Asymmetry-lite? The Constitutional Status of the "Terms of Union" for British Columbia, Prince Edward Island, and Newfoundland and Labrador

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ABSTRACT

"Terms of Union" exist between the federal government of Canada and three Canadian provinces: British Columbia (1871), Prince Edward Island (1873), and Newfoundland and Labrador (1949). These documents once paved the way for three provinces to join Confederation. But they have also since been amended several times, and occasionally become sites of political controversy. While it is not clear that these documents are "treaties", they do impose unique legal, constitutional and political obligations and rights on the signatory governments – obligations and rights which may not exist for other provinces. The function of these Terms of Union agreements is described and analyzed by comparing the case studies of the British Columbia railway dispute in the late 19th century and denominational education reforms in 1990s Newfoundland and Labrador. These events show not only that Terms of Union remain relevant in any discussion of constitution politics in the provinces where they exist, they are also sources of asymmetrical federalism.

Chapter I: Introduction

Federations can come about as a result of a variety of processes. Constituent units of a federation may form as a result of devolutionary or federal reforms. They may also come about as a result of a one-time agreement of a federation's constituent parts. Or, they may result from the incremental, evolutionary or expansionist growth of a state from pre-existing state or sub-state groups. The United States and Canada are especially good examples of the latter. Canada formed after the "Confederation" of Ontario, Quebec, Nova Scotia and New Brunswick. The three Prairie Provinces and the three Northern territories came about as a result of Acts of the central government in Ottawa. And three provinces joined as a result of unique agreements between the former dominions or colonies and the central government. These provinces are British Columbia (1871), Prince Edward Island (1873), and Newfoundland and Labrador (1949), and the agreements are called "Terms of Union."

The three Terms of Union agreements have an unusual and much understudied role in the Canadian federation. They are generally overlooked as being of any significant constitutional importance in the many decades since they were signed and put into effect. However they occasionally generate controversy or at least are recognized as important pieces of the larger puzzle that is the sweeping set of Acts, documents, accords, and conventions that comprise the Canadian constitution. On one hand, Terms of Union may be viewed as a pact or even treaty-like mechanism between two otherwise "sovereign" entities. On the other hand they may be viewed as mere "laundry lists" of time-specific requirements for the dominions to become provinces.

The truth is somewhere in between the two. This paper attempts to develop a theory of the evolution of the Terms of Union for Prince Edward Island, British Columbia, and Newfoundland and Labrador, with emphasis on the latter two. It suggests that the once-held notion that a Terms of Union agreement could be interpreted as a constitutional "partnership" between two equally sovereign groups has generally withered. Yet at the same time they are

not mere formalities with less weight than other parts of the Constitution. This paper looks at the cases of the railroad in early British Columbian and Canadian history, and denominational education in Newfoundland and Labrador as instances of when Terms of Union became prominent constitutional mechanisms which guided not only policy development but the overall behaviour of federal and provincial governments. In addition, the paper adds to the discussion of the constitutional significance of Terms of Union by assessing their impacts on the development of Canadian federalism. Specifically, it posits that these unique agreements contribute to – and are examples of – asymmetrical federalism.

Chapter II: Case Studies

The Terms of Union occasionally grab the attention of Canadians during constitutional or other political battles. Former British Columbia Senator Pat Carney caused controversy in the 1990s when she suggested that one way for British Columbia to get the most from Canadian federalism would be to renegotiate the Terms of Union between that province and the federal government.[1] It highlighted a somewhat consistent view that exists in British Columbia and elsewhere that Terms of Union between provinces and the federal government are relevant and evolving constitutional agreements. The view highlights a widespread interpretation of the Terms as having a contractual nature. That they are potentially open for renegotiation and revision is an exciting proposition with major implications for constitutional politics and Canadian federalism.

