revamped Senate, whose members were to be appointed and accountable to provincial governments, and could veto federal legislation deemed incompatible with the interests of provincial communities. The Senate's traditional role of reviewing and revising legislation from the Commons, which in a

¹⁸Rocher and Smith, "The Four Dimensions of Canadian Federalism", pp. 24-5.

¹⁹A. Cairns, *Charter versus Federalism : The Dilemmas of Constitutional Reform*, (Montreal and Kingston : McGill-Queen's University Press, 1992), p. 45.

British system of responsible parliamentary government is in practice ineffective from the perspective of reformers²⁰, would be replaced by a permanent body charged with managing the complexity of interdependent relations between governments. The centralist vision, by contrast, sought to restructure central government institutions in order to insulate the federal government from the active input of provincial delegates. Briefly, the main thrust of this approach was that the federal government could govern in its areas of jurisdiction, on a pan-Canadian level, with the credentials that its institutions are adequately representative of provincial concerns. For Cairns, in a speculative exercise, the shortcomings of intrastate reforms in both accounts are that they do not address the fundamental problem of providing an institutional framework that would at once balance the requirements of unity and diversity upon which the original federal compromise was based. In other words, either version falls into the trap of prioritizing one level of allegiance over the other. Intrastate federalism, in the final analysis, is decentralizing to the extent that it represents a tacit admission that a national community in Canada does not exist. All provinces are equal and legitimacy at the federal level stems directly from provincial identities and communities. Federal governments have for the most part rejected such proposals, claiming that Canada is more than an aggregation of provincial communities.

ii:-Nation to Nation Relations: From Binationalism to Multinationalism

“The tension between Quebec’s struggle to strengthen and reinforce its particularities and the federal government’s efforts to act as a national government has determined much of Canadian history.”²¹

While Quebec was an ardent supporter of a provincial rights doctrine in the periods following Confederation to the mid-1950’s, there emerged after the Quiet Revolution a prevalence to view its status within the federation as more than a province like the others. Quebec’s position was that its government represented a constituent national unit in Canadian federalism – one of two ‘founding peoples’. Kenneth McRoberts contends that the implication of such an approach to federal legitimacy is that asymmetrical arrangements would permit each

²⁰ The Canadian Senate is largely ineffective as a central body for regional representation because members are federally appointed, it lacks the legitimacy that would come from elections by the people, and does not strictly adhere to a principle that would guarantee it a suitable distribution of seats among the provinces.

nation to develop according to its particular needs.²² Quebec gradually viewed the federation as a compact between nations, with one nation represented by the Quebec government and the other occupying the rest of Canada. The status of the Quebec State was thus that it constituted a distinct society, which, in more moderate versions, strictly adhered to the division of powers granted by the original compromise and consistently rejected federal government encroachment into its jurisdictions. In its more forceful manifestations, in particular under Parti Québécois governments (PQ), such a vision sought to reconstruct the compact to recognize two sovereign nations whose relations would be conducted as equals in a sort of confederal arrangement. In this view, Quebecers would govern themselves as a majority territorial community as opposed to being a perpetual minority, as a component of a larger Canadian political community. René Levesque aptly described this sentiment in proclaiming that Canada is composed of two distinct nations “concealed behind the fiction of ten provinces”.²³

The variety of visions for Canada stemming from Quebec nationalist forces, as well as the evolution of the boundaries of Quebec nationalism itself, are too diverse and complex for full treatment here. However, several prominent themes about the federal system have been almost universally accepted by successive Quebec governments. For Quebec, federalism as an organizing principle is not equivalent to a single political community, thus there is an inherent rejection of the federal government’s tendency to forge a national identity across the country. Quebec’s insistence on dualism as a fundamental characteristic of federalism can be traced back to the Confederation debates. John A. Macdonald, one of the founding fathers, initially proposed a legislative union similar to that of the United Kingdom. He conceded, however, that federalism was the more satisfactory option and demonstrated a more sociologically sensitive solution to the persistence of national consciousness among French-Canadians:

[We] found that such a system [legislative union] was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their particular position – being in a minority, with a different language, nationality and religion from the majority – in case of a junction with the other

²¹ J. Boase, “The Spirit of Meech Lake”, in D. P. Shugarman and R. Whitaker, eds., *Federalism and Political Community*, (Toronto: Broadview Press, 1989), p. 212.

²² Kenneth McRoberts, “Canada and the Multinational State”, in *Canadian Journal of Political Science*, Vol. 34, No. 4, (December, 2001).

