17

Canada at 150: Federalism and Democratic Renewal

Elizabeth Goodyear-Grant and Kyle Hanniman

Queen's School of Policy Studies
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Canada: The State of the Federation 2017

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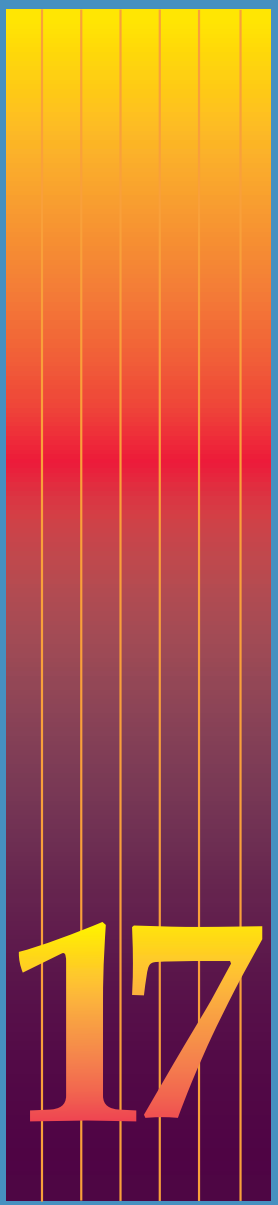

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Canada:

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CONTENTS

INTERGOVERNMENTAL RELATIONS

ACKNOWLEDGEMENTS

The genesis of this volume is the Institute of Intergovernmental Relations' (IIGR) 2017 State of the Federation conference, which was held June 16 to 17 at Queen's University's Donald Gordon Centre. The conference, entitled *Canada at 150: Federalism and Democratic Renewal*, took the opportunity to reflect on the federal Liberals' democratic reform agenda and—in light of Canada's sesquicentennial year—the legacy and future of Canada's federal and democratic institutions. While contributors used a wide range of criteria to evaluate Canada's democratic and federal architecture, we were struck by their emphasis on the need to accommodate diversity. Many of our contributors believe Canada's democratic and federal institutions have done a reasonably good job of promoting, protecting, and recognizing the identities and interests of the original federal partners. But they also see room to deepen those commitments and extend them to a much broader range of groups, including Indigenous peoples.

Our first acknowledgement goes to Mary Kennedy, the administrative support and events coordinator at the IIGR. Mary has organized a number of State of the Federation conferences and her knowledge, organizational skill, and patience were as indispensable as ever. We also thank the Queen's School of Policy Studies (SPS)—and Executive Director David Walker, Lynn Freeman, and Chris Cornish in particular—for their financial, organizational and promotional support. We also thank Bob Wolfe, David Walker, Lynn Freeman, and other members of the SPS for promoting the conference in the context of the *Public Policy & Canada's 150* initiative. Our home department, Political Studies, was also instrumental as a sponsor, source of contributors and as an open, supportive, and stimulating environment for incubating our conference ideas and plans. We thank Department Head Zsuzsa Csergo in particular for securing the department's financial support.

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We are grateful for the work of our chapter authors and their exciting contributions to the volume and conference themes. In addition, we would like to thank a

number of conference speakers whose names do not appear in the table of contents, but who greatly enriched our discussion and thinking nonetheless. In no particular order, these attendees were Julie Simmons, Jörg Broschek, Craig McFadyen, Nadia Verrelli, Leslie Seidle, Darian ("Wiiwakaa'ige") Baskatawan, Josée Bergeron, Benoit-Antoine Bacon, Janet Mason, and Peter Wallace. Finally, we also wish to acknowledge the support of David Elder and Bob Young—two important members of the IIGR and broader federalism communities whose engaging and insightful contributions to this and past IIGR events will be sorely missed. Bob was a co-editor of the last State of the Federation volume, which was dedicated to him and his immense impact on the field.

In preparing this volume for publication, as well as assistance at the conference itself, we are grateful for the diligent and thorough work of Rebecca Wallace, a senior PhD student in Political Studies at Queen's, as well as assistance from Chris Abbott, also a PhD student in the department. Thanks are also due to the SPS Publications Program and McGill-Queen's University Press, which helped shepherd the volume through the production process. We are particularly grateful to SPS general editor Kim Richard Nossal, SPS Publications Program coordinator Mark Howes, and expert copy editor Anne Holley-Hime.

BIOGRAPHIES

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Jean-Marc Fournier represented the riding of Saint-Laurent in the National Assembly of Quebec from 2010 to 2018, and previously represented the riding of Châteauguay from 1994 to 2008. He served as the minister of revenue, government house leader, minister of education, minister of municipal affairs, and attorney general in the government of Jean Charest and was the interim leader of the Quebec Liberal Party from 2012 to 2013. He was the Quebec Minister of Canada Relations and the Francophonie from 2016–2018.

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Peter H. Russell is a university professor emeritus at the University of Toronto where he taught political science from 1958 to 2016. He was the founding principal of Senior College at the University of Toronto and is a past president of the Canadian Political Science Association. His most recent book is *Canada's Odyssey: A Country Based on Incomplete Conquests*, published by the University of Toronto Press in 2017.

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INTRODUCTION

Elizabeth Goodyear-Grant and Kyle Hanniman, Queen's University

In 2015, Canada's "natural governing party" (e.g., Carty 2015) returned to power after a nearly ten-year hiatus. The Liberals had campaigned on an ambitious platform that included a number of proposed changes to Canada's federal and democratic institutions. The centrepiece of this agenda was a promise (famously broken) to replace the first-past-the-post electoral system. But the proposals did not end here. The Liberals also promised to revitalize intergovernmental relations with provinces; renew relations with Indigenous peoples; transform intergovernmental relations with municipalities; and change the way the federal government appoints senators and Supreme Court justices. It was an ambitious agenda to say the least and while it was a long way from the transformative efforts of the mega-constitutional period, it was a significant departure from the "open" federalism practiced by the Harper Conservatives. It also reflected the presumption of a growing disconnect between our political and federal institutions and the country's increasingly complex, diverse, and democratically demanding society.

By the summer of 2017, we had an opportunity to assess the Liberals' mid-term performance. We also had the opportunity to do so in the context of Canada's sesquicentennial year, a moment that challenged us to look beyond the policies and priorities of the day and to reflect on the legacy and future of Canada's federal and democratic institutions.

It was against this backdrop that the Queen's Institute of Intergovernmental Relations (IIGR) invited a distinguished group of panellists to our biennial State of the Federation conference entitled *Canada at 150: Federalism and Democratic Renewal*. When preparing their chapters, participants were asked to keep three questions in mind. First, what criteria (democratic and otherwise) should we use to evaluate the quality of Canada's political institutions and practices, particularly as they relate to the federal and intergovernmental landscape? Second, how do existing institutional arrangements perform according to these standards? And

finally, how are recent and proposed reforms likely to fare? The authors applied these questions to a wide range of topics, including Indigenous relations, Supreme Court of Canada (SCC) appointments, electoral reform, and intergovernmental relations. Some also commented on the overall state of the federation. Naturally, not all topics relevant to Canadian federalism and democracy were covered, but many of the most important and enduring themes were.

Because of the general nature of the questions, it is not possible to encapsulate the volume's many and varied answers in a single introduction. We have, however, highlighted what we see as the volume's most pervasive concern. Nearly all of our contributors spoke to the need to adapt Canada's rigid democratic and federal architecture to the needs of an increasingly diverse society. Canada's political institutions have done a reasonably good job of promoting, protecting, and recognizing the diversity of Canada's provincial and regional societies. But they have a long way to go in terms of reconciling and recognizing the identities and interests of the original federal partners; letting other groups and levels of government in; and giving ordinary citizens and groups, particularly historically marginalized ones, a say in the democratic process.

As the chapters also indicate, reform will not be easy. Canada's formal constitutional arrangements are notoriously path-dependent and incremental and non-constitutional change is often glacial and challenging in its own right. Accordingly, we also highlight contributors' strategies and thoughts on breaking the institutional and political deadlock and realizing a more diverse, democratic, and accommodating future.

The remainder of the introduction proceeds as follows. Section one assesses the performance of Canada' federal and democratic institutions as tools for recognizing and reconciling diversity. Section two identifies potential and evolving reform agendas. Section three summarizes the individual chapters, which address a number of topics under four broad headings: general assessments; democratic institutions; federalism for diversity; and venues of intergovernmental relations

ACCOMMODATING DIVERSITY

Accommodating diversity is one of the most common motivations for adopting federal or multilevel institutions, particularly in multinational or federal societies such as Canada's (Livingston 1956). Federal institutions provide territorially based groups with partial and constitutionally protected opportunities to express, develop and protect their distinct cultures. They also provide representatives of these groups opportunities to promote and reconcile group interests and identities in national legislatures or intergovernmental forums. This dual feature of federal systems—shared and self-rule (Elazar 1987)—has tremendous appeal in many modern societies. As Watts notes in his classic comparative federalism text, "More and more peoples have come to see some form of federalism…as…the closest

institutional approximation to the complex multicultural and multidimensional economic, social and political reality of the contemporary world" (2008, 5).[1]

Accommodating diversity was the central reason the founders adopted Canada's federal form of government and it remains central to the functioning and evolution of Canadian federalism today. Among federal regions, the provinces enjoy unusually high levels of fiscal and policy autonomy. They, along with the federal government, have also developed elaborate, if highly informal, systems of intergovernmental relations to work out their differences, coordinate their policies and advance common goals. The nature of intergovernmental relations varies significantly across time and policy area, but its defining characteristic has been closed-door discussions and negotiations among federal and provincial executives (e.g., Simeon 1972).

Canada's combination of decentralization and executive federalism has not, as Hueglin notes in his chapter, always resulted in harmonious relations, as recent conflicts over healthcare funding, pipelines and climate change clearly indicate. And intergovernmental bargaining is far too power-laden and unbalanced, he adds, to describe as consensual. But there is a "common predisposition for negotiation, cooperation and…as much as possible under the circumstances, agreement" in Canada and this predisposition distinguishes Canadian federalism from its more coercive and majoritarian American form.

This predisposition has arisen, in large part, of course, as an effort to manage relations between the country's only majority French-speaking province (Quebec) and the rest of the Canada. Other intergovernmental cleavages have emerged and Quebec is not the only province that has pressed for decentralization or changes to national institutions or decision-making structures. But it is the only province in which these efforts have been rooted in a deep-seated desire for cultural-linguistic recognition and self-determination. As Russell's chapter indicates, Quebec's struggles have, in many ways, been successful. Much of Canada's history, he explains, is a story of the English-speaking majority's efforts to assimilate French-speaking Canada into a single ethnic state. But these efforts have failed and political elites have come to accept the country's multinational character.

Even Jean-Marc Fournier—another contributor and Quebec's Minister responsible for Canadian Relations and the Canadian Francophonie at the time of conference—sees significant merit in the Canadian model. For all its warts (and for any Quebec minister, there must be many) Canadian federalism has been "accommodating enough for Quebec to succeed in its nation building project," he argues, and has thus provided a firm foundation for a plurinational state rooted in the "deep diversity" of its component parts.

But its successes notwithstanding, many of the traditional concerns about Quebec's recognition and place remain. The province has yet to sign the Constitution

1. As the quote suggests, the advantages of federalism are not, according to Watts and others, limited to the accommodation of diversity.

Act, 1982 and many Quebecers still seek formal constitutional recognition of the province's distinct society. As Fournier's visit to the IIGR in 2017 (thirty-five years after patriation) suggests, these concerns are unlikely to disappear (even if their salience ebbs and flows over time).

But the quest for deep diversity does not end with Quebec and the rest of Canada or even the federal and provincial governments. As every chapter in the volume indicates, Canada needs to extend or strengthen the benefits of autonomy, recognition, and participation beyond constitutionally recognized orders of government.

The status of Canada's official-language minorities provides a telling example. Canadian federalism and the constitution provide Quebec significant opportunities for self- and shared-rule, but only limited non-territorial autonomy for the Francophone minority living outside of the province. Sections 16 to 23 of the Charter were supposed to help remedy this imbalance, which they have to some extent. But their interpretation is still constrained by the SCC's deference to the original federal compromise, as Chouinard's analysis of education and healthcare policy shows.

Perhaps the deepest failure of Canadian federalism, however, is the exclusion of Canada's Indigenous peoples from institutions of shared- and self-rule. Hueglin admits his mostly good news story about Canada's negotiated federalism has nothing to do with Indigenous peoples, who have been more or less excluded from the bargain. This failure is as old as Canadian federalism itself, but remedying it has acquired a greater sense of urgency in the wake of the Idle No More movement, the Truth and Reconciliation Commission's findings on the history and effects of the residential school system, and the federal Liberals' promise to renew relations with Indigenous peoples—Canada's most important relationship, as the prime minister has famously said.

Transforming this arrangement is, without a doubt, a long-term process, but one area where the Liberals could have made an immediate impact is with the appointment of the country's first Indigenous SCC justice. Two vacancies have come and gone, however, and the SCC is still without Indigenous representation, despite the Liberals' promise to make the bench's composition more reflective of Canadian society and despite the obvious importance of the SCC's rulings for Aboriginal treaty rights and the broader process of reconciliation. In the meantime, the federal government continues to uphold the convention of regional representation, despite suggestions that it would relax this convention to accommodate other forms of diversity. This decision, according to Crandall and Schertzer's chapter, reflects the enduring "structuring power" of regional representation—"one of the foundational narratives of Canadian federalism"—over the country's institutional design.

Wallner's chapter points to additional ideational obstacles—this time in the all-important arena of intergovernmental relations. Different intergovernmental forums reflect and refract competing federal narratives, but the central players in all of them are federal or provincial governments. Many would like to bring Indigenous peoples into the intergovernmental fold, but doing so requires a more

inclusive vision of federalism than the traditional executive model, a point that came to a head, Wallner notes, when the representatives of the three national Indigenous organizations decided to boycott meetings of the Council of the Federation (COF) in 2017 and 2018. (The leaders, who were offered separate meetings in the run-up to formal proceedings, wanted full standing in the body.)

Penikett shifts the analysis to the provincial level and examines the glacial progress of the BC Treaty Commission (BCTC). Many had hoped the BCTC would usher in a new era of Indigenous self-governance, replete with quasi-provincial powers. But the federal and provincial governments have shown little interest in resolving the two questions most fundamental to the treaty-making process, namely who owns the land and how will it be governed—opting instead for a strategy of endless negotiation and transactional deals.

Finally, Ladner, whose chapter takes the broadest look at Indigenous-settler relations, argues that Indigenous and Canadian constitutional orders (including the Constitution Act, 1982) provide a potential foundation for a decolonized future, but that transformative reconciliation is impossible as long as the courts and other federal and provincial elites cling to colonial interpretations of Crown sovereignty. Most insidious, she argues, is the principle of *terra nullius*, the doctrine of discovery and the notion that Indigenous peoples have already merged or reconciled their sovereignty with that of the Crown.

But the struggle for recognition and representation does not lie exclusively with federal or multilevel arrangements nor, for that matter, did the federal Liberals' democratic reform agenda. Today's pluralists seek to accommodate a variety of territorial and non-territorial groups, including ones organized along gender, ethnic, and racial lines. Mockler and Rose are thusly critical of the Liberals' consultation process on electoral reform, which failed, they argue, to provide sufficient input from women, racial minorities, and certain Indigenous groups. And as Schertzer and Crandall's chapter notes, the SCC is still without an Indigenous or racial minority appointment (though effective gender balance was achieved and has been maintained, with the exception of a two-year period, since 2004).

PATHS FORWARD

How might we redesign Canada's federal and democratic institutions to deepen and broaden our commitment to diversity? For decades, the answer for many lay in constitutional reform. But the country has yet to recover from the scars and fatigue of two rounds of mega-constitutional debates, which ended in the failed Charlottetown Accord over twenty-five years ago.

But if we cannot adapt with a big constitutional bang, perhaps we can transform ourselves gradually through sustained and informal dialogue. This was the approach proposed by the Quebec Liberals' *Policy on Québec Affirmation and Canadian Relations*—a summary of which appears in Fournier's contribution to this volume

(written when he was Quebec's Minister of Canada Relations, before the Quebec Liberal government's defeat in October 2018). According to Fournier, the policy was an attempt to seize "the opportunity" of Canada's sesquicentennial to initiate a dialogue with Canada about Quebec's place in the federation. While the hope was that the discussion would result in formal recognition of Quebec's distinct society (as well as a number of other longstanding constitutional demands), the minister preached patience and the province's obligation to engage other groups—including the federal and provincial governments, First Nations and Inuit peoples, the Francophonie and civil society—in a process of mutual recognition and learning. The new Coalition Avenir Québec government has since replaced the Liberals, and the future of the affirmation policy (which attracted far more interest from academics than Canada's political elites) is in doubt. But Fournier's address and the policy from which it was derived were remarkable for both their tone and content. As Russell notes in this volume, "A Quebec that is moving to embrace diversity as part of Canada's and Quebec's national identity is a Quebec to which Canadians should respond."

One of the most common ways of protecting and reconciling diversity in federal systems is a territorially based upper chamber capable of checking the majoritarian tendencies of the lower house. Canada's Senate has never really played this role, however, given its unelected status. The Harper Conservatives had hoped to remedy this by appointing all new senators through consultative elections, but the SCC dashed these hopes in its 2014 Senate reference case, in which it ruled that the measure would require the support of seven provinces with at least 50 percent of the country's population. This set the stage for the Liberals' non-constitutional approach, which appoints senators through an informal, non-partisan and merit-based process. According to many, the democratic implications have been dire. The reform has not altered senators' unelected status, but it has emboldened them to challenge the democratic will of the House. Both of the volume's assessments of Senate reform, however, are positive. While it is too soon to tell what effects the reform will have, Macfarlane believes it has, if anything, brought the Senate more in line with its constitutional role as a deliberative and complementary legislative body. Smith, by contrast, believes the behavioural effects have been more profound, but nevertheless welcomes them. He sees tremendous potential in a parliamentary chamber unmoored from the constraints of electoral politics and now party discipline.

Importantly, neither Macfarlane nor Smith discusses the reforms as a means of ushering in a more robust form of intrastate federalism, where the Senate defends and advances the interests of provinces. The Senate's real potential, according to Smith, lies in the representation of minority groups. Macfarlane (2018) makes a similar point elsewhere with respect to Indigenous groups. The Senate has become an important site of Aboriginal activism, as Indigenous and other groups gravitate toward independent senators, who have growing power to propose amendments and speak their minds, powers backbench MPs lack.

This is a promising development for Indigenous peoples, but as several chapters indicate, it is just the tip of the iceberg. Meaningful self-government cannot occur, argues Russell, without adequate fiscal resources, and that means granting First Nations communities two privileges Canadian provinces already enjoy: the capacity to raise own-source revenues and access to equalization payments. Reform must also come in the area of shared rule, argues Russell, preferably with the creation of an Aboriginal parliament (as recommended by the Royal Commission on Aboriginal Peoples), which could advise the House of Commons and the Senate as a third parliamentary house.

Penikett observes the frustration of Indigenous peoples with the BCTC process and the consequent turn of many communities to the courts. Litigation has yielded some success, but it is no panacea, especially for under-resourced communities. Far-reaching reconciliation can only take place at the negotiating table and in a post-*Tsilhqot'in* world, argues Penikett, this means negotiations among provincial leaders and the representatives of pre-colonial tribes, not Indian Act bands. Given the former's limited resources, early talks should be exploratory—focused on the broad implications of *Tsilhqot'in* for Aboriginal title and tribal governance. And if the premier or the relevant senior minister wants to foster a true nation-to-nation relationship, they should dispense with their lawyers, advisers, and consultants and meet with chiefs head-to-head. If the federal government is called upon to participate, it should embrace Aboriginal title and acknowledge "the co-existence of Crown and Indigenous title," which would build goodwill and "help Canadians understand their own history as residents of Indigenous territories, help them recognize a debt to Indigenous Nations, and also, the bounty Indigenous lands and resources provided generations of settlers."

For Ladner, the path to reconciliation lies in a framework of treaty federalism—a model that honours the treaties in their original spirit and intent and rejects the colonial notion that Indigenous peoples have somehow merged or surrendered their sovereignty to the Crown. The bad news, she argues, is that Canadian elites, including SCC justices, continue to adhere to these colonial doctrines. The good news is that Indigenous and Canadian constitutional orders contain the "transformative potential" to rebuild governance and embrace Indigenous peoples as co-autonomous partners in a generative constitutional order. While most Indigenous groups opposed patriation, it did have the benefit of constitutionalizing Aboriginal and treaty rights under sections 25 and 35. These sections have yet to transform the court's conception of sovereignty. But the interpretative principles of reconciliation and honour of the Crown (both of which have been applied in relation to section 35) may provide the transformative material treaty federalists seek. Reconciliation can only occur, however, if Crown elites see section 35 for what it is: a veritable fourth pillar (alongside parliamentary governance, federalism, and the Charter) of Canada's political system.

CHAPTER SUMMARIES AND ORGANIZATION OF THE BOOK

As noted above, we have organized the contributors' chapters under four broad categories: general assessments; democratic institutions; federalism for diversity; and intergovernmental relations.

General Assessments

The first section—with chapters from Peter Russell and Thomas Hueglin—provides a broad and historical overview of the state of Canada's democratic federal institutions. Drawing on the framework of his recent book, Russell argues that the central dynamic of Canadian history is the changing relationship between its three main pillars: Aboriginal, French-speaking and English-speaking Canada. The most important development in this relationship, according to Russell, is the English majority's embrace of the country's multinational character. Its political elites no longer seek to assimilate the other two pillars into a single ethnic state. This development is part of the evolution of what Russell calls the fourth pillar of Canadian federalism—a shared civic culture rooted in parliamentary democracy, constitutionalism, the monarchy and more recently, the recognition of diversity. This last pillar is essential, according to Russell, to holding a country of such deep diversity together. Despite the country's significant accomplishments, however, the multinational project is far from complete. Our biggest failing, according to Russell (and several other contributors), concerns our treatment of Indigenous peoples. While we have started to answer Indigenous calls for self-governance, negotiations have been painfully slow. Most Indigenous communities lack the requisite financial resources for self-government. They also lack representation in national decision-making bodies. Accordingly, he recommends equalization payments for Indigenous communities and a directly elected Indigenous parliament, which could play an advisory role to the House of Commons and the Senate.

Addressing the volume's questions head on, Hueglin evaluates the democratic quality of Canadian federalism against the criteria he considers most appropriate for a multinational federal society. He makes three main points. First, it makes little sense to evaluate Canadian federalism according to the principles of majoritarian rule and popular sovereignty that pervade American democratic discourse. Even unitary countries, he argues, flounder under the practical demands of popular sovereignty and majoritarian rule is at fundamental odds with the heterogeneous and group-based preferences characteristic of most federal societies. Second, he identifies an alternative set of criteria (subsidiarity, solidarity, and consensus) more appropriate to Canada and other diverse federations (and perhaps democracies more generally). Finally, he argues that Canada performs reasonably well on these fronts.

Canada has achieved a relatively balanced allocation of powers through the principle of subsidiarity (aided, in large part, by the Judicial Committee of the Privy Council's and SCC's doctrine of pith and substance). It has also achieved a reasonably equitable distribution of resources (or solidarity) through the equalization system and other transfer programs. And while Canada is not a consensus democracy, it exhibits a deep and abiding commitment to intergovernmental negotiation and cooperation (albeit one that occurs within an opaque, elitist, informal, and power-laden framework prone to bouts of federal unilateralism). This "procedural" model of federalism is not perfect. But it allows for far more consensus and negotiation than we observe in the coercive American case.

Democratic Institutions

The next section deals with important dimensions of democratic institutions, including those related to federalism. The focus is on recent changes (or attempted changes) to specific institutions, new interpretations of existing arrangements as well as representational arguments for institutional change.

We open this section with Janet Hiebert's analysis of the much discussed notwithstanding clause or section 33 of the Charter. The Charter has attracted a lot of scholarly attention, but very little of this has focused on the Charter's relationship to federalism. Hiebert notes that the Charter is a nationalizing force that exists in some tension with the logic of federalism and provincial diversity—a tension exacerbated by the fact that the federal government appoints SCC justices without input from the provinces. She also notes that there has been very little analysis of the federal implications of the notwithstanding clause, despite the fact that it is the Charter's only distinctly federal element (though it was not originally intended to be). Hiebert takes up two pressing questions on this topic: first, can we distinguish between federalist and democratic uses of the notwithstanding clause, and second, should we draw inferences for federalism from the well-established political reticence to invoke the notwithstanding clause? This chapter concludes with an important point: the reluctance to use section 33 has allowed politicians and the courts to avoid answering the question at the heart of Hiebert's analysis: "are differentiated interpretations of Charter rights for federalist reasons justified and, if so, what principles should guide political or judicial judgments that diverge from judicial norms about the scope or meaning of protected rights?"

The next two chapters focus on the democratic implications of the new process for appointing senators. Both argue that the reform has enhanced the quality of parliamentary democracy, but for different reasons. The first chapter comes from Emmett Macfarlane—an architect, in some ways, of the new model (as Macfarlane notes, he "advised the government on the constitutionality of its proposals and authored, at the government's request, a draft proposal for what a 'non-partisan, merit-based' appointments process should look like.") He addresses two questions:

whether the change is constitutional and whether it has unduly emboldened senators to challenge the House of Commons' democratic will. Macfarlane sees nothing suspect about the reform's constitutionality. Provided the process is not legislated and does not fundamentally alter the Senate's constitutional role, it is difficult to imagine the SCC objecting to it. He also believes the Senate is behaving as a sober chamber of second thought should. It is amending legislation at a slightly higher rate, but the most obstructionist senators were appointed under the old patronage system, suggesting that partisan differences (rather than emboldened independents) are the real source of disharmony between the chambers. He also argues that the reform has brought the Senate's behaviour more in line with its constitutional role as a deliberative body and complementary chamber to the House. Far from adopting a competitive stance, the Senate has tended to focus on constitutional aspects of legislation and to defer to rejections of proposed amendments, both behaviours befitting a chamber of sober second thought.

David Smith's chapter explores the questions of how the newly invigorated upper chamber will and ought to function in relation to the lower house. This is not, Smith argues, a question that political scientists and other observers have taken seriously, at least not until recently. The tendency, he notes, has been to treat the Senate as a tangential body with little influence. This is quickly changing, he argues, with the severing of senators from the Liberal caucus and the new appointment process. Like Macfarlane, Smith believes it is too soon to tell what this non-partisan approach means for Canadian bicameralism. It is clear, however, that Smith regards the changes as potentially transformative. He notes that citizens have grown increasingly frustrated with hyper-party discipline in the House. They have also grown disillusioned with electoral politics and the traditional political parties. An independent Senate offers enormous appeal in this context. Its members are "less subject to party discipline, and increasingly likely to act assertively," which, according to Smith, sounds a lot like the legislature Canadians want. The Senate also represents a constituency both broader and more specialized than that of the House (and one that extends well beyond traditional regional interests). Finally, it is a far more deliberative body, a quality reflected in its recent and thoughtful review of the Charter implications of several pieces of legislation. For all these reasons, the Senate is "slowly (or not so slowly) promoting itself as an ally to the people," argues Smith, with the potential to transform the way Canadians conceptualize and relate to their democratic institutions.

Parallel with the changes to Senate appointments, the Trudeau government also set its sights on the judiciary upon taking office and announced a new procedure in 2016 for identifying and selecting Supreme Court justices. Erin Crandall and Robert Schertzer's chapter examines this new process. In addition to increasing the accountability and transparency of SCC appointments, the reform's purpose was to appoint functionally bilingual candidates capable of enhancing the court's diversity. The Liberals also indicated that they were willing to break with the convention of regional representation to achieve these goals (an important departure

from the Martin and Harper reforms, which also sought to enhance transparency and accountability but without the emphasis on diversity). According to Crandall and Schertzer, the reform opened up a fault line between two competing ideas about the court's role—one in which the court is seen as a pan-Canadian defender of the rights of a diverse and bilingual society and another in which it is seen a defender of a more traditional and federal form of diversity defined by regional and provincial interests. The prime minister eventually upheld the convention of regional representation and appointed a white male, Malcolm Rowe, to replace a retiring Atlantic Canadian justice. This maintained the only distinctly federal feature of the appointments process, while missing an opportunity to appoint the SCC's first racial minority or Indigenous justice. The result confirms the power of the federal idea, argue the authors, but the opposition to Rowe's appointment (and the Sheila Martin appointment that followed it) suggests the struggle for a more diverse bench continues.

But the Liberals' most controversial attempt at institutional engineering (ultimately aborted) was electoral reform. The party campaigned on a promise that 2015 would be the last federal election under single-member plurality (SMP) electoral rules. Upon taking office, the House of Commons Special Committee on Electoral Reform (ERRE) was formed with a mandate to consult with stakeholders on the electoral system. The government also conducted a survey on the topic. There was a lot of public support for electoral reform, though there was no consensus, by most accounts, on what the problems with the existing system were or what alternative should replace it. In any case, in a controversial move, the government announced in February 2017 it was abandoning electoral reform. Electoral system change is a perennial topic of discussion in both federal and provincial politics, with no fewer than eight reports at the federal level since 1921 recommending some form of change, as well as various (failed) provincial referenda on the subject since the early 2000s.

This volume includes three chapters on electoral reform, focusing on various aspects of the issue. Patricia Mockler and Jonathan Rose start us off with an examination of the electoral reform consultation process, which they embed in a larger analysis of research on deliberative processes and democratic engagement. The analysis addresses a number of critical questions, including who participates, how meaningful is citizen involvement, and what are the implications of citizen participation for actual decisions? Given that criticisms of SMP typically focus on its assumed undemocratic nature (wasted votes, distortions between popular votes and seats), the onus was arguably on the Liberals to ensure an inclusive and participatory process. Mockler and Rose's chapter draws on survey data and an original content analysis of participant contributions to the ERRE to make the case that the consultations largely failed the norms of good deliberation. The descriptive representation of large portions of the Canadian public was low; those with specialized political knowledge were unduly privileged; the consultation did not

have a sufficient impact on the outcome; and the consultations failed to educate the public about the issues at hand.

Complementing Mockler and Rose's analysis of process, the volume has two chapters on electoral reform's substance: Anna Drake and Margaret Moore's analysis of the "equal voice" justification for reform, and Levick's federalist case for reform. Drake and Moore focus on the "equal voice" critique of the current system. Critics charge SMP or first-past-the-post (FPTP) with violating people's equal right to vote on at least two grounds: it does not count votes equally on account of regional discrepancies, and it creates a "winner-take-all" contest in which votes for losing candidates are "wasted." As such, the system violates the principles of proportionality and democratic equality, both of which require the equal representation of each individual in the electoral system. Critics then contrast SMP with other electoral systems, particularly proportional representation (PR), which is presented as "more democratic." Ultimately, the chapter makes a strong case that the meaning of democratic equality in the 2016 electoral reform debate was unclear. What does democratic equality mean, especially in a context with important regional considerations in terms of the vote? Where might we look for answers? Drake and Moore look at what the SCC has said about the relationship of the right to vote with democratic and regional equality—two values that require balancing in a federal context, and which inform understandings of political equality. Their conclusion points to mixed-member proportional (MMP) systems as the best embodiment of the Court's emphasis on "effective representation" and "meaningful participation" in the context of voter equality.

Whereas Drake and Moore take a federal perspective on democratic equality, Levick takes a federal perspective on electoral system choice and change. She argues that the 2016 electoral reform process ignored federalism, despite the important implications of electoral rules for federal representation. Making a federalist case for electoral reform in Canada, Levick argues that a move to a more proportional system would enhance provincial input into the federal legislative process, thereby taking pressure off Senate reform (and bypassing the need for constitutional change) to fulfill this role. Parliament's lower chamber has been an unusually poor venue for the representation of provincial interests compared to other federal systems, and this results mostly from Canada's strict party discipline and the geographic distortions in seat counts common under SMP. A more proportional system could address the latter concern, and likely lead to a loosening of party discipline as well if coalition governments became more common. The added bonus is that provincial representation would be enhanced without constitutional debate or change, thus continuing Canada's track record of extra-constitutional reform. Interestingly, Levick endorses a mixed system, arguing, like Drake and Moore, that MMP is particularly well suited to federal systems.

Federalism for Diversity: French and English Canada

The volume then proceeds to two sections on "Federalism and Diversity," one focused on French and English Canada and the other on Indigenous governance. While these sections are separate, the conference's most anticipated presentation (which came from then-Quebec minister, Jean-Marc Fournier) illustrates how intertwined the interests of French-speaking Quebec and Indigenous peoples have become. Fournier provided a summary of the Quebec government's controversial *Policy on Québec Affirmation and Canadian Relations*. The policy was not, Fournier emphasized, about constitutional change—at least not first and foremost. Rather, it was an attempt to seize "the opportunity of the 150th anniversary of the Federation" to initiate a dialogue with civil society and the rest of Canada about Quebec's place in the federation. The hope, of course, was that dialogue might ultimately result in formal recognition of Quebec's distinct society (as well as a number of other longstanding constitutional demands). But Fournier and his government were in no hurry and the tone was not, as Peter Russell (this volume) notes, threatening: "We know [dialogue] will take patience," notes Fournier. "Strengthening bonds of trust is a long and gradual process. We must first discuss, share our ideas, and improve our understanding and acknowledgement of each other." This process of mutual recognition must not, Fournier emphasized, be limited to provincial and federal governments. It must also involve a much wider range of identities and interests, including those of First Nations and Inuits, the Canadian Francophonie, and the broader civil society.

Stéphanie Chouinard's chapter examines the balance between French and English communities from the perspective of official-language minority rights, using it as a prism to examine the federal system in Canada and the place of national minorities that are not territorially concentrated. Chouinard argues that the system has been fairly successful in carving out non-territorial autonomy rights for official-language minorities, particularly since the 1982 constitutional repatriation and the strengthening of language rights that were ushered in with judicial mobilization around sections 16–23 of the Charter. What has resulted is a system that Chouinard calls "Federalism plus," with the "plus" describing the accommodations, particularly in education and healthcare, that have been made for non-territorial autonomy, and especially for Francophone minorities. This combination of territorial and non-territorial autonomy for national minorities creates, Chouinard argues, a deeper recognition of the cultural aspect of the Canadian federation. In other words, the system seems to be functioning well in terms of accommodating official-language minorities, especially since the 1980s. Chouinard's chapter also engages explicitly with other applications of "Federalism plus," and the most natural extension would be to arrangements with Indigenous peoples to accommodate both territorial and non-territorial forms of autonomy.

Federalism for Diversity: Indigenous Governance

Two chapters focus explicitly on issues of Indigenous self-governance and reconciliation. Tony Penikett's chapter on the BCTC reveals just how glacial treaty making in British Columbia has been. Many had hoped that the BCTC, established in 1992, would result in the rapid conclusion of Yukon-style agreements endowing First Nations with quasi-provincial powers. Since that time, however, only five treaties with relatively small groups have been negotiated and the process remains mired in the same obstacles that Penikett observed in his 2006 book: a federal preference for endless negotiations over final settlements; rent seeking from consultants and lawyers; the extinguishment of Aboriginal title; and a federal and provincial preference for transactional deals (including Accommodation Agreements) over resolution of the central questions at the heart of the process, namely who owns the land and how it will be governed. Disillusioned with negotiations and emboldened by the courts (including the SCC's *Tsilhqot'in* ruling), many First Nations are abandoning the treaty-making process in favour of litigation. But legal rulings do not resolve a number of important details and many First Nations simply cannot afford it. He recommends a new approach. The province should create "Nation Tables" to explore the implications of *Tsilqot'in* with Indigenous Nations rather than Indian Act bands. It should also arrive at the table without "fixed agendas, prescriptive mandates or settlement formulas" and see where this open-ended dialogue takes them.

In the spirit of our times and the volume, Kiera Ladner's chapter seeks to identify the foundation for meaningful reconciliation between Canada and Indigenous peoples. The starting point, she argues, is the recognition of the fact that Indigenous and Crown sovereignty have not, contrary to popular myth, been merged. The treaties and Canadian constitution recognize Indigenous sovereignty and rights and it is now up to the SCC and other Crown actors to do the same. Doing so would help lay the groundwork for a model of treaty federalism or treaty constitutionalism, in which treaties provide the foundations for renewing nation-to-nation relations. But the path to reconciliation will be long and hard. Canadians will have to figure out how to balance their political system on a fourth pillar (section 35); create space for constitutional pluralism; and allow constitutional supremacy to trump parliamentary supremacy. Indigenous nations, meanwhile, will have to pursue "transformative resurgence and reconciliation," while renewing their internal constitutions and exercising their sovereignty. More generally, she argues, all parties must engage in "imagining the creation of a post-colonial Canada. As Canada sets the course for the next 150 years, perhaps this could happen."

Intergovernmental Relations

Our final section examines recent and historical developments in intergovernmental relations. Jennifer Wallner focuses on relations involving federal and provincial governments, while Zachary Spicer shifts our attention to the neglected area of federal-municipal relations—another relationship the Trudeau Liberals promised to cultivate during the 2015 election campaign.

Wallner examines the ways in which competing visions of Canadian federalism reflect and refract the operation of intergovernmental relations. She also looks at how these narratives affect the perceived legitimacy of intergovernmental organizations, with an empirical focus on the Health Council of Canada (HCC) and the Council of Ministers of Education, Canada (CMEC). Wallner acknowledges that intergovernmental arrangements generally embody elements of more than one federal vision. That said, she argues that the HCC and CMEC conform, by and large, to two well-known narratives of Canadian federalism. The now defunct HCC was a prime example of a nationalizing vision: it was initiated by the federal government; involved non-government actors; sought to promote convergence of policies through dissemination of best practices; and perhaps because of the threat its experts posed to provincial autonomy, never secured the participation of Quebec. The CMEC, by contrast, is a prime example of a compact vision of federalism: it focuses on information sharing and facilitation of voluntary collaboration among provinces (with little emphasis on sharing best practices); involves all provinces and more recently, territories as equal members; explicitly upholds provincial jurisdiction in the educational field; and even represents Canada in important international forums. Wallner argues that these and other narratives help define and structure the intergovernmental landscape and inclusion of Indigenous and other groups will require alternative visions of Canadian federalism—particularly ones that emphasize the multinational character of Canadian society.

Spicer argues that the federal government has long shown an interest in municipal affairs, particularly since the 1960s. But this interest has rarely translated into an explicit policy agenda—not least because of federal fears of a provincial backlash. Federal governments have dabbled in municipal policy, particularly in the area of physical infrastructure, but have yet to develop a sustained, comprehensive, and collaborative agenda, despite the growing appreciation of cities' importance for the realization of federal economic, environmental, and social goals. The closest the federal government came to an explicit agenda in recent memory was Paul Martin's "New Deal for Cities," in which the Liberals provided municipalities with a share of the federal gas tax, increased federal funding for municipal infrastructure, and established the Ministry of State for Infrastructure and Communities (since merged with the federal Department of Transportation). But even the Martin government was careful to tread lightly in this sensitive area of provincial jurisdiction. The current Liberal government has promised a far more expansive and collaborative agenda than its Conservative predecessors and has been more explicit about

linking federal funding and priorities (including explicit commitments to public transit and green and social infrastructure). But it has shown the same reluctance to engage in formal policymaking and governance as past federal governments (the establishment of the Canada Infrastructure Bank notwithstanding) and has fallen well short, therefore, of its promise of transforming federal-municipal relations.

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GENERAL ASSESSMENTS

1

FEDERALISM REFORM AND DEMOCRATIC RENEWAL FOR A COUNTRY BASED ON INCOMPLETE CONQUESTS

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INTRODUCTION

The State of the Federation Conference this year, as in the past, has a forward-looking theme: what reforms of Canada's system of federal and democratic government should the country engage in as it goes forward from its one hundredth and fiftieth birthday? But I suggest there may be merit as we Canadians contemplate our future to look over our shoulder at our past, at the country's historical trajectory that has given Canada the distinctive character it has today. It is with that in mind that I accepted the invitation to base my contribution to the conference on my recently published book, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Russell 2017b).

The theory I put forward in the book is that the best way to understand Canada—its distinctive nature as a country—is to recognize that it is built on three pillars, Aboriginal Canada, French Canada and English-speaking Canada, and that the main dynamic of Canadian history is the changing relationships between these three pillars. These changes, I argue, have been generated primarily by changes within the pillars. The biggest change that has taken place, and has occurred recently, is that the largest of the three pillars, English-speaking Canada, has abandoned its long-held desire to get rid of the two smaller pillars through policies of assimilation aimed at building a state based on a single ethnic nation. Canada, at least at

the level of political elites, has finally come to accept the country's multinational nature, the nations within, and to celebrate its ethnic diversity.

A key ingredient of the story is the emergence of a shared civic culture that gradually develops over a quarter of a millennium. This is a set of principles and governmental practices that provide the ingredients of a civic culture that all three pillars can share. This gradually unfolding civic culture is like a fourth actor in the story of Canada's three pillars. It is the glue that is necessary to hold together a country of such deep diversity and that enables Canadians to work out their difference peacefully rather than through violence or the force of the majority. The most recent addition to Canada's shared civic culture is the embracing of diversity as the key to Canadian identity.

Let me briefly sketch in the conditions of the three pillars and their relationships as they had developed in the century preceding Confederation.

CANADA'S THREE PILLARS AT THE TIME OF CONFEDERATION

French Canada

French Canada, homeland of the first *Canadiens*, survived the British takeover of New France and was not subject to the complete conquest inflicted on the *Acadiens* just five years earlier. The Canadians were allowed to keep their farms and their civil law, and worship as Roman Catholics. Britain's military governors spoke French and sided with the Canadian majority against the English minority. In the 1774 Quebec Act, the Canadians obtained protection in British law of vital elements of their distinct society, not only the right of Roman Catholics to worship according to their faith but the power of their priests to tithe their parishioners, the continuation of their civil law and the expansion of their western Quebec boundary to the Mississippi (a red flag to Americans in the thirteen colonies). All this perhaps had something to do with the fact that Quebec's 75,000 habitants did not succumb to the blandishments of the American revolutionaries who occupied Montreal and put Quebec City under siege in the winter of 1775–76, proclaiming that the Canadians were "to be conquered into liberty" (Cohen 2011).

In 1791, when the British divided Quebec into two colonies, Lower Canada with a French Catholic majority in the east and Upper Canada with an English Protestant majority in the west, the Canadians received the benefit of being the majority for an elected chamber in the Lower Canada parliament. While that would give them the frustrating experience of controlling an elected house of assembly that had virtually no power, that very experience, coming at a time when the ideals and spirit of democratic nationalism were dominating European politics, turned their elected assembly into a crucible for kindling French Canadian nationalism.

The flaws in the constitutional arrangements Britain had put in place led to the 1837 and 1838 rebellions in Lower Canada, and a much milder 1837 uprising in Upper Canada. The rebellions produced Lord Durham's one-man Royal Commission to diagnose the troubles in the Canadas and prescribe a cure. It took Durham just five months to come up with answers. His famous report had one good idea, responsible government (in effect home rule for the British North Americans) and one bad idea, assimilation of French Canada into English Canada—in effect completion of the conquest of French Canada by constitutional and administrative means.

The bad idea was based on the liberal orthodoxy of the day. John Stuart Mill, for instance, insisted that democracy could work only in a state based on a single ethnic nation. "Free institutions," he wrote, "are next to impossible in a country made of different nationalities" (Mill 1988, 392). The only liberal philosopher who challenged this doctrine was Lord Acton who saw as potentially tyrannical "the perpetual supremacy of the collective will, of which the unity of the nation is the necessary condition, to which every other influence must defer…" (1972, 158–160). Acton argued that "the coexistence of several nations in the same state is a test, as well as the best security of freedom" (1972, 158–60). In his day and for a very long time afterwards and nowhere more than in English-speaking Canada, Lord Acton's was a voice crying in the wilderness. But not so today, at least in Canada. Lord Acton is the philosophic hero of *Canada's Odyssey*.

Fortunately, *les Canadiens* successfully resisted Durham's bad idea. They learned how to use responsible government to assert the right to use their language in parliament and the courts, and make the united Province of Canada in effect operate in a quasi-federal way. The incompletely conquered French Canada at the time of Confederation was poised to become a self-governing province in a British North American federation.

Aboriginal Canada

It is even more of a stretch to talk about a complete conquest in the context of relations with Aboriginal peoples. On hearing that in the 1763 Peace of Paris ending the Seven Years War France purported to hand over the Indian nations' country to Britain, a confederacy of Indigenous nations led by the Odawa Chief Pontiac in the spring of 1763 went on the war path. The Pontiac confederacy destroyed or put under siege the forts in the Northwest that France had handed over to Britain, and attacked American settlements in the Ohio Valley that encroached on their lands in raids which, in terms of shock and terror, historians have compared with Pearl Harbour.

Britain, exhausted by seven years of world war, and influenced by Sir William Johnson, George III's personal envoy to the northern Indians, chose to negotiate a peace settlement with the Indian nations, rather than raise an army for an Indian war.

The outlines of the British offer are set out in the last six paragraphs of the Royal Proclamation issued by George III on 7 October 1763. Most of the Proclamation is devoted to arrangements for governing the settler colonies, including Quebec, ceded by France and Spain to Britain. When the British monarch turns to the native peoples in the western part of the new British territory, he does not purport to impose British colonial government on them, but addresses them as "the Nations or and Tribes of Indians with whom we are connected" (Canada 1763). George III promises to cease any further encroachment of settlers on their lands and to allow settlement only on lands secured by the Crown through properly authorized agreements with the nations that own them.

Ten months later, in July 1764, the terms of the Proclamation were presented by Sir William Johnson as conditions for peace to representatives of twenty-four Amerindian Nations at Fort Niagara. The Treaty of Niagara was negotiated and consummated through Indigenous diplomatic protocols (Tidridge 2015). Johnson presented a grand covenant chain binding the British Crown to the twenty-four nations. The First Nations reciprocated with two-row wampums symbolizing agreement to share country (land and waters) in a respectful and mutually beneficial way. Recognition of the Indian nations' political independence and the Crown's commitment to allow settlement only on lands ceded or sold to the Crown through properly authorized agreements were the key points in persuading Indian leaders to lay down arms and enter into peaceful relations with Great Britain and her colonists. The Treaty of Niagara should be recognized as our first Confederation (Russell 2017a).

After the Treaty of Niagara, Indian nations fought as military allies of Great Britain on three occasions. First, in the American revolution many of the Iroquoian nations fought for the Crown and after the war were rewarded with lands in Canada (mostly Mohawks led by Joseph Brant and John Desoronto). But in the Paris treaty of 1783, ending that war, Britain did not hesitate to hand over to the United States all the Indian lands north and west of the thirteen American colonies. This was the first of three betrayals.

Then, in the first post-war decade, Britain encouraged the northwest Indian tribes to resist American expansion. Bizarre as it may seem, Britain held on to former French forts in the United States south of the Great Lakes, garrisoning them and using them as bases for mobilizing Indian resistance to the US with a promise of establishing an Indian buffer state between the US and Canada. Suddenly in 1794, Britain, now preoccupied with fighting revolutionary France, totally reversed its policy and signed the Jay treaty under which it withdrew from the US northwest, leaving a dozen or so Indian nations to resist the Americans on their own. This was the second betrayal.

The third betrayal came at the end of the War of 1812. The Indian nations—Iroquoian as well as Anishinabek, whose military support was so important in repulsing US efforts to take Canada, again were induced to fight on Britain's side by Britain's promise to support an Indian buffer state. British negotiators put that

idea on the table at Ghent in 1814 but withdrew it when they could see it was a deal-breaker.

After the War of 1812, the circumstances of the Indian nations and communities in Upper Canada and, after 1840, in the United Province of Canada, deteriorated. A huge influx of settlers reduced Indigenous peoples from the majority to a tiny minority. This was coupled with diseases brought in by the settlers against which Indigenous people had no immunity, inflicting horrible, unbelievable, and bewildering losses. These Indigenous peoples were never conquered, but their depressed and weakened conditions made it easy for Britain and its successor settler colony to get away with treating them as wards of the state.

English-speaking settlers began to see the Indians as a problem standing in the way of the colony's development. In 1857, the attorney general for Canada West, John A. Macdonald, introduced the Gradual Civilization Act (Canada 1857) as the solution to that problem. Under the Act, Indians were confined to postage stamp reserves on the edge of the frontier of settlement. A father who passed a morals test could remove his family and fifty acres of land from the reserve and become a mainstream British subject. The "incomplete" conquest of Aboriginal peoples was to be completed by administrative means. If we are to grasp how far we have to go in this era of reconciliation in establishing just relations with Indigenous peoples, it is essential to understand the past colonial oppression, the English-speaking and French pillars inflicted on them.

English-speaking Canada

By 1867 English-speaking Canada in numbers and power was poised to become the dominant force in a British North American state. Its leaders and most of its people continued to hanker for a one-nation Canada in which French Canada and Indigenous peoples had no enduring place as nations within.

Besides numbers and power and monoculture ambition, English-speaking Canada brought to the country a civic culture in which were embedded the seeds of a system of government that would become the common heritage of all Canadians. The three elements of this embryo civic culture were parliamentary government, the monarchy, and constitutionalism.

The system of parliamentary government first planted in the Maritime provinces in the mid-1770s and later in the century extended to Lower and Upper Canada was the mere institutional shell of the evolving British model. Unlike Westminster where, by the latter half of the eighteenth century, the elected House of Commons had become the centre of government power, in the British North American colonies the elected assemblies were virtually powerless and were centres of opposition not government. It would take rebellions in the Canadas and Lord Durham to push Britain's colonial governors into permitting the principle that government must be responsible to the elected assembly to operate in British North America. But well

before the democratization of parliamentary government in the colonies, the close bond between the executive and legislature (the heads of the executive being the dominant members of the legislature) which is the hallmark of the parliamentary system was well established in the colonies that were to form the Canadian federation.

The struggle for responsible government did much to reform parliamentary government and make it sufficiently democratic to satisfy French and English Canada—but with not the slightest chance that the leaders of these two pillars would think the native peoples sufficiently civilized to participate in its processes (only one Indian man passed the morals test and opted for enfranchisement in the Province of Canada).

The second vital component of the tradition of government that English-speaking settlers planted firmly in Canada was monarchy. By the time Canada was being formed the British Crown had become a constitutional monarchy, well on its way to giving over the direction of government to politicians responsible to the elected chamber of parliament. The winning of responsible government meant that the Crown's representatives in Canada would cease acting as heads of government and comply with the principle of responsible government. A republican head of government is a good fit for a country whose founding myth is that it is based on one people. But Canada is not such a country. For Canada, a country based on incomplete conquests, the Crown would serve as a unifying institution.

The third seed that grew to become an important part of Canada's civic culture was constitutionalism. This is the principle that those who govern, regardless of their popularity, must do so according to constitutional rules, written or unwritten, that they cannot unilaterally change. This is the essential principle of liberal government. Constitutionalism was not by any means uniquely British. Aboriginal peoples had well developed constitutional systems long before they came into contact with Europeans. The Great Law of Peace of the Five Nation Iroquois Confederacy is a leading example. Though the French Canadians as subjects of an absolute monarchy had not experienced constitutionalism, they embraced the constitutionalism of the Quebec Act, which recognized their right to live under their own laws and to practice their religion. The content of constitutionalism—the rights and practices of the government it protects—and the mechanisms for making constitutionalism effective will evolve over the decades. But respect for constitutionalism was established well enough to fill Canada's constitution-makers in 1867 with a deep sense of gravitas.

Let me now move from this brief account of the evolution of Canada and the relationships among its three foundational pillars in the century preceding Confederation to the themes of this conference: federalism and democratic renewal. In doing so I will connect the "reform" of these two dimensions of Canadian governance to my thesis about changing relationships among the country's three pillars.

FEDERALISM

What I find so fascinating about federalism in Canada 150 years ago is how little theorizing there was about it in the discussions and debates that produced our founding Constitution. The Fathers of Confederation, unlike the American constitutional framers were not theoreticians of federalism. The federal provisions of the founding Constitution did not spring from any intellectual or ideological understanding of federalism but were a practical accommodation of political realities. Yet, despite this, Canada became far more committed to the practice of federalism than its southern neighbour.

For the French-Canadian Conservatives or *bleus* led by Cartier and Taché, a self-governing province in a federation was essential. The alternative, favoured by many, if not most of their Liberal *rouges* rivals, was an independent Quebec. The Maritime leaders would not give up their local parliaments and that meant they would insist on a Canada with two levels of legislative authority. But that did not make them theoretical federalists. Indeed Joseph Howe, the most articulate and influential political theorist in the Maritimes at the time of Confederation, bitterly attacked the Confederation plan for its confusing mixture of British parliamentary government and American federalism. For John A. Macdonald, and many other English-speaking Fathers of Confederation from the United Province of Canada, federalism was the unfortunate price they had to pay to accommodate French Canada in a Canadian union. Macdonald worked hard, and with considerable success, to make the federal scheme as centralist as possible He expressed the hope that the provinces would quickly be reduced to mere municipalities.

There was no place in the confederation plan for a federal treatment of Aboriginal Canada. The founding Constitution treated Indians as subject to the exclusive authority of the new federal parliament. The Métis and Inuit peoples were out of sight and out of mind. For more than a century after Confederation, Canada imposed a vigorous colonial regime on Indigenous peoples with the aim of assimilating them into the Canadian mainstream. This policy only served to strengthen the bonds of native people to their historic nations and communities. But it was not until the 1970s, by which time respect for universal human rights had become another component of Canada's civic culture, that Canadian political leaders and jurists were open to the idea of Indigenous peoples enjoying a degree of self-government within Canada. It is only then that federalism, in the sense of combining self-rule with shared rule, can become a possibility for Aboriginal Canada.

After Confederation, it quickly became clear that Macdonald's vision of a unitary Canada would give way to a very federal Canada—a federation with strong governments at both levels competing for power and popularity. By no means was this all the doing of Quebec provincial leaders. In fact, Ontario premier Oliver Mowat was as ardent and vigorous a promoter of provincial rights as Quebec's Parti Nationale premier, Honoré Mercier. Mercier and Mowat, and other provincial premiers, were aided and abetted by an imperial high court, the Judicial Committee of the Privy

Council, which had the final word in interpreting Canada's Constitution and held that Canada was a federation based on a division of sovereign powers between the two levels of government. A federal ethic—respect for maintaining a proper balance between the two levels of government—became part of the country's civic culture.

With strong, popular governments at both levels of government competing for power and public support, it is Canada's fate that its federal system operates primarily through interstate (rather than intrastate) processes. While some Canadians might prefer the sunnier ways of the intrastate model, I believe the interstate model is here to stay. Queen's University's institute for studying intergovernmental federalism can look forward to a long future.

The aspect of the intergovernmental system to which the Fathers of Confederation gave little thought and continues right up to today to be much neglected is its judicial component. The Fathers of Confederation gave very little thought to the federation's court system. The only specific courts they provided for were set out in section 96 of the Constitutional Act, 1867: superior courts (with unlimited jurisdiction) and county or district courts (with limited local jurisdiction) would continue in each province. In terms of federalism, these were hybrid courts. The federal government would appoint and pay the judges, the provinces would maintain and administer the courts. What the founders did not foresee is that the provinces would use their constitutional responsibility under section 92(14) of the Constitution for "The Administration of Justice in the Province" to create their own courts for lesser criminal and civil matters and that these purely provincial courts would become the workhorse tribunals of the Canadian judicial system. The provinces appoint and pay the judiciary of these provincial courts.

Over time, the federal government was happy to let the provinces administer and pay for the provincial courts, but there was a cap on how far Canada could go in downloading judicial responsibilities to the provincial courts. Under Canada's inherited common law jurisprudence only a "superior court" can hear the most serious civil and criminal cases, and under section 96 of the written Constitution, a "superior court" judge must be appointed by the federal government. Therefore, provincial court judges and the courts they preside over are constitutionally considered to be "inferior" courts and cannot deal with the most serious criminal cases (such as rape and homicide), the most serious civil cases (suits involving large amounts of money) or the final aspects of family law cases (issuing or changing the decree of divorce).

This has created a highly dysfunctional system of provincial "inferior" courts and federal "superior" courts with no government responsible for the overall administration of justice in the country. The system's dysfunctional nature has recently received a good deal of public attention by exposing the system's unfortunate inability to observe the constitutional obligation to bring persons charged with a criminal offence to trial "within a reasonable time." In serious criminal cases such as rape and homicide that must be tried in a "superior court," the first step is a

preliminary inquiry in a provincial court, and no one is in charge of coordinating the activities of the two levels of courts.

Few Canadians realize that an awkward and unnecessary division of responsibility for the management of courts in the operation of Canadian federalism is a primary factor in causing this really shameful situation. In 2002, a national conference on Canada's trial courts that included leading judges, lawyers, politicians, and academics from all parts of the country and both levels of government unanimously endorsed a one-tier system of trial courts (Russell 2007*)*. The key to doing this without a constitutional amendment is to have the federal government elevate provincial court judges to superior court status and give the provinces a significant role in selecting judges for appointment by the federal government.

It has been possible to think of how Canadian federalism might apply to Aboriginal Canada only since Canadian governments began to recognize Indigenous peoples' right to self-government. That process began in the 1990s when the federal government, following the lead of the Royal Commission on Aboriginal Peoples, opened up the land claims process to include self-government. Canada's commitment to Aboriginal self-government was strengthened in 2010 when the Harper government agreed to support the United Nations Declaration of the Rights of Indigenous Peoples. Article 3 of that Declaration recognizes that the world's Indigenous peoples (with populations totalling over three hundred million) have the right to self-determination, by virtue of which "they freely determine their political status and freely pursue their economic, cultural and social development" (Henderson 2008).