The Terms of Union for Prince Edward Island were also recently cited by citizens of that province as a reason for the federal government to build a fixed link between the Island and the mainland of Canada. The Prince Edward Island Terms of Union state that the:

> "…Dominion Government shall assume and defray all the charges for… Efficient Steam Service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, Winter and Summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion."[2]

In the 1990s, this evolved into the interpretation that the federal government was required to provide Prince Edward Island with a bridge to the mainland, and in 1994, the Schedule to the Terms of Union was amended by the federal government through the Constitution Amendment 1993. It provided that a "fixed crossing joining the Island to the mainland may be substituted for the steam service referred to in this Schedule."[3] It is noteworthy that the legislative and statutory process was not the main or only approach used. The Terms of Union were not

[1] Pat Carney, *Speech Presented to the BC Unity Panel* (December 16, 1997), retrieved April 26, 2008, accessed on-line at: http://www.uni.ca/initiatives/bc_carn.html.
[2] *Prince Edward Island Terms of Union*, Retrieved April 25, 2008, Accessed on-line at http://www.solon.org/Constitutions/Canada/English/peitu.html.
[3] *Constitution Amendment Proclamation, 1993 (Prince Edward Island)*, Retrieved April 25, 2008, Accessed on-line at: http://www.solon.org/Constitutions/Canada/English/cap_1993pei.html.

constitutionally irrelevant and were not otherwise ignored or overlooked. This was a matter of constitutional scope and significance.

The selected cases for comparison in this paper are two examples which help us develop a comprehensive theory of Canada's Terms of Union agreements within the context of the Canadian constitution and Canadian federalism. They were chosen because they both represent the two points noted above: Terms of Union are useful during constitutional crises for bargaining purposes, as with Senator Carney's remarks; and they are means to an end for policy development and resource allocation as when the Constitution was amended to bring about the Confederation Bridge. The first case concerns British Columbia's general disposition towards its constitutional status in the 1870s and 1880s. The federal government was slow to act on its codified promise to build a railroad linking the province with the rest of the country. The second case to be examined is the role of the Terms of Union as a source of constraint on the discussions surrounding reforms to the denominational education system in Newfoundland and Labrador in the mid-1990s.

British Columbia and the Railroad

British Columbia became Canada's sixth province in July of 1871. The political culture in this colonial, settler society prior to Confederation was one of pronounced British loyalty. In the 1860s and 1870s, many settlers supported the direct tutelage of Queen Victoria and the imperial government in London. But increasingly it was felt that the colony should have local representative institutions by way of responsible government and membership in (or partnership with) the Canadian Dominion.[4] The catalyst for British Columbia's joining Confederation was the "sandwiching" of that colony after the Alaska purchase,[5] and the British government's purchase of the land rights hitherto owned by the Hudson's Bay Company for the Canadian Dominion.

Yet even the most ardent supporters of Confederation in the colony identified British Columbian entry into confederation in mainly economic rather than political terms.[6] It was viewed as a potential boon to the local economy – one which was reeling from the slow down of the Gold Rush a decade earlier. As such, the British Columbian position was that Confederation would have to be on terms that were agreeable to the political and economic establishment in the colony. The three delegates of the colony who were sent to Ottawa (Joseph Trutch, Robert Carrall, and John Helmcken) drew up Terms of Union which were closely emulated by Prince Edward Island two years later when that province joined Confederation in 1873.[7]

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[4] Jean Barman, The West Beyond the West: A History of British Columbia (Toronto: University of Toronto Press, 1991), 72-94.

[5] Philip Resnick, The Politics of Resentment: British Columbia Regionalism and Canadian Unity (Vancouver: UBC Press, 2000), 14.

[6] Barman, 96.

[7] Gilbert Kennedy describes the Terms and the orders-in-council from which they originated for both British Columbia and Prince Edward Island as being "practically identical" in "Amendment of the British North America Acts in Relation to British Columbia, Prince Edward Island, and Newfoundland," University of Toronto Law Journal 8 (1950), 211.

The British Columbian Terms of Union detail a number of conditions for entry into Confederation including services to be taken up by and run by the federal government. These are largely uncontroversial conditions which in any event are the jurisdiction of the federal government throughout Canada as outlined in Section 91 of Constitution Act, 1867 (formerly the British North America Act). These include funding for a national postal service, the military, penitentiaries, the "trusteeship and management" of Aboriginal lands and relations with Aboriginals, and other functions.[8] In this respect, the Terms of Union of British Columbia (but also Prince Edward Island and Newfoundland & Labrador) are not fundamentally interesting to study given that they merely repeat obligations already stated in the Constitution.