²³ Quoted in Cairns, *Charter Versus Federalism*, p. 38.

provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced.²⁴

George-Etienne Cartier, the principle voice of French Canada during the debates, was more forceful in his vision of duality:

Such is (...) the significance that we must attach to this constitution, which recognizes the French-Canadian nationality. As a distinct, separate nationality, we form a State within the State with the full use of our rights and the formal recognition of our national independence.²⁵

Of particular salience in the initial agreement, at least with regards to Quebec's specificity, are provisions that recognized Quebec's distinct legal tradition (civil law, in contrast to common law elsewhere in Canada), and provincial autonomy in education and most 'social' matters, including linguistic provisions respecting the use of French in Quebec.

During the 1960's, the Royal Commission on Bilingualism and Biculturalism (B and B Commission) received a mandate by the central government to review the federal system with specific regards to the principle of equality between the two founding peoples, a tacit acknowledgment of this vision. Following the Tremblay Commission in Quebec, the B and B Commission marked the emergence of an era that would re-visit the pillars of Canadian federalism and the original compromise. These initiatives were in large part a reaction to events related to the Quiet Revolution, which came to see Quebec autonomy less as a defensive 'provincial rights' issue and more as a political, economic and social project aimed towards greater state intervention in affirming national specificity. Daniel Johnson, the Quebec premier in 1966, expressed this more affirmative sentiment succinctly,

At the base of operations as a nation, it wants to be the master of the decisions which deal with the human growth of its citizens (that is to say education, social security and health in all its forms), with their economic affirmation (that is to say the power to establish the economic and financial levers they believe necessary), with their cultural flourishing (that is to say not only arts and literature, but also

²⁴ Speech of February 6, 1865, *Confederation Debates*, p. 29.

²⁵ *La Minerve*, Montreal, July 1, 1867.

language) and with the extension of the Quebecois community (that is to say relations with some countries and international organizations).²⁶

Again, the reasoning stems from the basic premise – the Quebec government is the only institution in North America in which francophones constitute a majority. The accommodation of Quebecois identity is the first principle of federalism in this view.

Two dominant visions emerged in Quebec, which, in many respects, constitutes the mainstream divide among nationalists to this day. The first sees asymmetrical federalism²⁷ as an option that would adequately satisfy the requirements of stability and unity in Canada without subsuming its national diversity. For proponents of this vision, asymmetry would be a more accurate reflection of social and historical realities. Moreover, it would exhibit a degree of flexibility that might put an end to Quebec’s perception of federalism as a rigid, centralizing and instrumental structure – in other words, it seemed to reflect a willingness to ‘adopt’ Canada as a legitimate political community in its own right – able to address fundamental diversities that acquire political salience. The ‘minimal conditions’ put forth by the leader of the Quebec Liberal Party (PLQ), Robert Bourassa, in the lead up to the Meech Lake negotiations for constitutional renewal in the latter half of the 1980’s serve as somewhat of a culmination of this vision:

1. The explicit recognition of Quebec (in the preamble of the Constitution) as a distinct society;
2. Increased power to Quebec in immigration regarding recruitment, administration, and integration of new arrivals;
3. Quebec’s participation in the appointment of three Supreme Court justices with expertise in Quebec civil law;
4. Limitations on the federal spending power;
5. The recognition of Quebec’s right to veto any constitutional amendment that affects it.²⁸

Taken together, such demands reflect the view that Quebec’s political future in Canada can best be accommodated by affirmative measures that go beyond the original compromise. For

²⁶ Quoted in Rocher and Smith, eds., *Op. Cit.*, p. 30.

²⁷ For a more developed reflection on the appeal of asymmetrical federalism as a basis for Quebec-Canada relations, see Alain-G. Gagnon, “The Moral Foundation of Asymmetrical Federalism : A Normative Exploration of the Case of Quebec and Canada”, in A.-G. Gagnon and J. Tully, eds., *Multinational Democracy*, (Cambridge: Cambridge University Press, 2001).

²⁸ Robert Bourassa, “The Economic Future of Quebec”, speech delivered on the occasion of the tenth anniversary of *L’Actualite*, September 23, 1986.

proponents of asymmetrical federalism, such affirmations were necessary to redress the increased presence of the federal government in provincial matters as a result of a blurring of the division of powers over time. Definitions of the Canadian political community could no longer operate along symmetrical lines, since the perceived sentiment from this perspective was that citizens and governments of the other provinces looked to the federal government as their national government and their principle instrument of growth, while this was not the case in Quebec.

