

## ASYMMETRICAL FEDERALISM

# **DISTINCT STATUS FOR QUÉBEC: A BENEFIT TO ENGLISH CANADA<sup>1</sup>**

GORDON LAXER

How can a constitution be devised to give Québec greater powers than other provinces without reducing Québec's power in Ottawa?

Pierre Trudeau 1967<sup>2</sup>

The federal Constitutional proposals of September 1991 entitled *Shaping Canada's Future Together* will not resolve the tensions that are tearing Canada apart because they paper over the underlying problems. Leaving aside the aboriginal peoples' inherent right to self-government, an issue which must be urgently addressed, what we need are proposals that satisfy three long-standing constitutional goals: 1) leaving the federal government with adequate powers to maintain a unified economy and a sense of shared Canadian citizenship; 2) provide greater influence for Outer Canada in Ottawa; and 3) recognize that Québec is a sociological nation and requires extra powers than other provinces.

The September 1991 proposals do not satisfy any of these goals. The combination of "distinct society" and the "equality of the provinces" is at the heart of the problem. "Distinct society" is a weasel way of recognizing goal number 3 — that Québec is a sociological "nation" — but it is done in such a way as to deprive the concept of any real powers or meaning so as not to contradict the idea of equality of the provinces. But, "equality of the provinces", does not satisfactorily achieve goals one and two either.

Unlike the Meech Lake Accord, the federal proposals would, except in the discardable and probably unworkable section on the economic union, substantially weaken the power of the federal government. There is plenty of room for the provinces, individually, to negotiate extra powers. This is meant as a hidden asymmetry to satisfy Québec's aspirations but, because the equality of the provinces principle is upheld, other provinces, in the long-run, would likely seek at least some of these greater powers too. There is little likelihood that there would ever be a reverse flow of powers to Ottawa. Thus, goal number one, a sufficiently strong central government, is not satisfied. Outer Canada, comprising western, northern and Atlantic Canada, is supposed to gain more influence in Ottawa through Senate reform. But Senate reform is more chimera than reality. In neither the current proposals, nor in any conceivable proposals that are compatible with responsible cabinet government, will the Senate be given

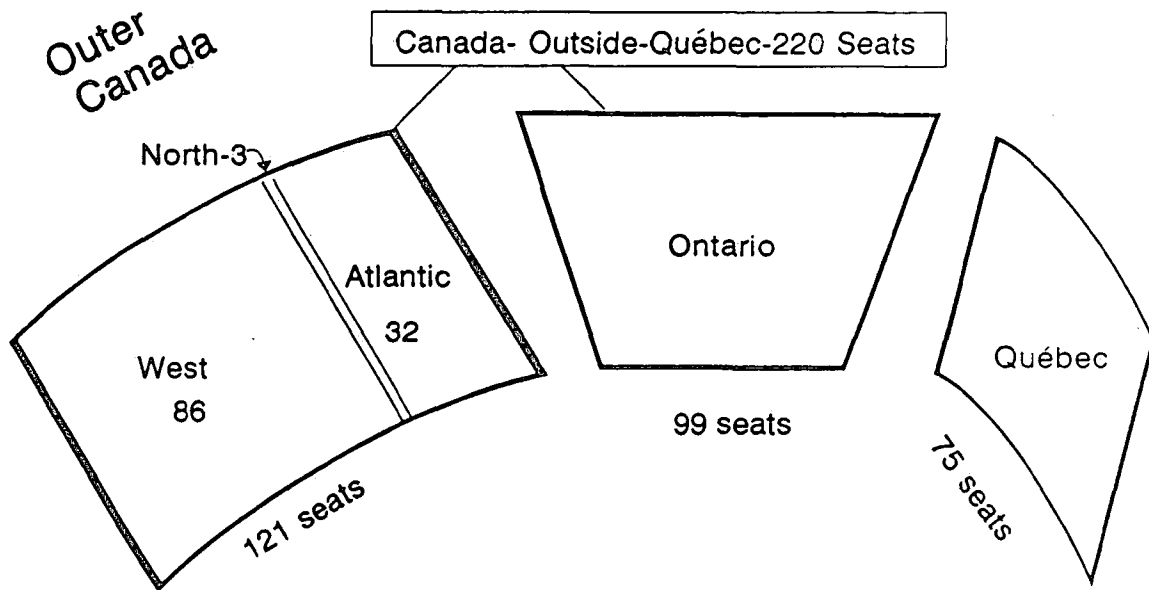
much power. In the current federal proposals a reformed Senate would get only a 6-month suspensive veto over "matters of particular national importance". In the cases of appropriation bills and votes of confidence, the power will still rest solely with the House of Commons. Appearances to the contrary then, Outer Canada will still not gain much power in Ottawa through Senate reform.