Implementation of Indigenous peoples' right to self-government has been painfully slow. Only a dozen or so agreements have been negotiated. A major obstacle is adequate funding. For more than a century services such as education, health, and social welfare that provinces provide to their non-Aboriginal populations have been the responsibility of the federal government to provide for First Nations, and for more than a century have been grossly underfunded. First Nations recognize that it would be unwise to assume responsibility for these services unless they are adequately resourced. Part of the resourcing can come from Aboriginal communities gaining much greater access to revenues from their traditional lands. But transfer payments along the lines of the equalization grants that Canada's federal system provides for provinces will also be necessary if members of self-governing Aboriginal communities are to enjoy the same level of basic public services available to non-Aboriginal Canadians.

Applying the equalization principle to governments operated by Aboriginal peoples was a recommendation of the Royal Commission on Aboriginal peoples (Canada 1996). Without fiscal equalization, Canada's program of Aboriginal self-government imposes on Indigenous communities in Canada a heavy price for recovering responsibility for governing their societies.

The essential reform of the federal system that Quebec has sought since the 1960s is recognition of the special status of Quebec as the homeland of one of Canada's

founding peoples. The Government of Quebec's recently published contribution to the celebration of Canada@150, *Quebecers: Our Way of Being Canadian*, makes it clear that this has not changed (Quebec 2017). This lengthy statement aims at stimulating a conversation that will convince people inside and outside Quebec that "proper recognition of the Quebec nation" is the right way for Quebecers to be Canadians. What is new is not the idea of Quebec being not just a province like the rest, but the manner in which that idea is put forward and the vision of Quebec and French Canada that it advances.

For Quebec's minister of Canadian relations, Jean-Marc Fournier, the tone of his contribution to the Queen's Canada@150 conference, like the paper on Quebecers' way of being Canadian that his department has sponsored, was not threatening. In seeking recognition of Quebec as a nation within Canada, the minister and his government are not throwing out an ultimatum that if such recognition is not forthcoming Quebec will turn to separation from Canada. The paper puts forward a conception of Quebec that emphasizes the constitutional rights of its Anglophone minority, the special status and rights of Indigenous peoples in Quebec, and the cultural diversity that immigrants are bringing to the province. Moreover, it recognizes that French Canada is not coterminous with Quebec. Unlike Quebec governments in the past, this government expresses a strong commitment to support the rights and interests of French-speaking communities in Canada outside Quebec.

The immediate reaction to the Quebec statement was not enthusiastic. Politicians and journalists treated it as another futile attempt to drag Canada back to the constitution negotiating table. That characterization of the Quebec booklet "Quebecers: Our Way of Being Canadian" is unfair and inaccurate. A Quebec that is moving to embrace diversity as part of Canada's and Quebec's national identity is a Quebec to which Canadians should respond.

DEMOCRATIC RENEWAL

For the Fathers of Confederation, democratic renewal would have been a strange phrase. In 1867 democracy had not yet become a popular concept in British North America. This was so despite the fact that a good deal of democratic reform had taken place in Britain's North American colonies in the two decades before Confederation. The key reform was putting control of government policy in the hands of politicians who had the confidence of the elected chamber of parliament. But that reform was referred to as achieving responsible government not becoming democratic. Democracy was too American a term to be a popular political idea in the Canadas or the Maritimes. When three of the founding fathers in a letter to the British colonial secretary aimed at securing the mother country's support for Confederation, they emphasized the differences between their plan and the United States. The first point they made was that "It does not purport to be derived from the people…" Canada's Constitution, instead of being based on the sovereignty of

the people, an aberrant American idea, "would be the constitution provided by the imperial parliament, thus remedying any defect" (Skelton 1966, 97).

In the debate on the Confederation plan in the parliament of the United Province of Canada, the only reform for expanding democracy that received some consideration was making the upper chamber of the new federal parliament an elected body. But that idea went down in flames when it was opposed by George Brown, who was among the most democratic-minded of the founding fathers. Brown, like many Canadian democrats today, did not think that responsible government would work well with a parliament in which both chambers had popular mandates.

Today, the phrase "democratic renewal" connotes that democracy in Canada has been slipping, that there was some golden age in which Canada had more democracy or more vibrant and effective democracy than it has today. I am doubtful about the existence of this golden age. Executive domination of the House of Commons is built into the parliamentary system, and one-party control of the executive through the power of the Prime Minister's Office assures partisan direction of government. The resulting government control of the House of Commons seriously undermines the deliberative role of the elected chamber in debating public policy. The one reform which might lessen this concentration of power, electoral reform, has now fallen out of favour with the Liberals and has never been supported by the Conservatives. While the Trudeau government's reform of the system of appointing senators has led to a more independent and useful upper house, Canadians who are eager democratic reformers have a hard time coming to terms with unelected legislators having real influence on legislation.

I would like to suggest two improvements of the Canadian system of parliamentary democracy that are not matters of renewal but deal with the incompleteness of the original work of Canada's constitution-makers in 1867 and might yield benefits for all three of the country's foundational pillars.

The first is the Fathers of Confederation's total reliance on "unwritten" constitutional conventions as the basis for the democratic aspects of parliamentary government and the practice of responsible government.

In 1867, relying on "unwritten constitutional conventions" to regulate principles and practices crucial to the proper functioning of parliamentary democracy was satisfactory for Canada's small English and French governing elites of property-owning white males. It is most unsatisfactory today. In a large mass democracy, such as Canada has become, with governments many times larger and more complex than a century and a half ago, those who govern and are governed, as well as those who cover politics in the media, need an authoritative and accessible guide to principles and practices that are fundamental to democratic governance. That is why New Zealand in the 1980s and the United Kingdom in this century, two parliamentary democracies based on the Westminster model, adopted cabinet manuals—short well-written, authoritative statements of principles and practices of central importance to the functioning of government. These cabinet manuals are accessible online. Though these projects have been initiated by sitting governments,

opposition parties and constitutional scholars have had input in their production and they are open to continuing change.

A 2010 workshop at the University of Toronto attended by leading constitutional scholars, leading members of all five parties in the House of Commons, and a representative of the Governor General's Office strongly endorsed a Canadian Cabinet Manual (Milne and Russell 2011). Since then, though PCO and PMO officials have expressed support for the project, they have not had an opportunity to get the go ahead of the prime minister (Stephen Harper or Justin Trudeau) essential for initiating this effort to "codify" important principle and practices of government.

Producing a succinct, accessible description of principles, practices, and institutions of government that are not included in the written Constitution is often referred to as "codifying conventions." This can be a misleading term as it suggests a legal code enforced by the courts. Cabinet manuals are not meant to be court enforceable. A recent study of how they operate in New Zealand and the United Kingdom shows that they have not become sources of litigation (Blick 2016). Their primary aim is to increase the constitutional literacy of citizens.

My second suggestion for the democratic renewal agenda relates to the treatment of Aboriginal peoples at and since Confederation. At Confederation and for more than a century afterwards, Aboriginal peoples were treated constitutionally as a subject matter of federal legislation. But more recently, as I have noted, the Government of Canada, with strong support from provincial and territorial governments and most Canadians, has engaged in facilitating a program of Aboriginal self-government through agreements with First Nations, Inuit peoples, and Métis communities. The country has made a little progress in enabling Indigenous people to recover their capacity to govern their own societies.

Through these developments, Aboriginal peoples have been moving towards a more federal relationship with Canada than was ever envisaged by English-speaking or French Canadians at the time of the 1867 Confederation or in the two-row wampum belts and covenant chain exchanged with Indigenous peoples at the Treaty of Niagara in 1764. Self-rule is being combined with a measure of shared rule as First Nation, Inuit, and Métis people participate as individuals in the institutions of Canadian government, including both houses of the federal parliament, provincial and territorial legislatures, provincial and federal courts, and the public service of all levels of government.

The time has come to consider a more effective and systematic means of ensuring that Indigenous peoples' views are heard in policy making at the national level—a directly elected Indigenous peoples "parliament." The idea that Sami parliaments have played a useful role in ensuring that the concerns of Indigenous people of a Canadian Aboriginal parliament along the lines of Sami parliaments in Scandinavian countries was recommended by the Royal Commission on Aboriginal Peoples (Canada 1996). An Aboriginal parliament would be a third house of parliament whose main function would be to provide advice to the House of Commons, the Senate, and the federal government on legislation and policy issues relating to

Indigenous peoples. For some First Nation leaders, such a proposal smacks too much of Aboriginal acceptance of the Canadian state. But I suspect that within Aboriginal Canada that is the position of a small minority. Many Inuit, Métis, and members of the historic Amerindian nations might find an "Indigenous Peoples Parliament" a more effective way of influencing Canadian policy than relying on pan-Canadian lobbying organizations.

CONCLUSION

Let me conclude by observing that Canada at 150 has much to learn from Canada at 250. Through a quarter of a millennium we Canadians—French, Aboriginal, and English-speaking—have stumbled towards enjoying the virtues of a country that is both multinational and multicultural. Though Canadians are not supposed to think of ourselves in grandiose ways, our accommodation of nations within and celebration of diversity might offer more useful guidance for what lies ahead for the peoples of this planet than the tidy model of the single-nation sovereign state. "As an example of how diverse peoples can live together in freedom and peace, this loose, never settled alliance of peoples called Canada could replace empire and nation-state as the most attractive model for the twenty-first century" (Russell 2017b, 19).

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2

CANADIAN FEDERALISM, DEMOCRACY, AND POLITICAL LEGITIMACY

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I am taking as the cue for my contribution to this critical evaluation of Canada at 150 the twin question that was given to us: What criteria should we use to evaluate the quality of Canada's institutions and practices and their effects on federalism and intergovernmental relations, and where do democratic criteria figure within this? My answer is twofold as well:

First, I will argue that I find it increasingly problematic holding the institutional and procedural reality of Canadian federalism accountable to what often turns out to be unrealistic, if not outright, naïve assumptions about democracy. These assumptions or democratic myths are the responsiveness of democratic systems to the people, and the sanctity of majority rule.

I will then propose three normative criteria for assessing the political legitimacy of federalism in general, and of Canadian federalism in particular, on its own normative terms. These criteria or principles are subsidiarity, social solidarity, and consensus. I will argue that Canadian federalism holds up quite well to these criteria, maintaining a fairly balanced allocation of powers, providing for a reasonably equitable distribution of fiscal resources, and committing to cooperative interaction, which lacks, however, a more secure institutional framework.

But I want to begin by dispelling some of the negative founding myths that have accompanied the Canadian federal state and which, I think, bear some responsibility for its often-negative image. And before I do that, I want to make clear that my arguments are solely focused on a federal system in which Aboriginal peoples have played little, if any, part to date.

FOUNDING MYTHS

The negative image entirely stems from comparisons with the United States of America. Both Canada and the United States had become federations for similar reasons. At the heart was a compromise among economic modernizers and cultural traditionalists (Hueglin and Fenna 2015, 101). While the modernizers wanted to forge a larger economic union, the traditionalists wanted to preserve local tradition and culture. The American colonies had been formed separately, had developed their own self-governing institutions separately, and therefore would not now yield powers to a distant national government without assurance of continued autonomy at least in local matters. In the case of Canada, not only were there separate colonies across a vast continent, there also was among these colonies Quebec, which had been turned from a French settler colony into a British conquest colony on the Plains of Abraham in 1759, and which had no intention of losing to national economic considerations the few assurances of cultural autonomy granted by the Quebec Act of 1774.

What is also different in the Canadian case is that the outcome, the British North America (BNA) Act of 1867, did not achieve the American constitution's iconic status as a document of political perfection (which, one must add, happened in the American case only after the Civil War). The Canadian literature on federalism is full of scepticism and doubt, if not despair about the status of Canadian federalism. Titles of works include "unfulfilled union" (Stevenson [1979] 2009), "failure of the constitution" (Vipond 1991), "tragedies of nationhood" (LaSelva 1996), and "negation of the ideal of federalism" (Rocher 2009). The list could go on.

When it comes to federalism, this gloom and doom perspective is not uniquely Canadian. A system of divided and shared powers, to put it in a nutshell, can somehow never quite live up to expectations of rationality in an age of alleged enlightenment. In the Canadian case, the prevailing negativism obviously has to do with the inability over time of accommodating Quebec in a satisfactory manner. However, since this is well known enough, I want to make a different argument, which is that the negativism also has to do with a series of negative founding myths that have all arisen from comparisons with the United States, and that have endured even though they can be debunked quite easily.

The first one of these is the myth that the Canadian founders were less liberal and more authoritarian than the American framers. Often cited evidence is the famous POGG clause in section 91 of the British North America Act of 1867, now the Constitution Act, 1867. Whereas the American constitution emphasizes in its Preamble that the purpose of the federal union is to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty," the POGG clause in much less flowery terms declares that parliament has the residual power of making laws for the "Peace, Order, and Good Government" of Canada. This myth already has been debunked

by Stevenson who points out that the Canadian founders' Quebec Resolutions in fact had stipulated "peace, welfare, and good government, and that it had been the Colonial Office in London which later replaced welfare with order" (Stevenson [1979] 2009, 31). More importantly in terms of federalism, however, the POGG clause never bestowed upon parliament the kind of coercive supremacy handed to the American Congress, first by means of a bloody civil war in the nineteenth century, and then by a compliant supreme court in the twentieth.

A second negative myth is that Canadian federalism was brought about in a way that was less democratic than the one adopted by the Americans because it lacked popular involvement (Stevenson [1979] 2009, 40). It is true, of course, that the Americans had their constitution ratified by the people in the several states whereas the Canadians left it to the provincial legislatures—or not even that: the legislatures of New Brunswick and Nova Scotia never voted in favour of the Quebec resolutions. They voted only to send delegates to London for further exploration of a constitutional deal which was then finalized right there and then without further involvement of the provincial legislatures (Smith 2004, 53–54). It is likewise true that the American constitution was ratified by elected conventions in all of the thirteen original states even though the last holdout, Rhode Island, did so only after the already constituted US government threatened with economic sanctions. What is not so true is that the process was any more democratic than in Canada. Here, as there, the entire process was driven and controlled by those enfranchised, a small fraction of the population due to property qualifications. The difference then is that the propertied classes got to decide twice in the United States in comparison to just once in Canada. The Americans were only better in creating a myth of popular consent (Russell 2004, 8).

The third negative myth is that Canadians are less liberal than Americans (again) because Americans started their country with a revolutionary bang whereas the Canadians retained loyalty to European Tory conservatism. The myth mainly stems from Seymour Martin Lipset's best-selling reiterations of Canada as a counter-revolutionary country full of deference to authority (Lipset 1990). It has most eloquently been debunked by J. F. Conway as a fallacy of simplistic descriptive tautology: Americans are revolutionary because they had a revolution, and Canadians are counter-revolutionary because they had a counter-revolution (1991, 311–321). Conway reminds us that responsible government was established by the counter-revolutionary elites despite their victory over the rebels in 1837–38 (315). He also points out that it was the "significant strength of provincial governments" that "allowed popular movements to win power and actually to proceed to realize and test some proposals for reform." The relative strength of these movements, of workers and farmers, Conway suggests, may indeed be owed to "the Toryism that Lipset makes so much of, and the consequent lack of empty democratic and revolutionary myths that so easily disarm the American people" (316). Despite their counter-revolutionary beginnings, in other words, the counter-revolutionary

Canadians often proved to be more progressive than their American liberal counterparts.

Canada's negative founding myths extend to federalism only somewhat indirectly. Guilt by association, so to speak: If Canada as a country appears to be rooted in less liberal and hence less legitimate beginnings, then its federal system must be somehow deficient as well. The key question about federalism then becomes: how legitimate is it? Answers to this question routinely revolve around the existence of an alleged democratic deficit, and they usually centre on that procedural part of federalism most significantly differing from unitary governance systems, intergovernmental relations, or, as it is known in Canada, executive federalism—policy making between the two orders of government at the executive leadership level.

Ever since Alan Cairns mused that the "institutional framework of federalism" may allow Canadian governments to make society "responsive" to their demands rather than responding to the demands of society (1977, 695), and Donald Smiley postulated more caustically that executive federalism contributes to "non-participatory and non-accountable processes of government" (1979, 107), there has been a lingering suspicion that intergovernmental relations inevitably violate the most sacred of Canadian democratic principles—responsible government—the accountability of the executive branch of government to parliament as the representative of the people (Simeon and Nugent 2012). This may well be so. However, at least implicitly this argumentation makes assumptions about democracy as a critical yardstick for good governance against which federalism must be probed and assessed, which may turn out to be rather naïve (Hueglin 2013b).

DEMOCRATIC MYTHS

I am not questioning democratic values. In fact, it is democratic theory that constantly probes and criticizes political practices in the countries and systems we usually label as democratic. Yet, when it comes to federalism, there often is an assumption that in order to be legitimate, it must hold up to democratic benchmarks of public participation, inclusiveness, and responsiveness (Smith 2004); even in unitary systems, this may not amount to much more than aspirational expressions of the democratic myth of popular sovereignty, which in the course of the bourgeois revolutions of the eighteenth and nineteenth centuries programmatically replaced the earlier myth of absolute sovereignty as a divine right of kings.

With public participation for the most part relegated to periodic elections, and inclusiveness an elusive goal at least in first-past-the-post electoral systems, it is *responsiveness* that becomes democracy's most telling test of legitimacy. And in a post-2008 age, one may at least be allowed to pose the question again in the starker terms of social class relations: responsive to the many or the few?

It was Aristotle who first identified democracy as the rule of the many who are poor, as distinguished from oligarchy, the rule of the few who are rich (*The Politics*,1290b7). Accordingly, then, democracy in Canada as elsewhere should be responsive to the many who are poor or at least not as well-off as the rich. Logically, this should mean a narrowing of the gap between rich and poor over time. As is common knowledge by now, however, this has not been the case at least since the beginning of the neoliberal attack on the postwar welfare consensus in the 1980s (Dyck and Cochrane 2014, 167). Federalism itself is sometimes blamed for the majority's lack of power because, as explicitly so intended by James Madison, one of its founding purposes was to frustrate majority rule so that the wealthy minority could be safe (Hamilton, Jay, and Madison [1787–88] 1995).

But since the most unequal democracies in the western industrialized world are the United States, a federal union, and the United Kingdom, still a unitary polity (The Conference Board of Canada 2017), the assumption that federalism is to blame for inequality obviously does not hold. In fact, as a major comparative study of federalism and the welfare state concludes, while institutional blockage in decentralized federal systems has been an initial impediment to modern welfare state formation, it has also functioned as a brake on welfare state retrenchment in the current age of neoliberalism (Leibfried, Castles, and Obinger 2005, 332, 338–339). Growing inequality, then, is more likely owed to democracy, or at least to what goes for democracy in a hegemonic neoliberal age of marketization. Of course, there are other factors such as technological change, globalization, and generally lower rates of economic growth. But, first of all, these factors are themselves driven by the neoliberal market dynamic. And secondly, the growing segments of socioeconomic losers that have been the result of this dynamic have for the most part been ignored by the democratic process over the past forty years.

It may be more appropriate, then, to see what goes for democracy as a mixed republican regime, described by Machiavelli as a fragile balance between an upper class with "a great desire to dominate," and a lower class driven by "merely the desire not to be dominated" ([1513] 1988, 116 [I.5]). The great Florentine realist also observed that "all legislation favourable to liberty is brought about by the clash between them" (113 [I. 4]). The deregulatory destruction of labour power since the 1980s, the delusional search for a Third Way by progressive parties since the 1990s, and the hollow appeals to a shrinking middle class by politicians of all shades ever since do not inspire much hope in legislation favourable to liberty.

To put it differently: For Aristotle, the most inclusive and therefore best polity in practice was one in which a strong and stable middle class formed a majoritarian buffer between the rich and the poor (*The Politics,* 1297a7). Machiavelli, however, insisted that such a happy state of affairs would never come about by wishing the underlying class antagonism away. Participation in class conflict was necessary for a polity that meant to be inclusive and responsive.

The sanctity of *majority rule* itself may be the most enduring and at the same time most problematic democratic myth. It had its famous beginning in the Lockean

postulation according to which a "Body Politick" is created when "any number of Men have so consented to make one Community or Government… wherein the Majority have a Right to act and to conclude the rest" ([1690] 1988, 331 [II: 95]). The rationality of Locke's social contract postulation entirely depends on two interrelated assumptions of social homogeneity. "Any number of men" presupposes a uniform body of citizens as individuals, a presupposition that for obvious reasons would appear useless as a yardstick of democratic legitimacy in a diverse polity like Canada.

The right of the legislative majority "to act and conclude the rest" in turn presupposes something even more problematic in terms of democratic legitimacy, a social homogeneity of interest, in Locke's case of property interest, which is to be represented in the legislative assembly "in proportion to the assistance, which it affords to the publick" (373 [II: 158]). By "assistance," Locke meant taxes. The point is not that this amounts to representative government for and by the propertied classes, but that majority rule logically can only be considered legitimate as a safeguard against interest violations as long as interests are all the same.

Despite these highly questionable presuppositions, majority rule has become nearly synonymous with democracy. When Alexis de Tocqueville came to America in 1835 in order to study what he thought would be an inevitable democratic future everywhere, he noted with some surprise not only the omnipresence of majority rule, which in its omnipotence famously appeared to him as tyranny of the majority, but also that it had become an unquestioned moral category: "The moral authority of the majority is also founded upon the principle that the interests of the greatest number must take precedence over those of the smallest" (de Tocqueville [1835/40] 2003, 289). The ultimate justification of majority rule therefore is not utilitarian, serving the interests or happiness of the largest number. The majority rules because this is understood as its moral right (Hueglin 2008, 169–70).

Democracy understood in this way as majority rule is the very antithesis of federalism and cannot be used at all as a yardstick for a critical assessment of federal legitimacy. As Reg Whitaker put it some time ago: "Any functioning federal system denies by its very processes that the national majority is the efficient expression of the sovereignty of the people" (1992, 167). To say this does not amount to a criticism or invalidation of democracy. It only suggests that it is often unclear what is democratic about governance in political systems we call democratic.

I am in full agreement that "federalism only flourishes in democratic government" (Benz and Sonnicksen 2017, 4). In fact, federalism doubles down on democracy by offering electoral choice at two levels of government, by creating two orders of responsible government, and by creating checks and balances between them. What I am arguing, however, is that the democratic environment in which federalism flourishes has little to do with the hallowed—or hackneyed—formalities of parliamentary democracy. Instead it has to do with checks and balances grounded in the rule of law. And I am arguing that in this understanding of political legitimacy,

federalism in general and Canadian federalism in particular can be evaluated critically on their own normative terms.

FEDERALISM IN ITS OWN (NORMATIVE) RIGHT

When Franz Neumann famously declared that "there are no values that inhere in federalism as such," ([1955] 2005, 17) he meant federation, not federalism, and the inability to demonstrate the goodness of federal governance historically or empirically. The normative values of the federal idea, however, as first pre-formulated by the seventeenth century political theorist Johannes Althusius ([1614] 1995), can be credibly identified as principles of subsidiarity, social solidarity, and consensus (Hueglin 1999). These principles, as I will argue, allow for an adequate and self-sufficient critical evaluation of political legitimacy in federal systems.

First, Subsidiarity. Subsidiarity is not exactly a household word in Canadian federalism. It is mainly known as a concept in European Union governance where, since its first inception in the 1993 Maastricht Treaty, it has served both as a normative commitment to decision making at the lowest possible level of governance, and as a procedural mechanism for its "correct application … through enhanced inter-institutional dialogue" (Horsley 2012, 269).

The origins of subsidiarity are commonly thought to be found in Catholic social doctrine. However, the research team of the architect of the Maastricht Treaty, then Commission President Jacques Delors, identified a different and Protestant source, the 1571 General Synod of the Dutch Reformed Churches in the East Frisian city of Emden, and the *Politica* of Althusius (Luyckx 1992). The difference is significant. While Catholic social doctrine is primarily concerned with the "bounds of the private sphere," which it seeks to insulate from absorption into the state, the European and Althusian meaning of subsidiarity aims at a principled "allocation of power within the public realm" (Barber 2005, 313).

At the Emden Synod, it was resolved that "general assemblies must not deliberate on matters already decided at a lower level," and that "they shall concern themselves only with such matters as pertaining to all churches generally" (Akten [1571] 1971, 79–83). Althusius in turn formulated that majority rule may apply "in the things that concern all orders together, but not in those that concern them separately," ([1614] 1995, 65 [VIII. 70]) which effectively grants individual members of a composite union veto power over matters particular to them.

Subsidiarity has meanwhile inspired a wealth of new legal, theoretical, and philosophical scholarship on graduated allocations of power from cities to the global order (Fleming and Levy 2014). In Canada, Peter Hogg has written that even though subsidiarity has rarely entered political discourse, it nevertheless "does offer some useful ways of thinking about the Canadian Constitution," and not least so because "the division of powers in the British North America Act, 1867, did

generally adhere to what we would now describe as the principle of subsidiarity" (1998, 112 [5.1(g)]).

More importantly, the Supreme Court of Canada has referred to subsidiarity in a string of more recent decisions (Arban 2013, 219–234). In the first of these it affirmed that "matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity (2001)." In the last of them, Chief Justice Beverley McLachlin asserted that subsidiarity considerations nevertheless could never override the constitutional division of powers (2010).

What this reasoning makes clear is that the principle of subsidiarity must not be misunderstood as a formula for optimal power allocation. Itself "subsidiary" to the constitutional division of powers, which it does not challenge, the principle of subsidiarity instead provides heuristic and procedural guidance when it is not constitutionally clear who should best do what—or how much of what. And this guidance comes with a bottom-up perspective aimed at safeguarding spatial identity and autonomy. This not only demands that political decisions should be taken at the lowest possible level of government. It also means that subsidiarity considerations may deliberately overrule political efficiency considerations that would favour centralization.

Second, social solidarity. Federalism is at its core also an agreement among equal members to co-exist by sharing common resources fairly and for the benefit of all. This not only requires a commitment to the principle of subsidiarity, it also requires a commitment to social solidarity. Subnational decision makers must be able to provide their citizens with equitable living conditions across the federation. Solidarity considerations may thus overrule the allocation of resources by market forces (Hueglin 2015).

Taken together, subsidiarity and solidarity constitute what the Germans call federal comity (*Bundestreue*), first developed by the German Federal Constitutional Court as an unwritten constitutional principle: "The reciprocal obligation of the federation and the *Länder* to behave in a pro-federal manner, governs all constitutional relationships (Kommers and Russell 2012, 92)." In Canada, J. A. Corry alluded to it as "constitutional morality" (as cited in Dupré 1985, 27). The obligation to maintain a federal order, in other words, not only pertains to the explicitly institutional division of powers between different levels of government but also includes an implicitly procedural commitment to federal comity in the sense that the members of a federation have an obligation to act in such a way as to make the maintenance of the federal order meaningful to all in an existential and/or material sense.

That federal form, in other words, includes what Yanis Varoufakis has recently called a "political surplus recycling mechanism" (2016, 137). The most obvious such mechanism is fiscal equalization (Hueglin and Fenna 2015, 171–173). Its

essence is that tax revenue is redistributed so that all subnational jurisdictions can provide their citizens with equitable public services. While such redistribution can be accomplished by direct horizontal financial transfers from richer to poorer jurisdictions as has been most prominently the case in Germany until recently (Deutsche Welle 2015), Canada exclusively relies on vertical transfers from the federal government to the provinces. All federal systems except for the United States of America practice some form of fiscal equalization (Shah 2007).

Far more contentious is the use of the federal spending power for other forms of financial transfers even though these may have considerable redistributive effects as well (Watts 1999). Such transfers typically come in the form of grants to subnational governments for jointly financed policy programs, or they constitute direct payments to individuals or organizations for the purpose of social assistance, regional development, and the like. Contention and conflict may arise when, as is regularly the case, such transfers are made in areas formally under subnational jurisdiction.

It is here that the objectives solidarity and subsidiarity can be conflicting. While the spending power may in general serve legitimate purposes of social solidarity by supporting national programs or regional projects in the name of equitable living and working conditions for all citizens, it may at the same time violate the principle of subsidiarity by transgressing into policy areas where subnational entities can in principle act on their own. The crucial legitimacy test for federal systems then is whether, how, and to what extent the governments and societies of a federal union agree on where to strike a balance or equilibrium between subsidiarity and solidarity considerations.

Third, consensus. If subsidiarity remains a somewhat alien yardstick of political legitimacy in Canadian federalism to date, and the objective of social solidarity is sometimes hijacked by conjurations of national interest (Rocher 2009, 115), consensus may be the yardstick least appreciated in Canadian federalism. In fact, consensus as per the intergovernmental agreements resulting from executive joint policy making is precisely what is generally thought to stand in the way of political efficiency as well as legitimacy in federal systems. It blurs accountability and leads to federalism's most famous defect, the joint-decision trap (Scharpf 1988, 239–278). In its classical or coordinate understanding, federalism is not supposed to work that way. Each order of government is instead supposed to tend to the responsibilities under its jurisdiction separately and without interference from the other order. Federalism should be based on "well-established constitutional rules" and not depend on informal compromises and agreements working around these rules" (Gagnon and Iacovino 2007, 157).

Yet consensus surely must be considered one of the oldest and most venerable normative concepts of organized social life. Aristotle (again) said it first: "It is the sharing of a common view… that makes a household and a state" (Politics 1253a7). Althusius translated it into federalism: "The fundamental law" establishing union is "nothing other than certain covenants by which many cities and provinces come

together and agree to establish and defend one and the same commonwealth" (128 [XIX. 49]). Althusius also referred to the old counciliar consent requirement derived from Roman Law, according to which: "What touches all ought also to be approved by all" ([1614] 1995, 37 [IV.20]).

Modern federal systems have replaced the old confederal consensus requirement with high threshold majority rule in the name of efficiency, "compound majoritarianism" in the United States (Elazar 1987, 19), or "qualified majority rule" in the case of the European Union (Cini and Borragán 2013, 150–151). Constitutional amendment in federal systems, which amounts to a change of the original compact of union, requires super majorities in all federal systems. Underlying all these provisions, however, remains a commitment to consensus as the ultimate normative predisposition necessary for a federation to function and hold together.

In the European Union, qualified majority decisions are routinely avoided on contentious matters, with negotiations continuing until agreement has been reached. In Germany, the October 2015 fiscal equalization reform was achieved by intergovernmental agreement even though the formal requirement is a federal law passed by both legislative chambers. In Canada, Justin Trudeau at least in part won the 2015 federal election because he promised "sunny ways" of renewed intergovernmental cooperation and agreement.

Short of reaching agreement, as is well known enough, Canada's new prime minister has meanwhile threatened unilateral imposition of a carbon tax by 2018, and his government has struck bilateral healthcare deals with cash-strapped provinces, which did not see the process as particularly sunny. Open intergovernmental conflict may yet break out over the tension between resource-extracting and environmental interests, and pipelines versus global warming.

In light of such tensions and conflicts, consensus remains a fundamental normative yardstick for a critical evaluation of federalism. In a regionally and culturally divided federal system such as Canada, the ability to negotiate agreement is bound to determine success or failure of political legitimacy and good governance. As the Supreme Court of Canada put it in a recent landmark decision (2011):

> We may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts. Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.

I would argue, then, that subsidiarity, social solidarity, and consensus can serve as credible normative principles for a critical evaluation of federal systems in terms of their political legitimacy. Their relevance can be put to the test in reference to three contentious issues in the history and practice of Canadian federalism: (1) whether

contrary to common criticism the courts have by and large remained faithful to the principle of subsidiarity as first intended and enshrined in the BNA Act of 1867; (2) whether and to what extent Canadian fiscal federalism, so often bedeviled as the heavy hand of centralist machinations, nevertheless can be seen as a commitment to social solidarity; and (3) whether intergovernmental relations, despite all the gripe about "rolling the dice," as former prime minister Brian Mulroney characterized the closed-door late-night negotiations leading to the ill-fated 1987 Meech Lake Accord, can still be appreciated as a uniquely Canadian form of consensus building. But a note of caution: the exercise is meant to be suggestive, not conclusive—an invitation of how to think about Canadian federalism, and not meant as a final verdict.

(1) Subsidiarity: A Matter of Pith and Substance

From a perspective of parliamentary supremacy, the very idea that the courts might override the popular will is offensive as a matter of principle. It does not come as a surprise, for instance, that in the United Kingdom, which neither has a written constitution nor a court that would be able to invalidate parliamentary acts, one of the main arguments for Brexit has been to get out from under the shadow of the European Court of Justice in order to "end the supremacy of EU Law in Britain" (*Financial Times* 2017). In federal systems, by comparison, constitutional courts are generally accepted as final arbiters in division of powers conflicts. Offence is taken only when judicial interpretations are considered to distort rather than uphold the balance of power as originally intended or contemporaneously understood. The problem is that the two orders of government will likely have different views about what constitutes original intent or current meaning.

In Canada, subsidiarity obviously does not play the kind of explicit role in the political process of task allocation and decision making that it does in the European Union (Estalla 2002). But an argument can be made that the courts have based their adjudication of the division of powers in the Canadian federal system on a set of principles very similar to subsidiarity. Evidence for this argument has to be provided in two instalments because the role of final arbitration until 1949 was in the hands of the British Judicial Committee of the Privy Council (JCPC), and only after that fell to the Supreme Court of Canada (SCC). It is also likely to be told differently in different parts of the country.

In much of the English-Canadian literature on federalism, the JCPC has received a bad rap for turning the founders' intention of creating a highly centralized federal system on its head (Stevenson [1979] 2009, 5758; Baier 2012, 81). Following their own rationale and not really interested in the Canadian founders' intentions, the British Law Lords thus would sow the seeds for the kind of provincialism threatening to tear the nation apart a century later. Only the fully sovereign SCC after

1949 would at least restore some balance by a "cautious run of centralization" (Baier 2012).

Unsurprisingly, the JCPC gets a better rap in some of the French-Canadian literature. Instead of being criticized for whittling away federal power in favour of unbridled provincialism, the British Law Lords are praised for shielding the provinces from "the abuses of power by the central government" (Gagnon 2012, 257). French-Canadian scholars in turn likely will be more critical of what they see as a trend of unbridled centralism since the SCC took over in 1949, blaming what they perceive as a cozy vicinity of politics and law in Ottawa, with the judges of the SCC all appointed by the federal government (Caron, Laforest, and Vallières-Rolland 2012, 143–144).

What gets lost in these dichotomising, centralization-decentralization perspectives is the contribution that the courts have made to an understanding of the federal nature of the BNA Act beyond whatever the founders may have thought or intended. Already in its first important decision with regard to the division of powers in Canadian federalism, the JCPC established a remarkably principled and uniquely Canadian approach to judicial interpretation that would ultimately define Canadian federalism as a political enterprise requiring cooperation and compromise rather than take place in separate and watertight compartments. What the Law Lords discovered was that the attempt of assigning exclusive powers to each order of government was an exercise in futility. Judicial interpretation instead had to sort out the extent to which each "had to be limited to allow room for the other" (Saywell 2002, 25). Along the way, the Law Lords also gave sharper contours to the federal principle, a principle which the founders had left deliberately undecided (Vipond 1991, 20–22).

That decision came in the *Parsons* case (JCPC 1881). The constitutionally relevant question of *Parsons* was whether jurisdiction over property and civil rights would allow Ontario to regulate the provincial fire insurance business, or whether such regulation fell under the federal power of regulating trade and commerce. As delivered by Sir Montague Smith, the decision indeed denied the federal trade and commerce power the kind of unlimited reach that Sir John A. Macdonald might have wanted it to have and, in doing so, made room for the provincial regulation of intra-provincial business.

Along the way, the *Parsons* decision established principles for the understanding of Canadian federalism that have endured well into the present (Monahan 2002, 117–121; Hogg 1998, 337–381). It did so in four consecutive steps. First came an acknowledgment of the obvious: The "very general language" of Sections 91 and 92 made it difficult if not impossible to draw legislative boundaries with final certainty. Second, even though the gist of the BNA Act obviously was to accord "pre-eminence to the dominion parliament," this could not possibly mean that, "in the case of a conflict of powers," provincial powers simply "should be absorbed in those given to the dominion parliament." Third, the task then was "to ascertain in what degree and to what extent," the action undertaken in the case at hand might

fall under either section of the BNA Act. And finally, fourth, a decision would have to be reached by determining which of the two sections in question should receive a more limited reading "by necessary implication or reasonable intendment." Following this reasoning, the Law Lords decided that regulating a provincial insurance business was more a matter of contractual—and hence civil—law than an activity broadly falling under trade and commerce.

This reasoning, I contend, neither gives credence to the accusation that the JCPC opened the gates to unbridled provincialism, nor does it appear to be imbued by an urgent sense of shielding the provinces from federal abuse. Instead, it marks the beginning of what would over time become a uniquely Canadian contribution to the judicial interpretation of federal constitutions: the doctrine of "pith and substance." Apparently first explicitly termed in this way by Lord Watson in 1899 (Hogg 1998, 343), pith and substance is commonly referred to as a Canadian doctrine in the jurisprudence of India and Australia (Blackshield 2008).

According to this doctrine, each law or statute in question first must be examined as to its essential character (pith and substance) with regard to its intended objective and effects on public policy. Once the pith and substance of a law is thus established, the court must then decide to which of the contending powers, federal or provincial, it properly belongs, and to which it is merely incidental. In the *Parsons* case, then, the JCPC found Ontario's regulation of the provincial fire insurance business valid by judging that its essential character had to do more with contract law falling under the provincial power of property and civil rights, than with the federal trade and commerce power to which it was found to be merely incidental.

The doctrine of pith and substance arises, and derives its validity, from the acknowledgment that the powers in the Canadian federal system can be, and often will be, overlapping rather than mutually exclusive as constitutionally intended. Overlapping powers mean that both orders of government can in principle legislate on the same subject matter. In the case of conflict, the courts cannot settle once and for all which order has jurisdiction over a particular matter. Instead, judicial interpretation is held, as the JCPC first suggested in *Parsons*, "to decide each case which arises" on its own merit, and without "entering more largely upon an interpretation than is necessary for the particular question in hand." In other words, the courts must determine the pith and substance of every piece of contested legislation and then decide whether this legislation rightfully belongs to the power arsenal of the enacting government.

The Canadian doctrine of pith and substance can be likened to the principle of subsidiarity in that it commands to ask on a case-by-case basis whether, as it was put in the Supreme Court of Canada's aforementioned *Securities* decision, "local concerns remain the main thrust of the legislation — its pith and substance" (2011). As in the case of subsidiarity, in other words, the doctrine of pith and substance aims at a principled "allocation of power within the public realm" (Barber 2005, 313) when such allocation is open to dispute.

As with subsidiarity, of course, the pith and substance of a matter is also open to interpretation. Canadian constitutional jurisprudence has as a rule taken great care to describe and identify disputed matters closely in terms of the language provided by the division of powers in sections 91 and 92 of the BNA Act, now the Constitution Act, 1867 (Hogg 1998, 343). I therefore do not share the view of those who insist that the JCPC provided constitutional interpretations alien to the letter and spirit of Canadian federalism as constitutionally laid down. Instead, I side with Alan Cairns, who some time ago argued that the JCPC's rulings for the most part were "harmonious" with Canada's underlying territorial and regional pluralism, (1971, 301–345) although harmony obviously reached its limits when the Law Lords blocked federal legislation aimed at alleviating the disastrous social consequences of the Great Depression during the 1930s.

I would therefore also argue that the SCC's "cautious run of centralization" (Baier 2012, 81) after 1949 realigned constitutional interpretation with what had become a more national orientation of Canadian societies in the wake of postwar reconstruction and welfare modernization. Overall, the judicial reliance on the doctrine of pith and substance has provided continuity and legitimacy, striking a balance between that which "goes beyond local or provincial concern," as the JCPC had put it in the *Canada Temperance Federation* case of 1946, and that which does not transcend "local authorities' power to meet and solve it by legislation," as the SCC ruled in the *Labatt Breweries* case of 1980.

(2) Social Solidarity: Reasonably Equitable

A reasonably balanced division of powers as guarded by the courts only makes sense if the governments holding these powers also have the means to act upon them. As Van Loon and Whittington wrote some time ago, "the real distribution of power among governments is in significant measure determined by the complex processes of fiscal relations among governments" (1984, 266–267). In principle, all governments should have guaranteed access to revenue sources in proportion to their expenditure needs so that constitutionally assigned tasks can be accomplished autonomously and remain accountable to the citizens whose money is spent.

In practice, there will always be two kinds of imbalances: vertical, between the two orders of government because it is impossible to pre-determine at any given moment with exact precision the amount of revenue each will need to fulfill its constitutional obligations, and because it will likewise be impossible to determine with precision what the exact scope and dimension those obligations should and will entail; and horizontal, between the federated entities, because they will inevitably be endowed with different levels of resources, infrastructural capacity, and, in part resulting from both, competitive market chances.

The matter of proportionality is further complicated by the dualized nature of social citizenship in federal systems such as Canada (Gaudreault-DesBiens 2006, 194–99). At confederation in 1867, social policy matters were by and large assigned to the provinces because they were not yet seen as a matter of national concern. This changed, however, with the rise of a modern welfare state in Canada beginning with the 1940 constitutional amendment assigning unemployment insurance to the list of exclusive federal powers. Social citizenship or social solidarity from then on clearly came to be recognized, by governments as well as societies, as a joint responsibility. A complex system of welfare federalism developed over time, aptly described by Keith Banting as mix of classical, shared-cost, and joint-decision federalism (2012, 143–44), part of an overall regime of what has been called a "textbook best-practice system of fiscal federalism" resulting in a "fair and equitable social union" (Boadway 2007, 99).

In terms of federal political legitimacy, "federal solidarity" may be understood as a commitment to a "common federal citizenship," which may "counterbalance jurisdictional autonomy" (Gaudreault-DesBiens 2006, 194). Social solidarity from a normative perspective of federalism, however, points to the opposite direction. It is not to be understood or defined primarily as a choice, trade-off, or compromise, on an inherent tension between (provincial) autonomy and (national) solidarity (Noël 2012, 275–278). It is instead meant to be understood as a reinforcing safeguard for membership autonomy and equality alongside national social citizenship as captured by Alain Noël (2006) in the image of a plurality of "overlapping sharing communities."

The condition of autonomy and equality under which the members of a federation entered into a common union, in other words, must be underwritten by a commitment to share the financial resources necessary to make such autonomy and equality real. Social solidarity as a normative criterion of political legitimacy in Canadian federalism in this sense becomes a two-fold redistributive balancing act: horizontal fiscal equalization "to ensure," in the words of section 36(2) of the Constitution Act, 1982, "that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation;" and, secondly, vertical fairness in the sense that the federal government does not use its spending power to squeeze the lifeblood out of provincial autonomy.

Here is not the place to enter into a lengthy and technical debate about the quantitative extent to which Canadian fiscal federalism satisfies both these requirements. Some at least would question the characterization of Canadian federalism as "exemplary" (Boadway 2007, 119–120) with regard to fiscal transfer solidarity. But, in principle, I think that it is fair to say that fiscal equalization since its first inception in 1957 has significantly contributed to the constitutionally prescribed objective of horizontal balance. Despite fluctuations of formula and content over time, it has by and large enabled provincial governments to provide their citizens with equitable public services at equitable rates of taxation in conjunction with other social transfers. The issue of the federal spending power is a different matter.

In all federal systems, national governments have at their disposal more revenue than is necessary for the programs under their own jurisdiction. In all federal systems also, they will use this surplus spending power to pursue national policy objectives. And in all federal systems, albeit to varying degrees, national governments are empowered to spend in areas of subnational jurisdiction (Hueglin and Fenna, 176-202). In Canada, federal spending in areas of provincial jurisdiction has remained highly contested or even condemned as likely unconstitutional (Lajoie 2006) even though the courts have by and large acknowledged its validity as long as it does not amount to a regulatory form of intrusion into provincial jurisdiction (Swinton 1992, 124).

To my mind, the political legitimacy of the federal spending power in terms of social solidarity depends on whether the inevitable vertical imbalance of fiscal capacities becomes so great that federal spending no longer can be seen as serving a redistributive effort but instead as a source of provincial fiscal incapacity (Gaudreault-DesBiens 2006, 198). This was the common provincial complaint after the federal government had in 1995 cut drastically its transfer payments to the provinces. By doing this, so went the argument, the federal government sanitized its finances at the expense of the provinces. While the federal government was able to pay down its debt, the provinces increased theirs because they had to keep spending on the programs under their jurisdiction (Noël 2012, 285–296).

Again, here is not the place for a quantitative investigation about the existence or non-existence of a vertical fiscal imbalance that would be serious enough to undermine provincial autonomy (Lazar, St-Hilaire, and Tremblay 2003). On balance, over time as well as from a comparative perspective, I would argue that the political legitimacy of Canadian federalism has been enhanced by a significant commitment to social solidarity. Fiscal equalization and the general use of the federal spending power—transfers with the lowest level of conditionality among established federations (Watts 1999, 56–57)—have not significantly counteracted the division of powers or, as pre-formulated early-on in the JCPC's *Parsons* decision, "absorbed" provincial powers "in those given to the dominion parliament" (1881).

Unless it is based on a no longer credible view of federalism as a political system with powers divided into watertight compartments (Weinstock 2006), the provincial discontent with overlapping powers of fiscal federalism is not primarily about the federal spending power as such. It is about the fact that "it is ultimately Ottawa, and Ottawa alone, that makes the final determination as to the nature, level, growth, and duration of the fiscal transfer" (Cameron and McCrea-Logie 2003, 113). To put it differently, it is about an "imbalance of power" and the lack of "clear and consensual rules" (Noël 2006, 67).

(3) Consensus: As Much as Possible, Under the Circumstances

Canada is not a consensus democracy. It is a federation in which two orders of government sometimes cooperate, sometimes compete with one another, sometimes agree, and sometimes remain divided in disagreement (Simmons and Graefe 2013, 25–36). 1982, the end point of a long process of achieving constitutional patriation (Simeon [1971] 2006, 68–123; Russell 2004, 72–126), both exemplifies the procedural nature of Canadian federalism, and marks its darkest hour of breakdown. It is in the arena of extra-ordinary constitutional politics that the tension between autonomy and interdependence in federal systems (Rocher 2009, 95–96) is tested most severely.

But Canada is also a federation in which the governance of ordinary matters essentially relies on what at some point was estimated as exceeding 1,500 federal-provincial agreements. The vast majority of these are bilateral agreements, they extend to almost all policy fields, and they are in large part driven by the federal spending power; "framework agreement(s)" whereby federal funds are made available for projects under provincial management (Poirier 2002, 427–28).

A sense of disapproval of power posturing and imbalance is palpable in the literature. To be sure, governments "work together to get things done," but the nature of the interaction is one of "power-laden compromises, rather than one of actors working on the basis of cooperation and equality mapping out a joint vision and program of action to achieve it" (Simmons and Graefe 2013, 33). Moreover, as one intergovernmental official reportedly put it: "[T]here is a unilateral flavour to many of the agreements of the past decade" (as cited in Inwood, Johns, and O'Reilly 2011, 102). Some would even go further and claim more generally that Canadian provinces have become "administrative agencies of federal authorities" (Adam, Bergeron, and Bonnard 2015, 165). The trend towards bilateralism, finally, may allow the federal government to employ a combination of divide-and-rule as well as take-it-or-leave-it tactics, as is the case with the recent separate healthcare agreements struck by the Trudeau government with the provinces after a common accord could not be reached (Ibbitson (2017). Yet it can also be exploited by the provinces as a new form of "beggar-thy-neighbour" federalism (Brock 2012).

One only needs to take one look at the state of unabashed "coercive" federalism south of the border (Kincaid 2012) in order to appreciate that all these concerns and criticisms, while entirely valid, may miss the big picture nevertheless. As I have tried to show elsewhere, all federal systems are in practice animated by two complementary forces or dynamics: One is a dynamic of constitutional federalism with its insistence on the exercise of clearly divided powers. The other is a dynamic of what may be called procedural or treaty federalism aiming at cooperation and compromise in the sharing of overlapping powers (Hueglin 2013a). While the United States of America may be the most rigid case of constitutional federalism, Canada clearly falls into the category of procedural federalism based on a system

of "negotiated constitutionalism" (Benz 2008, 31). The point, however important, is not that negotiation is flawed by power imbalances, or that cooperation does not lead to a joint vision. It is that there is a common predisposition for negotiation, cooperation, and, as a classical Canadian saying goes, as much as possible under the circumstances, agreement.

Agreement or consensus in this context does not mean, and does not have to mean, harmony. It also does not mean, and cannot mean, the absence of power imbalances, between rich and poor, large and small provinces, and between provinces and a federal government endowed with superior financial clout. What it does mean, is that conflict and cooperation must be embedded and carried out in a spirit of "constitutional morality," faithful to the federal project. As the Supreme Court of Canada put it in its *Securities* decision, cooperative or "flexible" federalism, "however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state" (2011). While 1982 surely must be seen as a violation of constitutional morality in procedural terms, I believe that the outcome, the amendment formula, and the Charter of Rights and Freedoms did not lastingly erode the constitutional balance.

As has been noted in the context of European Union governance, the quality and character of cooperative interaction in large measure depends on "institutional preconditions" (Neyer 2003, 688). It is in this regard that Canadian federalism most likely falls short of following through with lofty normative aspirations. At issue are the informality of the process, and the unilateralism driving it.

The informality of the intergovernmental process may be "conducive to innovation and flexible adjustment" (Broschek 2012, 682), but it also makes it dependent on the "enthusiasm" of the respective office holders (Simmons and Graefe 2013, 28–29). Given their complexity and interdependence of governance, all federal systems need some form of regularized intergovernmental forum at the leadership level. Even in Germany, where the two orders of government are most directly interlocked in a bicameral legislature granting voice and vote to the *Länder* governments themselves, the federal chancellor has a statutory obligation to meet with the *Länder* prime ministers several times a year in order to discuss "important political, economic, social and financial questions" (Geschäftsordnung).

The Canadian Senate cannot be that forum although, now that the current prime minister, Justin Trudeau, intends to make it fully non-partisan, it has been suggested that it could at least take on a somewhat more regionalized character by creating regional caucuses (Kirby and Segal 2016). In a parliamentary federal system committed to the principle of responsible government, intergovernmentalism also cannot assume the role of a secondary legislator (Papillon and Simeon 2002, 131). But, as has been suggested time and again, and in tandem with the regularization of the premiers' meetings in the Council of the Federation, first ministers' conferences or meetings should be "held annually, at fixed times," in order to normalize and routinize Canadian procedural federalism at the top (Ibid., 132–133).

Addressing the lack of political legitimacy with regard to federal unilateralism is a far more contentious undertaking. No federal government will be prepared to relinquish formally what it sees as its legitimate prerogative, the autonomous use of its spending power. As then federal Minister of Health Anne McLellan concluded her discussion about the possibility of an arm's-length panel for dispute resolution on healthcare with regard to who would have the last word on how to take such a panel's findings into consideration: "[It] is my right and my right alone" (As cited in Cameron and McCrea-Logie 2003, 124).

An arm's-length commission is also what Béland and Lecours suggest as a more neutral option for fiscal equalization although, in this case, as they suggest, opposition might come from provinces seeing themselves as "equal partners with the federal government," and therefore "have been loath to endorse an arm's-length agency that potentially would limit provincial agency in shaping decision-making on equalization" even though "the federal government does not even have a formal obligation to consult them" (2016, 11–12). What this last observation suggests is that despite informality and unilateralism Canada's system of procedural federalism appears to be embedded in a political culture of cooperation and agreement that none of its governments want to see replaced with the kind of constitutional federalism prevalent in the United States of America.

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DEMOCRATIC INSTITUTIONS

3

NOTWITHSTANDING THE CHARTER: DOES SECTION 33 ACCOMMODATE FEDERALISM?[1]

Janet L. Hiebert

Scholarly discussions of the Canadian Charter of Rights and Freedoms have addressed a wide range of subjects relating to how the Charter has affected Canadian political governance including the Charter's implications for principles of representative government, (Weinrib 1999; Morton and Knopff 2000), litigation as a strategy for legislative reforms, (Epp 1996; Smith 1999), institutional changes affecting how legislative bills are evaluated before and after their introduction to parliament (Hiebert 2002; Kelly 2005), government litigation strategies (Hennigar 2009), specific judicial rulings (too numerous to list), and metaphors for evaluating the judicial/parliamentary relationship (Hogg, Bushell, and Wright 2007; Petter 2007; Huscroft 2009).

Yet Charter scholarship has exhibited significantly less interest in the Charter's influence on federalism. A fundamental characteristic of a federal society is the ability of its constituent parts to promote local or regional preferences according to the constitution's division of powers. For issues that are fully within Canadian

1. I would like to thank Elizabeth Goodyear-Grant, Kyle Hanniman and Dave Snow for their helpful and insightful comments and suggestions on earlier drafts. I am particularly indebted to Dave's spirited challenge of my earlier characterization of the Bourassa government's use of the notwithstanding clause on new sign law legislation as pre-emptive. I had construed this as pre-emptive rather than reactive because it was possible to anticipate the new sign law regime as being consistent with the Supreme Court's ruling in Ford. However, he has convinced me that on balance, it is better to conceive of this use as reactive. The tipping point for me was his question: would it have been necessary to use s. 33 if the Court had not ruled on the issue?

provincial constitutional competence, no provincial legislature is required to satisfy the preferences of voters in another province or the national government.[2]

Yet the Charter can undermine the provinces' abilities to diverge from national norms about how rights are defined and can result in judicial rulings that constrain legislative objectives that federalism might otherwise allow. The legal context for interpreting the Charter lacks an obligation or directive for courts to consider or accommodate key historic rationales for the federal principle in Canada: the insulation of Quebec from pressures of assimilation, the protection of local interests, and the acceptance of diverse policy outcomes amongst provinces. Judicial review of the Charter is oriented towards a pan-Canadian or uniform interpretation of whether rights are infringed and, if so, if legislation restricts them in a reasonable manner under section 1. The context for these section 1 assessments is whether legislative restrictions are justified in a democratic society; not a democratic society that is federally constituted.

Thus, judicial assessments of whether legislation comprises justifiable limits on rights are not directed to also consider explicitly whether federalism is a valid consideration when assessing the justification of limits on rights. Perhaps not surprisingly, the Supreme Court has not developed a theoretical or methodological approach for considering whether and how federalism is relevant when interpreting the Charter. A lack of diversity in provincial outcomes can also arise from the fact that Supreme Court judges are appointed by the federal government without the need for provincial consent and its rulings are binding on all other courts.

Early Charter scholarship acknowledged possible tensions for federalism, such as the promotion of identities based on Canadianness at the expense of regional loyalties (MacIvor 2006); changing perceptions of constitutional values arising from citizens' interventions that helped shape many of the Charter's key provisions (Kelly 2005, 63–64) and the effect this citizen engagement has had on transforming citizens' conception of their relationship to the constitution (Cairns 1995); the declining emphasis on federalism when understanding Canadian political culture (Laforest 1991); and the impact of potential Charter litigation on undermining diversity when developing and promoting the government's legislative agenda (Gagnon and Iacovino 2007). In a particularly stark warning, Pierre Fournier characterized the Charter as a "time bomb" for Quebec (Fournier 1983).

However, this interest in the Charter's impact on federalism has declined, particularly outside Quebec. One sign of this is that recent academic commentary is virtually non-existent on whether and how use of the notwithstanding clause is

2. Admittedly, the autonomy of Canadian provinces is compromised by concurrent powers in which Ottawa prevails in situations of conflict, as well as by Ottawa's ability to use its fiscal powers to influence decisions or priorities for social policies in areas of provincial responsibility (for example, healthcare). Nevertheless, the federal principle is strong and robust, as Canada is a particularly strong, decentralized federation.

an appropriate way of reconciling the Charter with the federal principle and, if so, whether particular normative considerations should guide such uses. Yet the notwithstanding clause is the only explicit federalist element of the Charter and can serve federalist purposes by allowing provincial dissent where judicial rulings represent norms or constrain legislative goals in ways that are inconsistent with provincial priorities and provincial autonomy.

The lack of discussion or interest in the federalist potential of the notwithstanding clause reinforces the continued significance of Samuel LaSelva's observation of more than twenty years ago: that just as Canada's theory of federalism lacks a theory of justice, the Charter gives too little attention to the particularities of federalism (LaSelva 1996).

This chapter addresses uses of the notwithstanding clause for federalism purposes. It is organized in the following manner. Part one discusses the possibility of distinguishing between federalist and democratic uses of the notwithstanding clause. Part two identifies uses of the notwithstanding clause and evaluates whether these are best illustrative of a federalist or democratic response to Charter rulings. Finally, in part three, the chapter discusses whether inferences for federalism can be drawn from political reticence to invoke the notwithstanding clause.

The chapter argues that more than half of the nineteen uses of the notwithstanding clause to date have been for federalism purposes. Quebec, by far, has used this power more often than other provinces (fifteen of the nineteen uses). The number of formal uses of s. 33, whether for federalist or democratic purposes, likely understates provincial willingness in all provinces to deviate from Charter norms because of the ability and incentive to pursue less controversial ways of pursuing inconsistent legislation. The same can be said for the federal government although, as argued below, it would be difficult to conceive of its intent to deviate from judicial norms as serving a federalist purpose. Thus, it is problematic to equate the relatively spartan use of the notwithstanding clause to date with compliance with Charter norms or with provincial acquiescence to pan-Canadian Charter norms at the expense of federalist objectives.