The second vision among nationalists is that the federal experiment has failed – that no mutually satisfying compromise was possible. The 1979 White Book of the PQ government aptly captures this sentiment. In this view, Quebec could only achieve what it desired through a clear break from Canada, in which a new Quebec-Canada agreement would be negotiated outside of the confines of the federal framework. The main thrust behind this vision was stated clearly in *Quebec-Canada: A New Deal*, “The fact that it is impossible, in the present federal framework, for Quebec to become a nation, constitutes the very basis of the Canada-Quebec political problem.”²⁹ The solution was to be found in the notion of “sovereignty-association”, which promoted a new political partnership based on two separate, sovereign entities while maintaining formal economic links. A decade later, following the defeat of the Meech Lake Accord which would entrench asymmetry, the Commission on the Political and Constitutional Future of Quebec (the Belanger-Campeau commission) arrived at a similar conclusion. The report, however, added the adoption of the Constitution Act, 1982 to its justifications for a rupture, since Quebec had not been a signatory to the agreement. It was noted that the principles upon which the Canadian political community was constructed could not accommodate Quebecois identity for several reasons, as outlined by Rocher and Smith,

Three dimensions of this new Canadian identity were given: the equality of all citizens, which does not allow special constitutional recognition for the Quebecois collectivity; the equality of cultures and of cultural origins in Canada, which would undermine Quebecois aspirations for the French language and the cultural origins of francophones; and the equality of the provinces, which would forestall the granting of special status for Quebec.³⁰

²⁹ Government of Quebec, *Quebec-Canada: A New Deal*, (Quebec City, 1979), p. 42.

³⁰ Rocher and Smith, *Op. Cit.*, p. 32.

The dualist vision of Canada has largely been driven by Quebec. Aboriginal groups, however have made the basic claim that binationalism in Canada is sociologically inaccurate and has detracted attention away from the notion that they possess an inherent right to self-government. In what would constitute a third order of government in Canada, the asymmetry sought by Aboriginal groups challenges the very conception that Canadian federalism is based solely on a division of powers between the federal parliament and the provincial legislatures. As such, the discourse of federalism that has provided the framework for conceptions of binationalism must be expanded to accommodate new institutions, a new division of powers, and a corresponding fiscal formula. Although the details of future relations remain unclear, since the present constitution merely makes reference to the inherent right of self-government for first nations, the salient starting point for Aboriginal groups is clear – the federal government must terminate its paternalistic relationship with Aboriginal peoples and begin the long road to accommodation on a nation-to-nation basis. Such groups seek a partnership that would, at a minimum, recognize that they possess sovereignty over the territories and resources upon which they depend.³¹ Indeed, Kiera Ladner notes that ‘treaty federalism’ should be considered as a founding principle of Canadian federalism altogether, as opposed to the more ‘conventional’ view that Aboriginal peoples’ official status in Canada’s federal configuration began with their explicit recognition in the Charter of Rights and Freedoms.³² The Royal Commission on Aboriginal Peoples provides a cogent summary of this emerging vision of Canadian federalism as it applies to Aboriginal peoples:

over time and by a variety of methods, Aboriginal people became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law (...) the current constitution in Canada has evolved in part from the original treaties and other relations that First Peoples held with the Crown and the rights that flow from those relations. The treaties for a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the Constitution Act, 1867 in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents covering relations between the federal and provincial governments but also in treaties and

³¹ For an excellent overview of Aboriginal peoples’ relationship to the federal system, see F. Abele and M. J. Prince, “Aboriginal Governance and Canadian Federalism: A To-Do List for Canada”, in Rocher and Smith, eds., *Op. Cit.*, 2003.

³² Kiera Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalisms”, in Rocher and Smith, eds., *Op. Cit.*, 2003.

other instruments establishing the basic links between Aboriginal peoples and the crown.³³

Although Aboriginal visions remain on the margins of discourses relating to Canadian federalism, the justifications of their claims is garnering increased attention and will constitute a fundamental challenge the flexibility of the federal system to adapt to distinct visions and circumstances.