Are there better ways to meet the three goals in a coherent new constitution? Let's look at what's behind each of the goals. Québécois feel their nationality is fragile and continually under siege by the overwhelming assimilation pressures of the English language in North America. The majority in Québec appear to be looking for a way to stay in Canada but will agree to do so only if assured that they can survive and grow as a collectivity. Distinct society is not enough. Québec needs more powers as a province, to be balanced by less influence in Ottawa.

Canadians outside Québec need something very different. English-speaking Canadians' sense of Canadian nationality is also fragile, especially after the free trade agreement erased the economic border with the United States. English-speaking Canadians do not have Québec's security of a distinct language and culture in relation to the Americans and so have always relied on a strong and active federal government. In contrast to Québécois and aboriginals who relate to Canada through belonging to their collectivities within Canada, English-speaking Canadians usually identify with Canada as a whole. Because of this, rather than wanting to increase the power of their province or territory, most English-speaking Canadians want a federal government with adequate powers to maintain a sense of unity and shared Canadian citizenship. Central to meeting these needs are "national" standards in areas such as medicare, pensions and higher education, thriving "national" cultural institutions such as the CBC and a Canadian-controlled economy. The federal proposals generally weaken these bases of Canadian nationality by giving the provinces too much power.

Outer Canada is not homogeneous. British Columbia

## House of Commons 1991 295 Seats



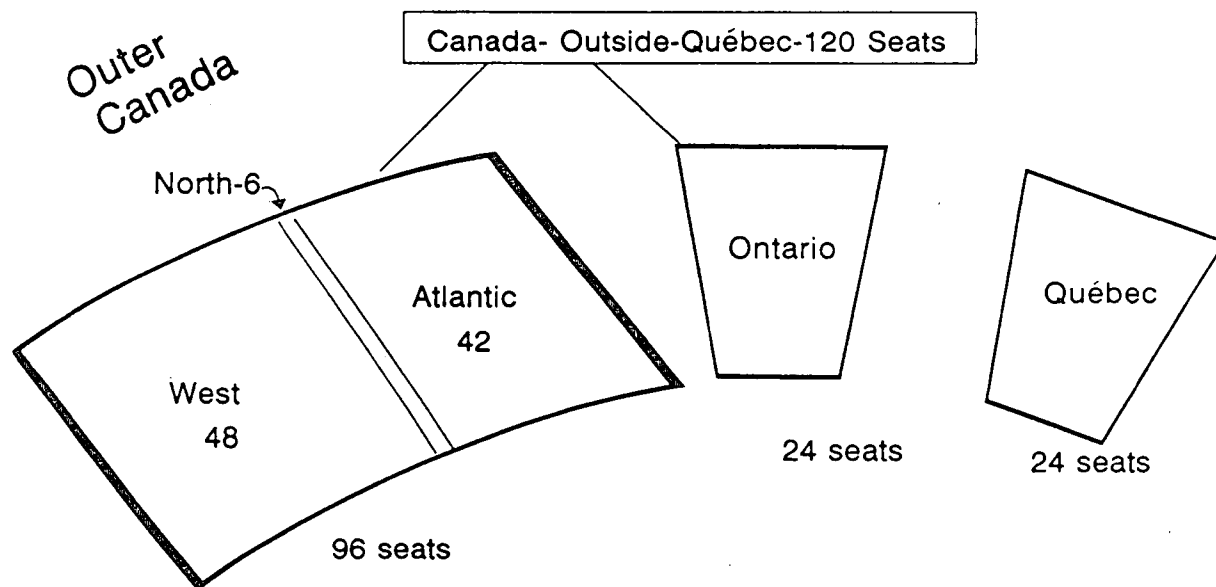
and Alberta are "have" provinces and, in the past, their governments supported greater provincial powers, especially over resources. Being poorer and less diversified, the other 6 provinces and the territories of Outer Canada have relied on a strong federal government to counter-balance market forces with regional development policies and equalization payments. Thus, Outer Canadians have not supported a common agenda with respect to federal-provincial powers. The economic and political bases for both these orientations — greater provincial powers or reliance on federal support — have weakened in the past decade. The terms of trade generally moved against Alberta's and British Columbia's resource exports and blunted their drive for greater provincial powers. Meanwhile, the federal government's deficit combined with its neo-conservative agenda, eroded federal regional-development policies, upon which the poorer regions of Outer Canada have relied. What Outer Canadians share in common are small populations and a sense of being marginal to federal affairs in Ottawa. Preston Manning's Reform Party reflected the changed mood even in Alberta when it coined the phrase "the West wants in" and restricted itself to the federal political arena. Outer Canadians want greater influence