However, three of the most important terms were: the availability of sufficient federal subsidies for British Columbia's transition to provincial status; the federal government paying off the combined debts of the two former colonies that now comprised British Columbia; and a federal undertaking of "construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada."[9] Of these Terms, the most pressing issue immediately after Confederation was the completion of the railway.[10] Conservative Prime Minister John A. McDonald was slow to initiate the Canadian Pacific Railway when he was first in power from 1867 to 1873 due to a continental recession, and Liberal Prime Minister Alexander Mackenzie effectively ignored British Columbia's terms and subsequent protests over the course of his government from 1873 to 1878. In response to British Columbian protests, but also as a result of the *National Policy* of opening up the west and economic protectionism, McDonald was returned to power in 1878 and quickly initiated work on the railroad.[11]

The federal government's slow response to British Columbia's railway demands as outlined in Term 11 was a source of intense political controversy in that province. It was around this time that the relationship between the province and the federal government immediately began to get frosty. Indeed, British Columbia has always had a unique relationship with the rest of the country as a result of being an "awkward partner"[12] in terms of federalist issues, separated geographically by the Rocky Mountains, and culturally distinct as "Lotusland" or the "Left Coast."[13] But the resultant confrontation over Ottawa's failure to quickly meet the demands expressed in the Terms of Union became so bitter that by 1876 the provincial government threatened secession if the federal government continued to stagnate on fulfilling Term 11.[14] According to John Munro, the young province likely would have succeeded to that

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[8] *British Columbia Terms of Union*, retrieved April 25, 2008, accessed on-line at http://www.solon.org/Constitutions/Canada/English/bctu.html.

[9] *British Columbia Terms of Union*. Retrieved April 25, 2008. Accessed on-line at http://www.solon.org/Constitutions/Canada/English/bctu.html.

[10] Rand Dyck, Provincial Politics in Canada: Towards the Turn of the Century (Scarborough: Prentice-Hall, 1996), 599.

[11] Barman, 106.

[12] Resnick, 3.

[13] See Donald Blake, "Value Conflicts in Lotusland: BC Political Culture," in Politics, Policy and Government in British Columbia Ed. R. Ken Carty (Vancouver: UBC Press, 1996).

[14] Dyck, 599; Kennedy, 211; Barman, 105.

end if the imperial government in London was willing to allow it.[15] As a result of the Terms of Union, British Columbians felt – according to Edwin Black – that the railway was a "paramount condition for Confederation" and that failure to meet this condition within the prescribed time frame would mean that "the deal was off."[16] Eastern Canadian newspapers, surprised at the young province's vociferous demands barked back that the province was in fact the "spoilt child" of Confederation.[17]

This unique event in history highlights early conceptualizations of the Terms of Union as something of a sacred document between a provincial and federal government. The provincial government of British Columbia, and the citizens of that province as well, looked at the Terms through a contractual lens. Clearly the federal government in this otherwise highly centralist period in Canadian history [18] did not feel quite the same way. The Terms were viewed by McDonald, but especially by Mackenzie, as a political to-do list. As such, even though many supporters of the federal government in this crisis were keen on British Columbia's entry into confederation they did not view the Terms of that province's entry as constitutionally, legally or politically binding. Nevertheless, the Terms provided a useful bargaining chip as the rallying point for secessionist sentiment when the federal government reneged on the promises to which it had formally agreed. Similar rhetoric existed over a century later in former Senator Carney's shocked reaction to the federal government's policy of de-staffing many British Columbian lighthouses.[19] The jurisdiction for lighthouses is ascribed to the federal government in Section 91 of the Constitution,[20] but Carney and others felt that the federal government's moves were particularly brazen because it was also seen as breeching the spirit of provisions in Term 5, Section G of the Terms of Union (which also compelled the federal government to assume the costs of operating and maintaining British Columbia's lighthouses).

Terms of Union guide the behaviour of both levels of government in those provinces where they exist. Provinces that do not have Terms of Union may seek other avenues to redress grievances pertaining to federal divisions of power and resources such as through direct constitutional amendments, intergovernmental agreements, informal or ad-hoc agreements, or other mechanisms. Terms of Union appear to have some currency as tools with which provinces can hold the federal government accountable.

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[15] John Munro, British Columbia in Confederation: Prime Ministers and Premiers 1864-1987 (Victoria: Queen's Printer for British Columbia, 1997), 1.

[16] Edwin Black, "British Columbia: 'The Spoilt Child of Confederation'," in Politics, Policy, and Government in British Columbia Ed. R. Ken Carty (Vancouver: UBC Press, 1996), 33.