II-Centralizing Visions

The Dominion was to be a deliberate creation which could be established, in the perspectives of the Fathers of Confederation, only through the instrumentality of a strong and vigorous central government. This meant both that the federal authorities would assume the decisive leadership in the task and that the dominant loyalties of the people, insofar as they were those of a political allegiance, would be focused on the Dominion rather than its constituent parts.³⁴

According to Roger Gibbins, the recurring theme in the construction of Canada's founding principles as seen from the perspective of the central government, is articulating the need for a single political community, one that is more than instrumental, through the institution of federalism. Institutionalist scholars fail to see the paradox of such an approach – and indeed – the centralizing visions of Canadian federalism have in many ways reflected a desire for national integration as opposed to federalism in its classic sense. For Gibbins, the compact theory of premiers and the dualist approach of Quebec make it difficult to even talk of a Canadian community or nation, much less base the country's self-understanding on such principles.³⁵ Indeed, the common element of the de-centralized visions for Canadian federalism outlined above, in many respects, is that they are reactions to a competing vision of federalism that seeks to craft a larger political identity in a nationalizing project. Interpretations of such intentions for the future of the Canadian political community also date back to its founding debates.

³³ Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, (Ottawa : Canada Communications Group, 1996), pp. 193-4.

³⁴ D. V. Smiley, *The Canadian Political Nationality*, (Toronto: Methuen, 1967), p. 2.

³⁵ R. Gibbins, "The Interplay of Political Institutions and Political Communities", in Shugarman and Whitaker, *Op. Cit.*, 1989.

i-The Nationalizing Vision of the Founders

As noted above, John A. Macdonald, the principal author of the Quebec Resolutions that had served as the basis of the BNA act, favoured a legislative union, and when he opted for federalism, it was to be a strong centralized federation in order to avoid what he perceived to be shortcomings of the American constitution.

(...) a conflict may (...) arise between the Dominion and the “States’ Rights” people. We must meet it, however, as best we may. By a firm yet patient course, I think the Dominion must win in the long-run. The powers of the General Government are so much greater than those of the United States, in its relations with the local governments, that the central power must win.³⁶

In early federal practice, the BNA act gave the central government unlimited powers to tax and spend, while provinces were limited in this area. Moreover, the federal government appointed Lieutenant Governors in each province with the capacity to reserve provincial legislation for a period of a year, which could be subsequently disallowed by the federal government. Moreover, all residual powers were to be granted to the federal government. In the context of an emerging State, it is not altogether surprising that the central state would undertake a nation-building project.

Indeed, while the JCPC continued to frustrate the realization of this conception of Canada by insisting on the integrity of provincial jurisdictions, the nationalizing project would come to the fore in a different version with the great depression of the 1930’s. Attempts to concentrate more power in the central government was thus a direct response to the perceived need to craft Canada’s very own ‘new deal’, which would place the federal government at the forefront of state intervention for the purposes of economic recovery. While Macdonald’s centralizing vision implied an interventionist federal presence in order to adequately develop a national economy, in a strategy meant to foster national integration, these new centralizers viewed the promise of the central state in terms of its potential for increased social and economic planning, areas that were more strictly embedded in provincial jurisdiction. Supported mostly by social democratic

intellectuals, this vision thus viewed federalism as an unnecessary impediment to the construction of a modern welfare state. By limiting the levers of intervention of the central state, federalism contributed to undermining the role that a “positive state” could play in equalizing conditions for citizens across Canada. In this sense, Canadian federalism was deemed to be inherently conservative, it impeded attempts to build a cohesive political community based on the equalization of socio-economic conditions, and a new distribution of powers was necessary for progressive policies to take hold. Federalism simply frustrated and impeded the actions of governments by imposing legal restraints on their authority. By the 1960’s, the country would be thrust into an all-out re-examination of its self-understanding, and the variable of federalism would once again take center stage in its debates.

ii-Trudeau’s Vision: Individual Rights and Federalism

As a response to the rise in Quebec nationalism and the election of the PQ in 1976, the Liberal government under the leadership of Pierre Elliott Trudeau sought to settle the question of splintered loyalties in Canada once and for all, by introducing a model of national integration that sought to transcend local allegiances as the basis for citizenship in Canada. By far the most powerful centralist vision ever articulated in Canada, Trudeau’s mark on federalism remains embedded to this day. Trudeau’s main contribution was to strengthen national unity by entrenching a constitutional Charter of Rights and Freedoms that would define Canadians as a rights-bearing citizenry regardless of location. Moreover, and contrary to the main recommendations of the B and B Commission, Trudeau defined Canada as a ‘multicultural country in a bilingual framework’ – no one state in Canada would be recognized as representing the interests of a particular ethnic or cultural group. While Trudeau acknowledged that Canada was a dualistic polity in a sociological sense, he did not equate this with the need to devolve powers to the provinces, or to accommodate Quebec with asymmetrical institutions. Indeed, the federal government’s dualism is summarized in this statement by the Report of the Task Force on Canadian Unity,

³⁶ Quoted in Stevenson, *Op. Cit.*, p. 44.