over the federal government. A reformed Senate is not enough. Outer Canada needs more power in Ottawa's most powerful legislative body — the House of Commons.

Can we reconcile more power for Québec as a province with a strong federal government and greater influence for Outer Canada in Ottawa. Yes, but only if we discard the Trudeau-Lougheed concept of equal provinces, which has its origins in the American constitution. This concept is the main stumbling block to a lasting resolution of Canada's constitutional problems. Provinces were never equal in the sense of "same treatment": Québec has not been a province like the others and its distinctive legal and religious practices were recognized in law as early as 1774 and reaffirmed at Confederation almost a century later. The equality-of-provinces notion, that whatever power Québec gets as a province the other provinces must get too, is a straitjacket that is destructive of English-speaking Canada. It is not Québec that has insisted on this concept. If we drop the equality of provinces idea we will not have to dismantle Canada to accommodate Québec.

## Senate Representation (Macdonald Commission Formula)

144 Seats



There are several ways to fulfill the three goals while adhering to a readily understandable principle of justice that *if Québec gains extra powers as a province, its parliamentarians must lose a commensurate amount of power in Ottawa*. Québec would be trading federal representation for provincial jurisdiction. Québecers would receive no net gain of powers — just a distinct set of them. Québecers would not have a double vote — one for themselves and another to determine questions that would apply only outside their borders. Goals one and three would be satisfied. Influence for Outer Canada in the affairs of Ottawa — goal number 2 — would also be enhanced by the removal or diminution of Québec's influence on important federal matters.

Three ways to fulfill these principles have been suggested: 1) reduce the number of Québec members of parliament for all matters; 2) make a reformed Senate into a legislature exclusively for Canada outside Québec. Instead of concurrent powers with the House of Commons, such a Senate would have separate powers. These powers would be exactly the same as the *extra* powers that Québec would obtain as a province. Or, 3) establish the rule that *for every power that Québec gains as a province, Québec's parliamentarians lose the right to*

*vote on those matters*. There would be separate parliamentary sessions to deal with Canada-outside-Québec issues. The powers of such sessions would be exactly the same as the extra powers Québec gains as a province.

The first two proposals are cleaner and more elegant but are fraught with greater political difficulties than the third solution. The first proposal of fewer Québec MPs would reduce Québec's influence over the federal government in a manner roughly equivalent to the enlargement of Québec's powers as a province. This idea has the virtue of avoiding the creation of parliamentarians with differential voting capacities. The disadvantages though are great. Québec's remaining MPs would still be voting on matters that applied exclusively to Canada-outside-Québec and therefore should be none of their business. On the other hand, Québec would not have its fair share of MPs to vote on issues of common federal jurisdiction such as external affairs, defence or international trade. In these areas, Québecers would have less power than they deserved. In both cases representation from Québec would be seen to be unfair.