[17] Resnick misattributes the origin of this phrase to John A. McDonald, 3; Edwin Black notes that the term developed within the Eastern Canadian media some time before that, 32-33.

[18] J.R. Mallory describes this period as one of *quasi-federalism* because the federal government had the power to trump provinces by way of its taxing, declaratory, and disallowance and reservation powers, in "The Five Faces of Federalism," in Canadian Federalism: Myth or Reality? Ed. J. Peter Meekison (Toronto: Methuen, 1977), 19-21. See also K.C. Wheare, Federal Government (London: Oxford University Press, 1953), and David Smith, "Empire, Crown and Canadian Federalism," Canadian Journal of Political Science 24 (1991), 457-458.

[19] Carney (1997).

[20] *Constitution Acts, 1867 and 1982*, retrieved April 26, 2008, accessed on-line at http://laws.justice.gc.ca/en/const/index.html

In the British Columbia case, the Terms were seen as forcing a contractual obligation on the federal government. Terms of Union may also have the effect of constraining provincial action. In this sense, Terms agreed upon by both federal and provincial levels of government are not used just to attain benefits or subsidies from the federal government but to protect pre-existing provincial rights or institutions from any potential federal (or provincial) intrusion. In the case of reform to Newfoundland and Labrador's denominational education system, the Terms of Union (as with any other part of the Constitution) provided something of a constitutional constraint on that province's policy agenda.[21] Like the rest of Canadian Constitution then, Terms of Union are rigid constitutional mechanisms that entrench rights, responsibilities and rules of behaviour of both orders of government.

Newfoundland and Labrador was the last province to join Confederation in 1949 as a result of a very close referendum. Religious or "denominational" education rights had existed there since the 1860s.[22] Such rights are cited in many areas of the Canadian constitution. Education is under provincial jurisdiction as outlined by Section 92, and protection of denominational education is outline in Section 93.[23] But, when the province joined Confederation in 1949, that section of the constitution did not make the sorts of specific guarantees for public funds on a non-discriminatory basis to denominational schools that eventually made its way in to Term 17 of Newfoundland's Terms of Union.[24] As such, Newfoundland's Terms of Union, which Kennedy notes is longer and goes into greater detail than that of British Columbia and Prince Edward Island,[25] specifically defined the ways in which denominational education rights, normally defined under Section 93, would come about in Newfoundland and Labrador. Indeed, the Terms of Union agreement specifically stated that Term 17 effectively replaces Section 93 or acts *in lieu* of it. In this way, Terms of Union may modify the application of provisions in the Constitution Acts for specific provinces. For new provinces, Terms may also then be seen as opportunities for negotiating specific applications and functions for constitutional provisions provided for elsewhere in the constitution.

This was evinced when the provincial Liberal governments of Clyde Wells and later Brian Tobin initiated a number of reforms in the education system over the course of the 1990s. In 1992, the *Royal Commission of Inquiry into the Delivery of Programs and Services in Primary,*

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[21] See Don Downer and Jody Bull, "Newfoundland's Denominational Education System: Stages of Development, the Constitution, and Legislative Changes," *Presentation to the Annual Conference of the Canadian Association for Studies in Educational Administration*, Brock University (June 1996); and Mark Graesser, "Education Reform in Newfoundland, 1990-1995: The Impact of Constitutional Constraints and Referendum Politics," *Presentation to the Annual Meeting of the Canadian Political Science Association*, Memorial University of Newfoundland, St. John's, NL (June 10 1997).

[22] Phillip McCann, "The Politics of Denominational Education in the Nineteenth Century in Newfoundland" in The Vexed Question: Denominational Education in a Secular Age Ed. William McKim (St. John's: Breakwater, 1988).

[23] Ronald Penney, "The Constitutional Status of Denominational Education in Newfoundland" in The Vexed Question: Denominational Education in a Secular Age Ed. William McKim (St. John's: Breakwater, 1988), 80-82; also, see *Constitution Acts, 1867 and 1982*, retrieved April 26, 2008, accessed on-line at http://laws.justice.gc.ca/en/const/index.html.

[24] Penney, 86.

[25] Kennedy, 212.