PART ONE

Distinguishing Where the Emphasis Should Be Placed between Democratic and Federalist Uses of the Notwithstanding Clause

Although the notwithstanding clause has been subject to considerable political and academic commentary, much of which is critical, it is not the federalist dimension that is usually discussed. Instead, attention focuses on whether the notwithstanding clause is consistent with the logic of a constitutional framework that otherwise

emphasizes judicial resolutions for disagreements about rights (Whyte 1990; Russell 1991; Hiebert 2009).

As is well known, the notwithstanding clause was a key factor for securing constitutional agreement in the late stages of prolonged negotiations to amend and repatriate the Canadian constitution that began in the 1960s and were rekindled in 1980–81. Although these negotiations involved a potpourri of provincial and federal demands, a key to securing agreement was a compromise on two critical stumbling blocks. One was agreement for an amending formula, which would be critical not only for future constitutional changes but was also essential to the task at hand, which was to "Canadianize" a constitution that previously had been an Act of the British Parliament. A second key unresolved issue was agreement for the Canadian Charter of Rights and Freedoms, which would fundamentally alter constitutional principles by codifying rights and authorizing strong judicial remedial powers of the kind previously unthinkable in a system that until that point had emphasized the principle of parliamentary supremacy (as modified initially by Canada's colonial status and also by federalism's division of powers).

After years of failing to convince provincial premiers to accept the federal government's constitutional proposals, which included the Charter, new pressure to reach a compromise arose in late 1981 after the Supreme Court's ruling on the constitutional validity of proposed federal unilateral action to amend the constitution. The Supreme Court's politically clever ruling in the Patriation Reference case[3] conveyed both victory and loss for provincial and federal governments (Russell 1983), thus creating new pressure to seek compromise.

The November 1981 first ministers' conference that was convened in the wake of this ruling has been characterized as constituting a "mixed mood of grudging necessity, persistent mistrust, and modest hope" (Romanow, Whyte, and Leeson 1984). A late-stage resolution was reached between the federal government and seven of the eight premiers (all but Quebec's Premier René Lévesque). Under this political agreement, Ottawa would accept the provinces' preferred amending formula, but without fiscal compensation for opting out, and the provinces would accept the Charter, but with a notwithstanding clause that would apply to fundamental freedoms, legal and equality rights.

The Charter presents serious tensions for two key constitutional principles upon which Canada was founded: (1) the principle of majority-based democratic governance as reflected in the principle of parliamentary or legislative supremacy and (2) federalism, which assigns provinces jurisdiction over a range of matters conceived initially to protect more local (and for Quebec in particular, linguistic and cultural) objectives.

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3. *Reference Re Amendment of the Constitution of Canada, (Nos. 1, 23 and 3) [1981] 1 S.C.R. 753.*

The Charter can undermine the democratic aspect of representative self-government underlying the principle of parliamentary supremacy by authorizing courts to declare inconsistent legislation to be unconstitutional and therefore unlawful. The Charter can also undermine federalism because this same judicial authority clashes with a principal intent of federalism, which is to allow provinces to exercise legislative autonomy over their areas of responsibility and, as discussed above, offers no directive to consider federalism when evaluating Charter consistency. Moreover, the Charter's emphasis on individual rights and a judicial orientation towards pan-Canadian interpretations can present particular challenges for a government wishing to protect cultural and linguistic policies that are conceptualized in community, rather than individual, terms (for example, see below for Robert Bourassa's explanation for using the notwithstanding clause in Quebec to insulate new sign law legislation from judicial review).

Although the notwithstanding clause can be used to mitigate both democratic and federalist tensions associated with new judicial interpretive and remedial powers, most of the discussion about this power, particularly in English-speaking Canada, focusses on the democratic rather than federalist dimension.

Many critics of the notwithstanding clause argue the power is inconsistent with the Charter's project of giving priority to juridical over political judgments involving rights, and worry that use of the notwithstanding clause is an unwelcome retention of majoritarian politics they believe the Charter has replaced, as its use to set aside the effects of a judicial ruling or to prevent Charter litigation requires only a majority support in parliament. In contrast, many supporters of the notwithstanding clause place more emphasis on principles of representative democratic government and view the notwithstanding clause as a valid accommodation of the democratic principle (Clarke and Hiebert 2011).

In one sense, this democratic rather than federalist emphasis when evaluating the notwithstanding clause is not particularly surprising, particularly outside Quebec. Few English-speaking Canadians equate federalism with the protection of culture and language or perceive a conflict between provincial or English-Canadian identities and the values represented in the Charter. For many English-speaking Canadians, the idea that the notwithstanding clause is a valid federalist instrument that allows provinces to deviate from a national rights standard is antithetical to the kind of rights project they associate with the Charter. As Peter Russell argues, for a majority of English-speaking Canadians, Charter rights have displaced the interest in provincial autonomy where Charter issues arise (Russell 2004). Thus, to the extent there is political reluctance to invoke the notwithstanding clause, this might be viewed not only as the triumph of juridical over political judgment about how rights should guide or constrain state actions, but also as the triumph of Pierre Trudeau's "anti-federalist" view of the Charter; the promotion of pan-Canadian or uniform judgments about rights and the subordination of local or cultural values where these conflict with judicial Charter norms.

In Quebec, Charter concerns take on a much more explicit federalism perspective as many perceive the Charter as potentially undermining a basic prerequisite for meaningful federal governance: the "autonomy" of Canada's constituent parts and, in particular, Quebec. Judicial review of the Charter creates a serious tension with Canada's historic compromise intended to protect provincial control over local matters and, more the point, to protect Quebec's autonomy over language and culture as enabled by the powers granted in 1867 under the division of powers (Russell 2004, 84–85). Thus, the Charter not only compromises the federal principle, some construe it as undermining a key historic compromise that led Quebec's political leaders to agree to Confederation in 1867 (Laforest 1991).

Although the cultural connection with federalism may not be pervasive in English-speaking Canada, and little attention has been paid to whether there should be a greater federalist emphasis on Charter interpretations, to rule out a federalist interest in the notwithstanding clause is to overlook historical grievances directed at interferences with the federal principle. What should not be forgotten is that early post-Confederation politics were characterized by intense battles to protect the federal principle and provincial autonomy (often viewed as one and the same) from perceived encroachments by Ottawa. A key factor in this battle was the federal government's use of the disallowance power that interfered with provincial jurisdiction.[4] Another indication of provincial concern for provincial autonomy is use of constitutional litigation to challenge perceived federal government infringements. Given the continued significance of federalist impulses as indicated by robust provincial resistance to federal policies that are perceived to interfere with provincial powers, it is possible to imagine provincial interest in the notwithstanding clause as an exercise of federalism to protect provincial autonomy; not in the earlier political sense of fighting Ottawa but instead to resist judicial imposition of a pan-Canadian interpretation of rights that conflict with provincial or community preferences.

Although I have suggested it is possible to interpret uses of the notwithstanding clause as emphasizing both democratic and federalist principles, this begs the following questions: How should democratic and federalist emphases be distinguished when assessing uses of the notwithstanding clause? Are both levels of government capable of using the notwithstanding clause in both ways? In other words, could a federal government use of the notwithstanding clause (if indeed this were ever to occur) be characterized as a federalist use? Should all provincial uses of this power be considered federalist uses?

Admittedly, it can be difficult to distinguish whether a provincial use of the notwithstanding clause is best characterized as constituting democratic or federalist dissent from judicial review of the Charter. Particular uses might satisfy both categories of dissent. Moreover, some might contest the need to make this

4. See for example, Vipond (1991).

distinction at all, particularly as federalism can be viewed in a diverse society as a more desirable way to organize democratic government than a unitary system that may not provide political accommodation or recognition for community or cultural distinctions.

When assessing whether provincial uses of s. 33 are best construed as democratic or federalist dissent from judicial review, what is most relevant for purposes here is where the emphasis should be placed between these two categories of dissent, rather than to construe these categories as if they were mutually exclusive.

Federalist Use of Section 33

Not all provincial uses of the notwithstanding clause necessarily constitute federalist uses. To construe all provincial uses of the notwithstanding clause as federalist responses to the Charter, simply by virtue of protecting provincial legislative competence from a negative judicial Charter ruling, constitutes a fairly thin understanding of what constitutes federalist dissent from judicial review. It fails to consider the reasons for using section 33 and whether and how these relate to provincial autonomy or cultural objectives associated with Canadian federalism.

This chapter adopts the notion of a "thick" federalist response to distinguish between democratic and federalist forms of dissent, and to avoid characterizing all provincial uses of s. 33 as constituting federalist responses. The criteria considered here for characterizing use of s. 33 as a thick federalist response is *whether a provincial use of s. 33 implicitly or explicitly reflects a political intent to protect provincial autonomy or cultural objectives from judicially defined Charter constraints, and or rejects the necessity of having to conform with national judicial norms about the justification for restrictions on Charter rights for those areas of responsibility assigned to the provinces*.

Just as it is not appropriate to characterize all provincial uses of the notwithstanding clause as constituting federalist responses to judicial review of the Charter, it is also problematic to interpret the federal government's use of this power as ever constituting a federalist response (assuming a federal government was ever prepared to invoke this power, which to date has not occurred). As Canadian federalism is grounded in the idea of allowing the provinces to protect differences, it makes little sense to equate the federal government's use of this power as a federalist interpretation of the Charter. Arguably, only a provincial use of the notwithstanding clause can be interpreted as a federalist use. Federal government uses of the notwithstanding clause should be interpreted as democratic responses to judicial review.

Democratic Use of Section 33

A democratic use of the notwithstanding clause would include federal or provincial legislative acts invoking this power (pre-emptively or reactively) to protect the stability of legislation from relevant Charter jurisprudence in light of uncertainty about whether legislation is vulnerable to judicial censure; to give effect to a philosophical or political disagreement with the Court about whether legislative objectives are too important to be set aside because of judicially imposed Charter constraints; to express disagreement about the priority or interpretation given to the rights issue in question; or as an expression of political refusal to abide by judicially defined Charter constraints for partisan or other political reasons (for example, to protect a legislative outcome that is a priority for the government's legislative agenda, or interpreted as responding to majority public opinion).

The understanding used here to characterize democratic use of the notwithstanding clause refers to how political power is exercised in a representative democracy, where legislative decisions are approved in parliament according to the majority principle. Although interpretations of democracy are extremely contested, and many infuse democracy with other normative considerations such as those impacting on the capacity to contribute to democratic decision making in a meaningful way, for purposes here my reference to a democratic use of the notwithstanding clause aligns with Jeremy Waldron's understanding of democracy. Waldron argues that persistent disagreement should be regarded "as one of the elementary conditions of modern politics" (Waldron 1999). In these circumstances, the majority principle is relied upon to resolve contentious debates; a reflection of what Waldron characterizes as a respectful way for governing given the reality of differences of opinion about justice or the common good (Waldron 1999, 159–160).

Some uses of the notwithstanding clause might satisfy both democratic and federalist criteria. In cases of provincial use, before labelling any disagreement as a democratic response, it is also necessary to determine if use of the notwithstanding clause also satisfies federalist grounds. For example, provincial use of the notwithstanding clause might seek to protect cultural goals that reflect ideological differences from Supreme Court rulings about the primacy given to individual rights, as was the case in Quebec's use of this power to exempt its sign law from judicial review (as discussed below). In cases of overlap between federalist and democratic considerations, the presence of federalist factors justifies characterizing it as a federalist use.

When distinguishing between federalist and democratic reasons for using the notwithstanding clause it is also helpful to reflect on subsequent constitutional developments elsewhere, where ideas associated with the notwithstanding clause were adopted by unitary systems, and therefore clearly envisage democratic (rather than federal) dissent from judicial review. New Zealand and the United Kingdom have been influenced by Canada's invention of the notwithstanding clause. Reformers in New Zealand and the UK who were interested in adopting

a bill of rights faced a serious obstacle: they lacked sufficient political support to give courts the strong remedial power the Charter authorizes to declare legislation invalid where inconsistent with protected rights. However, Canada's adoption of the notwithstanding clause introduced the idea that a bill of rights can function in a manner that separates judicial review from binding judicial remedies (at least on a temporary basis in Canada). Thus, reformers in New Zealand and the UK who were keen to retain the principle of parliamentary supremacy interpreted the notwithstanding clause as signalling the possibility of both adopting a bill of rights and also preserving parliament's ability to have the final say on the legality of legislation (Hiebert and Kelly 2015).

Political reluctance to authorize courts to invalidate inconsistent legislation meant it was unnecessary in the bills of rights for New Zealand or the UK to actually incorporate a mechanism emulating s. 33. Hence, the triggering mechanism for political dissent from judicial rulings in New Zealand and the UK differs from what occurs in Canada. Whereas in Canada the federal parliament or a provincial legislature must enact legislation that invokes the notwithstanding clause either as a pre-emptive way to deny potential litigants the opportunity for judicial review or in a reactive manner to dissent from a judicial ruling, New Zealand and UK parliaments can disagree with judicial rulings by simply ignoring them, unless courts have used their interpretive powers to alter the intent or scope of legislation to arrive at rights-compliant interpretation, after which the legislatures can simply pass ordinary legislation to reinstate their preferred intentions (Hiebert 2011). Yet, as neither New Zealand nor the UK is a federation, the intent of allowing for legislative dissent is to reconcile judicial review with democratic principles of representative government, whereas in Canada the notwithstanding clause can be inspired by both democratic and federalist impulses.

When distinguishing where the emphasis should be placed between federalist and democratic uses of the notwithstanding clause, it is helpful to reflect on the following questions:

1. Does use of the notwithstanding clause represent an attempt to protect legislation from judicial censor given uncertainty about consistency with relevant Charter jurisprudence or to maintain legislation that has already been declared invalid?
2. Does the use of the notwithstanding clause reflect ideological or other political disagreements with how the Court has interpreted the Charter?
3. Is provincial use of the notwithstanding clause defended or best understood as an explicit or implicit attempt to protect provincial autonomy or provincial cultural objectives from Charter constraints?
4. Is there an explicit or implicit defence of a provincial legislature's competence and legitimacy to reject national judicial Charter norms?

If the answer best satisfies questions 1 and/or 2, and there is no indication of the relevance of questions 3 and/or 4, the use of the notwithstanding clause is best categorized as a democratic response. If the answer best satisfies questions 3 and/or 4, it is better characterized as a federalist response, even if it also satisfies questions 1 and/or 2.

PART TWO

Differentiating between Democratic and Federalist Emphases When Using Section 33 to Date

Although the notwithstanding clause has not been used extensively, it has been invoked more often than many realize. The notwithstanding clause has been used nineteen times: once in an omnibus and retroactive fashion and in eighteen specific instances.

The federal parliament has never used the notwithstanding clause and only three provinces and one territory have invoked it (Quebec, Alberta, Saskatchewan, and Yukon). With the exception of Quebec's use after the *Ford* ruling and Saskatchewan's use of the notwithstanding clause in 2018 (both discussed below), all uses to date have been pre-emptive: to insulate legislation from judicial review, as contrasted with a reactive response to set aside the effects of a ruling that has declared legislation invalid.

The majority of uses of s. 33 occurred in the early years of the Charter. Most of these pre-emptive enactments did not precipitate strong opposition, likely because potential critics were either unaware this power was being used or because strong opposition to s. 33 had not yet become a potent force in Canadian politics.

Quebec has invoked the notwithstanding clause more often than any other province. Quebec has invoked this power on fifteen occasions, Saskatchewan has used it twice and Alberta and Yukon have each used it once.

Eleven of the nineteen uses of the notwithstanding clause (Table 3.1) can be characterized as federalist responses to the Charter (nine times by Quebec, once by Alberta and once by Saskatchewan), while eight of the nineteen uses are characterized as inspired by democratic impulses.

Table 3.1: Democratic vs. Federalist Uses of the Notwithstanding Clause

	Quebec	Yukon	Alberta	Saskatchewan
Federalist	9		1	1
Democratic	6	1		1

Table 3.2: Uses of the Notwithstanding Clause by Category

	Quebec	Yukon	Saskatchewan	Alberta
Uncertainty about scope of rights	6	1	1	
Uncertainty about s. 1	6			
Political Protest	1			
Political Disagreement	2		1	1

As illustrated in Table 3.2, uses of the notwithstanding clause fall within four categories.[5] These categories are: (1) risk aversion to protect the stability of legislation in the face of constitutional uncertainty about how freedom of association or equality rights would be interpreted (eight uses); (2) risk aversion to protect the stability of legislation as a result of uncertainty about whether legislation would be upheld under s. 1 (six uses); (3) political protest about the constitutional process that led to the Charter and the substantive effects this would have on provincial autonomy (one use); and (4) disagreement with the judicial interpretations of the Charter and their implications for legislative priorities (four uses).

All uses of s. 33 other than the eight in the first category can be construed as federalist responses to the Charter. The most obvious (or thick) federalist uses of s. 33 have occurred in categories three and four.

1. Risk aversion because of uncertainty about how rights would be interpreted. The notwithstanding clause was invoked eight times within this first category. Quebec used it six times to protect legislation in the face of uncertainty about how equality rights would be interpreted. Five of the six Quebec uses of the notwithstanding clause in this manner were to protect legislation that had gender-based differences for pension eligibility while one use involved different eligibility criteria for government grants for purchasing or leasing new farms.[6] This category also includes Yukon's use of this power to exempt possible conflicts with equality rights with respect to nominations for the Land Planning Board or Land Planning Committees (Kahana 2001, 258) and Saskatchewan's use of this power with respect to whether back-to-work legislation for the public sector offends freedom of association.[7] These uses occurred in the early days of the Charter before the

5. This analysis borrows from earlier published work by the author. See Hiebert (2017).

6. For a description of the specific legislative acts in question see Kahana (2001).

7. Saskatchewan invoked the notwithstanding clause in 1986 with respect to back-to-work legislation for the public sector after a series of rotating strikes. At the time the Su-

Supreme Court had interpreted how it would define equality and make clear what kinds of policy distinctions constitute discrimination, or whether or not freedom of expression would be construed as including the right to strike.

The motivation for invoking the notwithstanding clause appears to be its strategic use to protect the government's legislative agenda from possible judicial invalidation in light of the unknown factor of how certain Charter rights will be interpreted, rather than as an explicit attempt to protect provincial autonomy. In the early days of the Charter, a serious challenge for legislative decision making was to anticipate how the Supreme Court would interpret equality and, in particular, to predict when a distinction with respect to social policy benefits constitutes constitutionally invalid discrimination under section 15. The equality rights did not come into force for three years after the Charter was adopted, and it would not be until 1989 that the Supreme Court would first outline its method for interpreting equality; a method that continues to be revised.

These uses occurred at a time when the notwithstanding clause evoked little attention. Thus, these uses were not particularly controversial and were likely seen by political advisers and government decision makers as an effective and practical way to protect the stability of legislation in light of uncertainty about how the Supreme Court would interpret equality rights or freedom of association. In this sense, they can be interpreted as democratic uses of the notwithstanding clause, to safeguard legislation from judicial invalidation, as they did not reflect an implicit or explicit defence of federalist values, such as protecting culture or provincial autonomy.

2. Risk aversion because of uncertainty about the success of s. 1 arguments. The six pre-emptive uses of the notwithstanding clause in category two, to protect legislation in light of uncertainty about how it would fare under interpretations of s. 1, can be construed as federalist responses to the Charter because of the nature of the legislation at issue. These six uses by Quebec were with respect to moral and religious instruction in public schools (Kahana 2001, 255, 262–263). Provincial jurisdiction over education policy was a critical demand for a federal rather than unitary system of government. In using the notwithstanding clause in this context, Quebec insulated its legislation from the kinds of challenges that occurred in other provinces, as to whether the denominational character of Canadian public education violates Charter guarantees of religious freedom or equality in a manner not justified under s. 1 (Foster 1993).

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preme Court had not dealt with whether the Charter protects the right to strike. The Court's rulings two years later confirmed that the use of this power would not have been required at the time, as the Court then rejected the contention that the right to strike is constitutionally protected. *Reference re Public Service Employee Relations Act (Alta),* (1981) 1 SCR 313. More than three decades later, the Supreme Court reversed this position in *Saskatchewan Federation of Labour v. Saskatchewan* (2015) SCC 4. See Kahana (2001); Hiebert (2017).

These uses raise the question of why Quebec would have engaged in pre-emptive use of s. 33 rather than wait for the Court to rule and invoke s. 33 if necessary, to set aside a judicial decision and restore the impugned legislation. Any response can only be speculative, but it is reasonable to assume that this pre-emptive use was seen as an effective and practical policy response to Quebec's concerns about protecting its education policy from potential challenges, particularly absent strong controversy surrounding earlier uses of this power. A pre-emptive use was likely viewed as a more efficient away of avoiding policy uncertainty than to have to wait for multiple court challenges to work through the system, compounded by the need to then introduce a legislative response in the event of a negative high court ruling. Moreover, although protecting the denominational character of Quebec's public education system was deemed an important objective in a federalist sense, there was no perceived need to stage a "public war" on the Charter by waiting for litigation and then overriding a Supreme Court ruling.

The thickest examples of a federalist use of the notwithstanding clause occur in categories three and four. These uses justify more detailed discussion because they represent the most significant examples of how the notwithstanding clause has been used explicitly to mitigate tensions with federalism.

3. Federalist use of section 33, as a protest of the 1982 constitutional changes. The sole use of the notwithstanding clause in this category was Quebec's use of it as a political protest of the decision to adopt the Charter and other constitutional reforms without Quebec's consent. Shortly after the Charter came into effect, the Quebec National Assembly invoked the notwithstanding clause in a retroactive and omnibus fashion to repeal and reenact all legislation passed before the Charter was enacted. This action represented a political statement of opposition to the Charter and to the willingness of Canada to reform the constitution in a manner that affected Quebec, despite its failure to consent to the changes. As the Bélanger-Campeau Commission reported, the 1982 constitutional reforms contain "a new definition of Canada which has altered the spirit of the 1867 Act and the compromise established at the time."[8] Christopher Manfredi characterizes Quebec's invocation of the notwithstanding clause in this manner as forcefully confirming Quebec's opposition to how the Charter was adopted as well as its substance (Manfredi 2001).

4. Federalist uses of section 33, to disagree with a Supreme Court ruling. Four uses of s. 33 constitute thick federalist responses and have involved explicit contestation about the validity or merits of conforming to judicial Charter norms that constrain provincial priorities on areas of particular significance from a federalist perspective. Quebec has twice used it in this manner and Alberta and Saskatchewan

8. Report of the Commission on the Political and Constitutional Future of Quebec (Quebec: Editeur Officiel du Québec, 1991), 30.

have each used the notwithstanding clause once to dissent from judicial norms that constrain provincial autonomy.

Quebec's Use of Section 33 to Protect New Sign Law

The most controversial use of the notwithstanding clause to date was Quebec's response to a Supreme Court decision that ruled unconstitutional sign law legislation intended to promote the "visage linguistique" of the province. The impugned legislation was enacted by the Parti Québécois and prohibited the use of any language but French on public signs. On 15 December 1988, the Supreme Court ruled this restriction was invalid for violating freedom of expression in a manner not justified under s. 1 of the Charter (in *Ford v. Quebec*).[9]

In the provincial election campaign that preceded this ruling, provincial Liberal leader Robert Bourassa had promised English voters that if elected, his government would allow bilingual signs. He also promised to end the previous PQ government's practice of systematically invoking the notwithstanding clause to protest the 1982 constitutional changes (Russell 2004, 145).

However, the ruling occurred in a political moment that would influence how Bourassa interpreted his election commitment: just beyond the half-way stage of the three-year ratification process for the controversial Meech Lake Accord, which was initiated to address Quebec's minimum demands to agree to the 1982 substantial reforms adopted without Quebec's consent. Three days after the Court's ruling, the largest nationalist rallies occurred since the 1980 referendum, urging the Bourassa government to use the notwithstanding clause to overturn the Court's ruling. After the rallies and facing a divided cabinet and caucus, Bourassa decided to enact new legislation—Bill 178—that would maintain a French-only requirement for commercial outdoor signs, while also allowing multilingual signs indoors as long as they were out of sight from the street (Russell 2004, 145–146). Bourassa indicated he would invoke s. 33, which would insulate the new sign law legislation from constitutional challenge. Some question whether use of the notwithstanding clause was actually required (Russell 2004; Hiebert 1996, 144) as the Supreme Court had indicated it was constitutionally valid for Quebec to give priority to French on public signs, as long as it did not ban the use of other languages.

The use of s. 33 provoked substantial controversy. Public and political actors did not debate whether the legislation would have satisfied the Court as a reasonable limitation under s. 1 in the event of an almost certain constitutional challenge. Instead, debate focused on what Quebec's use of the notwithstanding clause signalled for the already controversial political issue of how the proposed distinct society clause in the Meech Lake Accord would affect interpretations of the Charter.

9. *Ford v. Quebec (Attorney General)* [1988] 2 SCR 712.

Peter Russell characterizes the reaction to use of the notwithstanding clause outside Quebec as severe and tribal (2004, 146), while Patrick Monahan characterizes this decision as weakening political support for the Meech Lake Accord to the point of there being "virtually no chance that the Meech Lake Accord would be ratified" (Monahan 1991).

Contributing to this controversy was Bourassa's explicit federalist explanation for invoking this power. In defending his decision, he justified it both in terms of protecting Quebec's culture and also his responsibility as premier to initiate a federalist response to the Charter. As he argued:

> When two fundamental values clash, someone has to make a choice, and find a balance between both. An unavoidable arbitration has to take place. Anywhere else in North America, the arbitration would have been made in favour of individual rights …
>
> At the end, when a choice had to be made between individual rights and collective rights, I arbitrated in favour of collective rights, by agreeing to invoke the notwithstanding clause.
>
> … I am the only head of government in North America who had the moral right to follow this course, because I am, in North America, the only political leader of a community which is a small minority.
>
> Who can better, and who has more of a duty to protect and promote the French culture if not the Premier of Quebec? … I chose to do what seemed to me to be vital for the survival of our community. (*Globe and Mail* 1988)

Enhancing the controversy associated with Bourassa's federalist explanation for using s. 33 was his suggestion that, had the Meech Lake Accord and its distinct society clause been ratified before the Court ruled in *Ford*, it would not have been necessary to use the notwithstanding clause. This statement implied the following assumption: that the distinct society clause would have changed how the Supreme Court interpreted the issue and would have resulted in a different ruling. Bourassa's explanation was extremely controversial, particularly for those whose concerns had been dismissed as unfounded, particularly outside Quebec where defenders of the Accord suggested this clause would not have any substantive impact on interpretations of the Charter because it was little more than constitutional poetry: a symbolic statement of the fundamental characteristics of Canada. By linking the distinct society clause and the notwithstanding clause, Bourassa's explanation also fueled controversy amongst those who had argued that both provisions were inconsistent with how many interpreted the significance of the Charter project: to ensure the primacy of judicial interpretations of individual rights over political decisions that would infringe them (Hiebert 1996, 138–142).

Also adding fuel to the controversy about Quebec's use of the notwithstanding clause was the intervention of former prime minister, Pierre Trudeau, and the response of the then current prime minister, Brian Mulroney. In a highly polemical editorial in the *Toronto Star* and Montreal's *La Presse*, Trudeau characterized

Quebec nationalists as "perpetual losers" and criticized Mulroney and the ten provincial premiers for authoring a constitutional reform that would "render the Canadian state totally impotent" and would destine the country's governance to "eunuchs" (*Toronto Star* 1987). In retaliation, Mulroney blamed Trudeau for agreeing to include the notwithstanding clause in the Charter, and characterized the potential impact of this power as rendering the Charter "not worth the paper it is written on."[10]

In short, Quebec's use of s. 33 to insulate new sign legislation from judicial review appears to have crystallized opposition to the notwithstanding clause. As discussed earlier, apart from the omnibus use of s. 33 as a form of political protest, previous uses of s. 33 had sparked little discussion and debate. Although the earlier omnibus use of s. 33 did not go unnoticed, its motivation was generally seen for what it was—a political (and federalist) protest rather than an explicit attempt to give primacy to legislative objectives that infringe upon protected rights.

Alberta's Use of Section 33 to Protest Supreme Court Jurisprudence Affecting Marriage

In 2000, Alberta employed s. 33 as a political protest of the policy implications provinces would endure from judicial interpretations of equality rights with respect to the treatment of sexual orientation and those in same-sex relationships. Alberta passed the Marriage Amendment Act (Bill 202) in a free vote within the government caucus. The government supported this private member legislation, which invoked the notwithstanding clause to disagree with the Supreme Court's interpretation that equality rights in s. 15 protect against discrimination on the basis of sexual orientation. At one level, this protest was a symbolic gesture as Alberta (like other provinces) lacks jurisdiction over marriage. However, seen from a federalist perspective, Alberta's dissent is consistent with earlier criticism by the provincial government for having to change critical assumptions for a wide range of social policies to conform with national judicial norms about the scope of equality rights (Hiebert 2002, 190–198). This issue has significant implications for provincial autonomy, and hence federalism, because the provinces have the bulk of responsibility for social policies that make distinction about benefits and responsibilities where norms about how to define family or spouse are critical in these distinctions.

10. House of Commons Debates, Brian Mulroney, 6 April 1989, p. 153.

Saskatchewan's Use of Section 33 to Protest Lower Court Ruling on Non-Minority Faith Students Attending Separate Schools

In 2018, Saskatchewan invoked the notwithstanding clause in a reactive manner to set aside the effects of a judicial decision after the Court of Queen's Bench ruled that the province had violated the principle of religious neutrality and equality rights by providing funding for non-minority faith students to attend separate schools.[11] The case arose after non-Catholic parents decided to send their children to a local Catholic school, rather than bus their children to a more distant public school following a decision to close their previous public school for declining enrollment. Rather than appeal the ruling, then premier Brad Wall indicated his government would invoke s. 33[12] and he defended this use of the notwithstanding clause to allow parental choice (Weatherbe 2017). Bill 89 was introduced by Wall's government in 2017 and was passed a year later by which time Scott Moe had become premier.

The Saskatchewan government's use of s. 33 can be appropriately characterized as a federalism-inspired disagreement with the judiciary. As discussed above, education policy is not only a significant area of provincial responsibility, but provincial autonomy on this issue was considered an important and contested issue at the time of Confederation. Moreover, questions related to funding religious schooling have remained sources of contestation within provinces.

Quebec's Pre-Emptive Use of Section 33 to Ignore Judicial Norms about Freedom of Religion

In 2019, the Coalition Avenir Québec (CAQ) passed legislation that included a pre-emptive use of the notwithstanding clause. The legislation (Bill 21) imposes a ban on what is characterized as religious symbols for a broad range of public servants, including judges, court officials, police officers, prosecutors, elementary and high school teachers, and members of government commissions. The stated intent of the legislation, "An Act respecting the laicity of the State," is to promote secularity to ensure a "balance between the collective rights of the Quebec nation and human rights and freedoms." Premier François Legault acknowledged that use of the notwithstanding clause is "a big decision" but one he says is justified

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11. *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan, Queen's Bench For Saskatchewan*, 2017 SKQB 109, 20 April 2017.

12. Saskatchewan, An Act to Amend The Education Act, 1995 (Bill 89). The legislation received Royal Assent 30 May 2018.

to protect collective rights and to maintain a distinction between government and religion (Authier 2019). The use of the notwithstanding clause is categorized as a federalist use, as its promoters justify its use as a way to protect "our identity" (*Montreal Gazette* 2019) and clearly reject the merits of conforming with judicial norms about freedom of religion where these interfere with collective and cultural objectives.

PART THREE

Political Reluctance to Invoke Section 33—Inferences for Federalism?

The notwithstanding clause has been used sparingly since the controversial use by the Bourassa government in 1988 to insulate new sign legislation from judicial review following the *Ford* ruling. This infrequency and the controversy generated by Quebec's use during the Meech Lake Accord are often interpreted as related; provinces are presumed to be reluctant to invoke this power because of the anticipated controversy that such use would generate. Adding to this perception is Alberta's quick reversal of its stated intent to use the notwithstanding clause in 1998 following swift and robust controversy after the proposed use was announced. [13]

However, recent developments suggest that the controversy associated with invoking this power might no longer be as serious an impediment for using it as was previously assumed. Ontario Premier Doug Ford proposed to invoke the notwithstanding clause in 2018 after an Ontario Superior Court ruling declared that legislation to change Toronto municipal boundaries was unconstitutional. At issue was the Better Government Act which reduced the number of wards for Toronto municipal elections from forty-seven to twenty-five and did so during an ongoing campaign after more than 500 candidates had already been certified and had decided to contest the election under the assumption the earlier ward boundaries would be in effect. Ford criticized the court ruling as "unacceptable" for its interference with the democratic will of the legislature, indicating he was not only prepared to invoke the notwithstanding clause to set aside the effects of the ruling, rather than wait until the decision was appealed, but was not afraid to invoke the clause

13. A controversial proposed use of the notwithstanding clause was Alberta's decision to invoke the notwithstanding clause in Bill 26, The Institutional Confinement and Sexual Sterilization Compensation Act. Then Premier Ralph Klein admitted that the government's consideration of the notwithstanding clause was a mistake, and implied that his government had been badly advised by its own legal advisers. (Alberta 1998; *Vancouver Sun* 1998, A10; *Calgary Herald* 1998, A1, 3).

again if courts ruled against his government. The legislature met in a rare weekend and overnight session to pass revised legislation that maintained the new twenty-five-ward system and included the notwithstanding clause. However, before the legislation was passed, the government sought an urgent hearing before the Ontario Court of Appeal to request an immediate stay of the lower court ruling. A senior government lawyer indicated that if this request was successful, the government would not proceed with its revised bill (that included the notwithstanding clause; CBC 2018). The stay was granted, which meant that it was not necessary to proceed with the revised legislation that included the notwithstanding clause.

Had the notwithstanding clause been invoked, this would best be characterized as a democratic response to the Charter, which was clearly indicated in Ford's explanation for why this power should be invoked. His argument was constructed in explicit democratic terms without obvious reference to federalist reasons.

What proved interesting about this event was that extreme controversy about using the notwithstanding clause appears to have had little effect on discouraging the Ford government from pursuing the notwithstanding clause and promising to use it in the future. Loud protests occurred both inside and outside the Ontario Legislative Assembly. Moreover, several key participants in the 1981 constitutional negotiations that led to the adoption of the notwithstanding clause stated publicly that they did not believe Ford's use was appropriate or consistent with the intent of the clause. These included Roy McMurtry, Roy Romanow, and Jean Chrétien who criticized Ford's intent to use the clause, which they characterized as having been "designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration" and not "to be used by governments as a convenience or as a means to circumvent proper process" (Canadian Press 2018). Former Ontario Conservative premier Bill Davis (who was in power during the 1981 constitutional negotiations) also stated that he did not believe Ford should use the notwithstanding clause in this manner. He added a federalist explanation that had not been made before with respect to the clause: that the "sole purpose" of this clause was to provide some relief in "exceptionally rare circumstances" when a province wished to introduce a "specific benefit or program provision" affecting some segments of the population but not all, and therefore might be viewed as discriminatory (Paikin 2018). In addition to these statements by former prominent politicians, more than 400 legal academics signed a letter to Ontario Attorney General Caroline Mulroney asking her not to support use of the notwithstanding clause (Rizza 2018).

Quebec's recent use of the notwithstanding clause to ban the use of religious symbols by public servants also underscores that substantial controversy about using the notwithstanding clause may not necessarily be a strong deterrent to prevent a legislature from invoking this power. Both the bill and appropriateness of using the notwithstanding clause were hotly contested. The claimed neutrality of the bill was challenged as it treats religious symbols as if these are simply choices or options that are neutral in their effects, regardless of their significance to one's religious

values or heritage. However, the impact of the legislation will be anything but neutral and will effectively require individuals who wish to pursue public sector careers to make a choice between employment and abiding by religious practices and beliefs, despite the absence of any harm that would otherwise be inflicted on others in society. Not surprisingly, the bill was subject to extensive public protests (Oliver 2019).

Critics argued the legislation is discriminatory and will inspire intolerance. Gérard Bouchard and Charles Taylor, who co-chaired the 2008 Bouchard-Taylor report on reasonable accommodations, both denounced the bill. Moreover, Bouchard accused the government of contradicting earlier uses of the notwithstanding clause by the province, which he interpreted as having been invoked as a way of protecting the rights of citizens, but in Bill 21 this power is being used to infringe citizens' rights (Magder 2019).

Montreal city councillors unanimously adopted a declaration opposing the bill, and Montreal mayor Valérie Plante denounced the bill, stating on behalf of the city's government that "[I]t is our duty to speak up" and to affirm that those individuals affected by Bill 21 have the "right to have the same opportunities whoever you are, whatever you wear." The city's declaration states that Quebec "is already a secular society, and there is no need to legislate what employees wear" (Stevenson 2019).

Whether or not recent trends suggest a greater provincial willingness to invoke this power, it is problematic to assume that the relatively spartan use to date of the notwithstanding clause signals that provinces have accepted the primacy of judicial interpretations of the Charter over federalist goals. The problem is that this assumption overlooks the distinct possibility that governments knowingly pass legislation that stands a high probability of being declared unconstitutional, whether or not they are prepared to invoke s. 33.

James Kelly and Matthew Hennigar warn against assuming that a provincial legislative response to a prior negative judicial ruling necessarily complies with the court's interpretation of the Charter, just because it does not invoke the notwithstanding clause. They argue that the Quebec National Assembly has demonstrated willingness to legislate in a manner that appears to ignore the very judicial reservations that were responsible for the prior invalidation of legislation, without invoking the notwithstanding clause. Kelly and Hennigar have characterized this practice as "notwithstanding-by-stealth" (Kelly and Hennigar 2012). This suggests that although the Quebec government is not prepared to be constrained by judicial norms, it is also not willing to acknowledge this by invoking s. 33 in a reactive manner. There is little reason to assume that Quebec is the only province to behave in this manner (for reasons discussed below).

What is relevant is not simply legislative responses to prior judicial rulings that contradict judicial norms without use of the notwithstanding clause. This behaviour can also influence legislative decisions at the outset, before judicial review. Although provincial and federal governments have policy processes in place to advise them on likely Charter problems and provide assessments of the level of risk of a successful

Charter challenge, apprehension of using the notwithstanding clause does not necessarily discourage the introduction and passage of high-risk and potentially inconsistent legislation. Instead, it almost certainly encourages strategic behaviour to choose less controversial ways to promote provincial agendas that are vulnerable to judicial invalidation, which involve reliance on arguments under s. 1 in the event of a Charter challenge. Even if legislation is ultimately challenged and declared unconstitutional for failing to satisfy judicial s. 1 criteria, by the time the relevant government exhausts its appeal options and the Supreme Court has ruled on the issue, another election will likely have occurred before political leaders have to address fully the consequences of losing. Thus, even if the same government responsible for the legislation has been re-elected, its political leaders will have had several years to exploit their party's record and appeal to their political base, while avoiding the potentially damaging label of being the political party that is willing to "override" rights. In other words, this time frame for the potentially non-compliant legislation to function is close to, and may even be longer than, the five-year exemption from judicial review associated with using the notwithstanding clause, but with significantly reduced political backlash than use of s. 33 could generate (Hiebert 2018).

Thus, a problem with equating reluctance to use s. 33 with compliance with judicial norms, and the potential constraint Charter rulings impose for provincial-based differences that federalism would otherwise allow, is that this suggests a legislative motive of compliance with judicial Charter norms that is not necessarily evident. (Hiebert 2017; 2018).

The assumption that a government will invoke s. 33 if it intends to knowingly pass legislation that is inconsistent with judicial interpretations of the Charter also does not confront the continued relevance of Westminster factors when influencing how political power is exercised, despite the adoption of the Charter. These factors ensure governments usually have the power to get their preferred legislative agendas through parliament and may include political objectives that do not necessarily prioritize Charter compliance (Hiebert 2018).

Westminster factors include executive dominance of the legislative process, the introduction of legislation at an advanced stage of development, a strict interpretation of the convention of responsible government (where the government must maintain support of the House of Commons to continue in power) and the centrality of strong, cohesive parties in organizing how parliament functions. In Canada, the convention that government will resign if it loses a confidence vote has encouraged the development of the strongest party discipline evident in Westminster systems, and ensures that defections from the preferences of party leaders are remarkably low.[14] Discipline is maintained not only by the culture of

14. For more analysis of the causes and effects of party discipline and a comparative analysis of Westminster-based jurisdictions, see Kam (2009), and Rhodes, Wanna, and Weller (2009).

shared political commitments but also by privileges leaders dispense, such as elevation beyond the backbench (or, if in opposition, appointment to, or demotion from, a shadow minister position) but also by the power leaders exert to demote ministers or expel members from caucus and deny them the opportunity to run as a party member in future elections.

Rather than equate non-use of the notwithstanding clause with acceptance of judicial interpretations of the Charter (and the possible diminishing of federalist responses) what is required instead is careful analysis of whether governments are knowingly promoting legislative agendas (with legislative approval) that are inconsistent with judicial norms, followed by an assessment of whether and how these are understood as democratic or federalist responses to the Charter. As discussed earlier, while democratic and federalist dissent from the Charter might not be mutually exclusive, it is helpful to assess where the emphasis is best placed if for no other reason than to have a better understanding of the extent to which the Charter constrains the diversity that the Canadian federalist principle is intended to protect.

CONCLUSIONS

Use of the notwithstanding clause as an instrument of federalism has been far more prevalent in Quebec than in other provinces where Charter supporters appear to have accepted the value and narrative of a pan-Canadian conception of rights that the Charter has encouraged, and which judicial interpretations generally reinforce.

Although the notwithstanding clause has the potential to offer a stage on which provincial governments can defend their disagreements with pan-Canadian or uniform interpretations of the Charter, and argue against the primacy of Charter over federalism concerns, deep scepticism about the legitimacy of the notwithstanding clause has undermined not only the willingness to address whether or how federalism and the Charter can be reconciled, but has also undermined constitutional transparency when governments seek to constrain the Charter's influence on legislation, whether motivated by federalist or democratic concerns.

Whether or not anticipated controversy continues to discourage frequent use of the notwithstanding clause for democratic or federalist reasons remains to be seen. However, this controversy does not necessarily discourage governments from promoting legislation that is inconsistent with judicial norms. Instead, it almost certainly encourages strategic behaviour to choose less controversial ways to promote provincial agendas, which involve reliance on arguments under s. 1 even if aware these arguments stand a high chance of being defeated. However, this form of strategic political behaviour diminishes what some might argue is the virtue of the notwithstanding clause: imposing an expectation that government justifies and explains its reasons for disagreeing with judicial norms about the Charter, and the constraints this jurisprudence suggests for legislative decisions. By avoiding debates about uses of the notwithstanding clause, this form of strategic behaviour

also helps explain why politicians, academics, and courts have not confronted in any serious manner the following important questions: are differentiated interpretations of Charter rights for federalist or democratic reasons justified and, if so, what principles should guide political or judicial judgments that diverge from judicial norms about the scope or meaning of protected rights?

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4

THE CHALLENGE OF MODERNIZING AN UPPER CHAMBER OF A FEDERAL PARLIAMENT IN A CONSTITUTIONAL MONARCHY: THE SENATE OF CANADA IN THE TWENTY-FIRST CENTURY

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Whatever else might be said of the title to this paper, there is no disputing its length. The explanation for this turgidity may be a poverty of language on my part, but I will argue, instead, that the complexity of its argument is of a piece with the complexity of the institutional change now underway. While reform of the Senate is something of a staple in the topic of Canadian politics, I maintain that it has secured that reputation because the subject has never been seriously examined. Usually, when the topic has been Senate reform, the real issue has been more power to the provinces (Triple E, for instance) or less power to the executive located in the House of Commons. In fact, there have always been more answers on offer than questions posed when the subject at hand has been the structure and function of the upper chamber. Since the decision of the Liberal leader, Justin Trudeau, to sever Liberal senators from the party's caucus and following the advisory opinion of the Supreme Court of Canada in 2014 on the Harper government's proposal for indirect elections with term limits for senators, that sequence—answers before questions—no longer prevails. On the 150th anniversary of Confederation and, in particular, of the upper chamber the Fathers of Confederation designed and bequeathed Canadians, the issue now is "how is the second chamber to function in its relations with the other legislative part of parliament?" There is no clear or immediate response to that query, in part because the constellation of forces at play

is without precedent. In early June 2017, the 105-member Senate comprised thirty-eight Conservatives, eighteen Liberals, six independents, thirty-five independent senators who have formed an Independent Senators Group, and one independent Reform senator. There were seven vacancies. However the Senate of today may be described, it is not your father's Senate! It is no longer acceptable to dismiss the Senate as tangential to politics or of little influence for the conduct of Canadian government, a position that was always of dubious validity, since it was the Fathers of Confederation who designed it in the first place.

Those paying close attention to my opening remarks will have noted that I have not, up to now, uttered the word constitution or variants of that word. Ron Watts, long a magisterial figure in these precincts, used to say that Canada must be alone among democracies of the modern world in its obsession with constitutional matters—thirty years ago books on Canada's constitutional odyssey could be purchased in airport bookshops. Apocryphal or not, the point of the reference is that the constitution Watts was referring to concerned federalism and the manifestation of the federal principle in the institutions of government. If what is occurring today in Canada as a result of the Supreme Court's 2014 ruling is deemed constitutional in its dimension and significance—and it would be hard to dissent from that proposition—then it is of signal importance to note that nothing constitutional in the "Wattsian" sense of the term has occurred. No statutes, no laws, no amendments. The Court had found that the object sought by the legislation of the Harper government could be achieved only through amendment of the Constitution Act, and that never happened; while Mr. Trudeau, on becoming prime minister the following year, delegated to an independent advisory body the selection of candidates for nomination to the governor general for appointment to the Senate. Surely, in light of these facts, a strong contender as a question on a PhD comprehensive examination in Canadian politics would be the following: "There is a tendency to underestimate the importance of convention and over-emphasize the importance of strict law in the Canadian constitution. Discuss."

How has this happened? A simple question deserves a straight answer: Canada is a constitutional monarchy. W. L. Morton (1972, 44) summarized it best: "The proposed scheme of government was, the Fathers insisted, a union monarchical in principle, parliamentary in form, and traditional in spirit." Take your choice: nothing has changed or everything has changed. (Parenthetically, I might say that I have been invited this sesquicentennial year to give three papers on the Senate—which is a challenge when it comes to avoiding repetition—and one on the House of Commons. Yet none on the Crown, even though in the last 150 years the prerogative has not contracted very much; it has been brought under the control of responsible ministers, which is a very different matter.) Despite the introduction of an independent selection procedure, the key characteristics of the Senate remain as they have always been, with the qualification that instead of lifetime appointment, senators have since 1965 been appointed to age seventy-five. Otherwise there is a fixed upper limit and equal allocation among four senatorial divisions (and later

the addition of six senators for Newfoundland and Labrador, plus one each for the three northern territories).

Some of those who adopt the view that everything has changed, or is about to change, argue from the perspective of the "threat" posed by an empowered Senate to the practice of responsible government. The most articulate purveyor of this alarm is Andrew Coyne. In a *National Post* article earlier this year, Coyne (2017a) wrote that "whether we know it or not, a constitutional crisis is upon us …The cause of the crisis is the Senate, and its increasing pretensions of superiority over the House of Commons: the demonstrated readiness of a few dozen appointed senators to overrule the elected representatives of the people." A couple of months later, another columnist reported a "lobbyist" as saying that "senators have become more open to amending legislation," although the Senate had not chosen to defeat a government bill (Smith 2017). What the phrase "more open" means in this context is unclear, although presumably it is related to the increased number of "non-partisan" senators in the chamber, with the inference being that interest group pressure will rise and be more influential as party discipline declines.

The power of this criticism originates in the power of the commitment to responsible government as the central principle of governing, one it is important to note that preceded the formation of the federal state. And one whose victory came at the expense of appointed governors and legislative councils. Upper chambers, in this perspective, existed to be vanquished. Only half of Canada's provinces ever had a second chamber and the last of these to be abolished was Quebec's in 1968. In this scenario, the opening words of the Preamble to the Constitution Act, 1867, which speak of the desire of the colonies to have a "Constitution similar in Principle to that of the United Kingdom," made their own unique contribution. The House of Lords, a hereditary body at the time of Confederation, and for another ninety years, declined in dominance as the franchise was extended in Great Britain, beginning in 1832. The Parliament Act, 1911 introduced a suspensive veto for the Lords, one that was further reduced in 1949, with the consequence, in words of American political scientist William Riker, of introducing functional unicameralism to the United Kingdom, where the cabinet acts as "an executive committee" (Riker 1992).

Whether one agrees with Riker that unicameral legislatures are less balanced in their treatment of public policy than bicameral legislatures is a separate matter from another consequence of the Parliament Act, which is to make the House of Lords a residual chamber. More than that, it is strikingly different in other characteristics from the Canadian Senate, beginning with no upper limit on its numbers and no territorial distribution of its members. Notwithstanding the differences between the upper chambers of the United Kingdom and Canada, there has long been a disposition in some quarters to promote the Lords as a model for emulation this side of the Atlantic. The first book-length study of the Senate, by George Ross (1914), a former premier of Ontario, was *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered*, which recommended a Canadian equivalent to the Parliament Act, 1911; while in 2016, former senators Michael Kirby and

Hugh Segal (2016) authored a paper for Public Policy Forum, "A House Undivided: Making Senate Independence Work," that echoed the recommendation. Whatever the rationale for advocating this option in these particular circumstances, there has been on occasion in some quarters a sense of penitence when it comes to the powers of the second chamber: that is, the upper house should in no respect harm (that is, threaten) the lower chamber in the exercise of its fundamental duty. For what reason? Implicitly or explicitly, the rationale for the argument appears to be that because they are unelected, senators have no personal stake in the political decisions taken. The commitment to election as the sole source of legitimacy is puzzling in a system of constitutional monarchy that, except for the period associated with the Rebellions of 1837, has never had a republican rival of any significance.

It would be an exaggeration to say that proponents of a suspensive veto are opposed to the Senate having a legislative role, yet at best that role could never be more than advisory since, in Coyne's words, appointed senators should never "overrule the elected representatives of the people" (Coyne 2017a). The crux of the quandary then becomes: how far can the Senate go to promote its interpretation of the requirements of good legislation? It should be noted that the Court's view in 2014 of the Senate as a *legislative* body, which is of seminal importance, is neither new nor unique to the opinion it offered. In a reference opinion of a quarter-century earlier, *Re: Legislative Authority of Parliament in relation to the Upper House*,[1] which was occasioned by the proposal of the government of Pierre Trudeau to create in lieu of the Senate a House of the Federation with suspensive veto powers, the Court said that "a primary purpose of the creation of the Senate, as part of the federal legislative process, was … to afford protection to *various sectional* interests in Canada in relation to *the enactment* of federal legislation."[2] What is unique to the 2014 ruling is the enunciation of additional fundamental principles—federalism, bicameralism, and independence—as compensatory constitutional characteristics for the realization of the principle (albeit imperfect) of representation by population in the lower house. Indeed, the 2014 ruling had a much longer pedigree than this. First, there was the constitutional amendment provision of 1915, which established a nexus relationship between a province's Senate and Commons representation (no province should have fewer of the second than of the first, s. 51(a), Constitution Act, 1867); and, second, there was the reference opinion *re: Provincial Electoral Boundaries*,[3] which spoke of section 3 of the Charter guaranteeing not equality of voting power per se but the right to "effective representation."[4]

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1. *Reference Re: Legislative Authority of Parliament in Relation to the Upper House, 1980 1 SCR 54.*

2. Ibid, at page 67, emphasis added.

3. *Reference re: Provincial Electoral Boundaries, 1991 2 SCR 158.*

4. For an analysis of the *Reference Opinion*'s significance in the study of elections, see Spafford (1992).

Supporters of the Triple E concept of the Senate saw bicameralism only through the narrow lens of a federalism whose constituencies were provinces. By contrast, the 2014 opinion suggests that the Senate represents the unrepresented: that is to say that it is a chamber of the people but not a representative body—its constituencies both broader and yet more specialized than those based on a democratic franchise. Because they are not elected, senators have no personal stake in the result of their actions, which may come by way of several forms: advice, or observation, or amendment, or even, by way of defeating a bill.

While it is not my intention or desire to become an advocate for the Senate, I sometimes feel as if I have been thrust into that role by general reluctance to grant the one second chamber the country has a role other than as a "spoiler" in the realization of responsible government. There is irony in that statement, since in other contexts it is frequently maintained that political parties, government, and the Commons itself do a competent job in achieving that goal. Clearly, such statements are generalizations, but they underline a point too often ignored when the Senate is the subject at hand. For more than a century and a half, responsible government has been the preserve of political parties active in electoral politics and situated in the Commons. Their rise and expansion into national institutions is a development of exceeding importance. Yet, as may be seen in multiple variables—among them, party membership, voter turnout, leadership selection—political parties are no longer the coherent entities they once were. Why this is the case is the subject of another paper—by someone else—but the ramifications of these developments are relevant to the Senate and especially to the future of the Senate. Parliament has never been examined as a bicameral institution; neither R. MacGregor Dawson nor Norman Ward included the term "bicameral" in the index to the various editions of *The Government of Canada*, published by the University of Toronto Press between 1947 and 1970. Such an omission will no longer be acceptable in future works on Canada's parliament.

For the first time, the ruling of 2014 has elevated bicameralism as a foundational principle of Canadian parliamentary government. Yet the Senate that has been declared an equal to the Commons in the legislative process is quite unlike its lower house counterpart: parties are in retreat as organizing vehicles and the discipline associated with parties is but a fading memory. Of course, this is not a consequence of the Court ruling, since Justin Trudeau, as party leader but not yet prime minister, severed Liberal senators from the parliamentary caucus before the Court handed down its opinion. Liberal senators are no longer "whipped," a development that makes them among the most independent of Liberals on the Hill. (Parenthetically, expelling the Liberal senators increased the Liberal leader's, now prime minister's, power). These days there is much talk about the heavy hand of the Prime Minister's Office, whether of the present incumbent or of his predecessor, but the indictment does not apply to the bulk of senators. The irony of this evolution is that the Senate, rather than the Commons, looks more like the legislative

chamber Canadians say they want.[5] The Commons is criticized as unresponsive to elections as well as providing little effective check on government. By contrast, senators are unelected, less subject to party discipline, and increasingly demonstrate a disposition to act assertively.

A cursory examination of recent Commons debates, and media coverage of Commons debates, on matters such as electoral reform and House rules changes reveal both a cynicism of the enterprise and a narrow sense of its purpose. Consider, for example, an article, once again by Andrew Coyne, with the title, "Here's How to Really Reform Parliament." Its subtitle, "Reducing Power of Government a Good Start," conveys the intra-cameral perspective that pervades the discussion (Coyne 2017b). That approach is as predictable as it is flawed in the new politics of bicameralism. Flawed because the principle of responsible government that animates the political parties and the chamber they populate appears ineffective as a mechanism for uniting the elected and the electorate. By contrast, the Senate is in a position today where it slowly—or perhaps not so slowly—may promote itself as an ally of the people, with the potential to promote rivalry (even jealousy) between members of the two chambers: those elected and disciplined and those unelected and free of constraint. Another, possible demonstration effect could be to embolden MPs to act less disciplined. Parliament's historic task is to represent, even if imperfectly so, the Canadian people. But in the modern world of social media, burgeoning metropolitan populations, and kaleidoscopic social and cultural values, representation, the essential activity ascribed to parliament, as presented in the writings of Dawson and Ward, for instance, must share the political stage more frequently and more willingly than in the past with other activities, such as mobilizing assent. Indeed, it might be argued that parliament's main task has always been to mobilize assent to legislation rather than to represent constituency opinion. In the rapidly changing demography of modern Canada, it may also be argued that the Senate is well placed to promote the assent of minorities, however defined, who are not heard or not heard clearly in the House of Commons. Parliament is a deliberative body and deliberation, even its critics agree, is something the Senate is demonstrably good at doing.

The Senate is no longer a partisan fiefdom, and absent that restraint there is a strong possibility that a public appreciation of the benefits of bicameralism will increase. Clearly, such a development lies in the future, and no political scientist with the experience of being asked to predict election outcomes will leap to envision a truly bicameral parliament, where one house remains the confidence chamber, while the other designs a new role for itself. On the other hand, to argue that the future Senate will, in its relations with the Commons, reflect the past is insupportable. To the extent that this prediction is accurate, then the implications that follow are vast: for the government, for the Commons, for the opposition parties in the Commons,

5. See Keller (2017).

for political parties generally and perhaps especially for third or protest parties, who it has been argued have been strong in Canada in substantial part because the upper house has traditionally been weak (Cody 2014). To this list of those potentially affected by upper house alteration might possibly be added the Crown in the person of the governor general, who will confront legislative chambers where the outcome of deliberations is less certain than in the past.

It has been a trope of Canadian politics for the past century and a half that the Senate's authority derives from either the partisan appointment of its members or the terms of the Confederation agreement. A succinct illustration of the latter explanation may be found in a recent critique of the upper chamber: "The greatest single role of the Senate was this, enabling Confederation to take place at all. The day Confederation became a reality on July 1, 1867, the Senate's principal function had been fulfilled" (Boyer 2014, 181). In either instance, the authority of parliament's unelected house lay in the past—historicity being its genealogy. Whether or not that was ever the case, it can no longer be maintained: in the future the Senate's authority must derive from another source, a source yet to be determined.