The clear functional separation of the Senate from the House of Commons, proposal number two, has its merits. A Senate without Québec senators would for the first time give English-speaking Canada an institutional voice and be the focus for the development of an English-Canadian identity. Québec's MPs would have exactly the same powers as MPs outside Québec so that the House of Commons could operate smoothly. Outer Canadian senators would outnumber Ontario senators by a wide margin and help redress the regional balance of power for matters under Senate control. The disadvantage is that such an arrangement would mean the creation of another level of government, a government for English Canada with powers parallel to Québec's extra powers. This is the proposal's major folly. In this period of high government debt and neo-conservative ideology, Canadians are in no mood to entertain yet another level of government. As well, such a reformed Senate could not perform its original purposes of regional balance and *sobre* second thought.

The best solution would appear to be number 3. It has a simple ring of justice to it which is understandable to all. For every extra power that Québec gets as a province, its federal parliamentarians do not vote on these issues. The proposal is compatible with a reformed Senate. Let's examine how the proposal would work, then assess the implications for influence by Outer Canada and, finally, evaluate the proposal's strengths and weaknesses.

The removal of Québec's MPs and senators from sessions dealing with issues applying only to Canada-outside-Québec would mean the creation of parliamentarians with differential capacities. But, it would not mean the creation of another level of government. In order to work there would have to be adjustments to Parliament.

(1) The House of Commons would need separate sessions: an all-Canada session and a Canada-outside-Québec session. These sessions could be held on the same day, say one in the morning and the other in the afternoon. Bills would be grouped according to whether they applied to all of Canada or not. The Senate would make similar adjustments.

(2) The Canada-outside-Québec sessions would not be a confidence chamber and the government, elected by all Canadians, would be the government in these sessions whether or not it had a majority outside Québec. The present government for instance, has a majority of all MPs but only a minority outside Québec.<sup>3</sup> Under these proposals, it would have to act as a minority government and make alliances with at least one other party in order to pass its bills in the Canada-outside-Québec sessions.

In other words these proposals would likely increase the power of parliamentarians in relation to the Cabinet and force cooperation and alliances amongst parties in the European manner. The short-lived Joe Clark government would have been in the reverse position — a minority in the all-Canada session and a majority in the other.

What extra powers would Québec get? At a minimum: immigration, broadcasting, culture, perhaps increased jurisdiction over economic policies such as those necessary to entrench "Québec Inc.", and perhaps opting out of all federal social services. But, Québec would not simply be given all the powers it asked for in return for reduced influence in Ottawa. For one thing, the extra powers that Québec gained would determine the powers of the Canada-Outside-Québec sessions, since the two would be symmetrical. English-speaking Canada and especially its Outer Canada portion, would have its own list of powers that it wanted the Canada-Outside-Québec sessions to deal with and these are not likely to coincide exactly with those that Québec wants. Outer Canada's grievances have traditionally been economic: interest rates, control over resources, transportation and regional development policies. There would need to be negotiations between the two partners, preferably between the Québec government and Parliament excluding the Québec MPs and Senators. Furthermore, the federal government would have to retain enough powers to maintain a viable country and these go considerably beyond the Allaire Report's list of exclusive federal jurisdictions of defence, customs and currency. My minimum list of powers over which the federal government must have exclusive or primary control include: external affairs, defence, international trade, citizenship, aboriginal affairs and monetary policy. The federal government must also retain substantial but not exclusive powers over the economy and regional development.

The regional implications of these changes are amongst its most interesting features. With Québec's 75 MPs removed from votes on important matters, western, Atlantic and northern MPs would outnumber Ontario's MPs by a margin of 121 to 99. For the first time in history, the "hinterlands" would have a majority in the powerful House of Commons for important issues. In this way, depending on the powers of the Canada-Outside-Québec sessions, some of the long-standing grievances of Outer Canada for more influence in Ottawa could be achieved without any redistribution of seats and without the illusions created by schemes to reform the Senate.

But Outer Canadians' gain is not Ontarians' loss. The latter's representation would increase from one-third to 45% in the Canada-outside-Québec sessions and

Ontarians have always favoured a strong federal government, something these proposals are designed to keep. Québec too would gain what it always wanted: recognition as a sociological nation and greater powers. But, this would be fair because the more power Québec gains as a province, the more its parliamentarians lose influence in Ottawa.