Elementary, and Secondary Education was convened by the Wells government to examine what possible changes needed to be made to Newfoundland and Labrador's denominational education system. The impetus for the change was the high cost of educational service delivery of so many school systems, the poorer quality of education in the province as a result of separate school systems, and the impact that such a system has on the rights of parents and students.[26] As a result of the Inquiry, the Liberal Government held a referendum in 1995 where a slim majority of voters supported the provincial government's efforts to reform schools and amend Term 17.[27] But after the referendum Wells was replaced as Premier by Tobin, and attempts to strike a deal with the churches in the province over the wording of the amendment to Term 17 broke down. Another referendum on the issue was held in 1997. A more definitive majority supported removing the role of the religious education councils from the school system and the provincial government implemented a sweeping amalgamation of the public school system.

Reforming the school system was not possible through simply implementing statutory changes. Of course, given that denominational education was a constitutional right, the constitution had to be amended in some way. Section 93 applies to denominational education, but in the circumstance of Newfoundland and Labrador, Term 17 effectively replaced or altered the conditions under which Section 93 applied in that province. Therefore, in order to affect change in the education system in Newfoundland and Labrador, amendment had to be reached through Section 43 of the Constitution.[28] This section states that amendment to those areas of the Constitution that apply only to certain provinces require only the support of Parliament and "the legislative assembly of each province to which the amendment applies."[29] With the support of the people of Newfoundland and Labrador, the provincial government, and Parliament, the Terms of Union were changed so that Term 17 now allows for the provincial government to have "exclusive authority to make laws in relation to education but shall provide for courses in religion that are not specific to a religious denomination… [and] religious observances shall be permitted in a school where requested by parents."[30]

The British Columbia case study shows that the Terms are important constitutional documents and may act as contract or treaty-like structures which govern federal—provincial relations. The case of Newfoundland and Labrador shows that Terms of Union may restrict legislative agendas in provinces if the provisions contained within the Terms seek to limit the legislative independence of either level of government (in this case, provincial governments).

What do these two cases tell us about a possible theory of the roles of Terms of Union in constitutional contexts? While Terms of Union are typically relegated to being nothing more

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[26] *Our Children, Our Future: Royal Commission of Inquiry into the Delivery of Programs and Services in primary, Elementary, Secondary Education Summary Report* (St. John's: Queen's Printer, 1992), 1-2.

[27] Bonaventure Fagan, The Loss of Constitutional Rights in Education in Newfoundland and Labrador (St. John's: Adda Press, 2004), 112.

[28] The *Special Joint Committee on the Amendment to Term 17 of the Terms of Union of Newfoundland* held a detailed discussion of the appropriate amendment procedures for constitutional change in this case, 1-2.

[29] *Constitution Act, 1867.*

[30] *Newfoundland Act (Terms of Union)*, retrieved April 25, 2008, accessed on-line at http://www.solon.org/Constitutions/Canada/English/nfa.html

than conditions for the entry into Canada of the three provinces where they exist (and potentially future provinces), they are clearly more than that. They are relevant in contemporary contexts. The salience of the Terms in Prince Edward Island when the fixed link was constructed a decade ago, the denominational education issue in Newfoundland and Labrador roughly around the same time, and the continued salience of the Terms in British Columbia at sporadic points in its recent history[31] are all proof of this.

One of the recurrent themes in the otherwise limited literature that exists on the Terms of Union is the question over whether or not these agreements constitute treaty- or contract-like agreements, or simply conditions for entry. When Newfoundland joined Confederation in 1949, the prevailing view among that province's elites was that the terms constituted a special compact between that province and the federal government.[32] British Columbia's early status as a firmly British colony with a voting public that heavily favoured that colony's special status with Britain also resulted in distinct views about the nature of the Terms of Union. Specifically, British Columbians viewed the Terms of Union and joining Confederation in general as an agreement with not only the federal government but also the imperial government in London.[33] For much of its early history, British Columbia had representatives in London to make sure that in cases of dispute between the province and the federal government, the imperial government would be put on notice and be able to act as an overseer to enforce the Terms. Of course, Britain rarely acted in this manner, but the view within British Columbia that the Terms served as something of a contract between Victoria, Ottawa and London was a persistent notion in the province and one that guided British Columbian relations with the rest of Canada at least until the middle of the twentieth century.[34]

Chapter III: Terms of Union and their effect on Canadian Federalism

To better understand this issue, it may be useful to look at the development of the Terms of Union as an issue in Canadian federalism. Kennedy, writing in 1950, suggested that the general compact theory had no basis in "law or in fact" and that it was used mainly by opportunistic politicians.[35] He did contend however that British Columbia, Prince Edward Island and Newfoundland & Labrador hold positions within Canadian confederation that are distinct from the seven other provinces, and that Newfoundland & Labrador in particular had a relationship with the federal government that was especially different from the other provinces given that it joined after the Statute of Westminster of 1931.