What is the "fit" to be—indeed, should there be a "fit"—between a lower house that continues to enforce the principle and practice of responsible government and an upper house that reflects and interprets the public will? The hearings of and the testimony presented to the Senate Modernization Committee over the winter and spring of 2016–17 make clear that there is no indisputable answer to the question, "how is the Senate to organize its business?" This time, unlike thirty years ago in the era of enthusiasm for a Triple-E Senate, the question precedes the answer. But that an answer will be forthcoming is indubitable. Parliament in a constitutional monarchy is demonstrably adaptable, whether the challenge is unicameral legislatures, a separatist party acting as official opposition, an opposition comprised of three political parties, each with one member in the legislature, a legislature in which no opposition members were elected, or where it is the custom that there is no opposition but decisions are made consensually. One examination of the metamorphosis of Canadian political parties may be found in an article written by Norman Ward (1952). Ward's thesis concerns the emergence of discipline and control, and with them the appearance of integrative national institutions in the form of the Conservative and Liberal parties. Despite some similarities in leadership skills, the structure and cohesion of the parties Macdonald and Laurier headed at the beginning of their careers in Canadian politics were light years apart. Consider, too, the contrast in the life of governments in United Canada before 1867 and the long tenure of leaders, such as Macdonald, afterward. For those who seek guidance in the aura of uncertainty that is arising around Canada's parliamentary politics, two classic and informative sources to consult are Stephen Leacock (1912), *Baldwin, LaFontaine, Hincks: Responsible Government* and John Charles Dent (1881), *The Last Forty Years: The Union of 1841*. Perplexing as today's political climate may appear, it is not without precedent.

For the record there is historical precedent elsewhere for a state of affairs where the institutions of parliament are less than clear in their form or function: "[In the eighteenth-century] in England the idea of a political opposition was created by disaffected Tories under the leadership of Viscount Bolingbroke and his circle…. The emergence of the first modern political parties—Whigs and Tories—grew out of this attempt to legitimize and lend respectability to the idea of a formed opposition not as a necessary evil but as a permanent feature of government as such" (Smith 2016, 127). While it goes beyond the present discussion to enter into an examination of Court intrigue of that era or to trace the consequent rise of a Country opposition, still it is worth recalling that at this embryonic stage of modern parliamentary development there was no agreement on what the future arrangement would look like.

> Unlike the Ministry, Opposition had no facilities for co-ordinating its efforts ….Government funds and patronage constituted a "war chest" for the Court party. An opposition had to rely upon its own resources … In the face of such difficulties it required leadership, tact, and vision to achieve cohesion among several groups which had little in common save being out of office. Long-range plans were impossible, with the result that party co-operation seldom survived a session, and Opposition had to be new-modelled before the next meeting.
>
> Nothing called an Opposition into existence as a matter of form. Neither orders nor usage assigned any responsibilities to those out of office. No "question hour" provided a regular means of raising embarrassing issues. Neither House accorded the Opposition a place to sit, a condition that hindered co-ordination of effort and gave the Government a considerable advantage over its opponents. (Foord 1964, 34–35)

To the two quotations just cited, the first by Steven Smith in *Modernity and Its Discontents* and the second by Archibald Foord from *His Majesty's Opposition*, should be added the highly relevant scholarship of Harvey C. Mansfield (1965) in *Statesmanship and Party Government: A Study of Burke and Bolingbroke*, in which he traces the evolution in the eighteenth century from "factious unconstitutional," that is, religious-based opposition to constitutional opposition based on parties. Unlike the former, party differences were deemed not *real* but only differences of opinion. Opinion, none the less, that became the basis for cabinet government and the acceptance of peaceful transitions by parties in power.

The analogy between present-day Canada and Great Britain of two and a half centuries ago is attenuated, but still it is a useful analogy. One that underlines the capacity of parliamentary institutions to adapt. And while a major contrast between Britain and Canada is that Canada is a federation; here too adaptation is the lesson to be learned from a study of Canadian politics since Confederation. Adaptation is not prediction and it is impossible to forecast whether the federalism of the future will resemble that of the past. On the basis of probabilities and taking into account the advent of a "new" Senate, the answer is that past practice and events are unlikely to offer a dependable guide in charting a political course. While it

may not be possible to answer with confidence the question "what will the future look like?" that does not mean the question should not be asked, however. I will conclude this chapter by suggesting themes that I expect to be present in Canadian politics, themes that have generally, until now, received little attention.

First, there will be a growth and strengthening in public attitudes toward bicameralism. To the degree that the subject has arisen in the past, it has been filtered through the prism of federalism, which is to say federal-provincial relations. Even though the Senate is the legislative chamber with an indisputable federalist paternity, this will not be the context in which future bicameral debate will occur. Rather, the issue, that greater visibility for the Senate will present, is the consequence of that development for public attitudes toward government generally, and toward the Commons, cabinet, political parties, and opposition specifically. Notwithstanding past criticism of the upper chamber, the Senate has not been a supine body. On the contrary, through the work of its committees, it has been very active. The difference, already evident in the media but which will grow, is public attention being drawn to that activity. Consider a news report in June 2017, in which "Senators Question Meilleur's Ability to be Impartial as Language Commissioner." The article speaks of the Senate as being "turned into a chamber of non-partisans;" of the Acadian Society of New Brunswick applying for "judicial review of … the appointment with the Federal Court …because the nomination process [of the Commissioner] was flawed;" and of the prime minister's defence of his government's choice: "'We will not hold against any qualified candidate their background in politics'" (Galloway 2017).[6] The issues of procedure and partisanship and whether there has been abuse of either in the conduct of government have a new and visible forum in which to be presented. In the post-Charter era, there has been a transformation in the idea of rules, with Canadians more rules-conscious than at any time before, and with the Senate affording a forum to articulate discontent with how rules are applied.

Second, but not unrelated to the preceding point, there is going to be a confounding of what the sense of the constitution is, certainly in respect to parliament. The principle of responsible government continues in its historic location, the House of Commons, but no longer will that, in itself, be an exhaustive explanation of Canadian government. And while it is true that the Canadian Charter of Rights and Freedoms for the past thirty-five years has worked its own transformation on the practices and attitudes of governing, the rise of functional bicameralism, detached from partisan allegiance, will insert similar concerns into the framework of parliament, with the result that a conjunction of issues that play to the Senate's strength and capabilities is emerging. Nowhere is this more evident than in the acute sensitivity the Senate has displayed in its handling of matters that fall within the scope of the Canadian Charter of Rights and Freedoms. It has applied itself in

6. The following day, it was announced that the candidate had withdrawn from consideration for the appointment.

rigorously measuring the impact of bills and government decisions on the rights and freedoms of Canadians, for example, on criminal justice for adolescents, the extradition of people to countries that have the death penalty, the need to control agencies responsible for the fight against terrorism, labour union freedoms, and access to physician-assisted dying. Debates in the Senate on such issues are more intense and probing than in the House of Commons, and thus allow senators to discern more acutely the long-term implications of policy for Canadian society.

While the confounding of the sense of the constitution infects the two chambers of parliament, it surely extends to the Crown as well, since it was alteration in the conditions surrounding the exercise of the prerogative that have enabled a more active and less partisan Senate to emerge. With those factors as background, how (if at all) have the preconditions for the making of law changed? Taking into account the distribution of powers in sections 91 and 92, has parliamentary supremacy been affected by a new concern for bicameralism, and if so, in what way? Does bicameralism, as it appears to be emerging in Canada, increase or decrease parliamentary supremacy? By contrast, does it strengthen the concept of the constitution? What political conventions will develop to guide or frame the Senate in the conduct of its new activities?

A third theme of politics to anticipate in the future is a re-examination of the criteria used to evaluate the quality of Canada's institutions and political practices. Voter turnout, and in particular the general decline in voter turnout, is a familiar lament in Canadian politics. So, too, it is claimed, is the suffocating effect of party discipline on behaviour of members of parliament of whatever party. A popular remedy for the ills of the political system, in so many words, is that "MPs Need to be More Like 'Loose Fish'" (May 2017). Here is a major rationale, articulated or silent, for proposals for electoral reform. Whether the diagnosis or the prescribed remedy is accurate is immaterial to this discussion because, when it comes to the Senate, there are no voters and few political parties and less discipline. In other words, neither the language nor the criteria that have for so long dominated political discourse in Canada is applicable to the situation of the "new" Senate. Not only are Canadians confronting a form of parliamentary institution different from what they have witnessed before, but they are limited in their response to the change by being constrained to interpret events using concepts and a political vocabulary retrieved from the past.

There is no reason to believe that Canadians, who have demonstrated a talent as builders—of railways and canals, of institutions (political, economic, and social), of citizens (for Canadians are not born, but made), are unable to respond to this new challenge. But it *is* a challenge, and must be recognized as one. The most famous line in Giuseppe di Lampedusa's *The Leopard*, a story of the Risorgimento in Italy, is the following: "If we want things to stay as they are, things will have to change" (1961, 29). With emendation suitable to Canada and its bicameral parliament, it is difficult to quarrel with the logic of that analysis.

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5

THE PERILS AND PARANOIA OF SENATE REFORM: DOES SENATE INDEPENDENCE THREATEN CANADIAN DEMOCRACY?

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The Supreme Court of Canada's 2014 opinion in *Reference re Senate Reform* arguably put an end to attempts at major reform of the Senate. The Court determined that establishing consultative elections for senators or senatorial term limits requires provincial consent under the constitution's general amending procedure. In lieu of engaging in daunting mega-constitutional negotiations, the new federal Liberal government under Justin Trudeau engaged in a more modest reform by establishing a "non-partisan, merit-based" appointments process. Modelled on judicial appointment advisory committees and the short-lived Advisory Committee on Vice-Regal Appointments, the new Senate advisory body is a five-member committee comprising three permanent federal members and two members from each of the provinces or territories where a vacancy is to be filled. While one objective of the reform was to eliminate patronage from the appointments process—the advisory committee recommends a list of names to the prime minister—the process also results in senators appointed without partisan affiliation. As a result, "independent" senators now comprise a majority of the Senate's membership.

Two aspects of this recent reform have received critical scrutiny. First, some scholars argue that it is unclear whether the new appointments process is constitutional (Baker and Jarvis 2016, 199). Critics argue for the very same reason that the Harper government's proposal to establish consultative elections requires provincial consent, changes to the appointment process mandating that the prime minister select names from a list provided by an advisory committee also compels recourse to formal amendment (Cyr 2014). This raises the question of whether

the recent reform stands as an illegitimate "constitutional amendment by stealth" (Albert 2015).

Second, another set of criticisms focus on the impact the reform will have (or has already had) on the Senate. Initial criticism of the reform ranged from suggestions it would be irrelevant, contradictory, unworkable, or all of the above (Coyne 2016; Dodek 2015). Some commentators, and at least one provincial premier, warned that the perceived legitimacy conferred by the new process would embolden the Senate to take a more robust, activist role (Canadian Press 2015). After the Senate proposed amendments to a number of bills during the current parliament, those criticisms became starker, with commentators describing the new Senate's actions as an "anti-democratic outrage" (Coyne 2016), "dangerous," and warning its activism could lead to a "constitutional crisis" (O'Neil 2017).

This paper critically analyzes these arguments. In the first section, I explore the constitutionality of the Trudeau government's reforms to the appointments process. I conduct this analysis in the form of providing readers with an insider's perspective of the reform, as I advised the government on the constitutionality of its proposals and authored, at the government's request, a draft proposal for what a "non-partisan, merit-based" appointments process should look like. The government's final policy largely drew from that draft paper.[1] In the second section, I examine recent developments in the Senate's behaviour and relationship with the House of Commons. Despite concerns expressed by some commentators that the Senate's proposed amendments to a handful of bills marks new activism from the upper house, I argue that the context of those amendments do not constitute a significant a departure from past practice. It is far too early to decry a new activist Senate. In fact, the current Senate's behaviour marks a healthy and useful advisory role consistent with the institution's purpose, suggesting the recent reforms have enhanced the Senate's sober second thought role.

THE CONSTITUTIONALITY OF THE NEW APPOINTMENTS PROCESS

Canada's amending formula, established under the Constitution Act, 1982, is famously complex. While the general amending procedure under section 38 requires resolutions be passed by the House of Commons, the Senate, and at least seven provinces representing at least 50 percent of the population—the 7/50 rule—the

1. One important feature of the government's final process that differed from my consultative draft was the inclusion of an application process. In my personal view, the best senators are those who are sought out and convinced to accept an appointment. In other words, I would argue self-application ought to be viewed as a disqualifying trait for prospective senators.

formula includes no fewer than four other procedures, depending on how they are counted. The unanimity procedure under section 41 outlines a number of specific issues requiring the unanimous consent of the provinces. Amendments affecting one or several provinces but not others may be passed under section 43's bilateral procedure via resolutions by the relevant provinces and the House and Senate. Section 44 allows parliament alone to make amendments affecting the House, the Senate, or the federal executive. Finally, provinces have the authority to make amendments affecting their own provincial constitutions under section 45. Complicating matters further, section 42 specifies a number of issues that require recourse to the 7/50 rule. Included among these are changes affecting "the powers of the Senate and the method of selecting Senators" under section 42(b).

In defending its proposal for consultative elections, the Harper government argued that because the prime minister would (formally) retain the ultimate discretion to make the final appointment, the reform did not constitute a change to the "method of selection" of senators. The Court was unconvinced by this argument, and the analysis in its unanimous opinion in *Reference re Senate Reform* focuses on three aspects. The first is that consultative elections would alter the "constitutional architecture" as it relates to the role or nature of the Senate: "The appointed status of Senators, with its attendant assumption that appointment would prevent Senators from overstepping their role as a complementary legislative body, shapes the architecture of the *Constitution Act, 1867*" (2014, para. 59). The Court directly ties the fact that consultative elections would alter the constitutional architecture to its conclusion that they "constitute an amendment" (para. 60).

The Court then specifically addresses the government's argument that elections would not directly implicate the "method of selecting Senators":

> It is true that, in theory, prime ministers could ignore the election results and rarely, or indeed never, recommend to the Governor General the winners of the consultative elections. However, the purpose of the bills is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections. (para. 62)

Finally, the Court emphasized that 42(b) applies to "the entire process by which Senators are 'selected'. The proposed consultative elections would produce lists of candidates, from which prime ministers would be expected to choose when making appointments to the Senate. The compilation of these lists through national or provincial and territorial elections and the Prime Minister's consideration of them prior to making recommendations to the Governor General would form part of the 'method of selecting Senators'" (para. 65).

Given this analysis, why does the Trudeau government's independent advisory process not fall under the weight of similar constitutional scrutiny? The first part of the answer lies in the nature of the exercise of the prime minister's discretion to recommend appointments. Where the Harper government's proposed consultative

elections would have been formally established by law (either by the federal government or in cooperation with provinces), the Trudeau government's advisory committee is established informally, effectively on an ad hoc basis. This formal versus informal distinction is important: the informal nature means it is not a direct attempt to bind future prime ministers to the new process.

In order to be bound by the new process, future prime ministers will have to establish, on their own volition, a similar advisory committee. By contrast, had the Harper government's proposed consultative elections proceeded, his successor would have had to dismantle a formally established process in order to avoid having the pressure of the "democratic mandate" influence the final selection, something the Court felt was unlikely. Thus, the formality (through legal entrenchment) of the reform is an important factor.

The second part of the answer lies in the nature of the change. Where the Court found that consultative elections would threaten to change the Senate's role by transforming a complementary body into a competitive one, it is far from clear an independent advisory process focused on merit and non-partisanship similarly alters the Senate's basic functioning. In a strict sense, it is impossible to know what the Court would say on this point if the Trudeau government's reform is ever subject to a constitutional challenge. This is because the Court's reliance on the amorphous constitutional architecture concept clouds more than it clarifies the scope of the various amending procedures.

The constitutional architecture concept includes written and unwritten aspects of the constitution, and it introduces considerable ambiguity into any analysis of whether specific reforms require provincial consent (Macfarlane 2015). It depends on the justices' ability to correctly identify and analyze the relationships between different animating features of the constitution and the various institutions and processes that comprise it. This is no easy task, as evidenced by the Court's refusal to properly analyze whether proposed senatorial term limits would also alter the Senate's basic functioning (Macfarlane 2015, 894–8). The Court acknowledged that non-renewable, lengthy terms may not alter the Senate's role, but writes: "It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure" (para. 81). The Court thus refused to draw a line, despite line-drawing being precisely what was asked of it in the context of the government's seven-point question on term limits in the reference.

While the Court failed to provide much clarity on the fundamental issue of when certain reforms might implicate the constitutional architecture, it is important to note that the Trudeau government's reform was designed explicitly in line with the *existing* role of the Senate as a forum for sober second thought. Nor does appointing non-partisan senators affect the core representative function of the Senate as identified by the Court, such as its regional nature or its deliberative capacity.

Although there was some public debate about the idea of having the Senate sit in regional caucuses (Kirby and Segal 2016; Pratte 2016), this idea has not gained traction. And there is no evidence the new independent senators have adopted a more "regional" posture in their role. (I address the argument that the reform increases the perceived legitimacy of the Senate and thus may affect the behaviour of senators in the next section).

As it relates to consultative elections, the combination of altering the essential features of the Senate and formally establishing a process in law in a manner that would limit or influence future prime ministerial discretion are what generate a requirement for provincial consent under the amending formula. Thus, in relation to its independent advisory body, I advised the government to avoid establishing a selection committee in law. In order to be constitutionally safe, the process needed to reflect the *current* prime minister's discretion rather than set out formal laws he and future prime ministers would be legally obligated to follow. I also advised the government that while it was free to seek out "independent" senatorial candidates, it could not dictate how appointees behaved once they became senators. For example, the government could not require that incoming senators pledge to never engage in partisan behaviour or sit in partisan caucuses within the Senate. The Senate is free to organize itself as it sees fit. To do otherwise would be to risk altering the nature of the institution via fiat.

Although the Trudeau government's reform does not formally bind future prime ministers in the same way a law mandating consultative elections would, some observers might argue that the new process nonetheless stands as an (illegitimate) attempt to establish a new constitutional convention. For this reason, the reform might still be regarded as an effort to change an aspect of the constitutional architecture. This is Richard Albert's view of the Harper government's failed reform proposals (2015). Albert's analysis, like the Court's in the *Senate Reform* reference, focuses on the nature and impact of consultative elections. The Harper government's attempt at a stealth amendment was illegitimate precisely because it would change the nature of the Senate without provincial input, as well as establish a practice that would bind future prime ministers who, despite their "consultative" nature, would faithfully appoint the winners of the elections (Albert 2015, 705). Important for Albert's argument, however, is the idea that this would, in his view, eventually mature into a convention, and a problematic one at that, because the "regularity of the practice would cause politics to override law" (709). As Albert writes, "[i]t is important to stress that the practice would not have matured into a constitutional convention without the compliance of opposition parties. Cross-party ratification, either by affirmative approval or grudging acquiescence, is a condition of the creation of a convention" (710).

There are two possible responses to the suggestion that the Trudeau government's reform constitutes a similarly problematic amendment by stealth. The first, as explained above, is that the Trudeau reform is not an amendment, as it does not fundamentally alter the role of the Senate. The second and more involved issue is

to examine whether it is likely the opposition will feel a similar need to engage in grudging compliance with the new practice. There is at least one piece of evidence they would not: new Conservative leader Andrew Scheer recently announced that he would revert to the traditional, partisan method of appointment upon becoming prime minister (Zimonjic and Barton 2017). Similarly, former Prime Minister Harper's response to the *Senate Reform* reference was to declare a policy of refusing to make further Senate appointments entirely (Payton 2015). Then-leader of the Opposition, Thomas Mulcair, shared the same position, in the (mistaken) belief that the Senate could be abolished by attrition. Notably, a formal policy of non-appointment is likely unconstitutional, not only because the text of sections 24 and 32 of the Constitution Act, 1867 effectively requires the governor general to make appointments, but because a policy of non-appointment would stand as an unconstitutional amendment to the functioning of parliament itself. Nonetheless, given these stated policies, it is difficult to see why future prime ministers who believe the Senate should either be elected or abolished would feel beholden to a practice of appointment predicated on enhancing merit and non-partisanship.

Moreover, whether the reform is a concealed attempt at creating a new convention is also contingent on the nature of the exercise of the prime minister's discretion to recommend names to the governor general. Consider a hypothetical prime minister who decides she will exercise her discretion to make Senate appointments by only appointing winners of the Order of Canada. If we read "method of selecting Senators" as broadly as the Court appears to, this decision implicates the selection process: our hypothetical prime minister is literally confining herself to a list from which she must make the appointments. Similarly, consider a prime minister who tasks a policy adviser from the Prime Minister's Office to develop a list of names for consideration. This prime minister faithfully follows this protocol throughout his tenure, and all of his appointments to the Senate are made from people effectively short-listed by PMO staffers. In neither of these scenarios, I would assert, would a reasonable person conclude that either prime minister has changed the method of selection in a legal or constitutional sense. Instead, the prime minister is exercising discretion to make appointments using procedures and qualifying factors as he or she sees fit.

It remains theoretically possible future prime ministers will feel beholden to the new "merit-based, non-partisan" process, but any sense of political obligation to adhere will be based on precisely the sort of ordinary politics that permits conventions to emerge and evolve in the first place. Prime Minister Trudeau provided public and transparent justification for how he will exercise his discretion in making appointments using a method that, in contrast to the consultative elections proposal, is not "lacking in legal basis" (Albert 2015, 711).

IS THE "NEW" SENATE TOO ACTIVIST?

In the current parliament, the Senate has proposed amendments to several pieces of legislation, including Bill C-14, which sought to regulate assisted dying policy following the Supreme Court's invalidation of the criminal law prohibition; Bill C-29, a federal budget implementation bill that would assert federal authority over the banking sector; Bill C-4, which would repeal legislation passed under the Harper government requiring disclosure of financial statements for unions and secret balloting to certify a bargaining unit; Bill C-6, which would repeal Harper government legislation permitting for the revocation of citizenship in cases of terrorism and treason; Bill C-7, on unionization and collective bargaining of the RCMP; and Bill C-37, on amendments to the Controlled Drugs and Substances Act (CDSA). Most recently, as of this writing,[2] the Senate proposed amendments to Bill C-44, a government budget bill, to extract the proposal for an infrastructure bank for further study (Platt 2017).

These amendments have attracted considerable criticism from commentators (Coyne 2017) and academics (O'Neil 2017). Two broad assertions are illustrative: first, that the proposed amendments are undemocratic and illegitimate because they are obstructionist; and second, that the Senate's activity in the current parliament is unprecedented. Declaring that "a constitutional crisis is upon us," national columnist Andrew Coyne writes that the Senate "was never quite so brazen before," despite previous "abuses" of its powers in previous parliaments (on matters ranging from abortion, the GST, free trade, and even more recently, the Kyoto Accord; 2017). Coyne (2017) specifically attributes the change to the new appointments process: "Conscious of their unelected status, aware of the low reputation that went with decades of low appointments, senators were more often inclined to yield to the Commons. But all that changed with the advent of Justin Trudeau's 'independent, merit-based' system of appointment." Similarly, law professor Jeremy Webber states, "I have often argued that a half-reformed Senate might be worse than an unreformed Senate if the half-reform emboldens the Senate to exercise its very considerable powers, without correcting that institution's very considerable faults. It seems that is exactly what we are seeing" (O'Neil 2017).

In this section, I explore the nature of the Senate's amendment activity to critically assess whether these concerns have merit. I begin with a qualification: it is undoubtedly the case that for some people, *any* activity by the Senate that influences the work of the House of Commons is illegitimate, precisely because the former is unelected. My analysis will not satisfy those whose objection, ultimately, is with the fact that the appointed upper chamber even exists. Instead, my focus is on the

2. This paper was presented at the Institute of Intergovernmental Relations State of the Federation conference "Canada at 150: Federalism and Democratic Renewal" on 16 June 2017.

question of whether the Senate's behaviour is a significant departure from past practice or convention, in terms of both the frequency of activism it has displayed in the current parliament and its qualitative nature.

In a broad sense, there are several factors that support the argument that the current Senate is not particularly activist. First, the frequency with which the Senate has introduced amendments to government bills is in line with modern practice. As Andrew Heard notes, the Senate amended 8.3 percent of bills between 1994 and 2011 (2014, 144). Of the fifty-nine government bills introduced thus far in the current parliament, the Senate has introduced amendments to seven, which would make for a rate of 11.9 percent. This is an amendment rate not much greater than in the thirty-seventh and thirty-nineth parliaments (2001–04, 2006–08), which saw the Senate amend 10.7 and 10.2 percent of bills respectively (Heard 2014, 146). Notably, the thirty-seventh parliament was governed by a Liberal majority which also enjoyed partisan control of the upper chamber; by contrast, the current Liberal government faces a Senate that was, until recently, dominated by Conservative senators, a period of partisan transition where we might normally expect increased Senate activism.[3]

Second, the Senate has not, at this point, blocked or rejected any government legislation. Although outright rejection of bills by the Senate has always been rare, it has occurred five times since 1988 (Heard 2014). The modern Senate has also effectively pocket-vetoed legislation, when it "delays passage of bills by holding them in abeyance so that hastily-made decisions may be reconsidered" (Smith 2003, 115). David E. Smith refers to this as a "cooling off" veto, and notes one of the most prominent examples stemmed from the 1988 decision by the Senate to delay the free trade agreement with the United States, which led to former Prime Minister Brian Mulroney's decision "to call an election to seek a mandate from Canadians" (Smith 2003, 116).

Indeed, the Senate's oppositional activity under the current parliament thus far pales, in a qualitative sense, in comparison to the Mulroney period. C. E. S. Franks describes the Senate during this period as effectively "the real focus of opposition to the government" (2003, 165). Although the rates of amendment per bill were lower than the parliaments noted above (7.3 percent for the thirty-third [1984–88] and 3.5 percent for the thirty-fourth [1988–93]), the nature and prominence of Senate activity at this time was extraordinary (Heard 2014, 146). During Mulroney's tenure, the Senate temporarily blocked a major borrowing bill, proposed amendments to a bill amending the Patent Act after which "the bill bounced back and forth between the two Houses" (Franks 2003, 157), engaged in a "prolonged struggle" over a copyright bill, proposed amendments to two controversial immigration bills, forced the famous 1988 election over free trade, proposed an amendment to

3. For an in-depth look at Senate committee-level activity in relation to legislation, see Lawlor and Crandall (2013).

a crucial supply bill over the use of special warrants by the executive, famously defeated a bill regulating abortion in a tie vote, engaged in efforts to amend the Unemployment Insurance Act, and, just as famously, refused to pass the Goods and Services Tax (Franks 2003, 157–61). After Mulroney successfully—and unprecedentedly—employed section 26 of the Constitution Act, 1867, to "stack" the Senate with an additional eight senators in order to get his legislative agenda back on track, Senate Liberals filibustered:

> At times during the ensuing days, their efforts at delay degenerated into chaos and worse, including shouted obscenities, the ringing of cowbells, the blowing of kazoos, and bitter personal confrontations, with a Liberal senator calling the Speaker a Nazi (the Speaker actually had a distinguished record in the Second World War, unlike the name-calling senator). Liberal senators were indulging in obstruction pure and simple, and it was not obstruction over matters of legislative drafting but over the fundamental principles of legislation that had been passed by the House of Commons. Neither side came out well from this battle (Franks 2003, 162–3).

What is particularly notable about Franks's analysis of this period is the extent to which the rancor was clearly heightened by partisanship (Franks 2003, 160–1).

Even if the Senate's current posture is not without precedent, that does not necessarily mean the Senate is acting appropriately. A closer look at the specific instances of Senate activism is necessary to evaluate the extent to which its behaviour is normatively problematic. The analysis that follows reveals that the current Senate demonstrates *less* obstructionist activism than it has in the recent past. The most prominent case of amendment under the current Senate, pertaining to Bill C-14 on assisted dying, is illustrative of why amendments by the Senate are not necessarily obstructionist. Bill C-14 was introduced following the Supreme Court's decision in *Carter v. Canada* (2015), which struck down the criminal law's prohibition on assisted suicide as an unconstitutional violation of the right to life, liberty and security of the person under the Charter of Rights and Freedoms. In its decision, the Court declared the criminal law provisions unconstitutional "to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition" (*Carter v Canada* 2015, para. 147).

Despite the Court's articulation of a threshold for access to medical aid in dying, the government's legislation contemplates a more restrictive set of conditions. Bill C-14 outlines a set of criteria for whether a person has a "grievous and irremediable medical condition" which include "an advanced state of irreversible decline in capability" and that "their natural death has become reasonably foreseeable." Without using the words "terminal," Bill C-14 effectively limits access to medical aid in dying to people with a terminal illness, something not contemplated by the Court's more liberal threshold for access. In effect, the new legislation is constitutionally suspect (Macfarlane 2017, 2018). The Senate introduced several amendments to

the bill, the most significant of which was to remove the "near-death" proviso in order to bring the legislation into closer conformity with the Court's prescribed threshold. The government immediately announced its refusal to accept the amendments, and the House of Commons rejected them. After some debate, the Senate voted to accept the original version of the bill in a 44–28 vote. Bill C-14 received royal assent in June 2016.

The decision of the Senate to accede to the wishes of the House of Commons after the House refused its amendments is an important one, and is arguably what allows for a distinction between the Senate performing its role of sober second thought versus engaging in obstructionism. If the Senate had refused to relent after the House had rejected its amendments, and instead engaged in a tennis match with the House over Bill C-14, it would be acting inappropriately—indeed, it would be acting as a competitive, rather than complementary body. Although the proposed amendments temporarily delayed the enactment of the bill into law, the Senate's conduct here was hardly troubling or out-of-step with its sober second thought role. A similar sequence played out in relation to the Senate's recent proposed amendments to C-44, a budget bill. The House rejected the proposed separation of the provisions relating to an infrastructure bank, and the Senate subsequently passed the bill without further fuss.

Another important factor is the context: the current Senate is most often asserting itself on matters of constitutionality, something that is far more in line with its sober second thought role than interfering on matters of ordinary policy or decisions implicating government spending. This is true of four of the other five bills on which the Senate has offered amendments. For example, in relation to Bill C-24, which seeks to repeal policy brought in under the previous government to revoke Canadian citizenship from dual citizens convicted of terrorism, the Senate introduced amendments to ensure due process for people implicated in other citizenship revocation processes (i.e., people alleged to have committed fraud or misrepresentation to acquire citizenship). Notably, the government accepted this aspect of the amendments (Levitz 2017). Similarly, in relation to the budget implementation bill, C-29, concerns were expressed that the federal government was asserting authority over banking in a way that would have circumvented Quebec's consumer protection laws. In other words, the bill implicated the constitutional division of powers. Technically, the Senate's amendment to withdraw the relevant provision of the bill came from a request of the minister of finance himself, who asked the government representative in the Senate, Peter Harder, to introduce the amendment after the government announced it was backtracking (Canadian Press 2016). The government also accepted Senate amendments to the RCMP union bill (C-7) and the CDSA bill (C-37).

It is difficult to characterize amendments the House of Commons agrees to (or, indeed, that the executive indirectly initiates) as representative of undue Senate activism or obstructionism. It is also notable that, to the extent some senators might be seeking to behave in an obstructionist manner, it is not necessarily those

senators appointed under the new process. In relation to Bill C-14, for example, although some of the senators appointed under the new system of appointments had supported the initial amendments, none voted to oppose the will of the House after it rejected the Senate's changes. Those who voted for a more obstructionist approach were all senators appointed under the old patronage system. A similar context is evident in relation to Bill C-4. It was Conservative senators who pushed for an amendment to retain secret balloting provisions in relation to bargaining unit certification. Critics are therefore in error when they ascribe all of the current Senate's activism to the new appointments process. In fact, a recent analysis demonstrated that the independent Senators were most likely, by far, to vote in support of government legislation, even relative to Senate Liberals. Independent senators appointed by Prime Minister Justin Trudeau voted with government 94.5 percent of the time, independents appointed by other prime ministers 87.7 percent of the time, Liberal senators 78.5 percent of the time, and Conservatives 25.3 percent of the time (Grenier 2017). If anything, rather than the suggestion of undue activism, this data raises the question of whether Senate independents are *too deferential* to the government.

There is as much reason to think increasing Senate independence will make the upper house more cognizant of its complementary role, particularly if the relatively restrained behaviour of senators appointed under the new system is any indication. The overt obstructionist activism of the Senate during the Mulroney years, as noted above, stemmed in large part from partisanship. The current Senate is in a period of adjusting to its new configuration, and to the growing number of independents among its ranks. Add to this context the presence of a substantial number of opposition members in the Senate, and some of the behaviour raising critics' ire is arguably less a product of the appointments process itself and more a product of the general uncertainty surrounding how the institution will adjust to its newfound non-partisanship and independence.

CONCLUSION

The reformed Senate appointments process heralds an opportunity for a widely ignored—and more recently, publicly reviled—institution to reinvigorate itself in a manner consistent with its original purpose. It is far too early to draw concrete conclusions about whether the new brand of senators will leave a distinct mark on the upper house, either by engaging in bold activism or by reforming the institution itself in an unanticipated manner. What is clear, at this point in time, is that the criticisms about unprecedented obstructionism or constitutional crises fail to stand up to scrutiny. The Senate's activity under the current parliament has, thus far, been consistent with its role as a chamber of sober second thought. In fact, the preliminary evidence suggests that the recent reform has enhanced that role in a productive manner.

To a certain extent, the record thus far also establishes a baseline of evidence in support of the idea that the reformed appointments process does not represent an unconstitutional change to the Senate's essential features or the role of the institution. Although the Senate has faced an adjustment period in terms of procedure and issues like filling committees to account for the disruption of partisan caucuses, its overall role and substantive behaviour has not been altered by the reform. Despite uncertainty generated by the Supreme Court's opinion in the *Senate Reform* reference, the system of merit-based, non-partisan appointments is a legitimate exercise of the prime minister's discretion over appointments.

None of this will satisfy critics of an appointed Senate who would prefer to see either a reform to make the Senate an elected body or the upper chamber abolished altogether. Yet in the context of a stringent constitutional amending formula that has been interpreted even more stringently by the Supreme Court, coupled with a constitutional culture that inhibits major efforts at reform, an effort to legitimate the Senate through improved appointments may be the best option. To the extent that the Senate's work continues to reflect a serious consideration of potentially flawed legislation, so long as the Senate does not ultimately block or interfere with the will of the elected House of Commons, allegations that our parliament is in crisis will continue to prove overblown.

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6

COMPETING DIVERSITIES: REPRESENTING "CANADA" ON THE SUPREME COURT

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The Supreme Court of Canada's (SCC) influence on politics and public policy—from deciding human rights cases to adjudicating federal-provincial disputes—has long placed it in the spotlight. Seeing the Court as activist or restrained, as siding with the federal government or as balanced in its federalism case law, as anti-democratic or the guardian of the constitution, are all hallmarks of the debate about its place in Canadian politics. Underpinning these debates is an often-critical focus on the justices themselves, the process by which they are selected, and the virtually unfettered power prime ministers have had in appointing individuals to the bench.

In August 2016, Prime Minister Justin Trudeau entered this debate by announcing a new way to choose SCC justices. Along with promoting more transparency and accountability in the process, the key elements of Trudeau's proposed reforms were to ensure that all future justices were functionally bilingual and that they represent the diversity of Canada (see Trudeau 2016b). In line with these new objectives, one of the first things Trudeau highlighted in his announcement was a willingness to break with the convention of regional representation on the bench and move toward an open application process. With the impending retirement of Nova Scotia Justice Thomas Cromwell in September 2016, questions immediately emerged as to whether the government would deviate from the tradition of having one of the nine SCC justices come from Atlantic Canada. After considerable public debate that was overwhelmingly critical of the government's proposed departure from regional representation, the Liberals ultimately appointed a justice from Newfoundland and Labrador, Malcolm Rowe. Given the government's strong and repeated emphasis on creating a diverse bench reflective of the society it serves, the appointment of

Justice Rowe, a white man, certainly appeared a departure from its stated objectives for the new appointment process.

This initial proposal, related public debate and outcome, exposed an important tension and set of questions about the judicial selection process in Canada. Why has regional representation proved to be so durable? How does it compete with other forms of representation? Why did regional affiliation take precedence in this instance over an explicit desire to shift away from the convention? This chapter sets out to answer these questions.

A seemingly obvious explanation for the staying power of regional representation is electoral politics; that the political costs for deviating from the convention of regional representation were simply greater than initially anticipated by the Liberals, thus pushing the government to acquiesce to public criticism and appoint a justice from Atlantic Canada. In other words, it could be argued that the electoral coalition from Atlantic Canada was stronger than the electoral coalition in favour of promoting greater diversity on the bench. However, such an explanation is ultimately lacking as it does not account for the considerable political capital the Liberals possessed at the time and were able to expend to achieve their stated goal of a more diverse Supreme Court (they won every seat from the Atlantic region in the 2015 federal election, and all four Atlantic provinces were governed by Liberals in 2016); why the negative reaction to the initial proposal was clearly stronger than anticipated by the Liberal government; or why the arguments against a departure from regional representation appeared so compelling. Building on these last two points, our argument is that the idea of regional representation in federal institutions—as one of the fundamental narratives of Canadian federalism—has a structuring power over decisions of institutional design and that this is exemplified in the case of Justice Rowe's appointment.

Our argument rests on the recognition that the SCC is not only the highest court of the land; it is also a *federal* institution. Accordingly, reforming the Court engages longstanding and powerful ideas about the very nature of federalism in Canada. In this instance, changing the appointment process—with an explicit focus on the representative role of the institution—brought to the fore competing ideas on the nature of Canadian federalism. One perspective, promoted by the federal government, framed the Court as a key national institution that represents a bilingual, diverse, pan-Canadian community. The other perspective, promoted by those arguing for the regional representation convention, framed the Court as a mechanism to protect regional and provincial interests in national-level decision making. The outcome, whereby the federal government reformed elements of the appointment process (notably, requiring functional bilingualism) but maintained the regional affiliation convention, shows the power of these ideas. In short: the idea of regional affiliation for justices, which has gained institutional expression through a long-established convention, constrained the ability of the federal government to radically break from past precedent in reforming the selection process for SCC justices.

In making this argument, this chapter adopts a neo-institutionalist position stressing the importance of ideas in explaining institutional dynamics (for an overview, see Beland and Cox 2010; Lecours 2005). When assessing the quality and prospects for reforming political institutions, and understanding why particular outcomes come about, it is critical to pay attention to the role ideas play in shaping political dynamics. From this perspective, we can point to multiple factors shaping institutional dynamics—rational actor calculations, historical legacies, and underlying sociological characteristics (Lecours 2005; Olsen and March 1984); however, underpinning and cutting across these factors is the importance of ideas, which help constitute actor preferences, inform early institutional design choices, provide escape valves allowing change, and reflect/shape perceptions of society (Schmidt 2010). The value of applying a broader "constructivist institutionalism" in this chapter is that it draws attention to how background ideas can shape the perception of institutional design proposals as legitimate (Hay 2008). Focusing on ideas, and particularly how they interact with institutions, allows us to account for the complex set of factors that can influence institutional dynamics and outcomes (Beland and Lecours 2016, 684; Parsons 2007).

Accordingly, this chapter proceeds as follows. It first explores the historical role of the SCC in Canada's federal politics, the evolution of its appointment process (in a comparative perspective), and the reasons for the persistence of regional diversity as a key criterion for the selection of judges. Through this analysis, the chapter reflects on the tension between regional and other forms of representation, and what the new selection process tells us about the federal government's vision of federalism and the Court's role. This analysis also helps us engage with important questions about evaluating the SCC as one of Canada's key federal institutions, and to consider how the recent reforms to the selection process may impact the effectiveness and legitimacy of the institution.

THE SCC AS A FEDERAL INSTITUTION

There are several powerful ideas that shape the discussion on SCC reform. When we focus on the appointment process in particular, there are key frames for thinking about the Court as a legal and political institution that begin to define the parameters of legitimate reforms and designs. There are ideas about the judicial role more broadly, focused on whether changes to the appointment process will protect or endanger the independence of the institution as a court of law, or whether they will promote more activist or restrained decision making (for a discussion of these elements of the judicial role in Canada, see Macfarlane 2013). Some of these considerations also engage ideas about the democratic pedigree of courts in liberal democracies, notably whether the appointment process promotes accountability, transparency, and descriptive/substantive representation on the bench, issues that have gained increasing importance over time in Canada (Crandall 2013b, chap. 3).

These varying frames related to the legal role of the Supreme Court also intersect with competing ideas on the nature of the federation and the SCC's place in that system. Like other political institutions at the federal level (e.g., the legislature, Senate, Cabinet, bureaucracy), the SCC is one of the key institutional components of the federal system of government. Accordingly, the different ideas about the nature of that system influence perceptions of the ideal and appropriate role for the Court, and how particular reform proposals fit within these frames.

The main perspectives on the nature of Canadian federalism are clearly identifiable, in both theory and practice (Schertzer 2016b, 47–58; Rocher and Smith 2003). For this chapter, it is sufficient to note the general split between the view of the federation as primarily a pan-Canadian community; the sum of its provincial parts, all treated equally; and a compact among multiple founding nations (e.g., Indigenous peoples, English Canada and French Canada). For the first view, the core idea is that the federation is, and should be, a centralized order with a strong federal government that represents a bilingual, multicultural, pan-Canadian nation. For the second view, the key is that the federal system is, and should be, a decentralized order that respects the importance of provincial and regional differences, with some measure of formal equality. For the third view, the federation is seen as necessarily recognizing and protecting the distinctiveness of Quebec and Indigenous peoples.

These competing understandings of the nature of the federation inform related ideas about how the Court—as a federal institution—should fit into the system. From the pan-Canadian perspective, federal institutions are seen principally as forums to represent the aggregate interests of the national community. From the provincialist and multinationalist views, federal institutions are legitimate to the extent they reflect and protect the particular interests of the different regions and provinces of Canada in national-level decision making. More to the point, these competing ideas play an important structuring role in the debate about how to reform judicial selection procedures. How SCC justices are selected directly engages perceptions of their independence and representative role, either as agents of the federal government, agents of the provincial governments, or protectors of regional and group interests. At the same time, there is questionable evidence that regional affiliation actually affects the decision making of SCC justices (Schertzer 2016a; Songer et al. 2012). Nevertheless, the *perception* of justices as federal or regional representatives has important implications for the legitimacy of the institution and the system more broadly. Regional representation on the SCC has significant symbolic value within Canada's federal system.

The power of these different ideas about how to select SCC justices, as members of a federal institution, stems from the fact that the Court plays such a critical role in the evolution of the federation. There are two areas where this role is particularly apparent. First, the Court's decisions impact high-profile and divisive social and public policy issues through its Charter jurisprudence—from assisted death, to same-sex marriage, to firearm regulation, to reproductive and abortion rights, to name only a few examples. How the Court rules on Charter issues such as these,

over time, impacts both national-level policy and the ability of provinces to tailor legislation to reflect varying regional interests (Kelly 2001; Kelly and Murphy 2005). In addition, the SCC is the ultimate arbiter of federal-provincial conflict. In this capacity, both extraordinary decisions on the very nature of the federation (e.g., the references on patriation and secession) and more mundane rulings on the division of powers shape the parameters of federal-provincial responsibilities and the evolution of federalism (Baier 2006; Brouillet 2005; Schertzer 2016b, 2008).

Together, these functions give the Court an important substantive and symbolic role in Canada's federal system of government. Concerns related to judicial independence, accountability, and democratic freedom are further complicated by intersecting issues associated with the Court's status as a federal institution. Accordingly, the method of selecting judges engages more than just considerations of the independence of judges from political influence, it also requires a consideration of how a selection process safeguards the independence of the Court as the arbiter of federal-provincial conflict. Similarly, how judges are selected—who has a say in their nomination, review, and appointment—impacts not only their perceived status as top jurists, but also as effective and legitimate representatives for different constituencies. This dual nature—as both a court of law and a federal institution—is what brings the powerful, institutionalized, and longstanding ideas about how federal institutions ought to account for the different ways the Canadian federation is understood to the fore when debating reform proposals for the appointment of justices.

REGIONAL REPRESENTATION ON FEDERAL HIGH COURTS IN CONTEXT

The importance of high courts in the development of federations, and their dual nature as both legal and political institutions, have informed their design across the globe. In general, the powers, appointment procedures, and administrative features of high courts in federations seek a balance between maintaining judicial independence and providing some form of (particularly regional) representation on the bench. Briefly examining the key features of the designs aimed at facilitating regional representation across several federations helps to contextualize the Canadian approach and our assessment of the Trudeau government's reforms to the judicial selection process.

In general, mechanisms distributing power over the selection (and removal) of judges on federal high courts are focused on providing either a direct or indirect role for sub-state units. Formal constitutional mechanisms distributing power to select high court judges among multiple political bodies within the state is a common practice in federal countries: twenty of twenty-seven federations today (74

percent) include such measures.[1] Examining the mechanisms that grant sub-state units a role in the appointment of high court justices allows us to assess the extent to which they facilitate regional representation on the bench. We can classify these mechanisms along a scale from weak to strong. Weak measures facilitating regional representation may not be constitutionally guaranteed (stemming from legislation or conventional practice), and/or they may trend toward more indirect means of diffusing the power over the selection of judges (e.g., legislative or conventional requirements for consulting sub-state governments on nominations, a minority number of sub-state delegates included in judicial nomination committees, public hearings for appointments with opportunities for delegates from sub-state units to question judges, etc.). Stronger regional representation measures provide constitutional guarantees of a direct role for sub-state governments and their delegates in the nomination and selection procedure for high court judges (e.g., providing nomination lists either through sub-state governments or upper houses, confirmation of nominations by super-majorities in upper houses, direct role for sub-state governments or officials in nomination/selection decisions, etc.). In addition, in some federations the seats on the federal high court may be explicitly or implicitly reserved for different sub-state jurisdictions/regions.

Applying this scale of representative mechanisms, we can evaluate the different approaches adopted across federations. Table 6.1 shows the variation in approaches from a preliminary examination of fifteen federations. Across these cases there is a clear tendency toward facilitating *regional* representation on high courts: eleven of the fifteen cases examined (73 percent) have some combination of such formal mechanisms. Those cases with the strongest forms of regional representation (Belgium, Bosnia-Herzegovina, Germany, and Spain) have institutional designs that give a direct role to sub-state units or their delegates/representatives in selecting judges. In two federations (Belgium and Bosnia-Herzegovina) these measures are combined with seat reservations for regions on the bench. The six federations that have more moderate means of facilitating regional representation on the federal high court have a more indirect (but still constitutionally guaranteed) role for sub-state units in the selection of judges through a requirement that upper houses approve selections (Argentina, Brazil, Mexico, Nigeria) and/or some form of identifying candidates through judicial councils staffed with regional representatives (Malaysia and Pakistan). The federations with weaker representative features have non-constitutional means of incorporating a sub-state role in the selection process

1. This figure uses data from Melton and Ginsburg's (2014) study, supplemented with case studies of federations and their high courts responsible for constitutional adjudication. In addition, 26 percent of federations also devolve power to multiple institutional bodies to remove justices. These figures likely under-represent power distribution in practice, since they do not include legislative or conventional practices.

Table 6.1: Scale of Formal Mechanisms Facilitating Regional Representation for Fifteen Federal High Courts

Weak Representation	Less-Weak Representation	Less-Strong Representation	Strong Representation
Australia	Canada	Argentina	Belgium
India		Brazil	Bosnia-Herzegovina
South Africa		Malaysia	Germany
		Mexico	Spain
		Nigeria	Ethiopia
		Pakistan	

(Australia) or lack any formal articulation of a regional representative feature (India and South Africa).

So why is this digression important for a chapter assessing Prime Minster Trudeau's recent reforms to the SCC selection process? Considering the approaches to institutionalizing judicial representation allows us to understand the significant role sub-state control and affiliation plays in the design of federal high courts. Some form of direct or indirect means of facilitating regional representation is the norm among federal high courts. The idea that federal high courts act as a means to facilitate regional representation in national-level decision making has clearly been influential across federations. In terms of the formal mechanisms, the regionalism dimension is, far and away, the principal check that is placed on the power of federal governments to appoint federal judges and the main method for incorporating "diversity" into the process. On this front, Canada stands at the lower end of the scale of formal mechanisms facilitating regional representation on its federal high court. Of course, such de jure mechanisms do not translate into de facto practices in all contexts (Melton and Ginsburg 2014). Canada is largely indicative of this potential gap: despite scoring relatively low on formal measures of representation, this chapter shows that the norms of regional representation exert considerable constraints on political actors. As we discuss below, despite a lack of constitutional measures incorporating regional representation into the selection process of justices, legislative and conventional approaches have long ensured that regional representation is a key criterion for selecting SCC justices. Understanding this practice in Canada and the trajectory of past and recent reforms to judicial selection, however, are enhanced by placing them in context with how other federations have designed their high courts in relation to this norm of facilitating regional representation.

THE EVOLUTION OF APPOINTMENTS TO THE SCC

To understand the historical evolution of Supreme Court appointments as they relate to regional representation and federalism more generally, it is important to not only account for changes (or lack thereof) in the selection process, but also the Supreme Court's constitutional status. Canada's founding constitutional document, the British North America Act, 1867 (now the Constitution Act, 1867), does not reference the Supreme Court. Rather, the opportunity for the Court's creation was merely provided for by section 101, which grants parliament the power to provide for the "Constitution, Maintenance, and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the Laws in Canada." The creation of the Supreme Court in 1875, then, was not by constitutional amendment, but rather as a product of federal statute, the Supreme Court Act (Supreme and Exchequer Courts of Canada Act, RS 1900, c 154). This gave the federal government de jure control over the institutional design of the Court in all respects, including its jurisdiction, appointment process, even its very existence, which could in theory be abolished by federal statute. Notably, the Supreme Court's creation and control by the federal government is clearly at odds with the federal principle given its status as the final court of appeal for all legal challenges, both provincial and federal.

The centralized nature of the Court's appointment system further compounds the institution's apparent inconsistencies with the federal principle, as understood through a provincialist or regionalist lens. Not surprisingly, given the federal government's control over its creation and design, the appointment process created for Supreme Court justices was highly centralized, with the power resting with the governor-in-council. In practice this meant, and continues to mean, that the authority to select Supreme Court justices is exercised by the prime minister in consultation with the minister of justice. Thus, unlike most other federations, Canada has never provided a formal, institutionalized role for sub-state units to participate in the identification and selection of Supreme Court justices. This arrangement has been criticized by Canadian political actors since the Court's inception; though these criticisms gained greater political importance after it became Canada's final court of appeal in 1949.

Despite this centralized approach to selecting justices, Canada's commitment to the norm of regional representation on the bench of its apex court has found expression through an important component of the SCC's institutional features: a convention of allocating seats based on the regional affiliation of judges. The reason for this institutional design can largely be answered with a single word response—Quebec. While Quebec's representation on the Supreme Court is part of the larger debate about its place in Canadian politics, the necessity of Quebec's representation on the bench has never been especially controversial and has moreover been guaranteed since the Court's establishment. While there are several reasons why Quebec's representation on the Supreme Court is critical, including for the

Court's perceived legitimacy (Schertzer 2016a), the bi-jural nature of Canada's legal system provided a compelling technical justification for Quebec representation. Unlike the rest of Canada, which practices common law, Quebec has a civil law system. Given the Supreme Court's status as the final court of appeal for civil law cases from Quebec, the necessity of having justices from the province who are trained and experienced in Quebec's civil law, is undeniable. Accordingly, when the Supreme Court Act established a six-person bench in 1875, the legislation required that two of the justices be selected from the judges of the Quebec Court of Appeal, the Superior Court of Quebec or from among the province's advocates with at least ten years standing at the provincial bar. The other justices were required to have comparable legal experience, but these qualifications were not attached to a particular province or region. When the Court's numbers were increased to its current nine-person bench in 1949, the statutory provision protecting Quebec's representation was adjusted accordingly, from two Quebec seats to three. In 2014, the Court clarified that the legislative requirement for Quebec's three seats on the bench is a constitutionally protected guarantee.[2]

While only Quebec's seats are formally guaranteed on the Supreme Court, the practice of judicial selection based on regional representation has been followed since the Court's first appointments. According to Snell and Vaughan, the "historical regional attitudes" in the country, particularly in Ontario, made regional representation an important criterion for selection (1985, 12). The first six appointments to the Court were made up of two justices from Quebec, two from Ontario, and two from the maritime provinces. As the number of western provinces increased, this region's representation on the bench also became standard, with the first western judge appointed in 1903. Sitting as a nine-person bench since 1949, regional representation on the Supreme Court has typically broken down as three seats from Quebec (guaranteed), three seats from Ontario, two seats from Western Canada, and one seat from Atlantic Canada.

While this convention of regional representation has been followed closely, it is worth noting that it has not ensured that all provinces and territories have been represented on the bench. Until 2016, a justice from Newfoundland and Labrador had never been selected and a justice from one of Canada's three territories has yet to be appointed. There has also been one notable (if brief) departure from this convention. In 1979, retiring Justice Spence from Ontario was replaced by Justice McIntyre from British Columbia. The Court thus operated with three justices from Western Canada and only two from Ontario for three years until Justice Martland from Alberta retired and was replaced by Justice Bertha Wilson from Ontario in 1982.[3]

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2. The constitutional protection of Quebec's three seats on the SCC was clarified in *Reference re Supreme Court Act*. For an overview, see Schertzer (2016a).

3. There is one additional possible exception to the convention, Justice Edmund New-

The appointment of Justice Wilson, the first women to serve on the Supreme Court, brings up the importance of other diversity-based criteria. Indeed, even with the very first appointments to the Court, regional representation was not the only diversity-based criterion considered. Religion, specifically the Roman Catholic and Protestant faiths, was also important, with a conscious effort made in the SCC's first few decades to create a balanced bench of both religions (Snell and Vaughan 1985, 129). While the perceived need to balance Catholic and Protestant justices has receded, other goals for diversity have emerged, including the representation of women, visible minorities, and Indigenous people on the bench, as Trudeau's 2016 announcement on Supreme Court appointments makes clear.

To date, there have been no visible minority or Indigenous justices who have served on the Supreme Court. There have, however, been ten women appointed. While this number is dwarfed by the seventy-eight men who have served on the Court, in 2004 effective gender balance was achieved, with women making up four of the nine Supreme Court justices. Since 2004, this number has only dipped below four for a two-year period (2012–14) during the tenure of Stephen Harper's Conservative government. This drop in the number of women on the Court was met with considerable criticism from both opposition parties and media (Crandall and Lawlor 2015), suggesting that gender balance has entrenched itself as an important consideration in judicial selection.

Thus, while some diversity-based criteria for selection to the Supreme Court have fallen out of practice (religion) and others have emerged over time (gender), regional representation has always been practiced and recognized as an important ideal. At the same time, however, judicial selection has operated as a highly centralized process, providing no formal place for the participation of sub-state units or other political actors. As already noted, institutional designs that grant power over the selection of high court justices to a number of political actors and/or institutions is the main way that federations seek to facilitate a measure of regional representation on the bench. The traditional Canadian approach that lacks a formal institutional role for sub-state units in the selection of justices is thus somewhat out of step with many of its federal counterparts. Not surprisingly, then, the federal government's control over the judicial selection process has been the focus of longstanding criticism and calls for reform. It is to these reform efforts and, particularly, the Trudeau government's proposed changes to both the process and

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combe. Newcombe was born in Nova Scotia in 1859, where he attended law school and was appointed to the bar in 1882. In 1893 he moved to Ottawa where he served as deputy minister of justice for over thirty years, before being appointed to the SCC in 1924 (following the retirement of Chief Justice Davies from PEI) through to 1931. Newcombe was succeeded by Justice Oswald Crocket, from New Brunswick, in 1932. Accordingly, there is some debate about whether Newcombe was a representative for Nova Scotia or Ontario (Russell 2017).

criteria for judicial selection and how this played out with the eventual appointment of Justice Malcolm Rowe in 2016 that we now turn.

REPRESENTING CANADA ON THE SCC IN 2016

While the Supreme Court's centralized selection process has been much maligned, it has nonetheless remained largely unchanged, at least formally. This is not for lack of trying. The latter half of the twentieth century engaged Canada in a decades-long process of constitutional politics (approximately 1960s to 1992; Russell 2004). The rules of constitutional reform in Canada give significant power to the provinces, with major constitutional amendments typically requiring either substantive (seven of ten provinces constituting 50 percent of the population) or unanimous provincial and federal consent.[4] This gives the provinces and federal government shared agenda-setting power. During this period of constitutional politics, the provinces were thus able to make sure that reform proposals established a provincial role in the nomination and selection process of Supreme Court justices (Crandall 2013b). Importantly, however, none of these efforts to reform the Supreme Court were successful, with the last constitutional effort of this type coming in 1992 with the failed Charlottetown Accord.

Since the end of this period of constitutional politics, reform attempts have been led by the federal government and were exclusively informal (non-statutory) in nature. Because of this informal approach, changes have not required the approval of the provinces. Perhaps unsurprisingly, then, these informal reforms have placed little emphasis on provincial participation. These distinctive reform processes, however, are not the only factor that has contributed to differences in the judicial selection systems proposed in these two time periods (1960s to 1992 vs. 1993 to the present). Over this timeframe, there has also been a shift in the framing of why changes to the judicial selection process are needed.