The biggest objection to proposal number three arises from its greatest strength: it does not create another level of government. As one person put it: "part-time Québec MPs would still have a large say in who rules us". Proposal number three eliminates the power of Québec parliamentarians regarding issues that apply exclusively to Canada-Outside-Québec, but it does not touch, in a formal way, the wide-ranging powers of Québec cabinet ministers. The influence of Québec ministers cannot be directly curtailed in regard to outside-Québec jurisdictions unless we adopt the politically impossible proposal number 2 or some variation of it and set up a new level of government for English-speaking Canada.

Do these objections doom proposal number 3? Not if we can call upon the British tradition of unwritten political and constitutional practices changing under altered conditions. Members of Parliament from Québec undoubtedly would not be named to a number of Ministries: those whose jurisdictions applied exclusively or mainly outside Québec such as Immigration, Secretary of State, perhaps Health and others. Orders-in-Council decisions made by these ministries then would not be made by Québec cabinet ministers and the problem of double jurisdiction by Québécois would be avoided. Political justice would dictate that there be fewer Québec ministers overall to coincide with the diminished influence of Québec in Ottawa. Regarding Orders-in-Council applying exclusively to Canada-Outside-Québec but involving the whole cabinet, there would be more difficulty. Here we would have to rely on the strong expectation that Québec ministers wouldn't exercise their influence in areas deemed to be none of their business.

Are there technical difficulties such as the need for unanimity amongst the provinces? Probably not. While section 43 of the *Constitution Act, 1982*, which permits amendments applying to one or more but not all provinces, could arguably be used to increase Québec's powers, the general amending formula (at least seven provinces representing at least half of the population) would be required to make the accommodation politically acceptable. The amending formulae could be used in combination to make the changes. The seven and 50 formula is necessary to give the changes legitimacy in Canada outside Québec and section 43 is necessary to give Québec a kind of veto over changes to Québec's

powers. (The Meech Lake Accord mixed two amending formulae.) If only the general amending formula were used, the other provinces could undo these changes over the objections of Québec. Alternatively if it is found that section 43 cannot be used as a de facto veto for Québec, Québec could partially protect the negotiated redistribution of powers suggested here, by the opting-out provisions under the general amending formula. The latter would protect the increased legislative powers given to Québec and the interests of the National Assembly.<sup>4</sup>

In the case of the exclusion of Québec parliamentarians from some sessions, Parliament can, for most matters, make its own amendments. One of the road blocks to excluding Québec MPs is the provision that Québec must not have fewer MPs than it has senators. If Québec's senators were also removed from the Canada-outside-Québec sessions, both Houses would have zero Québec members for these purposes.

Other elements could be added to this concept such as restricting the Canadian Charter of Rights to Canada-outside-Québec and constitutionalizing Québec's Charter of Rights, which preceded and is, in many areas, more comprehensive than the Canadian Charter. The important point is not to produce a fully-fleshed out blueprint but to replace the current weasel compromise that satisfies no one, with proposals that reflect the reality of Canada. Québec is a sociological nation. Why continue to deny the nationality of Québec? This will surely lead to the end of Canada. The only way to retain the integrity of Canada is to let Québec be more Québec and let English-speaking Canada be more itself too. Both sides gain when we recognize the social-cultural reality that is Canada.

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1. I wish to thank Paul Bernard, Claude Denis, David Schneiderman and Ian Urquhart for their helpful comments.
  2. Pierre Elliott Trudeau, *Federalism and The French Canadians* (Toronto: MacMillan, 1968) at xxiv.
  3. The Trudeau governments of 1972 and 1980 would have had fewer seats outside Québec than the Conservative Opposition and would have had to either make an alliance with the New Democrats or let the Tories take the initiative in these sessions. Either of these outcomes would have been popular in English-speaking Canada and would have better reflected the wishes of the electorate.
  4. However the opting-out provisions would not guarantee fiscal compensation for Québec, if such compensation had been part of the original transfer of powers to Québec, except in the areas of education and cultural matters.
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