Canada, seen from the federal government's perspective, is a linguistically dual federal state composed of two societies – one French-speaking and one English-speaking, which extend geographically beyond the borders of any one province. Thus the federal government believes that it is necessary that this linguistic duality be more fully reflected in Canada's central political institutions and in federal policies and programs.³⁷

In essence, by espousing a view of federalism based on the primacy of individual rights, multiculturalism, and pan-Canadian bilingualism (in terms of access to federal government services and minority language education rights), Trudeau sought to strengthen the civic component of Canadian identity by limiting the capacity of federalism to promote a diverse treatment of citizens as demarcated by provincial boundaries. The principles upon which federalism in Canada would be conceived were based on the universality of liberal-individualism. As Carty and Ward explain,

At one time or another most provinces have represented the nation as the sum of its provincial components or, at least, of its regions (...). But all such claims, whether based on the assumption that the nation is composed of cultures, regions or provinces, deny a fundamental principle of liberal democracy: that citizens are individually and equally incorporated into the political community.³⁸

By formally recognizing non-territorial groups such as women, multicultural groups and the disabled in the Charter of Rights, this vision made it clear that the political community of reference for all Canadians would be Canada, as defined by a central institution that would be the guarantor of equality for individuals and disadvantaged groups. The compromise that conceived Canada as a pact between territorial groupings was broken – citizenship in Canada was meant to override such sentiments of belonging. Even in the process leading up to repatriation, Trudeau threatened to proceed with unilateral constitutional renewal, without the consent of the provinces, by appealing directly to the people in a referendum. Moreover, in defense of this approach, and in response to Quebec's claim that the central government was foregoing long-standing conventions of provincial assent in constitutional change, Trudeau reiterated the symbolic national role of the federal government by claiming that federal Members of Parliament adequately represented the interests of Quebec. For critics of this approach, particularly in

³⁷ The Task Force on Canadian Unity, *A Future Together : Observations and Recommendations*, (Ottawa, 1979), 48.

Quebec, a pan-Canadian Charter is inconsistent with the diversity of treatment that is at the core of federalism. Quebec would be limited in defining its own language policy, a core aspect of its national aspirations. Renewing federalism in this direction meant rejecting basic federal premises about the integrity of member-states' capacity to act in its areas of jurisdiction. Indeed, Quebec rejected Trudeau's vision and to this day has not given its consent to the repatriated constitution of 1982.³⁹

Trudeau's vision has been somewhat consolidated in a view of Canada that emphasizes the primacy of rights. Canadian federalism today contains an element of non-territorial political identity that is the direct result of Trudeau's centralizing initiatives. This represents a watershed in Canadian federalism, with the polity increasingly characterized by groups and individuals making rights-claims to a central institution, in direct contrast with the traditional dualist and provincialist visions outlined above and seen to constitute the basic foundations of the original compromise. The legacy of the Charter is that the future reshaping of Canadian federalism must contend with the entrenched notion that any provision threatening "equal rights" across Canada is an affront to its self-understanding as a political community. Alan Cairns aptly highlights such tendencies. Assessing the role of the Charter of Rights and Freedoms on the construction of a single Canadian community, he argues that it is "strengthening the national community, diminishing the salience of provincial cleavages, and supplementing the discourse focused on federalist definition of issues with a counter-discourse relatively indifferent to territorialism and organized around rights".⁴⁰

iii- Non-Constitutional Renewal

With the consolidation of the Canadian political community through the instruments outlined above and the failure of two attempts at constitutional renewal in the late 1980's/early 1990's, a centralizing vision emerged under the guise of 'non-constitutional' renewal. The

³⁸ R. K. Carty and W.P. Ward, "The Making of a Canadian Political Citizenship", in Carty and Wards, eds., *National Politics and Community in Canada*, (Vancouver: University of British Columbia Press, 1986), p. 75.

³⁹ For a more detailed treatment of Trudeau's vision, see H. D. Forbes, "Trudeau's Moral Vision", in A. A. Peacock, ed., *Rethinking the Constitution*, (Toronto: Oxford University Press, 1996).