While the first period emphasized provincial participation, the second has focused on transparency and accountability. The primacy given to the latter perspective is evident in the informal changes introduced by the Liberal government of Paul Martin in 2005, which were then selectively modified by the Conservative government of Stephen Harper in 2006. Prior to 2004, the procedures followed by the federal government had never been publicly disclosed, whereas both the Martin and Harper governments emphasized the importance of clearly setting out the steps of

4. Canada's constitutional amending formula is contained in the Constitution Act, 1982 and has only been in place since 1982. Prior to this, constitutional amendments had to be passed by the parliament of the United Kingdom. However, by convention, amendments would not be forwarded to the UK unless substantive, if not unanimous, consent from the provinces had been obtained (Macfarlane 2016).

the selection process, as well as devolving at least some of the review process to actors outside of cabinet (for a more detailed description see Lawlor and Crandall 2015). Significantly, the need for a more transparent and accountable selection process was frequently explained in terms of the growing power and influence of the Supreme Court in a post-Charter environment (Crandall 2013a; Dodek 2014).

The informal nature of these reforms meant that there was no barrier, other than public opinion, that kept a government from deviating from, or abandoning altogether, their judicial selection process. This is well illustrated by the Harper government, which only had five of its nine judicial nominees participate in the public committee process it introduced in 2006,[5] and announced in 2014 that it would be abandoning its reforms altogether. Consequently, by the time the Liberal Party formed the government in 2015, the Supreme Court's selection process had actually reverted back to its traditional, opaque, and highly centralized form.

Thus, while short-lived, the reforms introduced by the Martin and Harper governments both emphasized accountability and transparency in their framing. As noteworthy, however, is what was not prioritized in the reforms—the federal nature of the SCC. That said, a failure to prioritize is not the same as an effort to undermine, and these reforms did not disrupt the existing components of the judicial selection process that recognized the SCC's function as a federal institution and balanced federal-provincial arbiter, namely the convention of regional representation. While the SCC's function as a national court of general appeal was clearly prioritized, the reforms carried out by Martin and Harper did not directly engage competing ideas on the nature of Canadian federalism and the Court's role in the system. In short: so long as the convention of regional representation remained undisturbed, the federal role of the SCC was not directly challenged. However, such a direct challenge was presented with the new process for Supreme Court appointments announced by Trudeau's Liberal government in August 2016.

Before getting into how this challenge to the convention of regional representation unfolded, it is worth noting that the appointment process announced by Trudeau is very similar to those of the Martin and Harper governments. As with these other selection processes, the Trudeau reforms are informal in nature and feature an advisory committee tasked with creating a shortlist of three to five judicial candidates from which the government's appointee is then chosen. Like the Martin process, the minister of justice is supposed to appear before the House of Commons Justice and Human Rights Committee (JUST) to answer questions regarding the selection process. And like the original Harper process, the selected SCC candidate is supposed to appear before a public ad hoc committee of parliamentarians.

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5. Note that one of these nominees, Justice Marc Nadon, was found by the SCC to be ineligible to serve because he did not meet the qualifications to sit as one of the three Quebec SCC justices (see *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21). A situation that has clear parallels with that of Justice Newcombe, discussed earlier.

The goals of this new selection process are also similar, with Trudeau's initial announcement describing it as "open, transparent" and setting "a higher standard for accountability" (2016b). In some respects, the Trudeau reforms go further in meeting this commitment to transparency and accountability. Unlike the Martin and Harper processes that provided a vetted list of eight to ten judicial candidates from which to create a shortlist, the Trudeau advisory committee evaluates all candidates who apply to the position, thus limiting the discretionary powers of the political executive. The advisory committee is also required to submit a report on the judicial selection process, which includes recommendations and demographic data on the judicial applicants (Independent Advisory Board for Supreme Court of Canada Judicial Appointments 2016). The chairperson of the advisory committee also appears before the JUST Committee to answer questions on the appointment process. However, even with these differences, the judicial selection processes of these three governments are very similar.

What makes the reforms introduced by Trudeau stand apart from other recent efforts is the strong emphasis placed on diversity and official bilingualism. Trudeau's initial announcement demonstrates this emphasis: "The nine women and men who sit on the Supreme Court bench must be jurists of the highest calibre, they must be functionally bilingual and they must also represent the diversity of our great country … A diverse bench brings different and valuable perspectives to the decision-making process, whether informed by gender, ethnicity, personal history or the myriad other things that make us who we are" (2016b). This framing of the personal characteristics that make up a diverse bench, combined with the introduction of an open application process that allows any qualified person (essentially anyone under the age of seventy-five and with at least ten years of legal experience) to apply, left the place of regional representation as an open question. This potential shift in the underlying idea of diversity was immediately identified and criticized by federal opposition parties, politicians from Atlantic Canada, and legal organizations (Chase 2016; Patil 2016; The Canadian Bar Association 2016). Because the first vacancy to be filled by this new process would normally go to a justice from Atlantic Canada, this left the possibility that the region could go unrepresented on the Court. The government's position on regional representation was clarified, to an extent, on 4 August, two days after the initial announcement, when the prime minister released his mandate letter to the advisory committee. The mandate letter asked committee members to submit "a list of three to five qualified and functionally bilingual candidates that includes candidates from Atlantic Canada" and advised that "the custom of regional representation on the Court" be taken into consideration (Trudeau 2016a). The inclusion of regional representation as one of the criteria for judicial selection was thus clarified; however, while it would be taken into account by having candidates from Atlantic Canada on the shortlist, it would not be guaranteed.

Reaction to this potential departure from regional representation on the SCC was overwhelmingly negative. In reviewing critiques forwarded by various political

actors and the government's defence, different views on the function of the SCC (either as a federal institution protecting the interests of the provinces or as a national institution and court of general appeal) are made apparent. The SCC's impact on the provinces was frequently posited as a reason to maintain the convention of regional representation. A statement from the Progressive Conservative parties of Atlantic Canada noted that "[i]t is simply unacceptable to not include a regional representative on the highest court in the country, whose fundamental decisions impact every province" (Baillie et al. 2016). In an open letter to the prime minister, Nova Scotia senators noted that as a federal institution, the SCC must reflect regional interests: "The House of Commons, the Senate, Cabinet, and the judiciary all reflect regional interests in the spirit of the compromise which led to Confederation. To abandon that compromise is to turn one's back on the basic premise on which this country was built" (Tattrie 2016).

By contrast, the priority placed on diversity by the Liberal government was clearly framed in terms of the SCC as a key national institution, representing a bilingual, diverse, pan-Canadian community. As Minister of Justice Wilson-Raybould explained:

> Canadian society is rich in diversity, and this has important consequences for the selection process. Justices of the Supreme Court of Canada must be able to adjudicate complex legal questions affecting those with a wide variety of experiences, backgrounds, and perspectives. For this reason, one of the assessment criteria is the ability to appreciate a diversity of views, perspectives, and life experiences, including those related to groups historically disadvantaged in Canadian society. Diversity within the Supreme Court itself is important for two main reasons: first, bringing together individuals with various perspectives and life experiences enriches the collegial decision making process of the court; second, a Supreme Court that reflects the diversity of the society it serves enhances public confidence in the court. The assessment criteria therefore require that candidates be considered with a view towards ensuring that members of the Supreme Court are reasonably reflective of the diversity of Canadian society. (House of Commons 2016, 2)

The public criticism of the Liberals' proposed selection process was further augmented with legal and legislative action. In September 2016, the Atlantic Trial Lawyers Association applied to the Nova Scotia Supreme Court for a declaration that the federal government's proposed departure from the convention of regional representation required a constitutional amendment (The Canadian Press 2016). In explaining the Association's decision to launch the legal challenge, spokesperson Ray Wagner noted the importance of ensuring the region would not "get forgotten and somewhat marginalized" and how without adequate regional representation Atlantic Canada could be hurt by future SCC decisions dealing with fisheries, employment insurance, and transfer payments (The Canadian Press 2016). Later in September, the Conservative Party introduced a parliamentary motion calling on the government to respect the custom of regional representation when making appointments to the SCC.

The significance of the idea of regional representation on the bench was also demonstrated by the behaviour of the broader legal community. Given the open nature of the application process and publication of information, we are able to determine the regional affiliation of everyone who submitted an application for the vacant seat. Interestingly, nearly half (46 percent) of applicants came from Atlantic Canada, despite the region only making up about 6.6 percent of the Canadian population (see Table 6.2). Many people who were otherwise qualified, but lived outside of Atlantic Canada, did not apply for the seat. This substantially higher application rate among Atlantic Canadians may indicate a broad commitment among the legal profession to the importance of regional representation and/or an aversion to political controversy: either those outside Atlantic Canada wanted to respect the convention or they did not want to face the potential backlash of breaking the convention if appointed.

This mounting political pressure to maintain the practice of regional representation influenced the federal government's framing of the reforms and arguably its ultimate decision on a new justice. With regard to framing, the Liberal government opted to support the Conservative Party's motion. When speaking to the motion,

Table 6.2: Supreme Court Applicants Received by Province

Province	Number of Applicants	% of Applicants	% of Canadian population
Newfoundland and Labrador	4	13	1.5
Nova Scotia	3	10	2.6
New Brunswick	7	23	2.1
Prince Edward Island	0	0	0.4
Quebec	3	10	22.9
Ontario	11	35	38.5
Manitoba	1	3	3.6
Saskatchewan	1	3	3.2
Alberta	0	0	11.7
British Columbia	0	0	13.1
Total:	30	97	99.6

Note: Data on applicants are drawn from the Report of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments (August–September 2016), p. 7. Canadian population data are drawn from 2016 estimates from Statistics Canada. The report states that there were thirty-one judicial applicants, but only thirty appear in the table breaking down applicants by province. Presumably this means that one applicant was from one of the three territories.

Minister Wilson-Raybould emphasized the need for flexibility in the custom of regional representation; however she also noted that "[a] Supreme Court that is not regionally representative will not be a diverse court. It is therefore for good reason that the custom of regional representation has developed and has been respected throughout the court's history" (2016, 4954). Unlike in earlier statements, here the minister treated regional representation as a *component* of diversity, rather than as a separate criterion for selection in tension with other forms of diversity. This is a subtle, but nonetheless meaningful, shift in how the government framed regional representation, demonstrating a response to the controversy spurred by their initial announcement. A few days later, members of parliament from all parties voted unanimously in favour of the Conservative motion (Simpson 2016).

With regard to the actual judicial appointment, on 24 October, the prime minister announced that Justice Malcolm Rowe, at the time a justice of the Supreme Court of Newfoundland and Labrador (Court of Appeal), was the government's selection to be the next justice of the Supreme Court of Canada. For all the controversy that had surrounded the issue of regional representation, this announcement made for a rather anticlimactic end. Not only was Justice Rowe from Atlantic Canada, thus maintaining the convention of regional representation, he was from Newfoundland and Labrador, a province that had never previously been represented on the Court. He was also bilingual, a skill that only a few months previously *The Globe and Mail* had reported no senior jurist in the province possessed (Fine 2016). Justice Rowe was also a white man, a feature unremarkable in the Court's history, but noteworthy given the Liberal government's strong and repeated emphasis on creating a diverse bench reflective of the society it serves. In the apparent struggle between regional representation and diversity that the Liberals' new Supreme Court selection process had triggered, regional representation came out the other side as the victor.

THE POWER OF FEDERAL IDEAS: ANALYSIS AND CONCLUSION

Despite the comparative transparency of the selection process that led to the appointment of Justice Rowe, there is much that will remain unknown except to those directly involved. For example, while this chapter has highlighted the considerable public criticism levelled against the Liberal government for its willingness to depart from the convention of regional representation, we do not know the kind of internal pressure that may have been exerted by the thirty-two Liberal members of parliament or the four provincial Liberal governments of Atlantic Canada. It is possible, for example, that the coalition defending regional representation was better defined and more electorally consequential. Knowledge about such behind the scenes politicking would help to further illuminate the political calculus that ultimately resulted in the appointment of an Atlantic Canadian justice. However, even assuming such

lobbying took place, the electoral politics and related considerations alone do not explain why regional representation on the SCC was viewed as such an important convention in the first place. As this chapter argues, to understand the continuing importance of regional representation on the SCC—why it won out here over other notions of diversity—we need to account for how competing ideas of federalism influenced the proposal, debate, and outcome of this attempt at institutional reform.

Trudeau's initial proposal for a new selection process privileged ideas of the Court as a national institution, with a primary function of protecting the human rights of all Canadians. This explicitly pan-Canadian understanding of the SCC and its role in the federal system of government was directly challenged by political and legal actors that promoted the idea of the Court as a federal institution that should protect the interests of the provinces and regions in national-level decision making. The outcome from these competing perspectives on the role of the Court shifted the initial position of the federal government to reaffirm a commitment to the convention of regional representation.

The series of events traced in this chapter demonstrate the importance of accounting for ideas when seeking to explain patterns of institutional reform/design, and when evaluating their effectiveness and legitimacy as *federal institutions*. Ideas related to the nature of federalism, and the key institutions that make up the system of self- and shared-rule, exert a powerful structuring influence on attempts to adapt elements of the system. In Canada, these ideas are roughly split between those stressing the importance of promoting a view of Canada as a bilingual, multicultural, pan-Canadian community, those stressing the importance of provincial interests and those stressing the ethno-national diversity of Canada. In relation to the selection of SCC justices, these ideas have informed the design and debate over a system whereby the federal government has autonomy over the selection of justices, but does so in line with rules and conventions of allocating seats on the bench by region.

As we have shown here, regional representation on Canada's high court has deep historical roots and loosely aligns with practices in other federations. From its inception, despite the virtually unfettered power of the prime minister to appoint SCC justices, a convention of regional affiliation has nearly always been maintained. These measures that help to federalize the SCC are actually comparatively restrained when looking at other federal high courts. The norm across federations is for formal mechanisms that guarantee sub-state jurisdictions a direct or indirect role in selecting justices. And so, when Trudeau attempted to shift the focus of the selection process away from representing regional diversity toward other forms of diversity, he was seeking to break from these historical and comparative norms related to the role of the SCC as a federal institution. At such a critical juncture in the institutional design of a key federal institution, we can expect to, and did, see competing ideas emerge that influenced the proposals, debate, and outcomes.

Accordingly, this analytical lens helps us understand the outcome in this instance—whereby elements of regional representation were maintained alongside

the inclusion and solidification of other factors in the appointment process for SCC justices. Trudeau's attempt to shift the underlying objectives of the appointment process failed to break entirely from the institutionalized norms related to the importance of regional representation. Despite considerable political capital and a compelling counter narrative (representing diversity in Canada in 2016 vs. older structural diversity of regions), the existing ideas and norms related to protecting the federal elements of the Court held their ground. This is predictable given the historical roots of the ideas and the fact that deviating from the regional representation convention would have taken Canada out of step with practices in other diverse federations. At the same time, the process instituted by Trudeau also clearly solidified ideas related to transparency and accountability that have emerged with the growing importance of the Charter in Canadian politics. Moreover, the idea of the Court as a national institution was further augmented by introducing the importance of bilingualism as a criterion for judicial selection. Accordingly, the competing ideas about the Court's role and the nature of Canadian federalism, along with the competing ideas about how diversity should be represented in such institutions, remains an important tension.

This episode and outcome of institutional reform have broader implications for Canadian federalism and politics. Canada is currently engaged in considerable debate regarding the design and functions of many of its pan-state institutions, from the Senate, to its electoral system, to the practices of parliament, to the Crown's relationship with Indigenous peoples, among others. The reforms to the selection process of SCC justices in 2016 is only one such instance within this broader "moment." The extent to which competing ideas of the federation shaped the process and outcome of this reform is a lesson that can inform how reforms to other key federal institutions are approached. Of course, this new process for selecting SCC justices is ultimately an informal one (it was not instituted through legislative or constitutional changes). The longevity of these changes are therefore contingent on the willingness of future governments to follow the same process and abide by the same norms.

Nevertheless, an indication of the staying power of the idea of regional representation did emerge with the retirement of Chief Justice Beverly McLachlin in late 2017. Upon the announcement of McLachlin's pending retirement, the Liberal government stated that "in recognition of the custom of regional representation, the process [to replace McLachlin] will be open to all qualified applicants from Western Canada and Northern Canada" (Trudeau 2017). Indeed, in making this announcement the prime minister explicitly highlighted that regional representation was an important norm: "the Supreme Court of Canada is recognized around the world as a strong, independent judicial institution. This strength includes regional representation." This shift in the framing of the SCC from the initial approach used for the Rowe appointment shows the power of the idea of regional representation. Rather than starting by conceiving of regional representation as something that is in tension with other forms of diversity, it has been identified as a structural feature

of the SCC as a federal institution, *within which* the government will seek to find "candidates who are jurists of the highest caliber, functionally bilingual, and representative of the diversity of our great country" (Trudeau 2017). Despite the Liberal government's embrace of regional representation, the eventual appointment of Courts of Appeal of Alberta, the Northwest Territories, and Nunavut judge Sheilah Martin to the SCC in December 2017 was not without controversy and criticism. In particular, Martin's appointment was seen by many as a lost opportunity to appoint the first Indigenous justice to the Court (Geddes 2017). Thus, while regional representation appears to be a stable criterion in the selection of SCC justices, Martin's appointment also highlights how other forms of diversity and representation are emerging as important criteria for judicial selection.

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7

WHO PARTICIPATED? EXAMINING CITIZEN PARTICIPATION IN ELECTORAL REFORM

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INTRODUCTION

This volume of *The State of the Federation* asks which criteria should be used to assess Canada's federal institutions and how governance structures fare according to these criteria. Citizen participation offers us one metric to think about those criteria. In this chapter we look at an electoral reform initiative and examine who participates, how meaningful is their involvement, and what are the implications of their participation in decision making. This chapter draws on norms of citizen engagement from the deliberative democracy literature to assess Canada's recent federal electoral reform consultation process. Drawing on survey data and an original content analysis of participant contributions to the House of Commons Special Committee on Electoral Reform (ERRE), we argue that consultations on electoral reform largely failed the norms of good deliberation.

Electoral reform is a salient issue for a narrow but well-defined policy community in Canada. In the 2015 federal election, three of the four major parties campaigned on platforms that included electoral reform proposals. After winning a majority, Prime Minister Justin Trudeau appointed a minister of democratic institutions and the government created a Special Committee on Electoral Reform that consulted with citizens, experts, and stakeholders. The government also conducted its own consultation that included a phone and online survey called MyDemocracy.ca.

Ostensibly, these initiatives provided ample opportunity for citizen engagement on the issue.

Given the centrality of the electoral system to Canadian democracy, the process by which decisions about an electoral system are made is crucially important and merits specific examination. This chapter is an examination of the consultations on electoral reform and the role that citizens played on this issue. We found that the process was dominated by men and those with expert knowledge, rather than everyday citizens; that the opinions articulated by participants were largely reflected in the committee's final report; and that there was little public awareness of the issue and no significant public education campaign undertaken by the government. These results are a function of design choices on the part of the government and may provide some insight concerning its intention. Consultation that meets the criteria for good deliberation as outlined in this chapter requires a commitment by government to move beyond "politics as usual"; this was not done in the case of electoral reform.

The chapter begins with an introduction to the theoretical literature on deliberative democracy, with an emphasis on the criteria that comprise the normative framework for good deliberation. A brief discussion of the consultation process and the methods used in data collection and analysis follows. The main findings are then outlined along with a discussion of the associated implications and an assessment of the process from the perspective of deliberative democratic theory. The chapter concludes with an evaluation of the importance of Canada's electoral system and a discussion of potential improvements to public consultation in Canada.

THEORETICAL PERSPECTIVES ON GOOD DELIBERATION

How do we assess citizen engagement? One answer can be found in the literature on deliberative democracy which is concerned primarily with how people reason about public problems and what role evidence, reflection, and values play in reaching decisions. Of central importance is the way in which participants engage with one another to reach decisions (Chambers 2003, 307). Deliberative democracy differs from aggregative approaches to democracy that treats decisions as legitimate when they result from competition among established perspectives (Young 2000, 19). In contrast, deliberative democracy sees decision making as legitimate if it involves discussion based on shared interests as opposed to position-taking and is intended to reach consensus.

Deliberative theorists note the need for a respectful exchange of reasons in justifying the positions held by participants when making a decision. Habermas's *Theory of Communicative Action* suggests that reason is central to good deliberation and notes one of the benefits of deliberative decision making, "reason replaces power

in the determination of outcomes, with the result that outcomes are not simply more just but also more rational" (Habermas 1981 cited in Humphreys et al. 2006, 586). Guttmann and Thompson (1996, 3) refer to the "reason-giving requirement" of good deliberation, suggesting that it is essential for participants to "appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject" in their discussions with others. In his application of deliberative democratic principles to an assessment of electoral systems, Colin McLeod also notes the significance of reason-giving for legitimate deliberation, noting "for deliberative democrats, legitimacy depends crucially on the respectful exchange of reasons between citizens and their political representatives" (McLeod 2017, 28). These authors' views are typical of the literature in that they stress the importance of reason-giving and reason as central to good decision making. As we will demonstrate in the analysis section of this paper, norms of inclusion, representation, political equality, consequentiality, and political knowledge are central to notions of good deliberation. These norms are discussed below and applied to the electoral reform consultation.

In addition to the quality of discussion, legitimate deliberation rests on participation by a diverse public. Meaningful inclusion from a diverse range of participants (Shapiro 1999, 33) ensures that participants come with different assumptions and experiences about the policy issue. Applied to electoral reform, norms of inclusion lead to questions about *who participated* in the consultation process and *what roles* were available to the participants. Notions of inclusion are most fully developed by Iris Marion Young (2000), who advocates for a theory of deliberative democracy in which inclusion is a central principle.

Young differentiates between what she terms "internal" and "external exclusion." External exclusion refers to circumstances in which those affected by a decision are formally able to participate but face structural barriers to participation. Young cites the examples of difficulties finding childcare or re-arranging work schedules to illustrate the ways in which external exclusion can operate in instances of formal inclusion (Young 2001, 680).

The issue of inclusion is significant to legitimate deliberation and goes beyond those who are physically present in the room. It is also important to consider the dynamics of the deliberative setting. Young's notion of "internal exclusion" is valuable here. This concept moves away from an examination of who is present in deliberation to consider how participation is structured by power dynamics within a given group. Internal exclusion occurs when participants have "obtained a presence" in deliberation but experience "a new form of exclusion: others ignore or dismiss or patronize their statements and expressions" (Young 2000, 55). Concerns regarding internal exclusion animate another facet of Young's prescription for good deliberation; she argues that "political equality" among participants is necessary, suggesting that those affected by a decision should be "included on equal terms" with regard to opportunities to express ideas and being able to question the ideas presented by others (Young 2000, 23). This concern with equality of participants is

also raised by a number of other scholars of deliberative democracy and encourages an examination of the structure of the electoral reform consultation meetings and the roles participants were given in the process (see Cohen 1989; Thompson 2008).

Scholars of deliberative democracy assert the importance of including all those affected by a decision in discussions leading to a resolution of the issue (Shapiro 1999; Young 2000). Young (2000, 22) suggests that when "decisions and policies significantly condition a person's options for action," they are considered to be part of the affected public. She goes on to characterize inclusion on this basis as reflecting "a norm of moral respect" (Young 2000, 22). While it would not be feasible to include every individual affected by electoral reform in any sort of meaningful consultation (which would arguably be every person living in Canada), descriptive representation[1] has been endorsed as a method to achieve legitimacy in public consultation. Fournier et al. (2011, 55) specifically note Pitkin's (1967) concept of descriptive representation as a source of legitimacy for the decisions made by participants in citizens' assemblies (Fournier et al. 2011, 55). James's discussion of the British Columbia Citizens' Assembly makes a similar argument, suggesting that "descriptive similarity and quality deliberation are not just complementary but intertwined, since the failure to represent all relevant viewpoints can render deliberation both unfair and epistemologically deficient. Deliberation is unfair when the interests of disadvantaged minority groups remain unrepresented within an assembly" (James 2008, 108).

Public participation in government initiatives should have an impact on the decision being made. Deliberation is no different. The concept of "consequentiality" as developed by John Dryzek relates to the relationship between a deliberative exercise and the final decision that is made. Dryzek introduces a framework for assessing deliberative capacity and suggests that "deliberative processes must have an impact on collective decisions or social outcomes" (Dryzek 2009, 1382). He goes on to suggest that this does not necessarily have to mean a direct influence on a particular policy decision and may include influence on policymakers who are not included in a given decision, or could take the form of "informal products of a network" (Dryzek 2009, 1382). The extent to which the policy direction taken on the electoral reform file reflects the input of participants in the consultation is therefore of central concern here.

Good deliberation requires participants to be informed prior to making a decision. In order for participants to be able to contribute reasoned positions and engage in

1. Descriptive representation occurs when there is "correspondence between the characteristics of the representatives and the represented" (Celis et al. 2008). Pitkin (1967) uses this term to describe notions of representation that are concerned with similarities in terms of viewpoints and perspectives, as well as demographic characteristics. More recently, the term has been used only to denote a correspondence of demographic characteristics such as gender, age, race, and class.

an assessment of the positions of others (as is required in deliberation) participants must have access to good information. Johnson (2015, 13) links information to notions of equality that animate the field of deliberative democracy; "all should have the resources to enable equal and meaningful participation and deliberation… access to information is critical to deliberative exchanges."

Moscrop and Warren (2016, 6) also note how the dynamics of participation are structured by education. Given the technical nature of electoral reform, it is likely that average citizens do not understand the complexities of the issue. It is therefore important to examine levels of political knowledge and the educational efforts taken by the government in assessing this consultative process.

BENEFITS OF DELIBERATIVE APPROACHES TO DECISION MAKING

Scholars associate a range of benefits with deliberative processes, both in terms of the quality of decisions and impacts on participants. A deliberative approach to a significant issue such as electoral reform ensures that both the process of decision making and the outcome are seen as legitimate. Habermas suggests that deliberation leads to higher quality decisions; reliance on the quality of reasons given rather than on power dynamics within a group in coming to a decision leads to results that are "more rational" and "more just" (Habermas 1981 cited in Humphreys et al. 2006, 586). Rawls echoes this assertion, suggesting that a more "correct conclusion" results from the incorporation of more participants and thus more information (Rawls 1971 cited in Gastil 2000, 23). James Fishkin (2009), creator and proponent of the Deliberative Poll, also suggests that the process of exposing decision makers to more information allows for a better decision to be made.

Other scholars provide claims of lasting impacts of deliberation on participants both at the individual and community levels. Gastil (2000, 24) argues that participation in deliberation helps citizens "clarify the implications of their basic values for public policy choices" and links this effect to the effectiveness of democratic governance within a given polity. Hicks (2002, 224) contends that citizens' preferences are more likely to be concerned with justice and the public good following deliberation and that this improves citizens' "political conduct." Fung (2005, 401) notes that the process of deliberation is valued by theorists as intrinsically beneficial given its ability to promote "commonly-agreed upon political values" which "broadens the interests and perspectives of participants."

While many studies of the quality of deliberation have focused on specific mini-publics, or on formal institutional structures intended for deliberation such as juries and legislatures, (see Johnson 2015; Hickerson and Gastil 2008; Lang 2008), Dryzek (2009) cites foundational deliberative theorists such as Habermas and Benhabib in arguing for the importance of an examination of deliberation in

the broader public sphere. Dyrzek (2009, 1383) suggests that while it is important to examine institutionalized forms of deliberation such as legislatures and the judiciary, "the public sphere in any democracy is where perspectives and ideas are generated, policy decisions are questioned, and citizen competences are developed," warranting in-depth consideration and assessment. Guttman and Thompson (1996, 12) echo this concern with "the forums of deliberation in middle democracy." The various components of the consultation on electoral reform constitute deliberation within this public sphere or "middle democracy"[2] and thus serve as an important case study to assess according to the normative framework of good deliberation. Typical initiatives used for citizen consultation in Canada are not deliberative in nature. As we discuss below, the ERRE consultation was no different, and by design, did not provide for deliberative engagement among citizens. Despite the fact that these initiatives were not designed to be deliberative, the questions asked by deliberative democrats yield helpful data about the nature of public consultation that can aid in improvements to the design of civic engagement initiatives.

The assessment of electoral reform is further warranted by the centrality of Canada's electoral system to the functioning of other structures of government. We contend that a robust deliberative process is necessary to ensure the legitimacy of the government's decision on this policy issue and thus subjecting the initiatives of the consultation to critical analysis from the perspective of good deliberation is a worthy exercise.

The ideals of deliberative democracy can contribute to the functioning of Canada's federal system. At their core, both deliberative democracy and federalism are about accounting for and accommodating diversity. LaSelva notes this in *The Moral Foundations of Canadian Federalism,* arguing specifically that "Canada was to be a nation in which multiple identities and multiple loyalties could flourish within the framework of a common political nationality" (LaSelva 1996, preface xii). While the nature of these "multiple identities" has developed and changed since Canada's founding, the fundamental need to account for diversity remains unchanged.

Like federalism, deliberative democracy is aspirational and assumes that political engagement is about a discussion of the ends. While we may not think of federalism in such a way, Samuel LaSelva encourages us to do so: "Canadian federalism is

2. Guttman and Thompson expand on the concept of "middle democracy" in a discussion of the relevance of deliberative approaches to democracy for this realm; "the forums of deliberation in middle democracy embrace virtually any setting in which citizens come together on a regular basis to reach collective decisions about public issues—the government as well as nongovernmental institutions. They include not only legislative sessions, court proceeding, and administrative hearings at all levels of government but also meetings of grass roots organizations, professional associations, shareholder meetings, and citizens' committees in hospitals and other similar institutions." (1996, 12–13).

now discussed in terms of … competing ways of life. Constitutional discourse has ceased to be a language of political expediency… and is increasingly becoming a branch of moral philosophy" (LaSelva 1996, 19). Deliberative democracy's concern with mutual respect and inclusion in decision making offers important lessons for Canadian federalism. Specifically, deliberative democracy asks how decisions are made in situations with divergent positions and asks who participates in decision making. These questions offer an important avenue of assessment for the Canadian federation and for decision making in a diverse polity in general.

2016 ELECTORAL REFORM CONSULTATION

In the 2015 federal election, three of the four major parties campaigned on platforms that proposed changes to Canada's electoral system. The election resulted in a majority government for Justin Trudeau's Liberal party which won 184 seats. Trudeau promised electoral reform and signaled the importance of it by appointing a minister of democratic institutions.

In addition to the minister's work, the government struck an all-party Special Committee on Electoral Reform on 7 June 2016. The committee's mandate was to "identify and conduct a study of viable alternate voting systems to replace the first-past-the-post (FPTP) system, as well as to examine mandatory voting and online voting" (House of Commons Special Committee on Electoral Reform 2016b*)* The committee was asked to consider alternatives in light of five guiding principles: effectiveness and legitimacy, engagement, accessibility and inclusiveness, integrity, and local representation (House of Commons Special Committee on Electoral Reform 2016b*)*. On 30 June 2016, the committee issued a press release calling for public input on alternative electoral systems. The press release encouraged the public to provide comments and questions using the Twitter hashtag #ERRE. It also included a call for written submissions to be shared with Committee members and on the Committee's webpage, as well as for requests to appear before the Committee and offer testimony on the topic (House of Commons Special Committee on Electoral Reform 2016a).

The Committee held fifty-seven meetings, thirteen of which were conducted in camera and were thus not open to the public. Of the fifty-seven meetings, thirty-nine were held in Ottawa and eighteen were conducted across the country. Notably, the Committee held at least one meeting in each Canadian province and territory (Special Committee on Electoral Reform 2016b). Most meetings included a number of speakers who were allocated five or ten minutes for their presentation to the Committee and were subsequently questioned by Committee members. At nineteen of the meetings, there was also a dedicated time set aside for open-mic participants. In total, 758 participants appeared in person at these meetings; this

total includes both open-mic speeches and formal presentations.[3] The Committee received further input from the public in the form of written submissions, reports from individual MPs' town hall meeting reports and an extensive e-consultation. The final report of the Committee, entitled "Strengthening Democracy in Canada: Principles, Process and Public Engagement for Electoral Reform," was presented to the Committee on 1 December 2016.

Along a similar timeline, then Minister for Democratic Institutions Maryam Monsef conducted an "Electoral Reform Community Dialogue Tour" which included twenty-four meetings across the country. Individual citizens were also encouraged to conduct their own events to discuss the topic and were provided with resources to assist in the planning and facilitation of each meeting. On 6 December 2016, the government also launched MyDemocracy.ca, a survey designed to solicit respondents' perspectives on electoral reform. The survey launch was announced with flyers sent to each household, inviting participation (Vox Pop Labs 2017, 4). Participants were also able to complete the survey over the phone where requested. As all these efforts attest, at first glance there were ample opportunities for citizens to participate, but what interests us here is *who* participated and the *quality* of that participation.

METHOD

Our analysis draws on data from four portions of the consultative exercises described in the preceding section: the ERRE e-consultation, MyDemocracy.ca survey, written submissions to the ERRE Committee, and oral presentations to the ERRE Committee.[4]

The data from the e-consultation by the House of Commons Special Committee on Electoral Reform was used to provide information about the age, gender, province/territory, citizenship status, and "unique status" of the participants in this process. The survey was available online from 19 August to 7 October 2016 (House of Commons Special Committee on Electoral Reform 2016b). "The consultation posed 36 substantive multiple-choice questions and three opportunities to provide

3. There is a discrepancy from the Committee's reported number of participants because four participants appeared at multiple meetings.

4. We were not able to get data on attendance from Minister Monsef's Federal Electoral Reform Community Dialogue Tour. Townhall events hosted by MPs were also not included in this study as the data available did not include demographic data about participants. Furthermore, the information about participant perspectives on electoral reform was in the form of a summary of each meeting as a whole written by MPs, rather than individual perspectives from the participants themselves.

short text responses" (House of Commons Special Committee on Electoral Reform 2016b, 6).

The MyDemocracy.ca survey findings were used to provide information about the gender, age, province/territory, and "group" of the respondents in this portion of the consultative process. The survey was available from 5 December 2016 to 15 January 2017. Further data from that survey have not been made available to researchers.

Written briefs to the committee (n = 559) were examined and coded according to participant type and gender.[5] Participant type was coded as one of the following: stakeholder organization, expert, chief electoral officer, public office holder, or citizen and are elaborated below. These classifications were determined according to the name of the author associated with each brief in Appendix C of the Committee's final report (entitled "Strengthening Democracy in Canada: Principles, Process and Public Engagement for Electoral Reform"). In cases where briefs were classified as "stakeholder organizations," no gender was assigned to the brief. The briefs were also examined to distinguish between individual submissions and reports from "community dialogues," the latter of which were meetings held by individual or community groups on the topic of electoral reform.

Transcripts of oral presentations made during the Committee's hearings (n = 747) were found on the ERRE homepage. Transcripts were also made for each meeting, including the proceedings that took place across the country. These transcripts were examined and coded for participant type, gender, type of speech (distinguishing between open-mic participants and invited, formal presentations[6]) and perspectives on electoral reform. Details about the decisions for gender and participant type can be found in the supplement at the end of this chapter.

Perspectives on Electoral Reform Choices

Since we were interested in whether certain participant types favoured one electoral choice over another, each speech was analyzed on eleven specific issues associated with reform: first-past-the-post, alternative vote, proportional representation, mixed-member proportional (MMP), single transferable vote (STV), lowering the voting age, citizens' assembly, referendum, online voting, other systems, and

5. The written briefs were located using links found in the online version of the Committee's final report.

6. For formal presentations, only the initial speech is coded for perspectives on electoral reform. The dialogue with committee members that followed each speech was not coded. This distinction was made in order to ensure the coding captured the most important parts of the speaker's perspective, rather than perspectives that may have been primed by discussion with the committee.

mandatory voting. On each of these measures, speeches were coded as "ambivalent/not mentioned" (0), in favour (1), or opposed (2). For all of these issues, code "ambivalent/not mentioned" was assigned when the speaker either did not explicitly mention an issue or expressed ambivalence on the issue. The further specific rules determining how each speech was coded on each measure are discussed in turn below.

First-past-the-post. Where the speaker indicated an opposition to the present electoral system the speech was coded as "Opposed." First-past-the-post was the only system for which speakers did not have to explicitly mention the system by name in order to be coded as opposed to the system. Statements such as "the system is broken," "we need to change the system," or "my vote doesn't count" were sufficient to qualify as opposed to first-past-the-post. "In favour" was assigned in cases where participants indicated support for the status quo.

Proportional representation. This is a family of electoral systems but is also used as another name for List PR. The conceptual imprecision between the family of proportional representation systems (List PR, MMP, STV) and the individual systems themselves posed methodological challenges for coding. Because it was important to capture the sentiments of the participants in their own words, the codes reflect what was said, rather than an interpretation of the specific system being described.

Code (1) *in favour* includes statements that explicitly mention the need for "proportional representation," reference to "proportional representation" with an explicit reference to MMP, suggestions of the importance of having the popular vote match the distribution of seats, comments on the need for "greater proportionality." Statements that listed the benefits of list-PR alone (e.g., the ability of parties to put women and minority candidates higher on party lists) without explicitly endorsing "proportional representation" were not coded as in favour of proportional representation.

Code (2) *opposed* includes explicit opposition to proportional representation as well as statements on the inherent characteristics of PR systems such as "I think multi-member districts are bad for Canada." These were coded as opposed because PR systems require multi-member districts (Barnes, Lithwick, and Virgint 2016, 6).

Referendum. On this measure, support for a referendum either before or after the introduction of a new electoral system was coded as *in favour*. Statements opposing a referendum at any point on the issue of electoral reform were coded as *opposed*. In many cases, participants did not indicate their preferred timeline for a referendum, while in others, speakers supported a referendum only after a new electoral system had been implemented.

Other systems. Speeches were only coded as *in favour* of other systems when speakers introduced or expressed support for alternatives to the status quo that

were not listed as other codes. Examples included proposals for weighted voting and "Urban-Rural Proportional" systems.

FINDINGS AND DISCUSSION

Our findings suggest that the process of public consultation failed the criteria of good deliberation on four key measures. These findings and the implications for our assessment of the process are explored further in this section.

Descriptive Representation

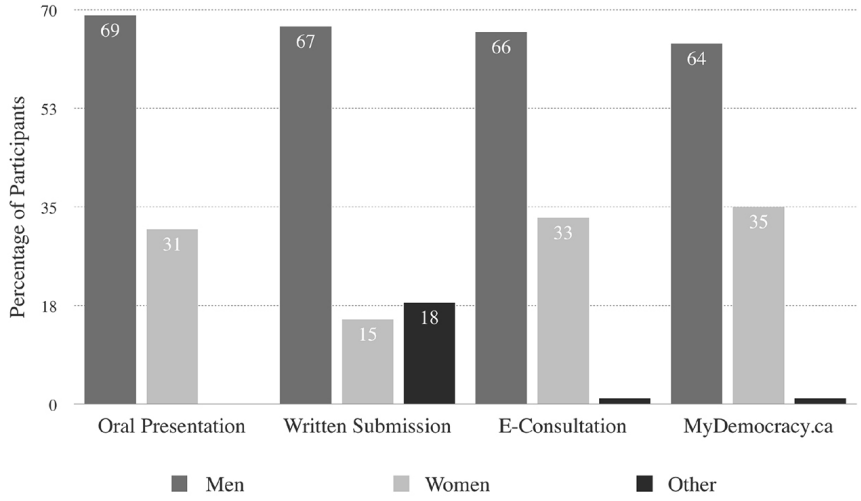
The consultation process was not adequately representative of the population. As discussed above, legitimate deliberation requires the participation of all those who are affected by a decision in the discussions in which the decision is made. This was not borne out in this case. The gendered and racialized patterns of underrepresentation in the public engagement efforts are particularly problematic for consultation on a topic that has such significance as electoral reform.

Gender

If the process was not representative, it can also be said to be gendered. Every element of the consultation process that we examined had higher rates of participation by men than women. This discrepancy was evident in the written briefs, where 69 percent of the 559 briefs analyzed were authored by men. Similar overrepresentation is demonstrated in the oral presentations, where 69 percent of speakers were men. A greater discrepancy emerges between men and women in the formal presentations; 76 percent of formal presentations were given by men while 67 percent of open-mic participants were men.

These findings suggest there were barriers that prevented women from participating in the consultation process. This is not dissimilar to the representation of women in electoral politics at all levels of government (Bashevkin 2013). The reasons proposed to explain underrepresentation in electoral politics may be instructive in seeking to understand the gender gap in participation in this public consultation. Specifically, Thomas (2013) notes the role of individual factors (women are less likely to be interested in politics, combination of work outside the home and childcare responsibilities) and social/community level barriers such as gendered division of labour and its implications for notions of appropriate roles for men and women that may influence women's willingness to participate in political life more generally (see also Newman and White 2006; O'Neill and Stewart 2009 for discussion of

Figure 7.1: Electoral Reform Consultation Process, Participation by Gender and Component



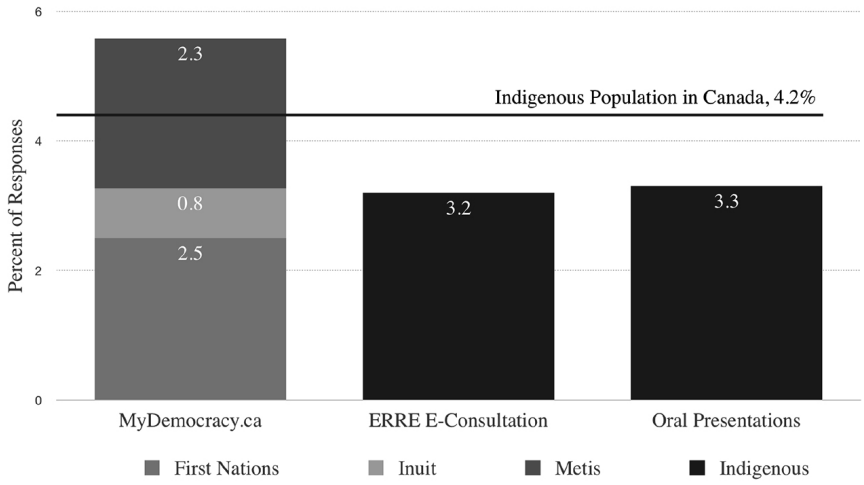
barriers to women's political participation). Gendered differences in participation are also problematized in empirical scholarship on deliberation specifically (see Delli Carpini, Cook, and Jacobs 2004; Karpowitz and Mendelberg 2014).

The underrepresentation of women is particularly significant given the content of much of the discussion of electoral reform. In both this process and in previous consultations on electoral reform, arguments about gender and the implications of electoral systems for the election of women are often used (Lang 2008, 87). While there is ongoing debate about whether there is a relationship between the representation of women and minorities in parliament and the electoral system (Tolley 2017, 65; Thomas 2016), gender remains a central theme in the discussions about electoral reform in Canada and legitimate discussions therefore require the representation of women.

Visible Minorities

Visible minorities were also underrepresented in the process. Participants in the MyDemocracy.ca consultation were asked if they self-identified as a visible minority or not. Only 10.36 percent of respondents identified as visible minorities. This is lower than the 23.86 percent of the Canadian population that identify as visible minorities. This finding relies on self-identification by participants on a binary

Figure 7.2: Electoral Reform Consultation Process, Indigenous Participation by Component



measure of "visible minority" or not and as such we do not have data broken down by specific minority groups.[7]

Indigenous People

The data suggest mixed results in terms of the descriptive representation of Indigenous people in the consultation process. In the ERRE e-consultations, 3.2 percent of respondents self-identified as Indigenous, compared with 4.2 percent of the population. The MyDemocracy.ca survey asked participants to self-identify as First Nations, Métis, or Inuit. Métis people were overrepresented among survey respondents, with 2.31 percent of the respondents identifying as Métis, compared with only 1.36 percent of the general population. A similar pattern emerged among Inuit people, who comprised 0.77 percent of the sample and represent only 0.18 percent of the population. First Nations were slightly underrepresented, comprising

7. Tolley's (2017) chapter in *Should we Change How We Vote?* notes the importance of assessing the descriptive representation of institutions in a more nuanced way than is possible here; specifically she notes the tendency for assessments of representativeness to consider visible minorities as a homogenous group and thus obfuscate the differences in representation found among specific groups.

2.5 percent of the sample and 2.6 percent of the population. There were ninety-one stakeholder organizations that appeared before the Committee and only 3.3 percent of these presentations were delivered by groups that claimed to represent Indigenous people.

Low participation rates of Indigenous people may be partially explained by ambivalence regarding the legitimacy of the process, the importance of electoral reform for Indigenous well-being, or even the legitimacy of the Canadian state. There is an ongoing debate about whether participation by Indigenous people in the structures of governance of the Canadian state imbues undeserved legitimacy to these structures (see Alfred 1999, Cairns 2000). The controversy regarding the legitimacy of the process may explain the disproportionately low participation by Indigenous peoples in Canada in the examined portions of the committee process. However, this account does not explain overrepresentation of Indigenous people among respondents to the MyDemocracy.ca survey or the differences in response rates among Indigenous people between the e-consultation and the MyDemocracy.ca survey. It also does not explain the overrepresentation of Inuit and Métis people in the MyDemocracy survey.

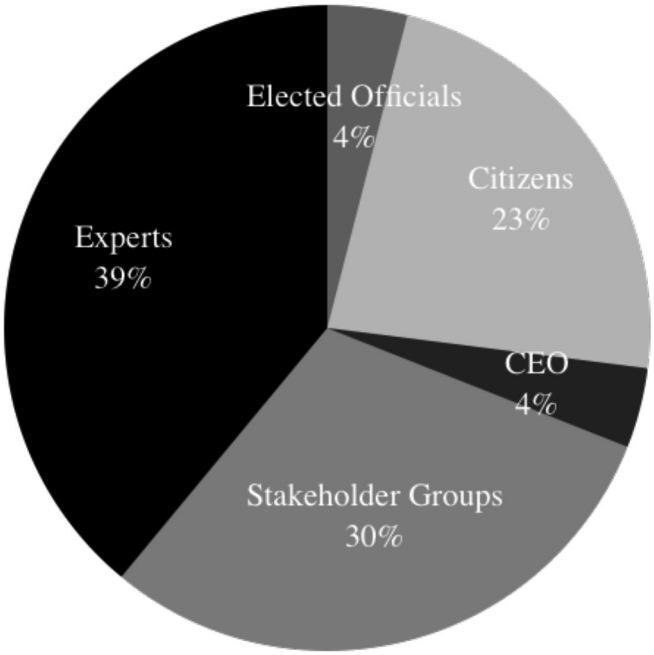
These results highlight the need for more effective engagement with Indigenous peoples in Canada. Numerically, Indigenous people are not dramatically underrepresented in this process but this type of consultation cannot meaningfully account for the legitimate claims to decision-making authority that Indigenous peoples have on the basis of their status as one of Canada's founding peoples. It is beyond the scope of this chapter to propose improvements to Crown-Indigenous relations, though Ladner's chapter in this volume discusses treaty constitutionalism as an appropriate rearrangement of Canada's institutional structure for Indigenous peoples.

The underrepresentation of women and visible minorities and descriptive dissimilarity between the participants in the consultation and the public affected by the discussions at hand fail the criteria for legitimate decision making according to the norms derived from deliberative theory discussed above. This is an important consideration because the policy area being discussed affects the functioning of Canada's political institutions and thus every person in Canada. Consultation that does not include a wide cross section of the population allows for the overrepresentation of voices that are already privileged in political life. In this case, we see an overrepresentation of men and people who do not identify as Indigenous or as visible minorities.

Equality of Participants

Participants in the consultation process were not treated equally. Young (2000) argues that participants in deliberation should be equal in their opportunities to participate and in the opportunity to question the ideas being put forward by other participants. This means that there should be not just formal equality of participation

Figure 7.3: Electoral Reform Consultation Process, Formal Presentations to Committee by Participant Type



Source: House of Commons, ERRE Committee meeting proceedings.

but that there must be a perception of equality amongst the participants. While the latter is difficult to measure, the former certainly did not apply. In this case, participants with specialized political knowledge were granted more speaking time and unique opportunities for dialogue that were not available to citizen participants.

As discussed in the methods section, the oral presentation portion of the consultation included both formal presentations and open-mic presentations. The formal presentations included those speakers who were preselected by the committee to appear. Their contributions included time to make an opening statement (usually five or ten minutes) followed by the opportunity to engage in dialogue with the committee members. As these data demonstrate, these opportunities were dominated by individuals with specialized political knowledge either as academic experts, as representatives of stakeholder organizations, or experience as a chief electoral officer. These three types of participants accounted for 73 percent of the formal presentations made to the committee, suggesting this part of the process

was dominated by participants with well-developed political knowledge rather than ordinary citizens.

Formal presentations allowed participants to engage in a dialogue with the Committee. While it is beyond the scope of this chapter to assess the extent to which the speeches made in this setting approximate the norms of good deliberation found in deliberative theory, the back and forth discussion, which is a fundamental prerequisite to reason-giving deliberation, was only available to participants with specialized political knowledge. The other forms of participation in this process, which were more heavily dominated by citizens[8] were one-sided, did not involve discussion between parties, and thus precluded the provision of reasons required for good deliberation. The differences demonstrated in the data suggest a hierarchy in terms of the quality of participation and in terms of which participants were granted access to various sites of engagement.

This differentiation by participant type is inconsistent with the norms of good deliberation found in deliberative scholarship from the perspective of equality and inclusion. Thompson notes that good deliberation takes place in circumstances of equality; he suggests that considerations of equality should examine "both membership in the deliberative body and the patterns of participation in the deliberation itself" (2008, 506). Thompson (2008, 506) specifically points to the speaking time of participants as a reliable proxy for equality of participation. It is clear that in this case that participants were not equal in their patterns of participation and that this was a result of the design of the consultative process.

This differential treatment further clashes with Young's (2000) notion of the political equality of participants in deliberation. In failing to allow for dialogue between the majority of citizen members and the elected officials of the Committee, the consultation process failed the criteria of political equality. This also can be interpreted as a form of internal exclusion which occurs when participants are granted access, but not influence, in a deliberative setting. The statements made by open-mic participants, who were largely citizens, were not given a verbal response or substantive acknowledgement from the Committee.

Further evidence that there was not equality of participants, as conceptualized by Young (2000) and Thompson (2008), can be seen in the barriers to participation that were present for open-mic participants and not for those giving formal presentations. Speakers who were invited to appear before the Committee are given reimbursement for travel expenses (House of Commons, n.d.) while a similar option is not available for open-mic participants at the meetings creating clear barriers for access. This provides further evidence of how certain kinds of participants were valued more than others in the consultative process and clearly violates the norms of equality of participation found in deliberative theory.

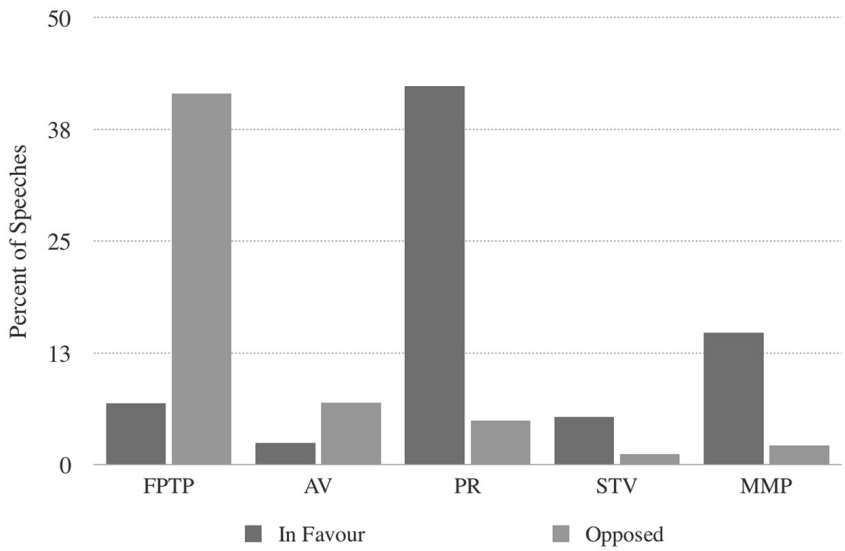
8. Citizens accounted for 514 or 91 percent of the open-mic participants.

The process privileged participants with specialized political knowledge to the exclusion of everyday citizens with whom the government and the Committee purportedly wished to consult. This type of differentiated treatment creates an additional barrier to participation by everyday citizens and reflects a value judgment on the relative importance of contributions by individuals with and without specialized political knowledge.

Consequentiality

A process has deliberative legitimacy if participants are able to influence outcomes. Were the perspectives that were articulated in the oral presentations reflected in the content of the ERRE final report and the government's response to it? In short, did participants' ideas influence the outcome? Dryzek's criteria of consequentiality requires that deliberation have "an impact on collective decisions or social outcomes" (2009, 1382). Consequentiality matters. If governments ask citizens for policy input without adopting that advice, it could lead to a more cynical public, less interested in engaging, and more hardened to the motivations of the government.

Figure 7.4: Electoral Reform Consultation, Participant Preferences on Electoral System



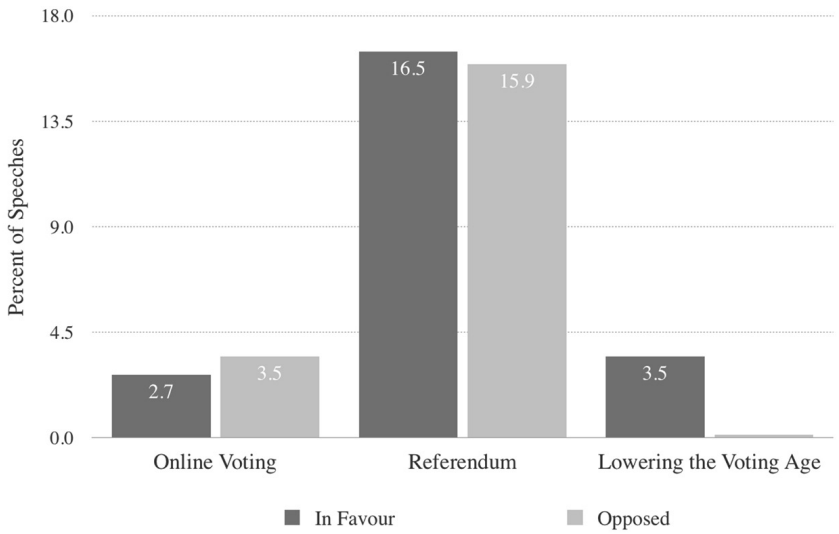
Source: House of Commons, ERRE Committee meeting proceedings.

It is thus important to assess processes using this criteria, regardless of whether other criteria were met.

Many of the speeches made before the Committee contained no clear position on each of the specific issues being examined by the committee. For example, of the 747 speeches coded for opinion data, 52 percent were ambivalent about FPTP, but FPTP was one of the more controversial issues, as 310 participants spoke out against FPTP in their speeches. First-past-the-post was only supported by 7 percent of the participants in the oral presentations to the committee. In 42 percent of the speeches, participants endorsed proportional representation, making it the issue that received the most consistent endorsement among participants. A referendum was supported by 16 percent of participants (compared with 16 percent opposed) and mixed-member proportional representation was supported in 15 percent of participant speeches.

The final report from the ERRE Committee made recommendations that generally reflect these perspectives. The report suggests the use of a referendum to garner citizen input on changes to the electoral system and suggests that first-past-the-post

Figure 7.5: Electoral Reform Consultation, Participant Preferences on Other Changes to Voting Rules



Source: House of Commons, ERRE Committee meeting proceedings.

and an additional system with a Gallagher index[9] of less than 5 (and therefore more proportional than FPTP) should be included on the ballot. A clearer reflection of the wishes of participants would have included specific reference to the MMP system, which had the greatest support among specific systems mentioned in the oral presentations; however, the recommendations from the committee are interpreted here as broadly reflective of the wishes of participants making oral presentations to the committee and are thus in line with the principle of consequentiality as conceptualized by Dryzek. The government's response to the Committee's report was to state that electoral reform would not occur within the mandate of the minister for democratic institutions (Trudeau 2017). This decision makes the deliberation not only not "consequential" but also irrelevant for those who participated. And that was reflected in the public outcry that followed this decision (Thompson 2017).

A failure to meaningfully include the perspectives of citizens in decision making may decrease feelings of political efficacy of participants and the general public. The fact that this consultation had no bearing on decision making may discourage citizen participation in this type of consultation in the future with further implications for legitimacy.

Public Knowledge

Good public engagement must be premised on evidence. In order for this to happen, there needs to be sufficient public knowledge about the policy. The substance of the electoral reform consultation exercise was a salient issue for a few, but not known by many. As of 9 October 2016 only 40 percent of respondents in a Forum Research Poll could correctly name Canada's electoral system; 22 percent suggested that Canada employed a proportional representation system, and an additional 22 percent stated that they did not know what electoral system Canada uses. These results suggest that levels of public knowledge on the issue of electoral reform were low while the consultation process was taking place.

Furthermore, there was no learning material published specifically by the ERRE Committee. While resources such as an Electoral Systems Factsheet and a glossary of terms were made available on the webpage of Democratic Institutions Canada, accessing these resources required a pre-existing interest in the topic of electoral reform. Given that very few Canadians were aware of the work of the committee[10]

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9. The Gallagher Index assess the proportionality of electoral systems using vote-seat differences. The index allows for comparative assessments of the proportionality of various electoral systems. See Gallagher (1991).

10. A poll conducted by Ipsos found that only 19 percent of respondents were aware of the consultation while it was underway. Only 3 percent of respondents stated that they were following the process closely.

it is likely that these were accessed by a very small portion of the public and thus were not effective tools of broader public education. Advocacy groups in civil society such as Samara or Fair Vote did create educational materials but none had the same reach as a broad-based government campaign.

It is hard to imagine that the consultation exercise created a space where citizens might be persuaded by "the unforced force of the better argument" (Habermas 1996, 306). While it's beyond the scope of this chapter, we do not have any good evidence to support an argument that citizens were informed by the judgments of experts or those who had familiarity with electoral reform.