[31] Aside from the controversy over Senator Carney's remarks, and the occasional British Columbian or Western Canadian secessionist movement, John Munro gives a detailed history of the "Better Terms" movements that existed in British Columbia from the 1880s to the middle of the twentieth century and still have some residual effect, 49-84.
[32] Raymond Blake, Canadians at Last: Canada Integrates Newfoundland as a Province (Toronto: University of Toronto, 2004).
[33] Munro, 11-21.
[34] See Munro (1997), and Smith (1991).
[35] Kennedy, 208.

British Columbia's early views that the Terms constituted a contract between essentially three tiers of government has to be understood in a context of a Canada that at the time did not have total control over its own sovereignty. Not only had the Constitution not yet been patriated, but the Statute of Westminster which effectively equalized the status of Commonwealth members with that of Britain under a common Crown was itself in the distant future. Therefore, British Columbia's and Prince Edward Island's very existence in Canadian confederation was for much of Canada's history codified through British orders-in-council.[36] As a result of this, the argument has been made in both provinces that the rules governing the relationships of Victoria and Charlottetown with Ottawa are a result of unique constitutional loopholes that – until 1982 – were ultimately governable by and accountable to the British Crown.

For a variety of reasons however, this does not lend weight to the general compact theory with which some have argued that Terms of Union are fundamentally treaties or contracts. First, the Terms of Union for each of the three provinces which have them are, in substance, not treaty-like in nature. Each of the three Terms of Union in Canada all contain similar clauses which state that the Terms "shall have the force of law notwithstanding anything in the Constitution Acts, 1867" and 1982. With the exception of transitional subsidies, and various Terms that – as discussed above – modify the application of already existing constitutional rights or responsibilities, there is nothing in the Terms that either trump something elsewhere in the constitution or add new constitutional rights and/or responsibilities that do not (or can not) theoretically exist for other provinces. The general picture then suggests that Terms of Union, in substance at least, do not contain "treaty rights," however defined.

Second, Terms of Union are neither theoretically nor in practice treaty-like mechanisms for another reason. Kennedy asks – assuming the Terms did have contractual features – what would occur if the Canadian government failed to live up to it's 'treaty' obligations?[37] We have seen that popular protest and complaints from provincial governments have occurred in early British Columbia with regard to the railway issue. Otherwise, much of the Terms already repeat "terms" described elsewhere in the constitution such as in Sections 91 and 92, and thus would be dealt with accordingly in court or through informal agreements. As Kennedy notes, breaking the terms of these supposed treaties could certainly give rise to "proceedings for enforcement of 'treaty' obligations, but it is doubtful if any other remedy arises—certainly not a right to withdraw, or justification for withdrawing, from federation."[38] The failure of any of these agreements to adequately or formally deal with breaches of them by either partner government is evidence that they do not comprise contract-like legal or constitutional entities.

Despite this overwhelming evidence that the substance of these Terms do not suggest treaty-like obligations between the provinces and the federal government (or an *especially* distinct status for the signatory provinces) the Terms do provide unique constitutional opportunities for the provinces that have them. Their very existence for some provinces and absence in others conforms to the textbook definition of asymmetrical federalism. Douglas

[36] Kennedy, 211.
[37] Kennedy, 211.
[38] Kennedy (211) was writing decades before the *Reference re Secession of Quebec*.

Brown notes that federal asymmetry is the condition where the "entities becoming united or being governed by a federal or central government are treated… unequally or non-identically."[39] As such, and given that the sub-national units of Canada constitutionally came about as a result of four distinct means (territories that are governed largely from the centre; the four original provinces that framed the Constitution Act, 1867; three provinces that came about as a result of Acts of parliament; and the three provinces that negotiated terms of union), federal asymmetry can be seen in *de jure* features of the Canadian constitution as well as through *de facto*, political processes.

But do these *de jure* differences amount to any fundamental asymmetrical differences in the provinces, particularly the three in question? Yes and no. In fact, Brown submits that both religious education rights in Newfoundland and Labrador (and also in Ontario, Quebec and elsewhere), and the "transportation guarantees in the terms of union for British Columbia, Prince Edward Island and Newfoundland," are among the most significant examples of constitutionally entrenched asymmetrical federalism in Canada.[40] Both of these examples – which constitute the cases studied here – are indeed examples of ways in which Terms of Union have produced unequal or non-identical pressures on Canadian federalism.