⁴⁰ Alan C. Cairns, "Charter Versus Federalism" in Curtis Cook, ed., *Constitutional Predicament...*, (Montreal : McGill-Queen's University Press, 1992), p. 83.

clearest example of this approach is the Social Union Framework Agreement (SUFA), signed in 1999 by all provinces except Quebec. Under the rubric of collaboration, the SUFA purports to act as a blueprint for the management of social policy delivery that serves to circumvent many of the pitfalls of competition between governments. Intergovernmental relations in all areas of social policy are to be governed by this agreement. The key centralizing aspects of the agreement are its establishment of ‘national standards’ in social programs, as well as the recognition of the federal spending power in areas of provincial jurisdiction. Moreover, the SUFA allows the federal government to impose a nationally defined program in areas of provincial competence if the majority of provinces agree. Questions that were once deemed fundamental to federal legitimacy in Canada are now treated as mere administrative matters.

A clear example of the centralizing nature of the SUFA can also be discerned in its choice of language. Under the heading “Meeting the Needs of all Canadians”, policy is assumed to be targeted to all of Canada as an aspect of universal citizenship. The quote reads as follows,

Work in partnership with individuals, families, communities, voluntary organizations, business and labour, and ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs.⁴¹

It does this by claiming that policies are a product of consultations with a wide array of interested groups, ranging from provinces to local and international non-governmental organizations. The latent effect of such an approach, however, is to regulate the forces which may potentially come in the way of the central government’s role in a changing global context. Social policy delivery, rather than resting with territorial communities, has been optioned out to third sectors in the name of “citizen engagement” and greater effectiveness by the central government. In short, democratically accountable provincial governments are lumped with private and voluntary sector providers that are on the short end of a hierarchical relationship with the federal government. Alain-G. Gagnon describes the centralizing thrust of the SUFA from a Quebec perspective,

The central government is laying the cornerstones of the social union, as it conceives it, by advancing several non-federal principles, including the uniformity

⁴¹ The SUFA agreement, in A.-G. Gagnon and H. Segal, eds., *The Canadian Social Union Without Quebec*, (Montreal : IRPP, 2000), p. 243.

of programs, skirting around the provinces in the development of the overall project and getting direct access to partners (individuals, families, communities, voluntary organizations, businesses, unions, etc.) without taking into account provincial responsibilities in these areas of exclusive jurisdiction (...) Ottawa is hoping to expand the notion [partnership] to include partners with whom it would be easier to deal because they are not accountable to citizens, as are elected provincial governments.⁴²

Conclusion

Continuing cultural-ideological disagreements with regards to Quebec's indelible specificity, the strong sense of territorial identity expressed by Aboriginal peoples, the consolidated rights-based national identity in Canada outside Quebec, and the persistence of regional tensions with regards to the representative institutions of the central government continue to dominate the landscape of diverging visions of Canadian federalism. Moreover, inherent stresses and strains associated with division of powers continue, particularly with regards to encroachment into provincial areas of responsibility. Indeed, the present government of Paul Martin has included direct federal intervention in the affairs of municipal governments (creations of the provinces) in his upcoming agenda, promising yet another clash with proponents of decentralization in Canada. Much remains to be done to federalize the federation – the endurance of competing visions demonstrate that the defining aspects of the Canadian political community have yet to be 'solved'. Indeed, the urgency of persisting with the affirmation of various conceptions of 'political space' in Canada becomes evident when we recognise that territory remains one of the rare areas within liberal-democracies where it is still possible to maintain representation and to demand accountability from political actors.

The continuity of diverging federal visions in Canada, far from threatening the country, is a positive tribute to the idea of federalism itself. Federalism represents more than an institutional arrangement. It is not reducible to political solutions than can be imposed by any one particular government or prevailing idea of political community. The Canadian experiment with federalism, rather than threatened by the political conflicts spawned by diverging visions, has

⁴² Alain-G. Gagnon, "Working in Partnership with Canadians", in Gagnon and Segal, eds., *Op. Cit.*, p. 140.

been shaped and indeed defined by the negotiation of distinct visions over time. This is the essence of the federal spirit. In the interests of federalism, Canada should embrace its diversity of views about political community and take solace in the idea that this is a system that, like politics more generally, cannot be resolved. The goal is to recognise this fundamental and unchanging condition of Canada's existence.