Citizens' lack of knowledge is often given as a rationale to avoid meaningfully incorporating citizens in policymaking. We would suggest that a lack of knowledge on the part of citizens instead demonstrates the need for good public education to precede or be included in public consultation on a particular issue. This position is informed by deliberative democratic theory's commitment to inclusive decision making and evidence from previous studies that demonstrate the capacity of citizens to make reasoned decisions when provided with the proper tools and support (see Fournier et al. 2011). We describe models in which education is meaningfully incorporated into consultation in the conclusion.

CONCLUSION

As the evidence above suggests, the federal government's electoral reform consultation process conducted in 2016 fails the criteria for good deliberation. The process fell short of the deliberative ideal because of the lack of descriptive representation of large portions of the Canadian public, the privileging of those with specialized political knowledge in the process, the lack of consequentiality of the consultation, and the dearth of public knowledge on the issue at hand.

Electoral systems play an important role in structuring a country's democratic institutions; the chosen electoral system "reflects the nature of the democracy within the country" (Wilson 2011, 516). The centrality of Canada's electoral system to the functioning of Canada's democratic institutions and the effective representation of interests across Canada's diverse federation thus necessitates a robust deliberative process for reaching a legitimate decision on the issue. For this reason, the consultation on electoral reform should be held to a higher standard than other issues.

While referendums are often cited as methods by which to gauge public opinion and make democratically legitimate decisions, referendums also fail the criteria for good deliberation. Referendums function as an aggregation of existing positions, with no method to account for the level of public knowledge on a given issue (Hayward 2014, 11). Furthermore, referendums do not foster meaningful public debate but are prone to capture by well-organized interests relying on rhetoric to encourage support for a particular side. The nature of a referendum requires often nuanced and complex issues to be artificially simplified to fit the format of a "yes"

or "no" question. The technical complexities of electoral reform do not fit well with this type of process.

A more effective process would ensure that participants are informed about the topic at hand. This can be accomplished through the creation of in-depth and widely accessible educational materials produced by organizations that are neutral, or funding given to organizations on various sides of the issue. Furthermore, a concerted effort to ensure citizens are aware of consultation processes and the opportunities to participate are also necessary. However, awareness and education does not address the issues of equality of participants, or inclusion.

The use of a citizens' assembly with participants selected by sortition addresses concerns about knowledge and addresses concerns about inclusion and equality of participants in decision making. Sortition allows for the creation of a random sample in which every citizen has an equal opportunity to be selected to participate. Stratified samples are used in citizens' assemblies such as the British Columbia and Ontario Citizens' Assemblies on Electoral Reform which took place in 2004 and 2006 and has seen a resurgence in the UK as a potential solution to Brexit (Brown, 2019). This process allows for the creation of assemblies that are gender-balanced and representative of the target population in terms of age and geographic location (Fournier et al. 2011). These processes demonstrate descriptive representation and therefore meet the criteria for inclusive deliberation discussed above. A citizens' assembly allows participants equal opportunity to speak and express their concerns, as trained facilitators are employed to ensure certain individuals are not able to dominate discussion. A citizens' assembly also includes a robust education program to ensure participants are informed about the topic being discussed. This approach would be appropriate for a complex issue such as electoral reform and in fact was used twice at the provincial level in Canada to examine this issue.

The Liberal government had an opportunity to do real citizen engagement on an institution that is integral to our democracy. Electoral reform advocates and many other Canadians were excited about the prospect of having the opportunity to provide meaningful input into the method by which politicians are elected. While the government did honour its commitment to hear from Canadians, it was not a truly deliberative exercise and, in this way, represents a significant opportunity lost.

SUPPLEMENT TO CHAPTER 7

PARTICIPANT TYPE

Authors and participants providing oral presentations were organized into one of five "participant types." Each type and the associated criteria are described below.

Expert: Speaker holds a PhD in a social science (political science, law) or in the topic being discussed in their speech. For example, a participant with a PhD in computer science speaking or writing about the implications of online voting would be coded as an expert. This code was also applied to PhD candidates in the relevant discipline who demonstrated extensive knowledge on the topic or had a record of teaching or conducting research on the topic, and individuals from public opinion polling firms.

Stakeholder organization: Speaker identifies as speaking on behalf of or "being with" a specific organization. Speakers who had stakeholder organizations listed next to their names in the *Hansard* record of the meeting were also coded as "stakeholder organizations."[1] This code also includes representatives from political parties when the name of the political party is listed on the transcript. It does not include participants who self-identified as former candidates for office with a political party.

Current or former electoral officer: Speakers are listed on transcripts or self-identify as current or former electoral officers in any jurisdiction.[2]

Citizen: Individuals who spoke on behalf of themselves rather than a group and do not have specialized political knowledge.

1. In some cases, witness names were listed with stakeholder organizations next to them in Appendix B of the ERRE Committee's final report, but the speaker did not make reference to the organization and the transcripts did not have the organization listed next to the speaker. In this case, the speaker was not coded as a stakeholder organization.

2. This does not include former/ current returning officers.

Elected official: Speaker holds public office. This includes municipal councillors, provincial and federal members of parliament, and band councils. This does not include school trustees.

In coding the written briefs according to participant type, decisions were made for the name associated with each brief in Appendix C of the ERRE final report. Briefs that were attributed to stakeholder organizations were coded as such. In cases where briefs were co-authored, the lead author's name as found in Appendix C was used to determine both "participant type" and "gender" for the brief.

GENDER

In determining the gender of each witness, the salutation provided in the transcripts of the meeting was used. Each speaker was listed as "Mr.," "Ms." or "Mrs." in the transcripts. No such indication was reliably available for the written briefs and as such, the briefs that were written by individuals with gender-ambiguous first names were coded as such (e.g., "Alex," "Chris"). While a more accurate measure of participant gender would result from allowing participants to self-identify, this was not possible given the data set available.

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8

NORMATIVE JUSTIFICATIONS FOR DEMOCRATIC DESIGN: THE CASE OF CANADIAN ELECTORAL REFORM

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Until 1 February 2016, when Prime Minister Justin Trudeau dropped plans to push forward with electoral reform, choosing a new electoral system was a top priority. Calling for anything other than first past the post (FPTP), the Government of Canada had the following promise on a dedicated electoral reform website: "The Government has committed to have a new voting system put in place before the next federal election. These reforms will be aimed at better representing the views of Canadians and improving public trust in our political system" (Government of Canada 2017). The pledge assumes something is wrong with current levels of representation and the first-past-the-post electoral system is to blame. Specifically, criticism of the "winner takes all" approach targets principles of democratic equality, charging FPTP with violating people's equal right to vote insofar as it does not count votes equally (due to regional discrepancies and "wasted" votes) and fails according to the principle of proportionality (where each voter is supposed to be proportionally—that is, equally—represented as an individual in the electoral system). Critics then set FPTP in contrast with other electoral systems, particularly proportional representation (PR), which they claim will do a better job representing citizens and are ultimately "more democratic."

There are many ways for systems to meet democratic criteria, so in this sense saying one electoral system is undemocratic is incorrect and profoundly unhelpful. All electoral systems balance competing principles and do so in different ways. Further complicating the issue are the different ways we can approach equality: while critics call for an "equal voice," it is not clear what this means—and this is

especially so when we complicate the issue of democratic (voting) equality with Canada's distinct set of regional concerns.

We examine these claims, drawing on analysis of different justificatory arguments for democracy itself and looking at the various ways people understand what constitutes an equal voice. The chapter proceeds in two main parts. The first part of our chapter looks at different justifications for democracy and the way these justifications apply to electoral systems. Specifically, we look at two dominant normative democratic justifications: input- and output-related considerations that illustrate what is at stake and highlight the limitations of taking any one value in isolation. The second part of our chapter takes up the question of what it means to have an equal voice. The issue of (democratic) equality underlies critiques of Canada's current electoral system, and electoral reform, but it is unclear what, in this context, constitutes equality. To clarify what is at stake here we look at what the Supreme Court of Canada has to say about the right to vote in the context of democratic and regional equality—two values that require balancing and which inform understandings of political equality (found in normative justifications of democracy). These analyses, and our discussion of the strengths and weaknesses of single-member plurality (SMP) and PR systems when we evaluate them on a multi-value scale, lead us to argue for electoral reform in the Canadian context; however, we caution those who would emphasize proportionality as a fundamental value and instead suggest, with some caveats, that a mixed-member proportional system (MMP) offers the best institutional response as we aim to balance democratic and other values as we seek to clarify what is necessary to establish an equal voice/equal vote in Canada's specific institutional context.

NORMATIVE JUSTIFICATIONS FOR DEMOCRATIC INSTITUTIONS

In order to assess the democratic advantages and disadvantages of electoral institutions, we have to begin with a prior, conceptual question: What is democracy? What do we mean by calling institutions or states democratic?

Interest-Based Accounts and Output Considerations

One possibility is to begin with the familiar ordinary language account whereby a democracy is a political system in which citizens authorize the law that applies to them through participation in democratic procedures. This does not actually tell us what these democratic procedures are or ought to be, but here we might rely on what we commonly recognize as democratic political systems: France, Canada, the United Kingdom, Australia, India, the United States, and Germany. These are

all widely accepted as democracies and the states on the list meet the ordinary language definition in the sense that we can identify some mechanism for citizens to authorize the law that applies to them. This view, though, is mainly procedural: it focuses on the political procedures we identify with democracies and relies on political practices to give us examples of appropriate procedures. One problem with the procedural view is that, because it relies on the procedures that are typically instantiated in so-called democratic political systems, it presupposes that the practices in question are in good order—which may be precisely what is in question.

The *conception* of democracy at the heart of this relatively non-moralized and procedural view is what we might call a "family resemblance view," associating democracy with certain familiar and related procedures and practices: the rule of law, periodic competitive elections, and the protection of certain individual liberties such as freedom of association, freedom of the press, freedom of religion, and so on. This is a threshold conception in the sense that any country that meets the minimum threshold of appropriate procedures and practices counts as democratic, but such a conception is not well-equipped to give us an account of when a society is more democratic than another, or what considerations count as "more democratic" than others. One might think therefore that this largely procedural strategy is unhelpful for further normative analyses of democratic institutions, such as what electoral systems are more justified, or more democratic, than others.

This might be too quick, however, because democracy, even in its procedural form, needs to be justified. What values or reasons might suggest that democratic procedures are justified, or are a good practice? There are, as we go on to argue, two dominant types of justification for democracy and, within each of these broad categories, there are different (sub-)arguments. Here we focus on the kind of justification that accords best with this procedural view: this is an output-driven form of justification, which focuses on the instrumental value (or good effects) of democratic governance.

The most prominent *output-related* justificatory argument for democratic governance or democratic institutions contends that democracy protects, or protects better than other systems, certain individual human interests. The usual candidates for the relevant interests that democracy should protect are: security, access to resources and opportunities, education, healthcare, and the like (Weinstock 2006). Once these interests are specified, the usual argument is that democracy is valuable and/or justified because it helps protect these interests, or protects them better than rival forms of governance (authoritarianism, dictatorship, anarchy, etc.). This is an instrumental justification of democracy or the democratic system, but it does rest on widely accepted substantive values—typically, the protection of human interests. These interests are often so important that they justify holding others under a duty to respect them: that is, they can also ground an interest-based theory of rights. Rights to freedom of conscience, freedom of religion, due process, rule of law, rights to education, and healthcare can also be justified using a similar interest-based argument. The values at stake in these sorts of arguments may be very important, and

fundamental, but democracy's relationship to that value is an instrumental one: it rests on an empirical, broadly comparative and instrumental claim that democratic systems protect those interests better than rival forms of governance.

If we take this as the broad justification for democracy, then we can also apply the same argument about the protection of interests to other aspects of the institutional design—the drawing of internal or subunit boundaries, the electoral system, the organization of different aspects of governance, such as the upper and lower chambers, and so on. The same output considerations that ground this democratic justification may also apply to suggest different institutional designs, and different electoral formulae.

Most of the arguments for a FPTP electoral system appeal to an interest-based justification of democracy, and of the good effects (output) of protecting relevant interests, at least in certain contexts. For example, it is often said that proportional representation is better than a single member plurality system at representing and reflecting the range of diversity in society as well as giving expression to minority voices and placing their concerns on the political agenda.[1] But one might think that, in certain contexts, this might be (consequentially) undesirable. FPTP encourages broadly based parties that incorporate a range of identities and interests, and requires the voter to aggregate preferences in voting. Aggregating preference in this way may be less true to the voting individual's structure of preferences. However, one could argue—along consequentialist lines—that FPTP and the aggregation of preferences in broadly based political parties is desirable (at least in terms of how the institution will function [output]): it has the effect of discouraging interest-based parties from engaging in the kind of competitive politics where they aim to secure for their group the fruits of political power (although of course it does not reduce the risk to zero). The fundamental interests of the members of such groups can be protected by other elements of constitutional design: the protection of freedom of religion, freedom of speech, freedom of association, and so on.

Why exactly might we think that FPTP leads to a healthy or attractive dynamic in terms of actual political practice? Here a comparison with proportional representation systems may be salutary. The claim is that PR electoral systems may

1. There are some arguments for the diversity benefits of PR, particularly in terms of representation of women and minorities (Miljan 2017, 103; Tolley 2017, 124; Williams 2017, 129) and its more deliberative character (Macleod 2017, 75). There is, however, also caution about the limits of PR to remedy shortcomings in diversity. Tolley's analysis reveals claims of PR's increased diversity are contestable (111) and reminds us that when it comes to evaluating women's substantive representation "it is almost impossible to determine that the outcome is a function of voting rules" (112), adding the tendency of PR proponents' "focus on aggregate representation…conceals important gaps in representation" (116). Moreover, Williams notes "adopting a system of proportional representation would not suffice to address the ills of Indigenous underrepresentation" (134).

give increased power to very small groups in society to the detriment of the vast majority of citizens, who may feel they are (politically) held hostage to the demands of a small group who commands a swing vote in parliament. This has certainly been the experience of Israel: the Israeli electoral system rewards small political parties and this has sometimes meant the religious right wields extraordinary power within governing coalitions.

One could also claim that more expansive brokerage parties, which are likely to be the result of a FPTP system, are motivated to deal with social divisions, because they must compete for support from the different segments of society. Of course, it is true FPTP may ignore the interests of groups whose potential impact is very small, either because the group is very small or its population is diffused. One of the best examples of this is Aboriginal peoples in Canada. The major political parties have neglected their interests and done very little to improve their participation. But in general within broad political parties there is compromise among its many different constituencies—regional, ethnic, and class—so that the parties can appeal in more general terms to voters, either in their specific ethnic or class or regional identity, or by appealing to values that transcend these more local identities. Indeed, in a society fractured in many different ways, it might be helpful to have broad-based political parties to span cleavages, and these might help to alleviate group-based identity politics, which are potentially divisive.[2]

It is sometimes argued that single member plurality systems are more stable and offer more coherent policies than would be produced by other electoral systems (see Loewen 2017, 27). This is because changes in the mood or preference structures of relatively small numbers of people can yield much larger swings in the political configuration of the legislature. This produces more stable majorities and more stable government than is typically on offer in proportional representation systems because the resulting majority governments can govern effectively without relying on other parties or partners. Since stability is a good thing, in general, it is thought that, whatever else can be said for FPTP, at least we can point to this as a good consequence of this system.[3] Moreover, the instrumental protection of interests justification does not merely help us design an electoral system: it also

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2. This has been argued by Seymour M. Lipset (1960, 12–13). It was also noted by Justice LeBel in *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912, 2003 SCC 37 (S.C.C), at para. 158. See also Macfarlane (2016, 413).

3. One important advantage of this system is connected to the vertical accountability structures that it generates. Let's call this the Ghostbusters' issue (who ya gonna call?)… Since each locality/riding produces a representative, people living in the riding are not confused about who their local representative is, who might be in a position to raise issues with, address problems to, and so on. This is lacking in most proportional representation systems, which typically have representatives from the state as a whole, viewed as a single constituency, in proportion (or rough proportion) to their percentage of the vote.

explains other elements of the practice of democracy: the rule of law, constitutional protection for minorities, freedom of speech, freedom of association, all of which can be justified as necessary to protect fundamental human interests (indeed, many of the specific rights that we associate with liberal democracy can be so justified).

The role of democratic governance in protecting fundamental human interests and encouraging good governance should not be ignored, but one might think this type of argument fails to come to grips with the central normative ideal underlying democracy. A purely instrumental or output-based justification for democracy seems to suggest that the only reason to prefer democracy to other forms of government is for instrumental reasons: that it better protects fundamental human interests, improves moderation (which in turn better protects human interests), and this seems to imply that monarchy or aristocracy would be preferable to democracy if Plato was right that philosophers were better at protecting such interests. But one might complain there is something intrinsically valuable about collective engagement and choice, and that therefore we need to think of constitutive values as fundamental to our justificatory argument for democracy, such as the value of autonomy or political equality.

These arguments and this concern can also apply to the micro-level justification for the electoral system. Suppose one electoral system more reliably produces better outcomes than another, but does so by introducing non-democratic or undemocratic elements into it (at least as defined by other justificatory arguments). Would that be a justification for democracy? Or for the undemocratic institutional design?

Agency-Based Accounts, Substantive Values, and Input Considerations

This brings us to the need for a less instrumental justification for democracy: one that identifies democracy with specific constitutive and substantive values. If we go this route, we would have a scalar conception of democracy, such that we could call countries more or less democratic. And we would be able to identify certain institutions and certain practices as democratic—although these might not be precisely the same institutions we associate with the so-called democracies of Germany, the United States, and France. Indeed, some of the institutions that the practice-based conception deemed democratic, such as the rule of law or fundamental rights, may not be democratic at all: they may be justified by rival substantive values, and ought to be seen as a constraint on democracy (depending on how democracy is conceived).

What substantive values might we associate with democracy? Two values immediately suggest themselves, both of which suggest an intrinsic—or at least non-instrumental—justification for democracy. One is that of autonomy, and the second is that of political equality, which we will discuss in order.

First, let's consider autonomy or agency accounts. The basic idea here is that the normative bedrock of democracy is that of realizing people's autonomy: it is a system of government that allows people to make choices about the collective conditions of their existence, and the main justification for democratic institutions is that, through them, people can exercise some control over the public structure of their lives, such that decisions conform thereby to their will or their agency.

It is not hard to see why agency is valuable. Just as it is important for people to exercise choice over the shape of their individual lives, as self-choosing, self-forming beings, so it is important for people to do so over the collective dimension of their lives, in association with other people who live under the same institutional structure. Democracy, then, is associated with popular sovereignty, with government by the people, and the basic value at stake is that of self-determination, or autonomy. The main institutional prescription of this agency justification is to promote inclusion in democratic institutions, to promote participation, and to strengthen the government's responsiveness to people's will or choices.

It is important to see that this agency account is quite different from the interest-based account analyzed above. In many cases, of course, the interest-based account and the agency-based account do not come apart: people often make choices that are in their interests! Indeed, if we assume that people are largely rational, self-interested beings, it will follow that their choices are dictated by their perceived interests. However, this is not always the case, and many institutions and practices that are common in contemporary democracies are largely justified by the protection of interests deemed to be sufficiently important that they should not be held hostage to people's choices: this is true of liberty rights of course, but also expert panels, compulsory insurance schemes, environmental impact assessments, and the like are straightforwardly justified in terms of the protection of interests, independently of people's choices.

Moreover, it is not clear that people would really choose the deepening of their capacity to make collective choices. The implication of an agency account is that people seek more meaningful participation, more active involvement, and more responsive institutions. It is true that people might not want meaningless participation and unresponsive governments, but it does not follow that more democracy, more realization of the substantive agency value, is always to be preferred.[4] Indeed, the kind of participation suggested by the agency account is very time-consuming.

In terms of the micro-level institutions an agency account would suggest, democratic reform aims at deepening democracy, making it more responsive to people's wills.[5] The FPTP electoral system is hard to justify on an agency account,

4. For this point, we are indebted to Daniel Weinstock.

5. One objection to the autonomy account has been articulated by Allen Buchanan (1998): it is, he claims, simply false to think that an individual who participates in a democratic decision-making process is self-governing; he or she is governed by the majority. On

since the resulting government produces stability precisely by giving voice only to a small fraction—a plurality—of people in the country as a whole, aggregating preferences in ways that do not authentically represent the range of options or choices an individual might have. This does not show the agency account is necessarily wrong, but it does suggest (a) our democratic institutions do not accord well with an agency account, (b) our interests and our agency might come apart in certain circumstances, and, most importantly for the argument of this chapter, (c) the input consideration—agency—and the output consideration—connected to the protection of people's interests—can and often do point in radically different directions. However, while we might think this militates in favour of proportional representation as a system, and coalition governments as a way to overcome reasonable disagreement in unavoidably collective decisions, this is also somewhat inadequate for the reason that small parties holding the balance of power often wield disproportionate influence on government (e.g., the Israeli example above). How exactly the agency account translates into democratic design is somewhat obscure, at least for mass representative democracies. However, this justificatory argument clearly does support enhancing the possibilities for direct participation and direct governance arrangements, where that is possible.

Political Equality as a Substantive Value—Input Again

What other substantive value is often associated with democratic institutions? Tom Christiano (1996), in *The Rule of the Many*, has argued that the fundamental value of democratic institutions and democratic government is that of public equality. Unlike the autonomy argument above, this justificatory argument focuses on the implicit distributive requirement of democratic institutions: equal political voice. On this view, the commitment to democracy rests on the substantive value of equal respect for persons. The value of democracy inheres in the fact that it treats citizens with equal consideration: it gives each person equal influence over political decisions.

One advantage of Christiano's emphasis on the value of public equality is that it explains not only the commitment to equal voting, but other egalitarian commitments that we often find in a democracy: the rule of law, where the law applies equally to everyone; equal rights, especially equal opportunities to participate in public debate and discussion of collective decisions; and various requirements of justice that embody a commitment to treating each other as public equals.

Does the commitment to the substantive value of public equality suggest a particular electoral system? Does it give us reason to favour proportional representation

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this view, an individual can be self-governing in the private sphere, or if she or he dictates political decisions but that, "majority rule, under conditions in which each individual's vote counts equally, excludes self-government for every individual" (1998, 18).

over a single member plurality system? Christiano does not address these micro-institutional arrangements directly, but he does make clear that "each person ought to have an equal say in the process of collective decision making" (2006, 87), which, in the context of reasonable disagreement, diversity, fallibility, and cognitive bias, is reasonably associated with a majoritarian voting principle.

What this substantive value cannot tell us is the domain in which voting takes place: that is, where we are to count as equals (so it is silent on the question of internal boundary-drawing). It is also not clear which method of aggregating votes—whether it is a single member plurality or a proportional system—is preferable, since both of these are consistent with the commitment to public equality, abstractly defined. Normative democratic justifications, then, need supplementing with analysis of other important values if we are to make sense of them for the purpose of analyzing Canada's electoral system (and democratic health more generally). In the next section we turn our attention to balancing a number of considerations, including different elements of the government system as well as democratic voice and rights-based reasoning. These considerations are even internal to specific rules as they manifest in democratic institutions, which we see as we turn our attention to a key question underlying voting reform: how should we understand "equal voting"?

POLITICAL EQUALITY AND REGIONAL CHALLENGES TO AN "EQUAL VOTE"

In the preceding section, we outlined three distinct lines of argument that are sometimes thought to justify democratic institutions: the protection of fundamental human interests; collective autonomy; and public equality (assuming for the moment the latter two can be theorized in terms not reducible to interest-talk). It is tempting to think one of these values must be *the* correct one, because, if this were to be the case, we would have no possibility of conflict among different democratic values and clear guidance on how to design democratic institutions. One might also argue the public equality justification is the best because it explains a number of different institutions that we naturally associate with democratic governments. Public equality not only justifies formally democratic institutions—equal right to vote, periodic elections, and so on—but other elements that we might think are not directly related to democracy, such as equality before the law and equal political rights, which are also justified by the substantive commitment to public equality, but many of these elements can also coherently be justified by an interest-based conception. Moreover, it would be hard to get rid of the agency component of the justificatory argument, since democratic government operates through collective decision making on equal terms. There is, in other words, no a priori reason to think there must always be one single justificatory argument, rather than cumulative

justifications, rooted variously in autonomy, equality, and outcome considerations. After all, most democratic institutions do have better outcomes in terms of protecting people's interests than undemocratic governments, which lack accountability mechanisms (although the famed efficiency of Singapore is a possible counter-example). And democracies do give people the opportunity to choose amongst rival platforms and policies (autonomy), and to do so on the basis of public equality (the values of equal consideration and respect).

It is true that a cumulative justification provides less clear guidance than a singular justification when different values conflict—but that is not necessarily a reason to reject it, since it may be the case that there is more than one value at stake; and we are right not to endorse one substantive value (autonomy or public equality) if doing so means our other interests, in education or in environmental protection or healthcare, were to be unprotected. After all, there are many different interests that go into making a flourishing life, and we might think these output considerations cannot be irrelevant, and that the precise extent to which each is achieved has to be examined in a broadly contextual assessment of values.

If this is right, then we can see why it's very hard to say that democratic values dictate x or y institutional arrangement or specific electoral system. There are different understandings of democracy itself, and different plausible justificatory arguments for democracy. Moreover, input and output considerations seem to be in a careful balance, because we would want some minimal input considerations (equal vote) but we would also want to design institutions so the outcomes of the procedure are not predictably unjust. So, this means output considerations, which we are wont to include as fundamental interests that any government should protect, ought to count; although how exactly they should count is the most important question.

As we draw from various normative democratic justifications to answer these questions it is also helpful—particularly for the purpose of determining how different considerations should count—to take a closer look at public equality. As we note above, public equality, for all its potential benefits, and ones that are particularly evident when we expand our analysis to include other important (but non-democratic) values, is a broad concept and, as such, subject to many of the same considerations we apply to our analysis of normative democratic considerations. If we expect public equality to provide instruction in our efforts to determine the best electoral system, then we need to know more about what it is, since it is not obvious from Christiano's account.

To see what is at stake in debates over what constitutes an equal vote, as well as how different values can be embodied in one element of a democratic practice, it is instructive to examine regional representation in the Canadian federation. Political equality plays a significant role here, as underlying the question of what counts as an equal vote are considerations of not only equal weighting (as we determine what type of aggregation mechanism is best), but the more complicated question of an equal *voice*—something that does not necessarily follow from giving the same weight to each vote.

Canada's electoral system approaches vote equality from a specific perspective: in addition to the qualities typical of FPTP systems in general, Canada's electoral system assumes regional characteristics. Parliament's 338 seats are distributed unevenly, population-wise, throughout the country. Some of this is the result of logistics, with some ridings much smaller than others in order to avoid significant geographical problems in representation (which would undermine values of representation we discussed above). But the design of these ridings also reflects Canada's federal commitments and deliberately ensures that some citizens, by virtue of where they live, have numerically stronger representation than others (Elections Canada 2018; see Laura Levick's chapter in this volume for a critique of the federation's ability to represent provincial interests). From a standpoint of proportionality, or strict political equality (understood as representation that is proportionate to voting numbers), this effective overrepresentation undermines our ability to count votes equally. As Ken Carty (2017, 12) notes, "a vote in Prince Edward Island is worth three times that of one in British Columbia as far as its contribution to electing an MP is concerned." At one level we might think there are two distinct values in opposition here, numerical equality and regional equality, and that only the former counts as a democratic value. We might also think that no matter how undemocratic the "overrepresentation" of smaller provinces and territories is we cannot easily bypass it, for there are constitutional provisions to protect regional interests, which any electoral reform must take into account.[6]

Here delving further into public equality is instructive. When we look at arguments for an equal voice it both exposes equality-based problems with (unchecked) numerical equality and reveals that regional constraints on voting equality do not create stark conflicts with (democratic) equality as we might initially think. Indeed, when we think about what is at the core of calls for an equal voice—that is, the desire to treat all people as equals, which (without specific provisions) may fall by the wayside in majoritarian voting systems—regional provisions, or "constraints," may actually work to enhance public equality (and by association deepen a substantive account of democracy).

For an illustration, we turn to the Supreme Court of Canada (SCC). In key rulings on voting rights (enshrined in section 3 of the Canadian Charter of Rights and

6. It has been argued, however, these constitutional provisions are unlikely to "violate rights in an unreasonable manner" and "Parliament should expect considerable latitude to implement electoral reform" (Macfarlane 2016, 401). See: Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11: 41(b): "the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force" and 42 (1) (a): "the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada."

Freedoms[7]), the SCC outlined the "twin pillars of the right to vote," which "include the right to effective representation and the right to meaningful participation" (Macfarlane 2017, 37; *Reference re Prov. Electoral Boundaries (Sask)* 1991, 160). These values balance normative democratic concerns in light of regional concerns/constraints on Canada's electoral system. Moreover, the SCC advances a specific conception of public equality that provides important context for our analysis.

Significantly, the Court distanced the (individual's) right to vote from arguments for numerical equality: this makes sense given the constitutional seat floor guarantees, which leave leeway for disparities from pure proportionality. Deliberately addressing the "one person, one vote" rule in *Reference re Prov. Electoral Boundaries (Sask.)*, the Court declared the right to vote "is not equality of voting power *per se*, but the right to 'effective representation,'" (Macfarlane 2017, 37) adding "[r]elative parity of voting power is a prime condition of effective representation" (*Reference re Prov. Electoral Boundaries (Sask)* 1991, 160). This emphasis on *relative* parity offers room for voting systems to stray from the numerical approach—all in the name of vote equality. Here, the Court sets out a key distinction between numerical equality and parity: two types of equality that play out in different ways. Numerical equality would see each vote carry the same amount of power; as we discuss above, this does not and cannot happen in the Canadian context and, as the SCC notes, "absolute parity is impossible" (*Reference re Prov. Electoral Boundaries (Sask)* 1991, 160). Parity, on the other hand, approaches vote equality in terms of what it means, and takes, for individuals to participate in the electoral system as equals. This latter interpretation of the right to vote points to a number of factors we need to take into account as we look at what public equality entails. Importantly, equal respect for persons, in the context of voter parity set out by the SCC, requires more than numerical equality. The Court qualifies what it means to be equal, noting we ought to have "[d]eviations from absolute voter parity" in circumstances where they provide "more effective representation" (*Reference re Prov. Electoral Boundaries (Sask)* 1991, 160). On this view, more effective representation requires institutional mechanisms take into account various ways people require representation; an emphasis on parity highlights values and attachments important enough to require adjustments to a numerical way of aggregating votes. Specifically, the Court lists "geography, community history, community interests and minority representation" as factors contributing to effective representation (*Reference re Prov. Electoral Boundaries (Sask)* 1991, 184).[8]

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7. Section 3 states "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

8. The Court also adds: "These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list

Adjustments to the principle of voter parity that take into account other (non-democratic) values are not limited to questions of regional (provincial) representation. There are significant discrepancies between ridings, which critics point to as an additional reason to abandon FPTP.[9] At first glance, this seems to be a separate concern from regional (provincial) restrictions discussed above. However, as the Federal Court established in *Raîche v. Canada* (para. 28; drawing from the *Sask*. reference and the right to effective representation), the values that warrant deviating from numerical vote equality are not unique to federal/provincial concerns.[10] At issue in *Raîche* was a proposed readjustment of electoral boundaries in New Brunswick; the purpose was to correct for variances from the electoral quota—thereby moving closer to relative parity—but this recommendation met significant resistance from constituents of Acadie-Bathurst, who argued the adjustment would undermine their "community of interests and community of identity" (*Raîche v. Canada,* para. 14). The Federal Court agreed and, emphasizing their argument "that it is difficult to imagine a region that is more linguistically homogeneous and culturally distinct, with as much history, as the region of Acadie-Bathurst" (para. 14), the Court ruled in favour of maintaining existing boundaries. In its ruling, the court made explicit reference to individual and group rights (noting "[electoral] commissions are required to balance conflicting policies: on the one hand, the policy of voting power parity, which stresses the importance of the individual; and on the other, the principle of community of interest, which stresses the group"; para. 32). The decision here, and in *Sask.*, ought to remind us that the collective value of regional equality is ultimately felt by individuals in different ridings and provinces (as residents benefit from projects, transfers, the ability to maintain culture and language, etc). On this view, regional equality is one distinct aspect of individual Canadians' relevant characteristics: just as people want their MPs to reflect them along lines of sex, race, religion, economic status (etc.), they are also likely to have interests rooted in their regional attachments. On this view, regional equality, whether conceived as provincial or within unique ridings, which sees votes count disproportionately in order to offset demographic regional discrepancies, contributes to autonomy (as people are better able to make choices about localized collective concerns), political equality (as deviations from numerical equality are one way to ensure people with distinct/minority concerns are not systematically marginalized as a result), and interests (which include those of the community and broader regional equality). When we acknowledge regional representation/equality exists for the

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is not closed" *(Reference re Prov. Electoral Boundaries (Sask)* 1991, 184).

9. Concerns about the limits of provincial representation prompt Levick (in this volume) to argue it is necessary to add "an element of proportionality" if we are serious about overcoming serious problems in the federal electoral system.

10. We would like to thank Stéphanie Chouinard for helpful comments and direction to this case.

benefit of individual citizens, and is necessary to ensure effective representation, it challenges those who argue we should view proportional discrepancies in seat allocation/vote equality as undermining an "equal vote."

Reading the Court's interpretation of what effective representation requires with the right to vote's other "twin pillar"—meaningful participation—reinforces substantive democratic values. In *Figueroa v. Canada* (2003), which approaches regional equality and the democratic rights of citizens from the perspective of smaller political parties, as they (until this point) were denied particular benefits for fielding fewer than fifty candidates, the Court rejected the government's punitive argument that such parties do not "posse[ss] the capacity to advance the objective of effective representation" (*Figueroa v. Canada* 2003, para. 22; see also Macfarlane 2017). The government's interpretation of effective representation was that a party ought "to offer the electorate a genuine 'government option'" (*Figueroa v. Canada* 2003, para. 39), which requires broader appeal to the Canadian electorate. The Court rejected this argument on the grounds that "the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections" (*Figueroa v. Canada* 2003, para. 29 cited in Macfarlane 2016).[11] Here, the Court's argument is informed by its finding that s. 3 is "participatory in nature" (*Figueroa v. Canada* 2003, para. 29; see also Macfarlane 2016, 412). Relevant questions for the (equal) right to vote therefore depend upon not only how a person's vote is weighted, but on broader issues of participation in the electoral process that deal specifically with—and value—minority representation in the House. The "meaningful participation" aspect of vote equality is important for the question of electoral reform because PR systems (and MMP systems) are likely to increase the number of parties fielding fewer candidates. It also shapes our interpretation of what it means to have effective representation in the House of Commons; specifically, by highlighting genuine opportunities for minority participation in electoral processes and suggesting that diversity strengthens our institutions, effective representation draws from multiple democratic justifications (autonomy, political equality, and interests). This helps to vindicate our initial sense that it is too crude to think of a system as democratic or not, when in many cases the justificatory arguments for the democratic system may appeal to more than one value and can balance different values in different ways. In this case, numerical equality does not entirely disappear from view—since there is still equal (universal) franchise—but there are appeals to norms of effective representation, which embodies both the value of autonomy/representation and an appeal to interests (since presumably people's fundamental interests in particular need to be "effectively represented").

The complex character of electoral systems also reflects this balancing and weighting of different norms within democratic debate. This can be seen by a more nuanced treatment of the various arguments standardly assumed to be associated

11. *Figueroa*, at para. 29, cited in Macfarlane (2016, 412).

with FPTP and PR systems, respectively. In practice, most forms of proportional representation—and specifically the hybrid system mooted initially by Trudeau and adopted in Germany (and in a slightly different version in Northern Ireland)—do try to blend some of the instrumental advantages of a single member plurality system with a proportional representation system, which is more aligned with autonomy and democratic equality considerations. The design of this hybrid system is in fact justified not in terms of a single value but in terms of both input and output considerations, and thus can be seen as an attempt to achieve a balance between these various justificatory arguments.

In the first section of this chapter, we argued that proportional representation is less stable and more prone to small groups capturing disproportionate power than its single member plurality counterpart and used Israel as an example. But this occurs only with a particular version of a PR system: one with very low thresholds for political representation. The percentage of votes required to be represented in the legislature varies in different PR systems—from a high of 10 percent in Turkey, which has the effect that almost half of the people vote for parties that are then not represented at all, to only 1 percent in pre-1992 Israel, which did lead to disproportionate influence by small parties and has been gradually increased to 3.25 percent.[12] So, balancing perfectly proportionate representation with institutional designs aimed at producing outcomes that reward moderates is embodied in the very design of some types of PR systems. In Germany for example, the threshold for representation is 5 percent. This threshold is arrived at not because 5 percent is some magic number determined by the principle of public equality nor by agency considerations, but because it produces more stable outcomes than a lower threshold and tends to distribute power in the centre while at the same time avoiding some of the gross inequities of higher thresholds, such as what is evident in Turkey.

Hybrid systems, such as in Germany, also try to incorporate institutional mechanisms designed to achieve a balance between vertical accountability concerns (having a representative to call, to represent particular areas or constituencies) and proportionality concerns. These mixed member proportional systems thus combine some features of representative democracy with some representatives chosen on a proportionate basis. The idea again is not simply to combine different features of different institutions but to balance rival normative considerations: to give effect to political equality, as instantiated in a proportionality requirement, with other output-driven features, designed to produce stable and effective outcomes and enhance trust.

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12. The high threshold in Turkey is probably designed in part to prevent Kurdish political parties from representation in parliament, but as there is no threshold for independents, to some extent that effect has been circumvented by Kurdish politicians running as independents.

CONCLUSION

In this chapter we have suggested there are different justificatory arguments and values underlying different elements of a democratic system, and sometimes balanced in one element. This makes it somewhat difficult to identify a system as superior to another along a single (value) scale, but we would expect systems can be improved/reformed along a number of dimensions to achieve a productive and stable balance amongst these different values. We have also argued that some of the purported benefits of FPTP, particularly from an interest-protection standpoint, can be met with some versions of a proportionality system (as well as protections designed specifically with protecting the fundamental interests of citizens in mind). These factors, along with the weaknesses of FPTP systems, point to the need to reform Canada's electoral system. However, proportionality itself, in the Canadian context, cannot be a fundamental value since it conflicts with the Canadian constitutional understanding of representation, which incorporates a regional element. This, however, does not pose a problem when we draw from these normative democratic justifications to try to determine what, if any, changes need to occur to our electoral system in order to ensure the voting procedure upholds a substantive version of democratic equality. As we argue, when we clarify the meaning of public equality in (ambiguous) understandings of an equal vote we see several ways to interpret equality—some of which are more substantive than others. Here, the Supreme and Federal Courts' examinations of regional equality and democratic rights are instructive, particularly when we read this with our analysis of justificatory arguments and values. The relative value of proportionality, in combination with the Court's emphasis on the significance of "effective representation" and "meaningful participation" in the context of (relative) voter parity, has (at least) two implications for Canadian electoral reform. First, it suggests MMP—because it addresses a combination of values—is a stronger electoral system; this is true not only in terms of its ability to balance democratic and other justificatory values better than its alternatives, but also because the democratic principles it embodies offer a more substantive conception of democracy that takes values of autonomy and political equality more seriously than FPTP systems.

However, our analysis offers an additional word of caution for those who seek to reform electoral systems, and this brings us to our second implication. If a main justification for changing the electoral system is to enhance values of autonomy and political equality—and this is certainly a solid justification—it is not enough to evaluate the democratic health of our electoral system on a particular method of aggregating votes. MMP systems are normatively preferable to FPTP, but without broader institutional change they will not go far enough to properly address deficiencies in effective representation and meaningful participation (which are key to rich accounts of autonomy and political equality). In order to do this, we need to consider other institutional arrangements that affect, or are affected by, our electoral system. Specifically, the representatives Canadians vote for have

a considerable effect on our ability to secure effective representation. On this front, Canadian politics fares poorly, with some key minority groups numerically underrepresented[13] and with minority groups lacking power and influence more generally.[14] Remedying this lack of diversity in representation is necessary to give due weight to the substantive values we discuss above.[15] It also raises a host of other issues, which require a separate analysis to do them justice; however, as our above analysis argues, we need to balance democratic and other justificatory values, and representation—whether regional or minority—affects our understanding of substantive values of autonomy and political equality. A weighing and balancing metaphor is central to any evaluation of our electoral system (of which systems of vote aggregation are only one part of a broader set of democratic institutions[16]). Changing the way we aggregate votes is important; alone, however, as an institutional mechanism with the aim of improving meaningful democratic participation and representation, it is insufficient.

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13. Women are significantly underrepresented, while from a numerical perspective, racial and Indigenous minorities are not—at least not in a way that would benefit from proportional representation. One problem with relying on PR as a method to remedy diversity, however, is that discussions here tend to conflate the representation of women with other minority groups (Tolley 2017, 111). As Levick (this volume) argues for proportionality at the federal level she notes the accompanying opportunity to improve—and institutionalize—Indigenous representation.

14. In his discussion of Canadian electoral reform Weinstock (2017, 19) makes the important point "that concerns with proportionality should track power and influence rather than seats."

15. It is also, as Tolley (2017, 111) argues, possible to reform our lack of diversity without changing the electoral system. Tolley adds a note of caution for mixed-member systems, arguing they "would institutionalize the expectations for substantive representation that are already disproportionately placed on women and minorities" (2017, 115), underscoring the limits of electoral reform alone.

16. See Weinstock (2017, 15).

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9

THE FEDERALIST CASE FOR ELECTORAL REFORM IN CANADA

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INTRODUCTION

Electoral systems and federal structures are usually thought of as distinct organizing principles of government. Studies of federalism tend to focus on those institutions and structures that embody the federal principle, such as mechanisms of inter- versus intra-state federalism. But while comparative studies of federalism typically include a discussion of the system used to (s)elect the upper house, they rarely consider the system used to elect the national parliament. By the same token, studies of electoral systems have examined their effects on virtually every conceivable aspect of politics, yet, remarkably, little has been written on the relationship between electoral systems and federal politics. This neglect is doubly surprising because the relationship between electoral systems and federalism is a complex and dynamic one. Federal and electoral institutions are mutually reinforcing, which explains why major electoral reform is rare among federal states—even rarer than it is among unitary ones.[2]

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2. In recent years, the most obvious example comes from Russia, which adopted a mixed-member majoritarian system in 1993 and then switched to proportional representation in 2004. Looking farther back, Argentina adopted proportional representation in 1963, while Australia switched to the alternative vote in 1918 and introduced the single transfer-

Recent debates on electoral reform in Canada have focused on issues such as fairness and proportionality. However, the importance of these principles notwithstanding, the lack of attention to federal structures ignores the importance of the wider institutional context to the current reform debate. In so doing, it misses an important opportunity to address some long-standing institutional anomalies. Because of its disproportional focus on geographic interests, the single member plurality (SMP) electoral system ought to have moderated the lack of provincial representation in the federal legislative process that arises from the appointed Senate. In practice, however, the exercise of strict party discipline and the tendency of SMP to create artificial majorities have exacerbated this problem. With major Senate reform off the table for the time being, changing the electoral system is the most feasible way to facilitate effective provincial representation at the federal level.

This chapter makes a federalist case for electoral reform in Canada. It argues that reform proposals must be sensitive to the institutional context. Given the current political opposition to major constitutional change (outside Quebec), electoral reform could and should be used to address problems that arise from the unusual lack of provincial representation in the federal legislative process. Despite the difficulty associated with changing the constitution, Canadian federalism has proven remarkably flexible. Thus, this chapter argues that reforming the system used to elect the members to the House of Commons is a natural extension of the long-standing logic of extra-constitutional reform in Canada.

The chapter proposes several reforms designed to improve the representation of "communities of interest" at the federal level—without modifying the Senate, and without changing the constitution. It begins by reviewing the problems that arise from the lack of provincial representation in the federal legislative process before explaining how the existing electoral system might have moderated them. While minor reforms would help to improve the ability of SMP to facilitate better regional representation, replacing the current electoral system with a mixed alternative represents a better solution from a federalist perspective. Finally, the chapter considers how electoral reform also offers an important opportunity to institutionalize Indigenous representation in parliament. Irrespective of whether Canada eventually adopts a mixed electoral system, reserved seats, as a recognition of the special place of Indigenous peoples within the Canadian federation, would be of symbolic and substantive importance in our multinational state.

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able vote for Senate elections in 1948.

THE IMPORTANCE OF INSTITUTIONAL CONTEXT AND THE PROBLEM OF PROVINCIAL REPRESENTATION

Federalism is an uncommon political system, but it is not by accident that most federal systems are bicameral, nor that most bicameral systems are federal. Outside the federal context, bicameral legislatures have gradually fallen out of favour. Denmark switched to a unicameral legislature in 1953, and Sweden (1969) and Iceland (1991) have since followed suit. This trend can also be observed in New Zealand, which abolished the Legislative Council in 1951, and the United Kingdom, where the powers of the House of Lords have gradually been reduced. Among federal states, however, upper chambers serve a vital institutional function.

All federal systems employ different methods of (s)electing members for each legislative house. Reynolds, Reilly, and Ellis (2005) explain that this is because the purpose of bicameralism is to represent different "communities of interest" within the federation.[3] Federations are, by definition, diverse entities, and Canada is no exception. The very purpose of a federation is to preserve the diversity of its constituent units while maintaining the territorial integrity of the state as a whole. Bicameralism is one such tool for managing this tension.

How constituent units are represented in the upper house varies from federation to federation. Seats in the upper chamber may be distributed based on population (as in Germany), or all states may receive equal representation regardless of population (as in South Africa and Switzerland). Members may be elected directly by voters (as in Australia), indirectly elected by regional governments (as in Belgium and India), or not elected at all (as in Canada). Where members of the upper chamber are directly elected, federations use different electoral boundaries (as in the US) or electoral formulas (as in Australia) for elections to each house in order to ensure that the different bodies represent different communities of interest within the federation.

These institutional arrangements define the ethos of a federation. In Canada, the 105 seats in the Senate are assigned on a regional basis that does not directly correspond with population distribution.[4] Like its US counterpart, the Canadian Senate is prohibited from introducing bills relating to taxation or public spending,

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3. Despite using the term "communities of interest" repeatedly, Reynolds et al. (2005) do not offer a precise definition, although they suggest that it refers to minority groups of particular national significance. In the context of federalism, this would refer to the constituent units of the federation (states, provinces, *Länder*, etc.), which, as the founding partners of the federal state, each constitute a distinct community that merits special constitutional, institutional, and representational status within the federation (i.e., as opposed to other groups such as women, sexual minorities, or disabled persons).

4. Four regions (Ontario, Quebec, the Maritimes, and the Western provinces) each receive 24 seats, with the remainder being divided between Newfoundland and Labrador and the three northern territories.

and the approval of both chambers is necessary to pass legislation. Unlike in the US, however, the Canadian Senate rarely exercises its constitutional veto, in recognition of the diminished legitimacy that results from an appointment process that has tended to reward party service rather than represent regional interests. As Emmett Macfarlane notes in his chapter on Senate reform in this volume, in recent years the Canadian Senate has typically amended just 10 percent of the legislation that came before it. Despite concerns that recent changes to the appointment procedure may lead to an activist upper chamber, there is—so far—little evidence of this.

Canada is not the only country to have an unelected upper house, but it is the only democratic federation in which the constituent units (provinces) lack meaningful representation at the federal level. This is not merely a reflection of the fact that senators are unelected. In Germany, for instance, members of the *Bundesrat* are not elected to this position, but are members of state cabinets who have been delegated to represent the *Länder* and must vote as a regional bloc. In this way, they remain directly accountable to state legislatures and may be appointed or removed at any time. Not so in Canada, where members of the Senate are appointed by the governor general on the advice of the prime minister and serve until age 75.

As the German example illustrates, an upper chamber need not be elected to serve an important representative function within a federation. The crux of the problem in Canada is that senators are not accountable to provincial interests—neither to provincial legislatures nor voters. Although the seats in the Canadian Senate are ostensibly allocated on a regional basis, there is no mechanism to ensure that senators act in the interests of their regional "constituency." The only institutionally mandated linkage between senators and the province they purport to represent—the requirement that senators must maintain their primary residence in that province—has been interpreted so broadly as to be effectively meaningless. This, taken together with the fact that the entire process is mediated by the prime minister, and that provincial attempts to influence the selection of senators have failed,[5] has resulted in a unique lack of provincial representation.

If the purpose of a federal upper chamber is to represent different communities of interest, what communities of interest does the Canadian Senate represent? The criteria for eligibility are telling. To qualify, an individual must be a Canadian citizen between the ages of 30 and 75, with a minimum net worth of at least $4,000,[6] and own property in the province associated with their seat. By profession, virtually all current senators have a background in law, politics or public service, business management, or education. Almost none have prior experience in resource extraction, agriculture, fisheries, transportation, or any skilled trades. This reflects the

5. Despite holding regular elections since 1989, only three of Alberta's "senators-in-waiting" have ever been appointed.

6. The original amount was specified in 1867 and has not been adjusted for inflation, but today this figure would be over $90,000.

elitist understanding of the Senate as envisioned by its engineers. At the time of confederation, Sir John A. Macdonald intended that the Senate should serve as the chamber of "sober second thought" that would check the "democratic excesses" of the popularly elected Commons. In that sense, the original purpose of the Senate was closer to the hereditary House of Lords than other federal systems in existence at the time (e.g., the USA or Switzerland). But even in the United Kingdom the power of the Lords has been curtailed. A house of sober second thought may act as a check against a powerful Westminster-style executive (although the Canadian Senate has been notably loath to do so), but federal upper chambers typically serve a very specific function. While the Liberals have introduced a new, merit-based appointment process with an emphasis on achieving more diverse representation and reducing partisanship—analyzed in detail in the volume's chapter by Emmett Macfarlane—the lack of provincial input remains a critical problem.

In a highly decentralized federation, the lack of provincial representation at the federal level has been a source of considerable intergovernmental friction. The federal government has extensive reach when it comes to fiscal policymaking, but weak implementation authority because many areas are under provincial domain. While the provinces have constitutional authority in areas such as healthcare and education, they depend on transfers from the federal government to fund these expensive services, yet have no input into determining the timing, value, or conditions of federal transfers. As Watts (1999, 2) explains, this issue has often been at the centre of Canadian federal relations: "considerable intergovernmental bargaining preceded the introduction of the major shared-cost programs, but ultimately the federal spending on these programs was usually the result of independent federal decisions." The problem has grown as the range of cost-sharing programs and conditional grants has expanded since the 1960s.

Numerous attempts have been made to reform the Canadian Senate, especially since the patriation of the Canadian constitution in 1982. Some proposals have sought major changes, as in the 1992 Charlottetown Accord, which would have reduced the power of the Senate and reallocated an equal number of seats to each province, with senators being directly elected. Other proposed reforms have been more modest, such as Bill S-4, An Act to Amend the Constitution Act, 1867, which sought to limit the tenure of senators appointed after 14 October 2008 to a single, non-renewable nine-year term.[7] None have yet succeeded. Even seemingly minor Senate reform has proven incredibly difficult due to the infamously complex amending formula and a lack of consensus about how a reformed Senate should look. Moreover, major Senate reform does not feature as prominently on the political agenda as it did during the constitutional debates of the 1980s and '90s, or even

7. Bill S-4 was introduced in 2006 and has since been reintroduced as C-19 (2007), S-7, (2009), and C-10 (2010).

a decade ago when Stephen Harper took office.[8] In response to Quebec's recent proposal to engage in constitutional dialogue, Trudeau has also indicated that his government is not willing to reopen debate.

For those reasons, this chapter is not about Senate reform. Rather, this discussion underscores the unusual nature of the Canadian Senate in comparative context. There are, however, numerous other ways that Canadian federalism has adapted to compensate for the ineffectual Senate. The Supreme Court composition rule, for instance, provides a safeguard for the different civil and common law traditions in Canada. The convention that Cabinet must include representatives from each province (in addition to being generally diverse in terms of race, ethnicity, gender, etc.) is similarly intended to ensure fair representation of regional interests.

The next section argues that the SMP electoral system should have facilitated provincial representation in the federal legislative process. That it has not represents a major failing. But despite our petrified institutions, Canadian federalism is remarkably flexible. The remainder of this chapter argues that reforming the system used to elect the members to the House of Commons is a natural extension of this logic.

INCENTIVIZING LOCAL AND REGIONAL REPRESENTATION: THE UNREALIZED POTENTIAL OF SMP IN CANADA

All electoral systems strive to balance the inherent conflict between local and national representation. But with its use of single-member geographic constituencies, SMP[9] ought to have provided a mechanism for strong regional representation in Canada. Single member districts disproportionately reward candidates and parties that receive geographically concentrated support, thereby incentivizing a focus on regional issues. Voters in an SMP system also cast their ballots for individual candidates rather than party lists, which typically incentivizes legislators to advocate for the interests of their own constituency (i.e., rather than for their larger party base, as in a pure proportional representation system).

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8. Although Harper had been an outspoken advocate of an elected Senate prior to becoming prime minister, once in office his plans failed to advance (as in the 2014 Senate reference). The Harper government's proposal for consultative elections is discussed in greater detail in the chapter by Emmett Macfarlane.

9. Commonly (but less accurately) known as first-past-the-post, single member plurality electoral systems operate by dividing a state into geographic districts, each of which returns a single individual to parliament. Voters cast their ballots for a single candidate. The candidate who wins the most votes (but not necessarily a majority) in each district is elected.

The strength of the incentive depends on the institutional context. American political culture, for instance, emphasizes the importance of local representation. Hence, constituency service is considered a critical qualification (Cain, Ferejohn, and Fiorina 1984). At the other end of the spectrum, Searing (1985, 349) contrasts the "grass roots" character of US legislators with the more "elitist" British tradition, in which MPs are not required to live in their districts and are more likely to be chosen based on party service. Studies of other federations show that when legislators face conflicting pressures from their local district versus the national party, local influences usually win (see Tsebelis 2002). In that sense, however, Canada is a significant exception. The Canada Elections Act (S.C. 2000, c. 9) requires that candidates be approved by the leader of their party, which is unusual even among Westminster systems, and MPs can be kicked out of party caucuses for even minor infractions (Laponce 1994). The result is a degree of parliamentary discipline that is actually stronger than in many proportional systems (Depauw and Martin 2008). As a result, while legislators elsewhere can demand local concessions in exchange for their support, in Canada these debates tend to happen within the context of party caucuses and out of public view—assuming, of course, that parties enjoy diverse regional support.

In spite of these partisan constraints, regional identities in Canada are also exceptionally strong (see Guibernau 2006). Not surprisingly, respondents to the recent MyDemocracy survey overwhelmingly indicated (83 percent somewhat or strongly agreed) that they would prefer an MP who acted in the interests of their constituency even if that meant voting against their own party. The exceptional strength of Canadian party discipline is clearly an obstacle to this kind of representation.

Notwithstanding the significant obstacles posed by strict party unity, the SMP system has facilitated past attempts by regional parties to address federal grievances directly in the House of Commons. The emergence of the Reform Party (1987–2000) as an expression of Western discontent with the Progressive Conservative leadership of Brian Mulroney is one such example, but the most significant case is that of the Bloc Québécois, which formed in response to the collapse of the Meech Lake Accord. When executive federalism reached its breaking point, and without effective representation in the Senate, Liberal and Progressive Conservative defectors led by Lucien Bouchard formed a provincial-interest party with the singular goal of sovereignty for Quebec. The concentrated support of the Bloc proved a major advantage in the 1993 election, as it captured fifty-four seats (out of a total of seventy-five in Quebec) and formed the Official Opposition with just 13.52 percent of the overall vote. It continued to be a strong electoral presence throughout the 1990s and 2000s.

New (or break-away) parties with strong regional support do not face the same start-up challenges under SMP as parties with diffuse appeal, such as the Green Party.[10] But this should serve as a cautionary tale rather than a template for other

10. The Green Party received 602,944 votes in the 2015 election, slightly fewer than the

regions to follow. Even with a toned-down sovereignty platform in recent years, the purpose of the Bloc has always been to fundamentally disrupt Canadian federalism, and not merely to supplement or facilitate it.

This underscores a peculiar paradox. The Canadian brand of SMP does not provide the same strong local representation that such systems—especially federal ones—typically offer, and that Canadians seem to prefer, due to the unusual strength of party discipline. As a result, the greatest strength of SMP—its focus on local representation—has been profoundly undermined by extreme party discipline. Compounding this problem, even the convention that Cabinet should represent each province has been diminished by the increasing concentration of power in the Prime Minister's Office, the Privy Council Office, and central agencies (Savoie 1999)—a situation made possible by the fact that the prime minister's party controlled a majority of the seats in parliament.

The obvious solution is to relax party discipline. Cross (2006) suggests eliminating the requirement that party leaders sign-off directly on nominees, which would democratize and decentralize the nomination process. It would also likely increase competition among would-be nominees and reward local representation rather than party service. But local interests are not provincial interests.

Improving the representation of provincial interests in the federal legislative process would also require mechanisms that encourage local MPs from the same province or region to communicate and coordinate. To that end, I echo Thomas (1985) in proposing that links between the federal and provincial branches of parties be improved, and that all-party regional caucuses be established in the House of Commons. Such changes would not require a reform of the electoral system and would, in fact, be beneficial regardless of the electoral formula.

The likelihood of successfully reducing party unity ultimately depends on the willingness of federal leaders to relinquish their exceptional degree of control. In the current political context, this seems unlikely without significant and sustained pressure from individual MPs, riding associations, party members, and even the provinces.