But whether or not these cases exemplify asymmetrical federalism depends on which definition of asymmetrical federalism we use. For instance, Brown highlights such things as Quebec having civil rather than common law as evidence of asymmetry, which, indeed it is. But Gordon Gibson notes that such examples, and likely the examples Brown provides regarding the Terms of Union agreements, only represents *differences in* rather than *unequal relationships between* the federal government and the provinces. Federalism is by definition an institutional design that entails flexibility, diversity, and collaboration, and as Gibson notes, *symmetry* means equality of opportunities rather than sameness across all provinces in outcomes.[41]

In both cases presented here, the Terms of Union appear to provide non-identical opportunities to provinces. However, they also appear to conform more to Gibson's definition of *symmetry*. For instance, the transitional subsidies contained in the Terms of Union for all three provinces where they exist were meant to bring these provinces in line with Canadian standards and were meant to be temporary, as indeed they were. This suggests Gibson's symmetry of opportunities rather than in outcomes. The provisions mandating federal funds for a transcontinental railway linking British Columbia with the rest of the country in the 1870s and 1880s has, of course, been completed and as a result does not constitute a continuing source of inequality in the relationship between that province and the federal government vis-à-vis other provinces. Finally, denominational education rights, while they were unique in the case of Newfoundland and Labrador, were not unique in the context of Canadian federalism. Denominational education rights were already protected by the Constitution and only existed in those provinces that opted to have such school systems. In fact, at various points in history, all provinces except for Prince Edward Island, Nova Scotia, and British Columbia had public funding

[39] Douglas Brown, "Who's Afraid of Asymmetrical Federalism? A Summary Discussion," *Institute for Intergovernmental Relations (Queen's University School of Policy Studies)* 17 (2005), 2.
[40] Brown, 2.
[41] Gordon Gibson, "Some Asymmetries are More Legitimate than Others – And Subsidiarity Solves Most Things Anyway," *Institute for Intergovernmental Relations (Queen's University School of Policy Studies)* 17 (2005), 2.

for denominational schools.[42] The Constitution then can be seen as allowing for optional asymmetry in this particular issue area. The only difference in the case of Newfoundland and Labrador is that when denominational education existed in that province, the Terms of Union governed this right and allowed that province to make slight revisions or modifications on how already-existing constitutional rights would be practiced.

Chapter IV: Conclusion

Terms of Union serve a variety of functions. First, they serve as catalysts for the entry of new provinces into the Canadian federation through orders-in-council and by way of Section 146 in the Constitution (which governs the creation or entry of new provinces). Second, they are opportunities for new provinces to modify and codify the application of specific sections of the constitution. Third, they are opportunities for provinces to extract from the federal government a litany of promises, conditions, and subsidies that do not apply to other provinces. Many of these are time-specific, and are meant only for the brief transition period after joining the Canadian family.

Finally, while many of the Terms of Union either repeat or adjust the constitutional rights and responsibilities of both tiers of government that are already codified elsewhere in the constitution, in practice they also have the effect of creating a limited degree of federal asymmetry. This *asymmetry-lite* is a feature of Terms of Union that should be further studied and analyzed. Comparing the abovementioned cases with others in the three provinces can help stimulate new theoretical perspectives on the roles of Terms of Union as tenets of the Canadian Constitution. Examining court cases where the constitutionality of Terms of Union was questioned (or when rights outlined in Terms conflicted with those from other areas of the Constitution) also appears to be a useful approach in more accurately measuring the constitutional relevance of Terms of Union. The real test of the functionality of Terms of Union agreements would be under a few hypothetical situations: if, as Kennedy suggested, the federal government was put to the test by provinces in instances where Ottawa blatantly contravened obligations outlined in the Terms, or vice versa; if citizens attempted to take a signatory province or the federal government to court based on their reneging on obligations; or finally, if a province attempted to renegotiate their respective Terms of Union (especially if in doing so the provincial government in question attempted to modify the condition – found in all three Terms of Union agreements – that the agreements themselves must not contradict provisions of the Constitution Acts of 1867 and 1982).

[42] Penney, 85.

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