Although the problem of excessive party unity could easily be resolved if sufficient political will could be mustered, from a federalist perspective there are two further and more complex problems that arise from SMP in the Canadian context.

The first relates to the incentive structure that SMP produces for political parties. Specifically, the winner-take-all nature of individual contests encourages parties to concentrate campaign efforts in regional strongholds and tailor promises to appeal to voters in areas where they have a greater likelihood of winning. Cairns (1968)

Bloc at 821,144. If the Green votes had been regionally concentrated, this would have been enough to win eleven to twelve seats with a majority. However, because Green voters are spread across the country, they rarely constitute a plurality in any single district. Hence, the Greens took just one seat in 2015, while ten Bloc candidates were elected.

convincingly argues that because of this, the existing electoral system has exacerbated regional and ethno-linguistic cleavages in Canada by encouraging parties to promote regional tensions.[11] But to the extent that this is a weakness of the SMP system, it may also be a strength in an institutional context that lacks effective provincial representation at the federal level. To be sure, in a country with strong regional identities, regionalized voting patterns will occur regardless of the electoral system. Nor is this tendency unique to majoritarian systems, as party systems in countries with proportional electoral systems can also be divided along regional, linguistic, or ethnic lines, as in Belgium.

The problem, however, stems from the way in which governments are formed in majoritarian systems. Among proportional systems, single-party governments are rare, which means that parties representing diverse interests must compromise to form coalitions. In Canada, however, single-party governments are the norm, which can leave large areas of the country without adequate representation in government. For example, despite holding a majority of seats in the Commons, the current Liberal caucus is (at the time of writing) almost entirely composed of representatives from Ontario, Quebec, and Atlantic Canada, and contains as many representatives (four) from Alberta (population: 4,252,900) as it does from PEI (population: 148,600). The systematic exclusion or under-representation of certain areas by certain governments is clearly a problem for the representation by population logic of the lower house: even though all MPs represent an approximately equal number of Canadians, in terms of the likelihood of influencing policy, representation by an MP from the governing party is clearly more desirable than representation by an MP from an opposing party, especially in a majority government situation.

The second problem relates to the way in which votes are counted. Because votes cast for non-winning candidates do not affect the overall distribution of seats, SMP tends to create artificial single-party majority governments. It is this feature of the electoral system that is squarely to blame in almost every example Savoie (1999) cites in elaborating his argument about the centralization of power in Canadian politics. The legislative majorities that have facilitated this process were almost all artificial in the sense that they were manufactured by the electoral system without a majority of the popular vote. Only four times in the past century has a single Canadian party attracted more than 50 percent of the popular vote in a federal election.[12] Every other majority government during this time was artificially inflated by the electoral system. Three of those majorities received less than 40 percent of the vote.[13]

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11. The subsequent emergence of the Reform party and the Bloc are testament to the prescience of his argument.

12. In 1917, 1940, 1958, and 1984.

13. 1997 (38.5 percent), 2011 (39.6 percent), 2015 (39.5 percent).

Artificial majorities are not an aberration. By empowering the incoming executive to pass its legislative program, SMP manufactures policy mandates and gives voters a clear choice between alternatives. A party that fails to deliver can be ejected from office at the next opportunity. While this type of accountability and expediency may be desirable to a degree, in the absence of institutional checks it can resemble an "elective dictatorship."[14] With the appointed Senate loath to exercise its veto,[15] a single-party majority in the Commons effectively gives a prime minister unfettered authority to pass legislation. But empowering a party that lacks regional support across the country and received just 38 percent of the popular vote to pass its legislative agenda unhindered is clearly at odds with the decentralized, multinational character of the Canadian federation.

In sum, the status quo undermines the possibility for provincial input into federal policymaking at virtually every institutional opportunity. The next section explores reforming the electoral system to increase its proportionality as a potential solution.

THE FEDERALIST CASE FOR A MIXED ELECTORAL SYSTEM: FACILITATING COMPROMISE AND CONSENSUS IN A DIVERSE FEDERATION

During the 2015 election, the federal Liberals repeated their promise to replace first-past-the-post nearly 2,000 times,[16] although they did not articulate a specific alternative. Instead, the Trudeau government explored possible reforms using a series of town hall meetings and an online survey (MyDemocracy.ca). The issue was also referred to a Special Committee on Electoral Reform, which released its third and final report in late 2016. The report made two specific recommendations, but did not identify a specific alternative, much to the dismay of then Minister of Democratic Reform Maryam Monsef, whose public criticism signalled the beginning of the end of her government's commitment to major reform. The promise to end first-past-the-post has not been repeated since.

Broadly speaking, the report recommended that any new electoral system should contain a significant element of proportionality but should avoid the exclusive use of party lists in favour of maintaining some geographic link between voters

14. The phrase "elective dictatorship" was popularized by Lord Hailsham, former Lord Chancellor of the United Kingdom, as a hyperbolic description of a situation in which a single party dominates parliament and is, in effect, able to pass whatever legislative program it wishes.

15. To say nothing of the inconceivability of a governor general withholding royal assent.

16. By the count of NDP leader Tom Mulcair, the pledge was made 1,813 times. This figure was widely cited in the media.

and MPs. Monsef's concerns over the Committee's recommendations cited their ungainly breadth, but in fact the two recommendations, taken together, provide a clear endorsement of a mixed electoral system. Mixed, in this context, could mean an additional member system similar to German or Scottish-style MMP, as endorsed by the Law Commission of Canada (c2004), or a parallel list system similar to that recommended by the Pépin-Robarts Task Force on Canadian Unity (1979).[17] It could also mean a rural-urban mix of single and multi-member districts as outlined in the proposal submitted by Fair Vote Canada (Special Committee on Electoral Reform 2016, 82–84). These alternatives vary widely in their actual degree of proportionality, but all reflect the fact that in recent years the idea of a mixed electoral system has emerged as the clearest challenger to SMP in Canada. While a mixed system would continue to use geographic districts, the incentive structure for parties would change. A proportional top-up system such as MMP would dramatically reduce (though not eliminate) the bonus afforded to geographically concentrated parties such as the Bloc, while boosting the number of seats allocated to parties with diffuse support (such as the NDP or Green Party).

As noted in the introduction, recent debate on electoral reform in Canada has been framed in terms of fair and proportional representation—values that are clearly relevant to the principle of representation by population embodied by the House of Commons. For instance, Fair Vote Canada (2016) based its current campaign on the importance of "equal and effective votes." A similar logic is reflected in the report of the Law Commission of Canada (c2004, 139), which emphasizes the need to "reduce the discrepancy between a party's share of the seats in the House of Commons and its share of the votes." The language of the recent Report of the Special Committee on Electoral Reform (2016) is similar, stressing the importance of fairness and inclusion.

Both reports note the importance of regional and local representation as an asset of mixed systems as opposed to purely proportional alternatives. Yet neither says much about the larger institutional context. The Report of the Law Commission of Canada (c2004) mentions the Senate only in passing, while the Special Committee on Electoral Reform (2016) references the Senate primarily in relation to the Supreme Court's 2014 decision in the *Reference re Senate Reform* and its implications for constitutional reform. Finally, while many of Fair Vote Canada's

17. Mixed electoral systems combine the principles of proportional representation and plurality voting. The most commonly used method is the mixed-member proportional (MMP) system, which is a two-tier system that combines non-proportional single-member districts with a compensatory regional or national party list vote that determines the proportion of local and top-up list seats allocated to each party. The proportion of list seats may or may not be sufficient to balance the disproportionality of the plurality elections. Alternatively, parallel list systems, as the name suggests, distribute list seats in accordance with the proportion of the vote that each party received rather than in a compensatory way.

promotional materials emphasize the positive aspects of consensus government, they rarely do so in reference to provincial interests or the Senate.

The importance of fairness and proportionality notwithstanding, the lack of attention to federal structures ignores the importance of institutional context to the current debate. Older studies make the link between electoral and federal institutions more clearly. Although the report of the Royal Commission on the Economic Union and Development Prospects for Canada (1985; chaired by former Minister of Finance Donald S. Macdonald) rejected electoral reform for the House of Commons, it did so only because it envisioned a broader series of institutional changes that would ameliorate many of the problems associated with the federal electoral system. It therefore proposed that senators be elected by proportional representation, but recognized that electoral reform for the lower house would nonetheless be a "second-best" solution.

The recommendations of this chapter can be understood as the inverse. In 1982, when the Commission began its work, constitutional reform was fresh in the minds of the Canadian political elite. But the subsequent failures of the Meech Lake and Charlottetown Accords have since underscored the political difficulty of reforming the Canadian constitution, and the likelihood of an elected Senate now seems remote. For the Commission, electoral reform may have been a second-best solution, but given the fact that major Senate reform is off the table for the foreseeable future, and that implementing a mixed electoral system would not necessarily require amending the constitution, it would appear that the tables have turned.

Studies of electoral systems often point to trade-offs between diverse representation and consensus under proportional systems and political expediency produced by majority and plurality systems. From a federalist perspective, however, this trade-off is one-sided: political expediency is not desirable if policies lack broad support across the federation. From this point of view, the primary advantage of a more proportional electoral system would be to end the reliance of governments upon artificial majorities. Moreover, a system that would consistently produce coalitions would also require governments to enjoy broader regional support, which, in the absence of an elected Senate, would ensure representation of a wider variety of regional interests. Although existing regional voting patterns would certainly continue under a mixed system, allowing regional parties to continue to do well in single-member districts, crucially, parties with significant support (though not quite a plurality) would not be shut out of their rivals' regional strongholds, as is the case now. Rather than disincentivizing parties from pursuing broad, national appeal, a compensatory mixed system could use top-up seats to improve parties' representation in areas where their candidates attract substantial support but seldom win district-level races. Just as importantly, it would not be possible to form a government that lacks the support of a majority of Canadians, as is the case now.

Opponents of electoral reform in Canada raise several arguments that merit consideration from a federalist perspective. Given the current excess of party discipline discussed above, it is reasonable to be skeptical of an alternative that would

consolidate the control that party leaders currently have over their MPs. That said, the already extraordinary degree of control makes it difficult to imagine how party discipline could increase any further, as comparative studies already place Canada at the extreme end of the spectrum (Depauw and Martin 2008). In that sense, the minor reforms described above would also be useful in a mixed system.

Proponents of SMP also fear that proportional and mixed systems will empower minor parties at the extreme ends of the political spectrum to exert undue influence over larger parties reliant on their support. Such a scenario does not sound ideal from a federalist perspective either if parties with broad support can be manipulated by those with narrower interests. In truth, however, as the earlier example of the Bloc illustrates, SMP does not offer a guarantee that small parties with destabilizing agendas will not wield considerable power—potentially even acting as a coalition partner, as in their failed attempt to partner with the Liberals and NDP in 2008, which was forestalled only by the prorogation of parliament. In practice, as elaborated in the chapter by Drake and Moore, technical considerations such as electoral thresholds can be used to moderate the influence of fringe parties. Moreover, as the New Zealand case has shown, these fears are almost certainly exaggerated; far from empowering extremist parties, Nagel (2012) demonstrates that use of MMP since 1996 has actually brought government closer to the median voter than it was under the previous SMP system.

OTHER COMMUNITIES OF INTEREST: INDIGENOUS REPRESENTATION

This chapter has so far used the term "communities of interest" to describe the interests of the provinces. But they are not the only communities of interest that merit special representation in the Canadian federation. In particular, it is vital to consider the way in which reform might improve the representation of Canada's Indigenous peoples.

If the Canadian Senate can be said to have generally failed to represent provincial interests, then the legislative process, as a whole, has failed to represent Indigenous peoples. Although the Senate was originally intended to represent the provinces, however imperfectly, Canada's political institutions were never designed to accommodate the diverse interests of Indigenous peoples, who were denied even basic franchise rights until the mid-twentieth century. Electoral reform offers an important opportunity to redress this historical marginalization by consummating the symbolic and actual representation of Indigenous peoples within the federal legislative process.

While SMP has facilitated better (descriptive) representation of some geographically concentrated visible minorities (at least at the federal level, see Bird 2005), many historically underrepresented groups are not sufficiently spatially concentrated

to constitute a plurality in any single electoral district. As a result, women, sexual minorities, and many Indigenous groups continue to be chronically underrepresented in parliament.[18] Despite the fact that a record ten Indigenous MPs were elected in 2015, representing just under 3 percent of MPs, even this historic high is still lower than the proportion of Canadians who identify as Indigenous (4.3 percent, according to the 2011 census). Proponents of MMP, including the Law Commission of Canada (c2004), argue that a more proportional electoral formula would ameliorate the current chronic under-representation of women and minorities, including Indigenous peoples, but this assumes that parties will place Indigenous candidates high enough on their lists to have a reasonable likelihood of being elected. The fact that the Official Opposition currently contains no Indigenous representatives (out of ninety-nine MPs) suggests that parties may have a long way to go on this front.

Rather than relying on parties to incorporate Indigenous interests voluntarily, electoral reform presents an opportunity to institutionalize Indigenous representation at the federal level. This should include the recommendation of the Royal Commission on Electoral Reform and Party Finance (1991), better known as the Lortie Commission, to introduce what it calls "Aboriginal electoral districts" or AEDs. Reserved seats are used in many other places to represent important national, linguistic, and ethnic minorities. In New Zealand, for example, there are currently seven electoral districts reserved exclusively for voters of Māori descent, although Māori voters can choose whether to register on the Māori or general electoral roll.

Although Canada's federal structures make the introduction of AEDs more complex than in unitary New Zealand, they are not an insurmountable obstacle. In order to avoid the necessity of a constitutional amendment, the Lortie Commission suggests that AEDs should not cross provincial boundaries, although it acknowledges that this may be challenging in the Atlantic provinces, where Indigenous communities are small and diffuse. Assuming that the distribution of AEDs follows the same principle of representation by population as other seats in the Commons, then based on the current number of seats in parliament (338), and the current Canadian population (35.85 million), no single Atlantic province currently includes a sufficiently large Indigenous population to warrant its own AED. That said, the present seat distribution in the House of Commons is evidence of the fact that the current interpretation of the principle of representation by population is surprisingly elastic. Independent boundary commissions have clearly weighed the importance of local representation and regional differences very highly in designing districts that vary widely not just in terms of geographic size, but also by population: if the fact that Labrador (population: 26,728) and Kenora (population: 55,977) are entitled to the same number of MPs as Brantford (population: 132,443) and Vancouver East (population: 110,097) does not violate the principle of representation by population

18. On the tendency of SMP systems to under-represent women, minorities, and individuals from lower social class backgrounds, see Bogdanor (1984).

on the grounds that these districts group together voters with similar interests, then the same can surely be said of AEDs.

In numerical terms, the average population of a Canadian electoral district in the 2015 election was 99,044, with a standard deviation of 16,344. The difference between the smallest and largest ridings currently in existence (i.e., the maximum variation in district size currently deemed permissible without violating the principle of representation by population) was 105,715 people, or 6.47 standard deviations. This difference is substantively greater than the difference between the population of the average extant riding and the smallest possible provincial AED (PEI, with an Indigenous population of 2,230 in 2011) at 96,814, or 5.92 standard deviations. The difference between the largest electoral district currently in use and the smallest provincial AED (7.97 standard deviations) would be only slightly larger than the difference between the largest and smallest extant districts. As elaborated in this volume's chapter by Anna Drake and Margaret Moore, successive Supreme Court rulings have indicated that such deviations from perfect numerical parity are permissible where they facilitate more effective representation. If the Canadian federation can recognize the importance of representing regional communities of interest in designing electoral districts, it can surely make the same accommodations for more diffuse but no less significant Indigenous communities.

If the Lortie Commission recommended the use of AEDs to compensate for the marginalizing effects of SMP, would AEDs still serve a meaningful purpose if we adopt a mixed electoral system? As the example of Māori seats in New Zealand illustrates, AEDs are compatible with either SMP or a mixed system. However, in proposing the adoption of a mixed system for New Zealand, the Royal Commission on the Electoral System (1986) recommended against continuing the use of Māori seats under MMP, arguing that all parties would be incentivized to pay attention to Māori voters under the new system. In retrospect, the Commission's expectations have been borne out: as Reynolds, Reilly, and Ellis (2005, 122) explain, "twice as many Māori representatives have been elected from the general rolls as from the specific Māori roll," and, on average, only 40 percent of Māori voters choose to use the reserved electoral roll.

That said, in other respects, the reserved seat system is even more compatible with MMP than it is with SMP. In an SMP system, the comparatively small proportion of reserved seats could lead to a situation in which Indigenous parties seldom have enough clout to bring about meaningful policy change. While one might imagine a scenario in which an Indigenous party holds the balance of power in a narrow minority government situation (which is more likely under MMP but still possible under SMP), it is at least as likely that Indigenous parties would find themselves dominated by (artificial) majority governments produced by SMP. Even where "mainstream" parties compete in AEDs, it is entirely possible that the party

that wins the most reserved seats might not form the government.[19] Although this would still be an improvement over the status quo, this type of outcome is less desirable than the opportunity to participate in governing, or at least in coalition negotiations—a situation that is more likely under MMP. In New Zealand, MPs representing a majority of the reserved seats have been in government or part of a confidence-supply support agreement (a tacit coalition) following almost every election since MMP was adopted.

The New Zealand case also shows that use of AEDs in the context of MMP does not disincentivize general, non-Māori parties from appealing to Māori voters. As Banducci, Donovan, and Karp (2004, 537) explain, because "the party list determines the overall allocation of seats in parliament, parties have an incentive to appeal to Māori voters despite the segregation of their constituency votes. Such a system enables the minority to have a guaranteed level of descriptive representation without risking loss of substantive influence." The use of dual constituencies and MMP therefore ensures a minimum level of Māori representation while still inducing parties to appeal to the relatively small pool of Māori voters. Surveys show that "Māori who choose to be represented by Māori electorate MPs are more likely to believe that they have a say than those represented by electorate MPs who are not Māori" (Banducci, Donovan, and Karp 2004, 550).

Irrespective of whether Canada eventually adopts a mixed electoral system or not, in the Canadian context, AEDs would be of symbolic and substantive importance in our diverse, multinational state as a recognition of the special place of Indigenous peoples within the Canadian federation.

CONCLUSION

The likelihood of electoral reform at the federal level has waned since the Liberal government backed away from its promise to end the use of first-past-the-post in early 2017. One year on, in an interview with CBC Radio, Trudeau doubled down on his government's rejection of proportional representation, going so far as to say that it would be "harmful to Canada."[20] Instead, attention has turned to minor reforms to campaign legislation in advance of the 2019 election. Nevertheless, the debate has raised some important questions about the future prospects for institutional innovation in Canada and the relationship between federal and electoral institutions.

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19. This was the case in New Zealand under SMP, where Māori voters, who have historically supported the left-of-centre Labour Party, tended to lack representation in National Party majority governments (see Banducci, Donovan, and Karp 2004).

20. Interview with Chris Hall, reproduced in an article by Elise von Scheel, 1 February 2018.

Both academic studies of electoral reform in Canada and public proposals for change have so far had surprisingly little to say about any implications for Canadian federalism. Massicotte (2005), for instance, begins by describing the structure of Canada's federal system and the seat distribution and selection procedures for the House of Commons and the Senate, but his later discussion of the likelihood of electoral reform in Canada makes no reference to the effects that such a change would have on federal relations. Instead, debate had remained—disproportionately, perhaps—focused on questions of fairness and proportionality. Notwithstanding the importance of these principles, which are central to the logic of representation by population embodied by the lower chamber, this chapter has argued that institutional context is an equally vital consideration. With major Senate reform off the agenda for the foreseeable future, electoral reform presents an opportunity to address some of the shortcomings of the current system—not just improving proportionality, but also ameliorating the systemic under-representation of communities of interest.

This chapter has outlined a series of major and minor reforms to improve the representation of communities of interest—both provincial and Indigenous—within the federal legislative process without modifying the Senate and without changing the constitution. These reforms are not intended to fix the dysfunctional Senate, but there is more than one way to achieve the goal of improved provincial representation at the federal level. At the same time, it is vital to consider the way in which any potential path to reform might address the historical under-representation of Indigenous peoples. Whether or not Canada eventually introduces a mixed electoral system, dual constituencies would be an acknowledgement of the significance of Indigenous peoples as a community of interest within the context of the Canadian federation. Canadian federalism is nothing if not flexible, and electoral reform represents an important opportunity to bring federal governance more in line with the spirit of the diverse, decentralized, multinational reality of the Canadian federation.

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FEDERALISM FOR DIVERSITY: FRENCH AND ENGLISH

10

POLICY ON QUÉBEC AFFIRMATION AND CANADIAN RELATIONS[1]

Jean-Marc Fournier, Former Minister of Canadian Relations and the Canadian Francophonie for Québec

La conférence annuelle 《 L'état de la fédération 》 constitue un forum privilégié pour discuter des grands enjeux se rapportant à nos choix de vivre ensemble dans une fédération. Il est donc tout à fait approprié que cette première conférence universitaire suivant le dévoilement de la *Politique d'affirmation et de relations canadiennes* du Gouvernement du Québec, présentant sa vision du fédéralisme, se déroule à l'Institut de relations intergouvernementales de l'Université Queen's.

The *Policy on Québec Affirmation and Canadian Relations* unveiled on 1 June 2017 had the subtitle: *Quebecers, Our Way of Being Canadian* (Government of Québec, 2017). This subtitle expresses, in a concise way, the meaning and essence of Québec's participation in the Canadian Federation since its inception. It conveys that a plurality of ways of belonging characterizes our identity: an allegiance to Québec and a sense of belonging to Canada. This sense of belonging to Canada would be strengthened by the recognition, acceptance, and endorsement by the whole country of the allegiance to Québec of their fellow Quebecer citizens.

There is nothing surprising about this because, since 1867, Québec has been participating in the political project of the Federation, while affirming its own national identity. This identity is based on fundamental aspects such as its unique and predominantly French-speaking character, its civil-law tradition, and its political, cultural, economic, educational, and social institutions.

1. This is the full text of the speech by Mr. Jean-Marc Fournier, who was then Minister Responsible for Canadian Relations and Canadian Francophonie, except for a few introductory sentences pronounced at the conference. It has been edited for a written format.

Today, I have come to talk to you about our common Canadian future. The fundamental element of that future will be to learn to live together and, to do so, to accept our individual and collective diversity.

The acceptance of this collective dimension was part of our history. However, we lost it sometime over the last century. We must find it again and make it part of our future. We must find a way to dialogue about our shared experiences and about who we are, as well as our respective perspectives on our way of belonging.

Contrary to some recent reactions or comments, the aim of this initiative is not firstly about constitutional changes; it is about seizing the opportunity of the 150th anniversary of the Federation to reflect about ourselves—being diverse and united.

THE SOURCES OF THE PLURINATIONAL PROJECT

Known as French Canadians first, Quebecers were recognized as a separate entity as early as 1774 in the Quebec Act, and again in the Constitutional Act of 1791. Following the Act of Union of 1840, the same recognition was reaffirmed in the agreement between Louis-Hippolyte LaFontaine and Robert Baldwin, which neutralized the effects of the Act by establishing the double-majority rule for the passage of legislation. In 1867, the choice of a federation and recognition of Québec were prerequisites for Québec's support. In other words, recognition of Québec is part of our federal history, but it was partially set aside during the last century as a new way of interpreting the meaning of the federation emerged outside of Québec. Recognition must be granted again and returned to its rightful place in our joint project.

As we have moved away from the initial meaning of the compact between French and English Canadians, a gap has appeared between the two communities, leading to various misunderstandings. We should not deny that our history includes a number of genuine conflicts and disagreements which have left their mark, and certain key facts bear repeating here. As we are all aware and as we affirm here, the constitution needs to be improved to give effect to, and to guarantee recognition for, our national identity. That being said, as stated by Jocelyn Maclure (2016, 225): "Despite its dark days and obvious imperfections, Canadian federalism proved to be accommodating enough for Québec to succeed in its nation building project." [translation].

We have travelled a great distance apart, and had misunderstandings along the way, but our shared path has taken us to a level of social and economic progress that is envied around the world.

THE POLICY

The Policy first states who we are: an inclusive nation, predominantly French-speaking, keen to respond to the aspirations of the First Nations and Inuit, enhanced by the past and present contributions of a dynamic English-speaking community, and enriched by the diversity of people of all backgrounds who have chosen to live in Québec.

The Policy, on the basis of who we are, also establishes the principles underlying our vision of Québec in Canada, and guiding Québec's Canadian relations. Because of the distance built up over the years between Québec and Canada, the Policy sets out ways to begin to bridge the gap and be closer to our Canadian neighbours, through dialogue and mutual understanding. More precisely, we want Québec's aspirations to be better understood. Such a dialogue represents an essential condition if Québec's aspirations are to be well received.

By solemnly declaring who we are, we make the rationale of our position easier to understand. We will also be able to better present the foundations of our vision for the future. The promotion of Québec's interests and jurisdiction is part of this process.

Another major objective of the *Policy on Québec Affirmation and Canadian Relations* is to make Québec better known to civil society in Canada, and to increase its outreach throughout Canada, in particular in the economic, social, and cultural spheres. It is not just about government or premier and prime minister; it is about citizens, people, Quebecers, and all Canadians.

A VISION OF CANADIAN FEDERALISM

The Policy is a continuation of our political and constitutional history, drawing inspiration from it to offer an updated view of Québec's place in Canada. We want to shift the focus to a type of federalism that recognizes collective diversity in addition to individual diversity, and that recognizes a plurality of ways of belonging in order to strengthen a shared sense of belonging. Recognition of the national identity of Québec, and also of the Aboriginal nations, appears to be the natural fulfilment of the Canadian project.

This approach responds to the aspirations of Quebecers and demonstrates openness to the First Nations and Inuit. The Chief of the Assembly of First Nations of Québec and Labrador, Ghislain Picard, is right to say that trust must be re-established before reconciliation can occur. Moreover, as Québec philosopher Charles Taylor stated over twenty years ago:

> For Quebecers, and for most French Canadians, the way of being a Canadian (for those who still want to be) is by their belonging to a constituent element of Canada, la nation québécoise or canadienne-francaise. Something analogous holds for ab-

> original communities in this country; their way of being Canadian is not accommodated by first-level diversity. Yet many people in [Canada outside Quebec] are puzzled by the resulting sense of exclusion, because first-level diversity is the only kind to which they are sensitive and which they feel they fully acknowledge.
>
> To build a country for everyone, Canada would have to allow for second-level or 'deep' diversity, in which a plurality of ways of belonging would also be acknowledged and accepted. (Taylor and Laforest 1993, 182–3)

Alain-G. Gagnon also explains that this quest for recognition, far from being a thing of the past, is a contemporary and shared issue: "The national diversity inherent in most contemporary states is by no means decreasing; ways therefore must be found to entrench it in political institutions, otherwise the world around us will become increasingly uncertain and political projects will become less and less respectful of societal cultures […]" (translation; 2008, 204).

The recognition of differences in the spirit of fostering closer links and mutual understanding is not an old debate. It is a modern and universal quest, a challenge that is even more important today, in an era of identity withdrawal and isolation around us, to the South and in Europe.

This kind of federalism, a plurinational federalism, meets Québec's goal of acting as a full partner in the Canadian adventure, while upholding all the dimensions of its identity. It also offers a way to renew the relationship with the Aboriginal peoples. In both Québec and Canada, there is a new willingness to make a genuine effort to include the Aboriginal peoples in our shared future. This willingness must become a duty.

Plurinational federalism allows all Canadians to participate proudly in defining and implementing a form of cohabitation that could be an answer to the modern world's challenges, as this model is more welcoming and, because it is based on respect, more successful.

Aujourd'hui, où en est-on au regard de la reconnaissance du caractère national du Québec? La nation québécoise a été politiquement reconnue dans deux motions adoptées par la Chambre des communes, la plus récente en 2006. La Cour suprême a aussi tenu pour acquis, dans sa jurisprudence, l'existence du caractère distinct du Québec. Le constitutionnaliste Sébastien Grammond résume ainsi cette reconnaissance: "[s]omme toute, les tribunaux se montrent moins hésitants que les politiciens à reconnaître le caractère distinct du Québec" (2016, 267).

Par ailleurs, les craintes qui ont été souvent exprimées à l'égard d'une reconnaissance formelle de la Nation québécoise n'ont pas été confirmées. Cette reconnaissance de la Nation québécoise pourrait cependant jouir d'une assise plus solide dans le tissu constitutionnel et ainsi permettre de faire évoluer le Canada vers une conception davantage pluraliste du fédéralisme. Une telle reconnaissance permettrait de faire en sorte que les Québécois ne se sentiraient plus exilés au sein de leur propre pays. Pour reprendre les mots du politologue Guy Laforest: "Des Québécois qui ne seraient plus des exilés de l'intérieur devraient être capables de

proclamer, à leur façon, leur allégeance envers le Canada, de s'engager dans des projets communs pour le XXIe siècle" (2014, 275).

Les groupes autochtones forment également des Nations diverses qui ont bénéficié de la Loi constitutionnelle de 1982 dans laquelle les droits existants — ancestraux ou issus de traités — ont été reconnus.

It is possible and even beneficial for Canada to provide suitable recognition for the Québec nation and the Aboriginal nations. This recognition does not call into question its unity or its ability to develop. Canada has indeed already "raised diversity to the rank of a national value" (translation; Parent, 2014, 32). In addition, Canadians are open to the idea of a country in which diversity is the norm. This can and must include profound diversity, such as that evoked by Charles Taylor, namely the acceptance of a plurality of belongings. To Will Kymlicka (1995, 12–3), and many other authors, there is no doubt that throughout its history, Canada has in fact been a plurinational federation.

By opting for a plurality of ways of belonging and the recognition as well as the acceptance of national diversity, Canada can offer a partial response to current world issues. Moreover, the possibility to offer the world an inclusive view of humanity, a model for living together that brings together individual and collective diversity, constitutes an exciting project for all Canadians.

In an uncertain world, where isolation and identity withdrawal are a constant temptation, Québec and all Canadians now have an opportunity to come together again to discuss and implement a way to combine, rather than oppose, the plurality of their ways of belongings. Quebecers and Canadians can offer a partial solution to the worldwide challenges of mass migration, economic displacement and growing inequality, by choosing a plurality of ways of belonging, and recognizing and accepting the diversity of nations forming Canada. This is a major challenge, but also an exciting human project.

This process will mean facing all the taboos that, for two decades now, have prevented public debates about the functioning of Canadian federalism, including its constitutional aspects.

A MULTIPLE-STEP PROCESS

We have to acknowledge that we are at the start of a long journey. We must resume the discussion about the future of the Federation.

This includes the constitutional issue, not as the starting point, but as the result of a dialogue which will give shared meaning to our union and define a shared understanding of our future.

We know that this will take patience—strengthening bonds of trust is a long and gradual process. We must first discuss, share our ideas, improve our understanding and acknowledgment of each other. This is what we intend to do.

Québec therefore invites all citizens and federative partners to take part in a new dialogue, in order to renew their acquaintance. We propose a renewed foundation. We will begin by increasing our presence on the Canadian scene, making our voice heard in order to be understood.

IMPLEMENTATION

The Policy is based on a statement of affirmation of our national identity, which constitutes the source of the principles which will guide the conduct of Québec's Canadian relations. Québec will prioritize a proactive form of domestic diplomacy with its federative partners. Québec will also nourish a dialogue with the representatives of civil society.

In addition, Québec will work to bring citizens closer together. Despite the label "two solitudes," relations between citizens have shaped a depth of cooperation and solidarities that has contributed to the economic, social and cultural progress of Québec and Canada. For example, Québec's trade with the rest of Canada represents three-quarter of its trade with the United States, which has a population ten times larger. We have more commercial exchanges with British Columbia than with China, and more with New Brunswick than with France.

Another very telling example of this solidarity took place on the day Alberta's new environmental policy was launched. The premier of Alberta, Rachel Notley, was accompanied by Quebecer Steven Guilbault, spokesperson of Équiterre. This was a striking illustration of the solidarity existing between environmental groups in Québec and those elsewhere in Canada, and of their contribution to new public policies.

Why not increase the number of connections? We will encourage social and union organizations, business leaders, environmental groups, artists and researchers from Québec to begin or increase their interactions with people who, elsewhere in Canada, share the same desire to support the vulnerable, create employment, meet the challenge of climate change, entertain audiences, or innovate.

Québec's goal of playing a more dynamic role in Canada will also be reflected in the government administration. Our Canadian relations will now be coordinated by the Secrétariat du Québec aux relations canadiennes (SQRC). It will play a more prominent role as a strategic adviser in the area of Canadian relations. In addition, the new secretariat will work actively to create additional bridges and possibilities for dialogue within Canadian society at all levels. It is more than just relations between governments. The government, under the SQRC's coordination, will ensure that each of Quebec's departments has a unit for Canadian relations.

In general, Québec will be present everywhere where its voice must be heard to project the vision and goals of its government. It intends to increase its ties with civil society stakeholders. We will support closer links with the university sector

and economic, cultural, and social interest groups, and we will be more active on traditional and social media.

In the coming months, we will define and implement concrete measures to support all these goals; for example, encourage forum-type meetings for research institutes across Canada to discuss our experiences. Québec will also propose the organization of social, economic, and academic missions with the other Canadian provinces, such as Ontario, our main trading partner, our neighbours in the Atlantic Provinces, and all the provinces and territories up to and including British Columbia, which provides access to Asia for the whole country.

Of course, Québec is more determined than ever to help promote the Canadian Francophonie. We are working with all the governments of Canada and with Francophone and Acadian communities and we will seek to increase Canada's Francophone space. Indeed, the French presence, which is increasingly recognized, seen as legitimate and wanted by a larger number of our fellow Canadians, allows us, as Quebecers, to hear an echo of a fundamental element of our identity across the country. This echo in turn contributes to developing our sense of belonging to Canada.

The ties binding Quebecers to other Canadians must be based on trust and must be reciprocal. This will form the basis needed for a genuine discussion about the future of our country.

CONCLUSION

Today, Québec is affirming its national identity and clearly defining the place it intends to occupy in Canada. We are at the start of a path that should lead to greater mutual understanding. We must re-establish a dialogue in a spirit of openness, referring back to the idea of a federalism that welcomes and recognizes both individual and collective identities.

The 150th anniversary of the Federation provides an opportunity to come together and start a discussion. However, a lot of effort will be required before each party can occupy its rightful place in Canada. This will take more than one year; it takes time to build the future.

However, the objective is clear: we must seek to improve our understanding and acknowledgement of each other. And this must be reciprocal. Affirming who we are, which is fundamental for us, will make it easier to explain our priorities, visions, and plans.

For a vast majority of Quebecers, their identity is based on a double way of belonging: an allegiance to Québec, and a sense of belonging to Canada. This identity, our identity, no longer needs to be nourished by resentment or fear of others. Instead, it must be built on trust in ourselves and in our desire to live together. Our identity has matured and affirmed its nature. First as French Canadians and later

as Quebecers, we used to define ourselves by opposition to English Canadians or other Canadians.

Today, we prefer to affirm all the dimensions of our identity. What we are is a reflection of the plurality of our ways of belonging, our distinct way of belonging to Quebec and our shared sense of belonging to Canada.

We are Quebecers, and this is our way of being Canadian.

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11

FEDERALISM "PLUS"? CARVING A SPACE OF NON-TERRITORIAL AUTONOMY IN A FEDERAL STATE: THE CASE OF OFFICIAL-LANGUAGE MINORITIES IN CANADA

Stéphanie Chouinard, Royal Military College of Canada and Queen's University

This chapter discusses the evolution of the Canadian federal system through the prism of official language rights and minority protection. It will demonstrate that the tension existing between the federal system enacted in 1867 and the 1982 constitution has created a space for the recognition of a limited form of non-territorial autonomy for official-language minorities—that is, the 995,000 Anglo-Quebecers and 1,067,000 Francophones living outside of Québec (Statistics Canada 2015). The extent, and the limits, of this form of autonomy have mainly been carved out by the judiciary since 1982, as new protections for official language rights were entrenched in the constitution through sections 16 to 23 of the Canadian Charter of Rights and Freedoms (Charter). This chapter will therefore focus on the Supreme Court of Canada (SCC)'s language rights jurisprudence to shed light on the development of this feature of the Canadian federal system.

Federalism is commonly hailed as a successful tool for recognizing and accommodating cultural diversity within multinational states like Canada (Schertzer 2016). By the creation of two orders of government, federalism has been successful at creating a sphere of territorial autonomy for regionally concentrated national minorities. In Canada, this is effectively seen in the province of Québec. The self-rule/shared rule or autonomy/participation dichotomy found in the federal arrangement allows not only for the sharing of a certain political power, but also for the expression of identity through public and social policies (Béland and Lecours

2008). However, national minorities are not always territorially concentrated, and their recognition in a federal system, which is usually solely geared towards territorial recognition, then becomes problematic. Official-language minorities in Canada present this sort of challenge to our federation. Moreover, in a federation like Canada's, where culturally sensitive matters are delegated to the federated subunits rather than centralized, the federal system can in fact become a system of *oppression* rather than one of emancipation for these dispersed minorities. This situation has led official-language minorities, and especially Francophone minority communities, to demand a revision of our federal arrangement, and for the recognition of a space of non-territorial autonomy within our constitutional order. Some of these demands have found an answer in sections 16 to 23 of the Canadian Charter of Rights and Freedoms. However, the SCC's interpretation of these new constitutional dispositions has shown a sensibility towards the original compromise from which our federation emanated, limiting the breadth of the Court's response to these demands for further autonomy.

The addition of this limited layer of recognition and accommodation for the dispersed Francophone minority within the original federal arrangement is one that will be called, for the purpose of this paper, "Federalism Plus." Faced with the fact that the original federal arrangement, territorial in nature, proved insufficient to recognize Francophone minority communities and grant them the autonomy they were claiming, the Canadian federation has gradually evolved to allow for other spaces of autonomy, these being non-territorial in fashion, in a restricted number of domains (notably education and, in an even more limited fashion, healthcare) for this national minority. It is therefore this superimposing of territorial and non-territorial jurisdictions within the Canadian polity, allowing for a deeper recognition of the cultural aspect of the federation, that we consider to be the unique "addition" to the original federal arrangement. This chapter will explore how Federalism Plus has been gradually taking shape in Canada since the 1980s through judicial mobilization.

After a short discussion on non-territorial autonomy as a mechanism of accommodation of dispersed national minorities, the chapter will shed light on the evolution of the Canadian federation from its original power-sharing arrangement, which marginalized official-language minorities, to allow for the carving out of a limited measure of non-territorial autonomy in order to protect these communities since the 1980s. Notable SCC decisions will be explored to exemplify this evolution, and to highlight how the justices have had to negotiate the tension between the original federal arrangement and the new dispositions found in the Constitution Act, 1982 in the interpretation of these new language rights.

NON-TERRITORIAL AUTONOMY AS A MECHANISM OF ACCOMMODATION

The concept of autonomy has unfortunately sometimes been misused in the political science literature. "While there is general agreement on the basic concept of autonomy, there are many conceptions of the concept, that is, different views on its interpretation" (Lapidoth 1997, 29). As is noted by Safran, "self-government and autonomy are often used interchangeably, and autonomy has undergone incessant conceptual stretching" (Safran and Máiz 2000, 11). It is therefore important to qualify our understanding of the concept before continuing.

Taken in the etymological sense, autonomy is related to two Latin words, "auto" and "nomos", which literally mean the power to choose and live according to one's "own" "rules" or "norms" (Lapidoth 1997, 29). It is therefore a notion related to a certain type of political power, self-governance, or self-determination. In the 1920s, Georg Jellinek defined an autonomous entity as "one based solely on its own laws, and with all the material and functional attributes of statehood: the authority to govern, to administer, and to judge" (cited in Lapidoth 1997, 30). For this author, autonomy is therefore equal to the notion of sovereignty. This interpretation, however, is not unanimous. Rudolf Bernhardt argues, for his part, for an oscillation between a large and narrow definition of the concept. In the large sense, it would mean "the limits of State interference, on the one hand, and the autonomous determination and regulation of certain affairs by specific institutions on the other hand" (Bernhardt cited in Lapidoth 1997, 32). In the narrower sense, it would signify protection and self-determination of minorities. This second definition would be, according to Bernhardt, the one most often used in international law.

Some authors have defined autonomy in a territorial manner, while others speak of it in terms of power devolution and decentralization (Lapidoth 1997, 30). Pierre Foucher, for his part, tries to reconcile both points of view:

> The right to autonomy is defined as the right to make decisions without governmental interference regarding their content, related to subjects which the state has relinquished the powers to an entity responsible for these subjects. […] Autonomy confers a margin of appreciation, a sphere of freedom within which a political power can be exerted. (Foucher 2012, 93)

Territorial autonomy (such as federalism, but also going as far as separation from a state) being by far the type of autonomy most often claimed by national minorities, has also acquired a negative connotation within the international community for its propensity to open up to demands of secession. Personal or non-territorial autonomy, on the other hand, seeks "a minority's cultural maintenance and reproduction" (Roach 2005; see also Nimni 2007). For a long time, it had been cast aside by minorities because it was deemed too weak, a second-rate autonomy. However, in the past decade, it has gathered analytical clout for its aptitude to recognize minorities whose status is fuzzy on the national-ethnic spectre. For minorities for

whom territorial autonomy is neither possible nor desirable, but who still claim political recognition and the attribution of a set of political powers, non-territorial autonomy can be a valid option (Lapidoth 1993). It is also less menacing for the international nation-state system since it does not question its integrity or the integrity of its members (Roy 2006).

THE EVOLUTION OF CANADA'S CONSTITUTION: FROM MARGINALIZING TO RECOGNIZING OFFICIAL-LANGUAGE MINORITIES

The next section of the chapter will show how the territorial autonomy conferred to the French Canadians by federalism, at the time of Confederation, was at first a marginalizing force for a portion of this minority. Federalism, as we know, is a form of political organization of a state according to which jurisdictions of power are shared between two orders of government on a territory—the central government and the subunits' governments. Each of these two orders detains power of decision directly affecting its citizens in different domains. Canada is one of many federal states in the world today. One of the constitutional principles of this federation is, as was reminded by the SCC in the 1998 *Reference re Secession of Quebec*, minority protection, and particularly protection of the French-speaking minority. As the Court explains:

> The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed. (*Reference re Secession of Quebec* 1998, para 38)

This is one of the reasons why jurisdictions related to culture were granted to the provincial order of government, through which a certain territorial autonomy was granted to the French-Canadians by the creation of the province of Québec. In this province, where French formed a majority, both French and English were protected in the Constitution Act, 1867, at section 133:

> 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada estab-

> lished under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

These rights were nevertheless neither exhaustive nor inclusive, for the simple reason that all French-Canadians did not live in the province of Québec. In the other provinces, Francophones were granted no linguistic protection in the Constitution Act, 1867. Indeed, in Canada, language does not belong to one or another level of government—it is, rather, an ad hoc jurisdiction, which means that it complements other jurisdictions. As the SCC explained in the *Devine* case in 1988,

> A law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers. Language is not an independent matter of legislation but is rather "ancillary" to the exercise of jurisdiction with respect to some class of subject matter assigned to Parliament or the provincial legislatures by the Constitution Act, 1867. In order to be valid, provincial legislation with respect to language must thus be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction. (*Devine v Quebec* 1988, introduction)

In some cases, the provincial governments legislated, soon after Confederation, to hinder the French language in their respective jurisdictions, notably in the domain of education. Stand as witnesses the many different battles Francophones had to face in the course of Canadian history to gain or keep access to French-language schools, starting with Bill 87, which resulted in the New Brunswick schools crisis, also called the "Louis Mailloux affair," or the Regulation 17 crisis in Ontario (Bock and Charbonneau 2015, 17). This marginalization of Francophone minorities was being felt with more acuity starting in the 1960s as the French-Canadian solidarity between Francophones of Québec and outside Québec was collapsing with the rise of Québec nationalism and the creation of a welfare state in that province.

In other words, Canadian federalism and the territorial autonomy it granted to its French population by the creation of the province of Québec proved unable to protect the Francophone minorities outside of Québec, let alone to meet their claims for recognition. Moreover, the extension of further territorial autonomy for French Canadians, for example by the creation of a new province, appears to be a ludicrous idea at best, as this population is scattered throughout the rest of the vast territory. Francophones themselves have never been keen on claiming this political solution. Aside from the *Parti acadien*, a faction party present on the provincial political scene of New Brunswick in the 1970s and 1980s, not a single group or community has made such claims for the Francophone minority (Ouellette 1992).

The 1980s presented a new window of opportunity for official-language minorities to revisit their collective autonomy with a particularly marking event, the constitutional renewal process that led to the patriation of the constitution and to the adoption of the Charter in 1982. Sections 16 to 22 of the Charter entrenched

in the constitution dispositions of the Official Languages Act, adopted in 1969; section 23, for its part, entrenched brand new rights in the domain of education.

> 23. (1) Citizens of Canada
>
> (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> (b) who have received their primary school instruction in Canada in English or French [...]
>
> have the right to have their children receive primary and secondary school instruction in that language in that province.
>
> [...]
>
> (3) The right of citizens of Canada [...] to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
>
> (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
>
> (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Paired with the Canadian judges' new powers in the realm of judicial review, these new dispositions in the Canadian constitution presented official-language minorities with the possibility of further recognition within the federal system. However, this possibility would need to be tested through several court challenges before it became effective.

CARVING A SPACE OF NON-TERRITORIAL AUTONOMY IN THE FEDERAL ARRANGEMENT: AN ANALYSIS OF THE SUPREME COURT CASE LAW

The first years of the post-Charter era were marked, at the SCC, by the "political compromise trilogy." The bench, through the writings of Justice Jean Beetz, decided in 1986 on three different cases regarding language rights—*Bilodeau* (1986), *Macdonald* (1986), and *Société des Acadiens* (1986). These three decisions formulated and raised to the status of doctrine the principle of political compromise, according to which language rights in Canada should be interpreted in a restrictive manner. From this doctrine came, notably, the interpretation that right to be heard in one's official language of their choice before a judge or jury did not mean the right to be *understood* in that language. As the Court explains:

> It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald,* these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the Charter, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice. (*Société des Acadiens* 1986, para 53)

This decision outraged both the legal and political community within Francophone Canada, who saw this decision as a step backwards (Bilodeau 1986). Some legal scholars even went as far as saying that the Courts had turned language rights into "second-class rights" (Green and Réaume 1990).

Legislators responded to the political compromise trilogy in 1988, when the Official Languages Act (OLA) was amended. Among other changes, Part X was added to the Act, making most parts of the Act enforceable. Sections found under this part could now be called upon before a court in case of violations on behalf of the government—which clarified the role of the courts in upholding the Act. From that moment on, Canadian courts had better legal tools to protect language rights. Legislators had sent a clear message with the 1988 OLA: Canadian language rights are not declaratory rights and should not only be interpreted in a restrictive manner.

This message appeared to be heard. Starting in 1990, we witnessed a change of tone in language rights case law, starting with the *Mahe* decision. This case touched on the application of section 23 of the Charter to the Francophone community of Edmonton, Alberta, where parents were asking for the management and control of their school through a separate school board. In his decision, Chief Justice Dickson called for a liberal and generous interpretation of section 23 of the Charter and rejected the formerly restrictive approach brought forward in the 1986 trilogy:

> Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose. (*Mahe v Alberta* 1990)

In other words, his approach recognized that the courts should proceed with caution in the interpretation of positive rights, but rejected the idea that section 23 should be interpreted in a less generous manner than other Charter rights. This led the chief justice to develop a sliding-scale approach to section 23 rights, used to determine the strength of the minority's claims to collective autonomy depending on the number of potential pupils who would qualify for minority language education.

The more children there are in a given region, the more autonomy can be granted to the community, in the spectrum going from the extinction of the right altogether in cases where there are extremely low numbers, all the way to the right for the community to have its own linguistically homogeneous school board.

However, Dickson also warned that "the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right" (*Mahe v Alberta* 1990). The tension between the original political compromise and Charter dispositions appears here in the restraint the chief justice demonstrates towards a provincial government that has "failed to discharge its obligations" towards its official-language minority. It is then ultimately up to the province to find the proper modalities to properly respect its section 23 duties.

In other words, *Mahe* is the first decision where the right of official-language minority communities to the management and ownership of their own schools, financed through public funds, is clearly established. However, this right is limited; first, by the criteria of "where numbers warrant" found in the text of section 23 on which rests the sliding-scale approach, but also by the SCC's attitude towards the remedies (or lack thereof) that it is willing to impose on the province. This is an important development for the autonomy of official-language minorities, but one that remains heavily mitigated by the legislator's powers in the domain of education. This position was clarified in 1993 in the *Reference re: Public Schools Act (Manitoba)* case, which consolidated the right of the minority to their own schooling establishments, under its control.

In 1999, it was Justice Bastarache's turn to add to the case law, affirming in the *Beaulac* decision the positive aspect of language rights, which means rights that can only be exerted if the necessary means are available to the members of the language minority. *Beaulac* completely overturned the 1986 trilogy by affirming that the right to be heard by a judge or jury in court in one's official language had to mean the right to be understood in that language and that the onus was on the state to ensure the necessary services to make this right effective were available.

The 2000s opened the door to the recognition of a greater collective autonomy for the Francophone minority in the domain of education. In 2000, the SCC rendered the *Arsenault-Cameron* decision, which touched on the minister of education's discretionary powers and whether a decision from the Francophone school board regarding the location of a new school could be overridden. According to this decision, governments had an obligation to put in place certain educational measures for the minority that differed from those of the majority because of their specific cultural needs. This meant that the minister should have respected the school board's decision, as it had respected all provincial and constitutional requirements. Moreover, this decision also recognized the role of parents' associations and school boards as legitimate spokespeople for the community, apt to make decisions that are most appropriate for the community's needs—a clear advance for the autonomy of the community.

In the province of Ontario, the *Lalonde* (2001) case opened the door to the establishment and protection of homogeneous Francophone healthcare institutions, by demonstrating that they are institutions necessary for a minority's vitality. However, this decision rested on the Court's interpretation of Ontario's French Language Services Act (1986), which means it is not applicable outside this province. Moreover, this case was never appealed to the Supreme Court, and therefore has less normative strength than other cases analyzed in this chapter.

Meanwhile, in this decade, the Anglo-Quebecer community also had a series of Charter cases heard by the SCC. The *Solski* (2005) and *Nguyen* (2009) cases were a duo of cases regarding the issue of "bridging schools" in Québec. This issue concerned parents who were not eligible to send their children to a public English school, but would pay for private English-language education for the first few years of their children's education in order to eventually access English public education. In both these cases, parents from the Anglo-Quebecer community were claiming that sections of the Québec *Charte de la langue française* (*CFL*) underlining the requirements for access to English public schools were overstepping their section 23 rights. In *Solski*, the Supreme Court declared that the sections of the *CFL* in question were constitutional, as long as the requirements were understood in holistic terms:

> The application of s. 23 is contextual. It must take into account the very real differences between the situations of the minority language community in Quebec and the minority language communities of the territories and the other provinces. The latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of s. 23 (*Solski* 2005).

In *Nguyen* (2009), four years later, the SCC decided that a newly adopted provision in the *CFL* according to which time spent by a student in a private English school (a bridging school) could not count towards the student's eventual admission in a public English school was too draconian. In this decision, as well as in *Solski*, the Supreme Court offered a reminder that the will of the Québec legislator to protect and promote the French language within its boundaries is a legitimate and an important one:

> "[…] this Court has already held […] that the general objective of protecting the French language is a legitimate one within the meaning of *Oakes* in view of the unique linguistic and cultural situation of the province of Quebec:
>
> The section 1 and s. 9.1 materials establish that the aim of the language policy underlying the Charter of the French Language was a serious and legitimate one. They indicate the concern about the survival of the French language and the perceived need for an adequate legislative response to the problem. (*Nguyen* 2009, para 38)

In other words, the Supreme Court interpreted section 23 rights for Anglo-Quebecers differently than it had done in the cases involving Francophones outside of Québec, notably by recalling the province of Québec's power to protect its main

official language, which is the minority language in the broader Canadian context, an important and substantive goal according to the Court.

In the *Desrochers* (2009) case, the Francophone minority was demanding a wider margin of autonomy in a new domain, that of the development and running of a program targeting regional economic development in Northern Ontario. However, the SCC stopped short of interpreting a right to autonomous francophone institutions in the realm of economic development, rather declaring that Francophone minorities had the right to a service of equal quality to the service given to the Anglophone population of the same region.

The *Commission scolaire francophone du Yukon #23* (2015) case demonstrated a new limit to the Court's interpretation of section 23 in favour of further autonomy for Francophone minority communities. The Francophone school board was requesting the right to extend admission to pupils who were not rights-bearers, according to the constitution. The SCC refused to grant them this right, reminding the school board that the federal arrangement granted provinces and territories jurisdiction in the domain of education. As such, they were responsible for the implementation of section 23 dispositions in their respective territory; the decision to delegate to the minority school boards the power to manage their own admissions (or not) was thus in their hands, and not the court's. In the case at stake, the territory had not delegated this power to the Francophone school board. Therefore, the limits imposed by section 23 dispositions remained in effect.

In sum, we can observe from the above jurisprudence that the SCC has gradually read into the sections of the Constitution Act, 1982 pertaining to language in such a way as to add a layer of complexity to Canada's original power-sharing arrangement. It resulted in the devolving of a measure of collective autonomy to official-language minorities in provinces where they previously had very little, if any, recognition on behalf of the state. However, this autonomy continues to be limited to this day to the domains of education and, in a less assertive way, healthcare. These developments do not respond to all claims for autonomy on behalf of Francophone minorities, notably in the domain of economic and regional development, but they nevertheless reveal an important transformation of Canada's original federal arrangement.

CONCLUSION

This chapter tried to illustrate how the question of autonomy for Canada's official-language minorities has evolved within the federal system. A brief historical overview of language rights, as well as an analysis of notable SCC cases, hold a number of lessons on the creation of a space of non-territorial autonomy for official-language minorities. It was demonstrated that the type of autonomy granted by federalism was, originally, a marginalizing force within the Canadian polity for official-language minorities and especially for the Francophone minorities outside

Québec, confining them to a territorial framework where they lacked recognition and protection. However, the SCC's interpretation of language rights since 1982 has paved the way for the carving out of a limited space of non-territorial autonomy, as we saw in the case law analysis, in the domains of education and healthcare beyond SCC cases, notably with the *Lalonde* (2001) OCA decision. It has allowed for minority communities to make a number of decisions regarding their own institutions, as well as the full management and control of those institutions—this management and control usually under the purview of the "where numbers warrant" Charter disposition. However, this relatively new space of autonomy is in continuing tension with the original federal compromise, which granted to the provinces the bulk of the decision-making power on culturally sensitive matters. This tension existing between the tenets of the Constitution Act, 1982 and the underlying federal system laid out in the Constitution Act, 1867 have created this hybrid system we have called Federalism Plus, an imperfect but innovative federal arrangement comprising elements on non-territorial autonomy in culturally sensitive matters.

We should highlight that the phenomenon we have coined Federalism Plus is not the sole purview of official-language minorities in Canada. Indeed, pressure from Indigenous communities across Canada, both in the political and in the judicial realm, have resulted in a restructuring of the relationship between the two orders of government found in Canada's original federal arrangement and a third, emerging order of Aboriginal government. Two previous volumes of the *State of the Federation* series, in 2003 and 2013 respectively (Murphy 2003; Papillon and Juneau 2013), have highlighted some of the possibilities, as well as the many challenges, offered by the Canadian federal system in the accommodation of the various legitimate claims for self-determination made on behalf of Indigenous Canadians. Domains such as management of natural resources, education, health and welfare, and social programs, on and off reserve lands, have been the subject of exacerbated tensions between Indigenous, provincial and federal governments (Papillon and Juneau 2013, 4), which allowed for a number of power-sharing agreements to be negotiated and for many Supreme Court cases to be heard through the mobilization of section 35 of the Constitution Act, 1982. It is outside the purview of this chapter to evaluate these advances, but they certainly highlight the possible usefulness of the concept of Federalism Plus in the realm of Indigenous rights. In this sense, one might draw some parallels between the institutional arrangement we have dubbed Federalism Plus and Alan Cairns's (2000) proposal to develop "citizenship plus." However, the non-territorial autonomy obtained by official-language minorities through judicial mobilization appears to us to fly in the face of Cairns's assumed "pan-Canadian identity" or citizenship upon which he wishes to build to grant Aboriginal additional rights, this idea of citizenship plus. In this light, the findings of the present chapter could be considered a critique, rather than a continuation, of Cairns's normative framework.

Canada's federal arrangement continues to evolve. Recent developments highlighted above do not constitute a linear trajectory and some of these advances

could potentially be reversed in the future. For example, principles of the original, territorial federalism could eventually be applied by the courts to undermine these minorities' autonomy. This is a risk they may have to face by bringing claims forward to the SCC in the future. Some tendencies in that respect are already showing in recent SCC decisions. Two decisions, which do not touch on language or Aboriginal rights, in particular, are telling in this regard. The first one is the *Reference re Senate Reform* (2014) case, and the second one is the *Reference re Supreme Court Act* (2014). These two decisions have both insisted on the primacy of the provincial powers as a federal principle. It would therefore not be surprising to see this instance reoccurring in language rights and Indigenous rights cases where minorities are pitted against provincial governments in their claims for more autonomy.

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FEDERALISM FOR DIVERSITY: INDIGENOUS GOVERNANCE

12

BEYOND CROWN SOVEREIGNTY: GOOD GOVERNANCE AND TREATY CONSTITUTIONALISM

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FIRST WORDS

As Chief Justice Antonio Lamer states in the Supreme Court's ground breaking *Delgamuukw* decision which recognizes Aboriginal title, "let us face it, we are all here to stay." (*Delgamuukw* 1997, 186). Lamer does not stop to reflect upon the meaning of "we" or under whose rules or authority that "we" stay. I would argue that Lamer is speaking about Canadians, that he assumes that Indigenous nations are part of that singular "we," and that he never questions his authority or the Crown's authority in Canada. In so doing Lamer denies Indigenous sovereignty and the necessity of a transformative reconciliation between Canada and Indigenous nations. This is his starting place. But it is not mine. It should not be yours.

The fact is, Crown sovereignty is always assumed and never questioned. Instead it is continuously reified and reinforced by the courts and other Crown actors. According to Lamer, the "basic purpose" of section 35(1) of the Constitution Act, 1982, was to "achieve a reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown" (*Delgamuukw* 1997, 186).[2] This understanding

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2. Lamer had previously introduced this idea in *R v Van der Peet* (1996) 2 SCR 507,

of section 35 and of Crown sovereignty was reinforced most recently in another landmark Aboriginal title case, *Tsilhqot'in Nation v British Columbia* (*Tsilhqot'in Nation* 2014). The very idea of Crown sovereignty and the Court's unwavering support of Crown sovereignty should come as no surprise to constitutional scholars and political scientists. After all, Crown sovereignty was the foundation upon which the Westminster tradition was built. But, the assumption of Crown sovereignty is problematic when we think about colonialism and how the Westminster tradition came to the so-called new world given that the very assertion of Crown Sovereignty is vested in the idea of terra nullius and the doctrine of discovery (the legal doctrine which allowed European nations to claim lands that were "empty"; Macklem 2001, 114–115).

Though the Court vehemently denies in *Tsilhqot'in* that "the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) [was ever] applied to Canada," (*Tsilhqot'in Nation* 2014, para 69) John Borrows, however, effectively demonstrates that the very case in which the Supreme Court refutes the application of terra nullius, actually reinforces it (2015). As Borrows states:

> If only this declaration were deeply true. Canadian law still has *terra nullius* written all over it. The same paragraph which purportedly denied *terra nullius* contains the following statement: "At the time of the assertion of European sovereignty, the Crown acquired radical or underlying title to all of the land in the province." If all of the land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of *terra nullius* being deployed. The Crown's claim to underlying title on this basis "does not make sense". Some kind of legal vacuum must be imagined in order to create the Crown's radical title. The emptiness at the heart of the Court's decision is disturbing. (2015, 702–3. Quoting, *Tsilhqot'in Nation* 2014, at para 69)

> … The declaration that Crown sovereignty can displace Indigenous sovereignty through a bare assertion presumes that the land is empty of governance or that Indigenous governance powers are inferior. British words uttered half a world away diminished Tsilhqot'in jurisdiction. This implies that there is some kind of emptiness underlying Aboriginal title that must be filled by Crown-derived law in order to avoid a legal vacuum. … In light of these findings, the assertion of Crown sovereignty leading to radical Crown title rests on an "*inanis iustificationen*": an empty justification. It is a restatement of the doctrine of *terra nullius*, despite protestations on the contrary. The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In most other contexts, this would be called stealing. (2015, 724)

The assertion of terra nullius and the settler colonialism which transpired legalized both theft of land and the violence which continues to be unleashed against

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para 31.

Indigenous peoples (as individuals and as nations) and their lands. As Leanne Simpson explains,

> Colonizers wanted the land. Everything else, whether it is legal or policy or economic or social, whether it was the Indian Act or residential schools or gender violence, was part of the machinery that was designed to create a perfect crime—a crime where the victims are unable to see or name the crime as a crime. (2017, 15)

While the victims are unable to name the crime as crime, it would seem that this also holds true for the perpetrators; though arguably, for the state and its institutions, it is a matter of willful denial and the creative reification of the state and its colonial logics. Thus, despite the fact that the Supreme Court is adamant in its dismissal of terra nullius in *Tsilhqot'in* and its finding that Indigenous title remains despite assertions of Crown sovereignty, it nevertheless fails to question the legitimacy of Crown sovereignty and the political manifestations of such assertions. As John Borrows points out, following the Court's logic,

> … If the assertion of European sovereignty did not extinguish Aboriginal title, neither did it extinguish Aboriginal jurisdiction and authority over such lands. The same continuity of social organization that enabled Aboriginal people to establish title should also undergird the recognition of Aboriginal governance in subsection 35(1) of the *Constitution Act, 1982.* (Borrows 2015, 742)

While the Court has been unwilling to question the Crown's assertion of sovereignty over Indigenous nations or the continued existence of Indigenous sovereignty and have refuted such assertions by creating an alternative narrative of "merged sovereignty" (McCrossan 2015, 35), the so-called perfect crime must be dealt with in all of its complexities. "Let us face it, we are all here to stay," but we need to find a way to live here together (separately and in shared spaces) without the insidious "legal magic" which was created using the doctrine of discovery and terra nullius. If reconciliation is to be something other than a great big hug that the settler society and its institutions provide Indigenous people or if there is to be a meaningful and transformative reconciliation between both nations and individuals, it will have to tackle this founding myth. For it is this founding myth—the myth of terra nullius—and the legal magic contained within the doctrine of discovery which enables the Crown to claim sovereignty over stolen lands and other nations. This chapter asks what does it take to live without terra nullius and the imposition of the Crown's assumed sovereignty over Indigenous peoples? Is it possible to recreate Canada which is not premised on the truly magical claim that somehow Indigenous nations merged or reconciled (possibly ceded) their sovereignty with the Crown at the time of contact, through treaties, through the very creation of section 35(1) of the Constitution Act*,* 1982 or through judicial decision making (McCrossan 2015, 34–35). I would argue that treaty constitutionalism holds such potential.

Treaty constitutionalism provides a vision of transformative political reconciliation and thus, the means to "move beyond a 'totalizing vision of Canadian sovereignty and territorial space' which continues to recast Indigenous peoples

as voluntarily agreeing to give up rights to sovereignty in favour of possessing membership within the borders of the 'modern' Canadian community" (McCrossan 2015, 35). Viewed in this light, treaty constitutionalism represents a vision of Canada for the next 150 years that does not obfuscate or deny Indigenous sovereignty or assume Crown sovereignty. Instead, treaty constitutionalism represents a transformative vision of a new way of living together within the shared space we call Canada, which is grounded in the implementation of the treaties (honouring their original spirit and intent) and which responds to the persistence of constitutional pluralism and the need for political renewal within Indigenous communities, within Canada and in the relationship between. Beyond merely recognizing the persistence of constitutional pluralism, this chapter argues that both Indigenous and Canadian constitutional orders contain within them the transformative potential for rebuilding governance, decolonizing the relationship between and thus, to create a generative political order which is not premised on *terra nullius* and the resulting manifestations of assumed sovereignty.

SEEING BEYOND CROWN SOVEREIGNTY

It is inarguable that Indigenous peoples have their own constitutional orders. More contentious, however, is the idea that these orders are protected in the treaties and are "unfolded into" or "encrypted as" Aboriginal and treaty rights, and thus protected under the Canadian constitution. Understood as such, they provide for political decolonization and recognition of inherent jurisdiction and sovereignty that exists as sui generis within the existing Canadian constitutional order (Henderson, Benson, and Findlay 2000). This is the essence of the argument of treaty constitutionalism, or what Sákéj Henderson refers to as "treaty federalism" (Henderson 1995). This is but a mere theory or a vision of political decolonization—one that has yet to be given much consideration despite its historical and constitutional foundations. But in this age of Indigenous resurgence and Canadian reconciliation, perhaps the time is right for both sides to come to terms with what it means to live in accordance with their own constitutional orders and to grapple with the eradication of terra nullius and the realization of treaty constitutionalism.

Treaty constitutionalism emerged out of Indigenous understandings of treaties wherein treaties are viewed as nation-to-nation agreements negotiated to establish the terms by which the Queen's people would live and govern themselves within another nation's territory. Treaties also recognize the terms by which Indigenous nations would share their territory, the terms of the relationship, and any limitations to the sovereignty of Indigenous nations (such as an agreement to limit trade with other nations or to not molest settlers). Thus, it is the treaties which establish the limited rights of settlers and their governments within a shared territory and not a magical assertion of Crown sovereignty. Treaty constitutionalism refers to the fact that there exists in Canada competing constitutional orders, whereby both

Indigenous and the Canadian constitutional orders and their respective nations claim jurisdiction over the same territory. Both claim that their right to do so is established by and generally grounded in history, law (their own domestic legal tradition and the wider systems of international law), international agreements (including treaties), and, specifically, by their respective constitutions. Treaty constitutionalism also contends that competing jurisdictional claims of Indigenous nations and their oft contested sovereignties are vested in section 35 of the Constitution Act, 1982, by way of recognizing and affirming the sui generis Aboriginal and treaty rights of Indigenous nations. Thus, it follows that by accepting such arguments, the Canadian constitution provides a framework for the constitutional reconciliation of these competing sovereignties and jurisdictional claims, such that section 35 of the Constitution Act, 1982, recognizes and affirms Indigenous jurisdictions and section 25 of the Constitution Act, 1982, affords them protection from abrogation and derogation by the Charter. Viewed in this way section 35 recognizes and affirms Indigenous jurisdictions which were protected by treaty as either an exclusive jurisdiction similar to those defined under sections 91 and 92 as federal and provincial jurisdictions or as a concurrent or shared federal/provincial jurisdiction similar to those established in sections 93–95 of the Constitution Act, 1867 (for example, agriculture).

While some may choose to dismiss this as an inaccurate representation of Canadian political and constitutional history or some farfetched "Indian tale," it is not. Though still fairly obscure as a theory of Canadian constitutionalism, treaty constitutionalism or treaty federalism is argued to be the bedrock of Canadian federalism and its conception of sovereignty (Henderson 2004, 2017). Further, it notionally grounded many of the Indigenous constitutional activists and visionaries of the nineteen-eighties and nineties, and which arguably found expression in both the Constitution Act, 1982, and the Charlottetown Accord (Sanders 1983; Turpel 1989). Moreover, it has been the starting point of numerous constitutional claims pertaining to both Aboriginal and treaty rights in self-government talks, as well as legal disputes, such as those concerning Mi'kmaw fishing rights (Henderson 1997; Ladner 2005; *R v Marshall* 1999). Perhaps most importantly, the Royal Commission on Aboriginal Peoples (RCAP) upheld this understanding of the evolution of Canadian sovereignty and the continuity of Indigenous sovereignty, in both its final report to the federal government and its earlier publications on self-government (RCAP 1996, 193–194*;* RCAP 1993).

According to RCAP,

> 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 of 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 form 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 governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown. (1996, 193–194)

RCAP simply accepts treaty constitutionalism as the political and legal bedrock of Canada, providing both for Canadian sovereignty and the continuation of Indigenous sovereignty. Unfortunately, RCAP gives no consideration to the issues surrounding renewal and/or implementation of treaty constitutionalism.

In the twenty-plus years since RCAP, the state has stayed its course; steadfastly rejecting considerations of treaty federalism whilst reifying Crown sovereignty through policy initiatives such as the First Nations Governance Act and the First Nations Lands Management Act, and Supreme Court decisions such as *Marshall, Mitchel*, and *Grassy Narrows* (Canada 1999; Canada 2002; *Grassy Narrows v. Ontario* 2014*;* Ladner and Orsini 2003; *R v Marshall* 1999; *Mitchell v. M.N.R.* 2001). For those who view Indigenous legal and political systems as integral to those constitutional rights encrypted in sections 25 and 35 of Canada's Constitution Act, 1982*,* many are still searching out ways to implement the spirit and intent of their treaties. Indeed, the renewal of treaty constitutionalism grounds current efforts in resistance, resurgence, and renewal in the academy, the courts, the streets, and in communities across the country. This chapter is part of that renewal, part of the struggle.

How do we move beyond the jurisdictional quagmire that results from the competing constitutional orders? How do we deal with the contestation of Indigenous sovereignty within the settler state? How do we fully engage treaty constitutionalism and advance the process of political decolonization? How do we operationalize treaty constitutionalism at the community level? How do we rebuild good governance within the community and in intergovernmental relations between Indigenous nations and the state? In consideration of these issues, this chapter argues that the implementation of treaty constitutionalism is dependent on transformative change within both Indigenous nations and the settler state. I would argue that the answer to the questions posed and the implementation of treaty constitutionalism requires both parties to uphold the treaties and to govern themselves in accordance with their constitutional orders. If Indigenous peoples renew their own constitutional orders and create a system of good and honourable governance, and if the Crown acts honourably in recognizing and in governing in accordance with Aboriginal rights, then it is possible to implement treaty constitutionalism. More importantly, such implementation is not only constitutionally permissible, but is in fact constitutionally required by both constitutional orders.

COMMUNITY RENEWAL

Indigenous political systems comprise complex structures of governance, designed to meet the specific needs of each nation to create, interpret, and enforce laws in a consensual and inclusive manner, compatible with their territory, spiritual beliefs, and economy (Ladner 2003). Indigenous political systems were created, and continue to be maintained, by a constitutional order that set forth a system of government, established the rules of the "political game" and the roles and responsibilities of all members of the nation. Indigenous constitutional orders also provided, defined and limited the ability to make, interpret and enforce "law" within a territory. Such constitutions are not necessarily written documents but quite often consist of a myriad of traditions or conventions as well as "oral documents," such as songs, stories, ceremony, orations, and bundles. Similarly, the New Zealand and British constitutions remain unwritten, while the Canadian constitution includes a myriad of documents, and incorporates unwritten sources such as "conventions." Such constitutional orders were never subject to the authority of another nation or another government, but they were subject to the people of the nation. By this means, each nation determined the manner in which they would live together in "the best way possible." This idea truly captures the meaning of good governance within Indigenous thought, for it is quite simply about "the way in which a people lives best together" in their territory. Indigenous constitutions are expressions of the various complex, inclusive, community-building, consensus-based, adaptive, and transformative structures of governance created to accomplish this purpose.

Few would disagree with the statement that the Indian Act did not and does not provide for a system of good governance. Rather, the Indian Act system of band council government was created to aid the federal government in administering Indian reserves. Functioning very much as puppet governments or subordinate administrators, band councils continue to have few responsibilities or abilities that are independent of federal oversight. Band councils have the ability under section 81 of the Indian Act to make bylaws in a variety of areas of interest to local governments including traffic regulations (excluding speed), the establishment of dog pounds, the construction and maintenance of local infrastructure such as roads and ditches, and the regulation of bee-keeping (Canada 1989). In some respects, band councils have been delegated considerable responsibility for administering federal policies and programs such as healthcare, education, and social services (Elias 1991). But even in these areas, the federal overseers are able to influence and interfere in a multiplicity of ways, including through its control of all band funds, departmental administrative and accountability requirements, the use of third-party management protocols, and in its ability to override election results, call elections or appoint new band councils (sections 74–79). In short, the Indian Act does not provide for governance, let alone good governance, since it is very questionable as to whether band councils are in fact governments and not simply federal administrative structures.

Indigenous visionaries, philosophers/word warriors, leaders, and activists/warriors have long been fighting to protect and or reclaim Indigenous political and legal traditions, and to rid themselves of political interference by colonial governments. This includes Big Bear, who fought to protect Nehiyaw/Plains Cree sovereignty, and thus, the Nehiyaw constitutional order. Having lobbied the government for years to negotiate a treaty between their nations, Mistahimaskwa (Chief Big Bear), rejected Treaty Six in 1876, because he refused to "live with a rope around his neck" (ay-saka-pay-kinit). He would not give up his freedom, nor the freedom and sovereignty of his nation, to be led around like a domesticated animal in a skunkun (reserve or roped off piece of land). Following the negotiations of 1876, Mistahimaskwa continued his efforts to engage the Queen's representatives in a discussion about the terms of the Treaty, to foster a nation-to-nation relationship, and to attempt to mobilize the Nehiyaw to take a collective stance in negotiating and reconciling with the Queen. Despite the vision, dedication, and leadership of Mistahimaskwa, efforts to mobilize the Cree in peaceful union and to engage the Crown's representatives in discussion failed, resulting in the Cree's participation in the Northwest Resistance/rebellion, and resulting in that metaphorical rope (ay-saka-pay-kinit) being placed around his nation's neck.

So, what happens when ay-saka-pay-kinit is removed? What happens when the Government of Canada actually lives up to its treaty promises and upholds the honour of the Crown? What happens when the Indian Act, which has defined and confined Indigenous governance as subordinate administrators, is repealed? How do we operationalize Indigenous constitutional orders and the treaties? How do we create good governance and rebuild communities? In short, how do we rebuild Indigenous nations and constitutions? These are the questions that need to be addressed.

Scholars, such as Leanne Simpson, remind me that this process of removing the rope from around the necks of our nations, rebuilding, and operationalizing Indigenous teachings about such matters as law and governance, is going to take some time. Speaking from a position grounded in Anishnaabemowin philosophy, Simpson constantly reminds us of the need to look to the future, and to make changes and decisions with the seventh generation in mind. Recognizing that the process of rebuilding will not happen overnight, and that it will be a generational process, Simpson speaks to lighting the eighth fire (her generation being part of the seventh fire) and rebuilding, by raising communities up through the next generations. She advocates that we must ensure that children are raised with the skills, philosophy, and understanding necessary to truly engage in rebuilding, family by family, from a decolonized perspective (Simpson 2008). Simpson is not alone in suggesting that the rebuilding of nations is a ground-up generational process, as a number of other Indigenous women, including the late Patricia Monture, have also written from this vantage.

Simpson and Monture, however, do not dismiss the possibilities for decolonization that current generations hold, or the power that Indigenous traditions,

philosophies, and constitutional orders offer today. They simply acknowledge that decolonization is a long and arduous multigenerational project, and emphasize the importance of raising decolonized Indigenous citizens and activists, who can make this happen. In fact, in her most recent book on radical resurgence, Simpson reminds that it

> is our responsibility as Indigenous peoples to work alongside our Ancestors and those not yet born to continually give birth to an Indigenous present that generates Indigenous freedom, and this means creating generations that are in love with, attached to, and committed to their land. It also means that the intellectual and theoretical home for our nation based resurgences must be within grounded normativity and, for me specifically, within Nishnaabewin, our lived expression of Nishnaabeg intelligence. (2017, 25)

Working from Glen Coulthard's theory of grounded normativity ("ethical frameworks generated by place-based practices and associated knowledges") which "is the base of the political systems, economy, and nationhood, and it creates process-centred modes of living that generate profoundly different conceptions of nationhood and governmentality—ones that aren't based on enclosure, authoritarian power, and hierarchy" (Simpson 2017, 22; see also Battiste and Henderson 2000; Ladner 2001, 2003),[3] Simpson advocates for a radical resurgence and continual (re) building of Indigenous worlds through love and active engagement of collective responsibilities or "Indigenous life as it has always unfolded" (Simpson 2017, 246).

Renewing Indigenous constitutional orders does not necessarily mean replicating the teachings of the past, the system of governance, nor the legal order. Indigenous philosophy is, according to Leroy Little Bear, about flux. By and large, the same holds true with Indigenous governance. There existed enormous fluidity and flexibility within the structural design and functionality of traditional systems, which resulted in transformative political systems that could adapt to both external and internal needs. The reality is, these structures are about relationships and responsibilities and how a nation decided to live together. While flux is inherent, allowing structures to adapt to changing circumstances, it also an acknowledgement of the need to respond to internal flux or to engage in renewal of relationships and responsibilities, and the collective understanding of how one lives together in the best way possible.

Thus, making Indigenous governance "Indigenous" does not mean going back in time or struggling to re-establish an imagined "authentic." It means acknowledging that Indigenous systems of governance were, and are, themselves human creations that attempt to capture an ideal as to the way a people lives best together at a given point in time and in relation to a specific territory. It embraces an understanding of

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3. Coulthard's grounded normativity is what Sakej Henderson and Marie Battiste (2000) refer to as the implicate order, and Ladner (2001, 2003) discusses in reference to ecological contexts of inquiry.

"living Indigenous governance as it has always unfolded" through the implicate order or ecological context or inquiry through a "politics without power" (political systems constructed without the western-Eurocentric underpinnings of power, authority or hierarchy; Ladner 2003; Simpson 2017, 25). It acknowledges that change is both a structural and a philosophical feature of most Indigenous political systems traditionally, which allowed governance to be adaptive and transformative, despite the added complexities of multiple co-existing institutions (Ladner 2003). This approach thus implies embracing Indigenous ideas of development and progress as cyclical development, which draws from the past to build the future. It is understanding that change is constant, and one can never rebuild by simply recreating. This adaptation meets the needs of today by embracing one's relationship to the larger whole, which itself is in a constant state of flux.

Thus, "removing the rope" and escaping the colonial legacies of governance with its imposed system of subordinate rule, means picking up the teachings about Indigenous constitutional orders, using their systems of governance and law and the underlying philosophy, as a basis to work as a collective, in order to determine the way a people lives best together today. Whether a community decides to use tradition as a guide, or to completely rebuild traditional structures of governance, is for the community to determine. Although such a collective process of decolonization, education, resurgence, and decision making will not be an easy task, it is a necessary one. Only then can actual nation building occur, and a consensus-driven renewal of governance and constitutional orders be achieved. Such a process is necessary, for unlike western-Eurocentric political traditions, Indigenous political traditions see governance as a way a people live best together, and political systems, not as a way of manufacturing consent periodically, but as a way of constantly facilitating consent through consensus decision making and inclusive non-hierarchical structures. Rebuilding this process of good governance will require the type of radical resurgence that Simpson (2017, 246) envisions—one in which the "work starts in motion, in decolonial love, in flight, in relationship, in biiskabiyang, in generosity, humility, and kindness."

Understood in this way, it is important to understand that removing the rope around the nation's neck and seeing beyond the state and its assertions of Crown sovereignty requires the implementation of treaty constitutionalism within Indigenous nations and that this process can only be defined and confined by Indigenous constitutional orders. This is not to suggest that communities have free rein to do as they please, for their sovereignty is still vested in and limited by their own constitutional order (their legal, political and philosophical traditions as understood within the implicate order or a grounded normativity), and by their agreements (as formalized through treaties) with other nations. Whether used as a foundation for a new political system or for rebuilding communities, Indigenous constitutions must continue as the bases of renewal, for this is where sovereignty is vested, protected, defined, and confined. Thus, community renewal must respect the fact that Indigenous rights and responsibilities are vested in their constitutional

orders and protected by the treaties. While Indigenous nations must be guided by their own constitutional orders, so too must Canada be guided by its own constitutional order. Thus, let us turn our attention to the manner in which Canada's constitution provides for and guides the implementation of treaty constitutionalism.

CANADA'S CONSTITUTIONAL GUIDELINES

> How is it that the settling nations were able to make claims of sovereignty over these people, claims that form the historical backdrop to contemporary assertions of Canadian sovereignty over Canada's First Nations? In the debates surrounding Confederation, there was no discussion whatsoever about the propriety of asserting Canadian sovereignty over Canada's indigenous population. Sovereignty was assumed, and its assumption is basic to the Canadian legal imagination. Aboriginal peoples in Canada are currently imagined in law to be Canadian subjects, or Canadian citizens. Parliament is imagined to possess the ultimate law making authority over all its citizens. A fundamental assumption underpinning the law governing Native people is that Parliament has the authority to pass laws governing Native people without their consent. (Macklem 1993, 18)

In the 1970s, '80s and '90s, Canada underwent its own process of constitutional renewal. While it was primarily an elite-driven process and its success continues to be questioned both inside and outside of Québec, it did result in the constitutionalization of Indigenous rights within Canada. Opposed by all major Indigenous organizations (the only exception was the Métis Association of Alberta), and many are still critical for its supposed domestification of Indigenous rights and responsibilities, nevertheless, the Canadian constitution does afford protection and recognition to existing Aboriginal and treaty rights (Ladner and McCrossan 2008, 267). Though the dreams of Indigenous leaders were not fully realized, and they failed to halt the patriation process, nevertheless the process allowed for the development of a more solidified shield with which to protect Indigenous rights from the state and settler society. Those individuals and organizations that had the foresight to wage this battle for constitutional recognition seemingly achieved the impossible.

More limited than desired, section 35 only recognizes and affirms existing Aboriginal and treaty rights arguably as sui generis rights, originating within Indigenous nations and/or the agreements between Indigenous nations and settler society, while section 25 affords these rights further protection from the Charter.

According to Ladner and McCrossan (2008, 268–269),

> Although rejected out of fear that the level of protection needed for Aboriginal and treaty rights was not attainted, sections 25 and 35 achieved the impossible. Encrypted as Aboriginal and treaty rights, these sections represented the recognition and affirmation of Indigenous constitutional orders within the Canadian Constitution and their subsequent protection from the Charter. As James (Sákéj) Youngblood

> Henderson, Marjorie Benson, and Isobel Findlay argue, "the spirit and the intent of section 35(1), then, should be interpreted as 'recognizing and affirming' Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights." In essence, Aboriginal and treaty rights are the manifestation of Indigenous constitutional orders and the means by which these orders are recognized and affirmed in the Canadian Constitution. (Ladner and McCrossan, 2008, 268–269; quoting Henderson, Benson, and Findlay 2000, 432–34)

Ladner and McCrossan argue that this understanding of sections 25 and 35 was "embraced in large part by the early literature and early decisions such as *Sparrow*" (2008, 376). Such an understanding continues and is increasingly widely accepted, despite the fact the courts charted their own path and have interpreted section 35 quite narrowly (Barsh and Henderson 1982; Henderson, Benson, and Findlay 2000; Macklem 2001; Turpel 1989). As Brian Slattery suggests, as a "static [Canadian] constitutional order" (Barsh and Henderson, 1997; Murphy, 2001), section 35 is being defined by the Courts in accordance with the "dominant viewpoint." Slattery contends that

> the Crown's acquisition of sovereignty over indigenous peoples and their territories gave rise to Aboriginal rights in the Common law of Canada. These rights continue to exist in their original form unless or until extinguished by legislation, voluntary surrender or other valid process. As legal rights, Aboriginal rights are cognizable and enforceable in Canadian courts. However, Aboriginal peoples have to prove the existence of these rights on a case-by-case basis in order to gain judicial protection. (2005, 434)

Slattery suggests that the courts may be departing from this constrictive view and adopting one that sees section 35 as a "generative constitutional order," and that accepts such rights as dynamic and participatory, developing out of the relationship between, and the reconciliation of, Indigenous peoples and Crown sovereignty (2005, 434). Concluding that a new paradigm of interpretation and implementation is underway, Slattery argues that this shift is the result of the Court's ground-breaking decisions in *Haida* and *Taku*, which reintroduced the concept of the "honour of the Crown" as an interpretive principle (*Haida Nation* 2004; *Taku River* 2004). Some, however, may argue that this shift began with *Van der Peet*, for while this latter decision poses one of the most constrictive readings of an Aboriginal rights test, it posits that the purpose of section 35 is reconciliation, thus offering another interpretive principle (*R v Van der Peet* 1996). While these two interpretive principles offer the potential of change, one needs to be mindful of the fact that because of the Court's fixation on asserting Canadian sovereignty (Borrows 2015), while denying Indigenous sovereignty, these interpretive principles represent a move towards an acknowledgement of an "Indigenous-friendly" understanding of constitutionalism and not a paradigm shift or an outright acceptance of treaty constitutionalism; one which acknowledges Aboriginal title with limited Aboriginal authority rather than an Aboriginal jurisdiction on Aboriginal lands (Borrows 2015; McCrossan

and Ladner 2016). That said, however, these two guiding principles could assist in implementing the treaty order.

In reframing the court's conceptualization of Aboriginal rights, Chief Justice Lamer states:

> In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. … (*Van der Peet* 1996*,* at para 30)
>
> … [Therefore] the test for identifying the Aboriginal rights recognized and affirmed by s. 35(1) must be directed at … identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans. (*Van der Peet* 1996*,* at para 44)

Using in this extremely problematic cultural interpretation of Aboriginal rights as a foundation (Ladner and Dick 2008, 63; Barsh and Henderson 1982; Murphy 2001), the Supreme Court attempts to create a complete paradigm shift (like Slattery suggests occurs in the *Haida* decision), by proposing that the purpose of section 35(1) of the Constitution Act, 1982*,* was to "achieve a reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown" (*Van der Peet* 1996*,* para 31). As Russel Barsh and Sákéj Henderson (1982, 998) remind, the Court's proposition that the purpose of section 35 is reconciliation which is actually a total reconstruction of the purpose of section 35 using "a doctrine plucked from thin air." This new doctrine or interpretive principle is demonstrative of "the manner in which the Supreme Court obfuscates and denies First Nations their rights and the opportunity to re-establish their own constitutional orders" (Ladner 2009, 285). This is so because the Courts have attempted to undermine claims of Indigenous sovereignty, by suggesting that culturally grounded Aboriginal rights claims have already been reconciled with the sovereignty of the state and have, thus, fortified the ultimate sovereignty of the Crown. Worse yet, this undermining has been furthered through cases such as *Tsilhqot'in Nation* and *Mitchell v MNR*. Such that the *Mitchell* decision further fortifies Crown sovereignty (not that this was needed), by advancing the position that Canadian sovereignty is immutable, and that any possible remnant of Indigenous sovereignty was either subordinated or merged with Canadian sovereignty (a logic that was sustained in *Tsilhqot'in* despite the Court's position on terra nullius).[4]

That said, reconciliation as an interpretive principle holds incredible potential. This is because section 35 reconciled Aboriginal constitutional orders with the Canadian constitutional order (and its claims of sovereignty) by placing Indigenous

4. For a discussion of sovereignty and the manner in which the courts have dealt with it, see Ladner and McCrosssan (2008, 278–280) and *Mitchell v MNR* (2001, 125).

constitutional orders within the framework of constitutional supremacy (Ladner 2009, 288). It is as Henderson, Benson and Findlay (2000, 433–434) suggest:

> The *Constitution Act, 1982* has reconciled Aboriginal peoples with constitutional supremacy, the structural division of the imperial sovereignty. It vests their constitutional rights in the constitution of Canada, which is different than the Lamer Court's interpretation of constitutional rights reconciliation of Aboriginal peoples with the sovereignty of the Crown. While treaty relationships still remain vested with the imperial Crown, the treaty and Aboriginal rights are now vested in the Aboriginal peoples of Canada. The constitution of Canada replaces the indivisible sovereignty.

Thus, viewed as an interpretive principle, reconciliation holds significant potential for those seeking to realize both the Indigenous understanding of section 35, and the implementation of treaty constitutionalism. It holds this potential, however, only if we can escape the colonial mentality that upholds the sovereignty of the Crown and its understanding of colonization tantamount to either conquest or the peaceful expansion into terra nullius, for these are but "Canadian tales" and neither reflect Canadian history nor assists Canada in realizing its post-colonial potential. That is to say, reconciliation holds potential only if the Court spun Canadian fantasy of reconciliation understood as merging the remnants of Indigenous sovereignty under the sovereignty of the Crown is understood for what it is: a myth or a fantasy of a "master race" (Churchill 2001). That is to say that if we forgo terra nullius and accept the idea that Crown sovereignty is not absolute, then reconciliation holds potential insofar as section 35 reconciles the rights and sovereignty of Indigenous nations (encrypted as Aboriginal and treaty rights) with the sovereignty of the Crown thereby creating a generative order of constitutional pluralism.

While the interpretive principle of reconciliation holds some promise for thinking through what it means to live in accordance with the treaties without a "rope around the nation's neck" (the assumption of Crown sovereignty), the same holds true for the honour of the Crown. Briefly, the idea of the honour of the Crown was discussed in the 1990 *Sparrow* decision, wherein the Court "held that the constitutional affirmation of Aboriginal rights should be interpreted in the light of the fundamental principle of the honour of the Crown" (Slatterly 2005, 433).[5] As if forgotten, the idea of the honour of the Crown does not appear again until 2004 in the *Haida Nation* decision when Chief Justice McLachlin states:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal inter-

5. *R v Sparrow*, [1990] 1 SCR 1075, 4–5. Please note, honour of the Crown was used in this context in *Calder*, although it appeared as early as 1909 in *Province of Ontario v Dominion of Canada* 42 SCR 1.

> ests where claims affecting these interests are being seriously pursued in the process of treaty negotiations and proof. …
>
> …The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and Aboriginal people with respect to the interests at stake. The effect of good faith consultation may reveal a duty to accommodate. (*Haida* 2004*,* 5–6)

According to Slattery, the *Haida* decision ushered in the new paradigm characterized by a "generative constitutional order—one that mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society" (2005, 436). Beyond obligating Canadian governments to engage in consultation, the honour of the Crown obligates the government to manage conflict in their relationship with Indigenous peoples, and to work towards reconciliation (*Mikisew* 2005*,* para 50). The problem is, whilst honour of the Crown obligates governments to engage in reconciliation, reconciliation is still understood within the confines of assumed Crown sovereignty.

Despite the fact that Slattery claims that the honour of the Crown decisions (*Haida* 2004, *Mikisew* 2005; *Taku River* 2004) overcame the assertions of sovereignty that have plagued the courts' interpretation of sections 25 and 35 (thus leading away from the "standard" interpretation towards an affirmation of the Indigenous interpretation of the constitution outlined above), I would argue that the problem of assumed sovereignty remains (as does terra nullius). Neither Slattery's line of argument nor the Court's is convincing. As Chief Justice McLachlin states in *Haida*, "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" and suggests "sovereignty claims [will be] reconciled through the process of honourable negotiation" (*Haida* 2004*,* 20). Just as Slattery has suggested, the Court is careful in framing Crown sovereignty as de facto (factual control—legitimate or otherwise), rather than de jure (resulting from a legitimate assertion). But this does not mean that the Court has successfully overcome its own inability to question Canadian sovereignty or to recognize continued Indigenous sovereignties within section 35.

The presumption of sovereignty has been challenged in Canadian law (*Mitchell v MNR* 2001*,* 125; *R v Pamajewon* 1996) and in legal and constitutional scholarship (Henderson 1995; Macklem 1993, 18), but it remains, despite assertions by the court which deny the standing of terra nullius thereby challenging the very foundation and legitimacy of such claim (Borrows 2015). Notwithstanding the limitations caused by the problematic defence of assumed sovereignty, the demands of the honour of the Crown, along with the necessity of reconciliation, may provide Indigenous peoples and Indigenous understandings of the constitution(s), a glimmer of hope and opportunity. This opportunity is likely more comparable to a crack in the opening of a doorway, rather than Slattery's paradigm shift, but it is an opportunity nonetheless. When faced with a situation akin to David and Golliath, you make the most of

every possible opportunity. But is this an opportunity? Can these two interpretive principles create an opportunity or create the conditions for seeing beyond Crown sovereignty (and its continued assumption despite claims rejecting terra nullius) and the implementation of treaties, and thus, co-autonomous sovereigns?

According to Henderson:

> These Aboriginal orders and treaties had the force of imperial law within North American colonies. The remarkable thing is that, despite this, the British imperial order forgot about reconciling them until 1982….
>
> The ultimate purpose of these reforms was to create constitutional conditions—a legal and epistemic pluralism protected by the constitutional order from pragmatic, majoritarian politics—within which Aboriginal peoples and Canadians could rediscover good relations and live together on the shared land more compatibly. (2004, 75–76)

How do we move from constitutional conditions for legal pluralism to the realization of legal and epistemic pluralism and realize the potential for a post-colonial relationship, as set forth in section 35 of the Constitution Act, 1982?

If we take reconciliation and the honour of the Crown as interpretive frameworks and guiding principles, it is possible to begin the process of addressing issues of implementation. The treaties initially served to reconcile jurisdictional responsibilities of Indigenous nations and the settler society, and arguably provided the Crown with recognition of its derivative sovereignty. Derivative sovereignty, such that its authority and ability to govern in another's territory was in essence derived from both its claim of dominion over its own subjects (as *per* its own constitution), and the recognition of said dominion over settler-society and/or the delegation of such responsibilities by Indigenous nations, as established through treaty or de facto recognition. While it is easily argued that these concurrent sovereignties have long been reconciled, the Court's statement that the purpose of section 35 is reconciliation, further affirms the long-held conviction that this provision is part of the rubric of the Canadian constitution, and therefore fits under the umbrella doctrine of constitutional supremacy (Ladner 2009, 285). Viewed in this light, reconciliation is essentially an interpretive framework for the implementation of treaty constitutionalism, such that it instructs both the court and the government to further engage in political reconciliation, and thus implementation without the limitations imposed by the standard interpretation of section 35 or the defence of absolute Canadian sovereignty (de facto or de jure).

The courts have said that Canadian governments are responsible for upholding the honour of the Crown in their relationships with Indigenous peoples within Canada. This need goes far beyond fiduciary obligations or a responsibility to consult with Indigenous peoples. Upholding the honour of the Crown or governing honourably is required to manage the treaty relationship between Indigenous nations and the settler state. As an interpretive principle or guideline for understanding and implementing sections 25 and 35 of the Constitution Act, 1982, honour of the Crown obligates

governments to conduct itself in accordance with the constitution in its dealings with Indigenous peoples (Henderson 2009). Thus, it requires governments to act in accordance with the honour of the Crown when engaging in reconciliation, and providing for the renewal of Indigenous constitutional orders, which were encrypted as Aboriginal and treaty rights in 1982 (Ladner and McCrossan 2008, 267).

NOT A NEW BOOK, JUST A NEW PILLAR

Justice Ian Binnie has argued that "The *Constitution Act*, 1982 ushered in a new chapter but did not start a new book" (*Mitchell* 2001*,* para 115), and that this has formed the standard approach taken by courts. As such, the courts have typically acted as though little has changed, and have instead defended the presumed sovereignty of the settler state and ideas of parliamentary supremacy, conquest, and Indigenous subordination. As Slattery (2005) and others have suggested however, the times they are a changing; a paradigm shift has either occurred or is in the process of occurring as the courts slowly adapt to the paradigmatic shift resulting from 1982 and general trends in the literature. As Ladner and McCrossan state, "Legal scholars have argued that 1982 marked the dawning of a new era of constitutional supremacy, one that included Indigenous constitutional orders unfolded through Aboriginal and treaty rights as part of the supreme law of Canada" (2008, 277).

Henderson (2009) addresses the constitutional foundations and implications of this new era in his article on dialogical governance. Arguing that section 52(1) of the Constitution Act 1982 transformed Canadian politics by establishing constitutional supremacy as the primary tenet or defining principle of Canadian law and politics. Quoting the Supreme Court's decision in Quebec Secession Reference, Henderson states:

> Section 52(1) provides the essence of constitutionalism, declaring "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This principle requires that all government action comply and be consistent with all the various provisions of the constitution. Constitutional supremacy replaces the covert and overt white or settler supremacy behind Parliamentary supremacy.
>
> The Court has established that constitutionalism and the rule of law are not in conflict with democracy principle; rather, they are essential to it.… They control all exercises of executive and legislative power, determining their legitimacy and legal force: indeed their sole claim to exercise lawful authority rests exclusively with the constitution and "can come from no other source." …
>
> The Court has asserted that executive or legislative power must be harmonized with the principles if constitutionalism and the rule of law. Any power unilaterally asserted by government under the principle of majority rule or effectively is contrary to constitutional supremacy and the rule of law. (2009, 62–64; also see Quebec Secession Reference 1998, para 106–108)

Taken to its logical conclusion, Part B of the Constitution Act, 1982, radically transforms the constitutional basis and constitutional requirements of parliamentary government. No longer is it possible to think about parliament and the provision of good governance without due consideration of constitutional supremacy. That is to say, "peace, order and good government" is no longer the primary constitutional consideration for government in Canada, since section 52(1) requires that both the executive and the legislature govern in accordance with the constitutional supremacy. This surely signals the shift from parliamentary supremacy to constitutional supremacy, or at very least a heightening of the "dialogue" between parliament and the Court. Regardless as to whether any vestige of parliamentary supremacy remains, one thing is certain: the requirement of governing in accordance with the rule of law and the constitution remains constant. Much like the imperative of peace, order, and good government, this requirement is not situation-dependent and thus, while the Court has addressed constitutional supremacy as it relates to issues of Québec's possible secession, section 52(1) is not so limited in its application.

Section 52(1), as we know, has the ability to transform the entire political system. Alan Cairns (1992) acknowledged this when theorizing the Charter as the third pillar of the Canadian political system, alongside federalism and parliamentary government. For him, the Charter transformed Canadian politics, both by bringing citizens into the constitutional arena as a rights-bearing citizenry, and by making those rights constitutional, thus allowing rights to influence the two other pillars and their multiple manifestations (Cairns 1992, 114). Envisioning the Charter as a pillar of the Canadian system, captures the magnitude of the impact that section 52(1) had, and continues to have, on Canadian politics (Cairns 1992, 114). After all, section 52(1) requires both courts and governments to consider the Charter and its impact on the operationalization of both federalism and the parliamentary system. Whilst Cairns was intent on ignoring Indigenous nationhood and recreating Indigenous peoples as mere Charter groups, section 35 is neither part of the Charter nor are the rights that it encrypts or contains the creation of the Canadian state. Arguably, section 35 must be understood independently of the Charter and thus not as a constituent of Cairns's third pillar but as its own pillar. For it is not just the Charter that has a transformative effect on Canadian politics, or that becomes one of the defining attributes of the Canadian political system, alongside federalism and the Westminster model of parliamentary government. Or at very least, it should not.

For those who hold steadfast to the idea of parliamentary supremacy, even a slight acknowledgement of the possibility of constitutional supremacy, or even simply acknowledging that as a constitutional democracy any remaining remnants of parliamentary supremacy must adhere to and abide by the constitution, means that section 35 should be accorded a separate pillar alongside the Charter, federalism, and parliamentary government. This is because it requires all governments to act in accordance with the honour of the Crown and reconciliation and it also requires them to govern in accordance with section 52(1) which recognizes Indigenous constitutions encrypted in section 35 as treaty and Aboriginal rights, as having a

constitutional supremacy equal to that of the Charter (whilst also being granted protections from the Charter through section 25).[6] In short, it provides for the implementation of treaty constitutionalism and thus a renewed relationship between Indigenous constitutional orders and that of the settler state.

Understanding that the purpose of section 35 is reconciliation requires the reconciliation of Canadian federalism and its jurisdictional claims with Indigenous constitutional orders and their jurisdictional claims as encrypted in section 35 within the rubric of constitutional supremacy. This is particularly true if Canada is to abandon the doctrine of discovery and thus its claims of assumed and unquestionable sovereignty. For if Canada is to reconcile itself with its mythical and racist past, then it needs to consider what it means to govern without shared, merged, or assumed sovereignty, and focus its attention on understanding the operationalization of the Canadian constitution within a generative order of constitutional pluralism. This requires forging a new understanding of Cairns's pillars, as section 52(1) requires that federalism, the parliamentary system (including the judiciary) and the Charter be reconciled with section 35 and the Indigenous constitutional orders which it encrypts as treaty and Aboriginal rights. Viewed in this light, reconciliation is essentially an interpretive framework for the implementation of treaty constitutionalism such that it instructs both the court and the government to further engage in political reconciliation and thus implementation without the limitations imposed by the standard interpretation of section 35 or the defence of absolute Canadian sovereignty (de facto or de jure). As such, recognizing the constitutionality of both sovereignties (one of which is in part a derivative of the other in that it exercises jurisdictions delegated to it by Indigenous nations and whose authority [until de facto] was at the pleasure of Indigenous nations) section 52(1) requires that the constitution be interpreted in accordance with the interpretive principles of reconciliation and the honour of the Crown. Thus, parliamentary governance and the remnants of Crown sovereignty must be interpreted in accordance with the interpretive principles of reconciliation and the honour of the Crown and understood vis-a-vis the fourth pillar (section 35).

This means that federalism must operate constitutionally; it cannot be assumed that all jurisdictions are already occupied by federal and provincial governments, or that sections 91and 92 leave no room for Indigenous governments other than as responsibilities delegated through negotiation (Jhappan 1995). Looking beyond this standard interpretation and acknowledging that section 35 reconciles competing sovereignties means that upholding the honour of the Crown requires Canadian governments to facilitate the renewal of these constitutional orders by creating and/or vacating jurisdictional space, negotiating around concurrent and competing claims, and beginning to deal with jurisdictional disagreements as co-autonomous

6. This excludes municipalities, as they cannot be delegated Crown responsibilities. See *Neskonlith Indian Band v Salmon Arm (City)* 2012 BCCA 379 (CanLII).

jurisdictions (not subordinate Indian Act "governments"), acting either intra or ultra vires. To put it another way, as part of a constitutional dialogue, reconciliation and the honour of the Crown do not integrate Indigenous governments into Canadian federalism, but instead acknowledge Indigenous sovereignty as recognized, protected, and reconciled under the Canadian constitution, and other governments as having the responsibility of upholding the honour of the Crown in their relationships with the treaty order.

Beyond requiring federalism to operate in accordance with the honour of the Crown and reconciliation, constitutional supremacy also requires parliament and provincial legislatures to uphold it. As constitutional imperatives, reconciliation and honour of the Crown, coupled with constitutional supremacy and the rule of law, necessitates honourable governance. To understand the implications of this, it is necessary to look very briefly at the historical evolution and meaning of the honour of the Crown. As David Arnot, former treaty commissioner of Saskatchewan, stated in the University of Saskatchewan's 1997 Poundmaker Memorial Lecture,

> With respect to "the honour of the Crown", I suggest that this notion reflects the deepest and oldest layer of our tradition of human rights in Canada. … Long before we agreed, as an increasingly ethnically complex and contested nation, in a formal Charter of Rights we had inherited the British tradition of acting honourably for the sake of the sovereign. This is a very ancient convention with roots in Pre-Norman England, at a time when every yeoman swore personal allegiance to his chieftain or king … Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name. …
>
> The personal relationships between sovereigns and their ministers weakened as the medieval state grew more complex and bureaucratic. The sovereign became insulated from personal involvement in the affairs of the state.
>
> Although the culture of principle had begun to disappear in deeds, it survived in words. A cynical observer might be tempted to conclude that the language of Crown honour was often deployed to cloak the misconduct of ministers and to reassure British subjects that the power of the state remained in responsible and chaste hands that would not dare behave selfishly. (Arnot 1996, 340)

There is no doubt that the honour of the Crown is an important part of the historical development of our parliamentary tradition such that it explains (albeit in part) both roots of ministerial responsibility and the development of a constitutional monarchy wherein government is still conducted in the name of the Crown. That said, even in political science this concept and means of explaining political history has largely fallen by the wayside. More importantly, while the courts have renewed importance as a constitutional doctrine, even the most thorough and dynamic studies of the Crown in Canada do not address the honour of the Crown as it relates to Aboriginal and treaty rights, or for that matter such studies continue to be void of any discussion of Aboriginal peoples and their relationship with the Crown (treaty or otherwise; Smith 1995).

Given that ministers of the Crown have a constitutional duty to act in accordance with the honour of the Crown in all of their dealings with Indigenous peoples regardless as to whether or not an Aboriginal or treaty right has been confirmed (through judicial interpretation or negotiation). Given that governments have a constitutional responsibility for reconciliation (done in accordance with the honour of the Crown). Further, given that "each Crown has constitutional duty of honourable governance and a fiduciary relationship with Aboriginal people to the extent of its constitutional power to affect Aboriginal peoples' rights to discretionary control over their lives" (Henderson 2009, 66). Acknowledging such considerations, there is significant need for further study as to how the honour of the Crown can be translated and expressed as day-to-day governance. More thought needs to be given to the meaning and implications of honourable governance, as both federal and provincial governments are confronted with a constitutional requirement to act honourably and to uphold the honour of the Crown. In this new era of concurrent and overlapping jurisdictions and sovereignties, the renewed relationship between Indigenous peoples and the settler state is based on reconciliation and the honour of the Crown as interpretive principles of constitutional supremacy.

FACING FORWARD

The Court has instructed that the doctrine of the honour of the Crown is the underlying principle in the relationship between the Crown and constitutional rights of Indigenous peoples in Canada. As Henderson states:

> The purpose of this doctrine is a constitutional therapy for the ill of colonization on Aboriginal peoples, striving to include Aboriginal peoples in Canadian governance and to moderate historical disadvantage and exclusion … It creates a method for the courts to identify and to resolve the unstable relation between assumptions about governmental power and their policy and practices and constitutional rights of Aboriginal peoples. It allows for an imaginative and noble effort to construct and reconstruct power into honourable governance. (2009, 47)

While Henderson may overreach in his interpretation that this is a means of furthering the inclusion of Indigenous people into the Canadian state, it is at the very least a means of renewing relations between nations and reconciling sovereigns. Taking hold of this opportunity, however, will not be easy for either party. Aside from dealing with the relationship and working out how two constitutional orders occupy the same space, both will have to radically transform their own house. Canadians will be forced to grapple with rebalancing the political system on four pillars, the end of assumed sovereignty and creating space for constitutional pluralism, the trumping of parliamentary supremacy by constitutional supremacy, and the necessity of developing mutually agreeable, and mutually beneficial strategies and processes to effectively recognize, reconcile, and implement (encrypted)

Aboriginal and treaty rights. Indigenous nations need to engage in transformative resurgence and reconciliation within, whilst they renew their own constitutional orders and exercise sovereignty, which is limited only by their own constitution and the combined process of constitutional reconciliation. In short it requires all to engage in imagining the creation of a post-colonial Canada. As Canada sets the course for the next 150 years, perhaps this could happen.

Perhaps there is even some reason for hope. On 14 July 2017, Canada's justice minister, Jody Wilson-Raybould (an Indigenous lawyer and activist whose father had been part of the struggles which led to the inclusion of sections 25 and 35 in the Constitution Act, 1982), announced the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Canada 2017). These ten principles propose a definitive shift from the policy trajectory which dominated the first 150 years of the Canadian nation state. These ten principles, which are to define Canada's new relationship with Indigenous peoples, have the potential to give new life to treaties, self-determination, and both Canadian and Indigenous structures of governance. Such that Canada "recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government" and that "treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect." It also "recognizes that reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*" (Canada 2017). Whilst these give reason for hope, it would seem as though vestiges of terra nullius and assumed Crown sovereignty as the ten principles and their explanatory notes read in a manner consistent with the logics of merged sovereignty, which reinforce assumed Crown sovereignty and terra nullius (and thus deny Indigenous sovereignty). That said, these principles and the Trudeau government's announcement of a legislative process to create a new relationship and a Recognition and Implementation of Rights Framework—including those recognized in the Constitution Act, 1982 and in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) could go a long way in creating space for the exercise of Indigenous sovereignty and thus treaty constitutionalism (Canada 2018). More so they highlight an opportunity to engage in discussions pertaining to the possibilities for Indigenous governance beyond Crown sovereignty and the implementation of treaty constitutionalism.

As we venture forward, we must be mindful of the fact that while section 91(24) provides the federal government with the constitutional responsibility for "Indians and lands reserved for Indians," it also represents their responsibility for the relationship by ensuring that the honour of the Crown is maintained. This is not a responsibility over Indigenous peoples or for Indigenous governance, as this is unconstitutional and is a violation of treaty relations and ignores tenets of both international and commonwealth law. Acknowledging this responsibility means that it is necessary to repeal the Indian Act and replace it with legislation that sets forth a mutually agreeable, mutually beneficial, vision of honourable governance.

This then enables the implementation of the treaties through a renewed relationship, within the federation (and not simply with each nation, which would be considered unconstitutional or ultra vires). To succeed, such legislation would have to bring certainty to the relationship within Canadian law, implement fiduciary obligations and treaty responsibilities (in accordance with the principles of reconciliation and the honour of the Crown), and disallow federal paramountcy (except where explicitly agreed to without subjugation or the negotiation of inferiority). Building on this process, the courts would also have to acknowledge the place of the fourth pillar and address issues of constitutional supremacy such that their role would necessarily be transformed; they would no longer be able to try to determine the meaning of Indigenous constitutional orders, but would instead have the ability to rule on jurisdictional disputes. In short, moving beyond the legal and constitutional myths of terra nullius and assumed sovereignty whilst operationalizing constitutional reconciliation and the honour of the Crown will be a long and arduous journey.

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13

NATION TABLES AND THE BCTC TIC-TAC-TOE?

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The British Columbia treaty process resembles a multi-dimensional game of tic-tac-toe. In order to win, tic-tac-toe requires one of two players to "tic" (X or O) three aligned boxes. The BC treaty process has three players: First Nations, the federal government, and the provincial government, and all three must be aligned in order to "win" a treaty. Moreover, to achieve a "win-win-win" outcome, all three players must reach agreement, at the same moment, on several sets of difficult issues, including land, self-government, interim measures, and finance. Always, the potential departure of one or more of the players at any treaty table makes "winning" extremely difficult. And over the last twenty-five years, many players have walked away.

The glacial pace of negotiations has fostered the impression that governments were more interested in endless negotiations rather than actual settlements. Even good faith innovations have led to frustration, as other players tried to water down good ideas. So, one by one, First Nation players left the process to litigate or pursue other objectives. Then, in 2014, the Supreme Court of Canada ruling in *Tsilhqot'in* recognized a Nation's title without sending the issue back to the negotiating table. The decision represented a knockout punch to treaty negotiating as is, but created additional uncertainty as well. This chapter provides an overview of the BC treaty process from the inception of the BC Treaty Commission (BCTC) in 1993 to 2017.

THE BCTC TIC-TAC-TOE

The province of BC has rarely shown much interest in reconciling Crown and Aboriginal title. From late in the nineteenth century, when British Columbia's

government leaders denied that the Royal Proclamation of 1763 required them to negotiate treaties, to modern times, when Melvin Smith (1995, 79), a provincial official, insisted that the creation of tiny Indian reserves had settled all Aboriginal claims. Even today British Columbia's intentions may not be honourable.

The Nisga'a sought to settle the "land question" a century ago, but they were rebuffed by a provincial premier, William Smithe, who described their Nation as "little better than wild beasts in a field" (Gosnell 1998, 6).

At Vancouver in 1969, Prime Minister Trudeau said, "We can't recognize Aboriginal rights because no society can be built on historical might-have-beens … We will be just in our time. That is all we can do. We will be just today."[1] Not until Thomas Berger (1991), the Nisga'a Nation's lawyer, managed to get the Supreme Court of Canada to reopen the issue of Aboriginal title with its 1973 *Calder*[2] decision did BC come to the treaty table. But it was the beginning, not the end, of a long journey.

In 1992, Yukon First Nations reached a final agreement recognizing title to 41,000 square kilometers of land, with sub-surface rights on two-thirds of that quantum and the first third-order self-government agreements in Canada (Penikett 2012).

The Yukon treaty and the Nisga'a negotiations both informed the development of a British Columbia Treaty Commission. Later, in 1999, the Nisga'a reached British Columbia's first modern treaty, but its self-government chapter suffered legislative, legal, and plebiscite challenges from the provincial Liberal government. By then, however, Prime Minister Brian Mulroney, Premier Mike Harcourt and the First Nations Summit had established the BC Treaty Commission (BCTC). Under a 1993 Memorandum, Ottawa and Victoria agreed to share the cost of treaties, with the federal government providing the money and the province offering public lands.

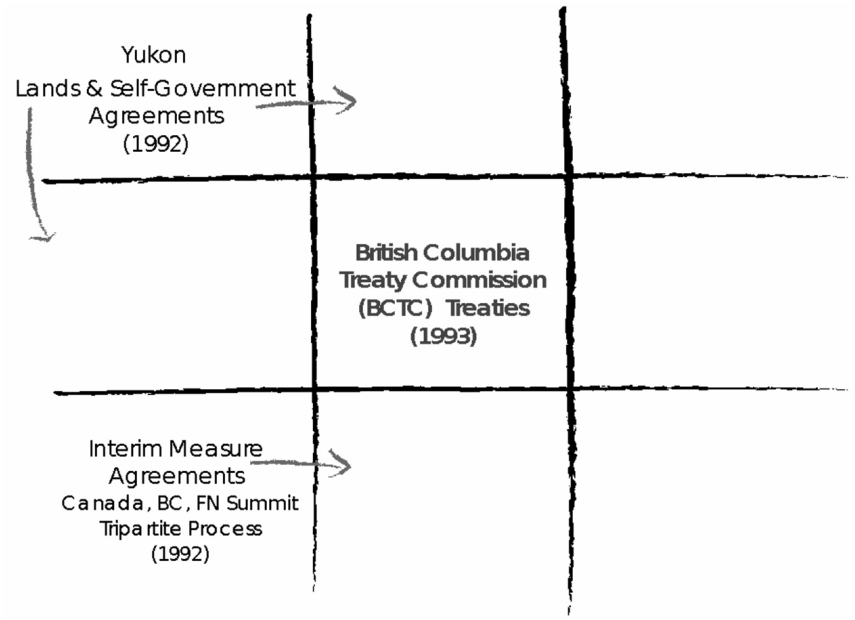
The two governments also promised to negotiate Interim Measures as a way to maintain confidence in lengthy negotiations processes. Interim measures would take the form of policy, financial, or other tools to overcome roadblocks in negotiations.

In 2004, former BC Premier Mike Harcourt predicted the settlement of fifteen treaties within four years. Problems soon arose: Indigenous dissidents occupied the offices of federal officials, and they blockaded roads and railways. The province responded to these acts of civil disobedience with expensive interim measures.

By 1997, the BC Government grew weary of "all give, no get" interim measure resolutions to disputes, and it approached the Department of Indian Affairs with a proposal to create a new tool: Treaty Related Measures was an instrument designed to accelerate the BCTC process by providing treaty "down payments" in the form of lands, fish, forests, and monies for First Nations in advanced stages of treaty negotiations. A 2006 audit report found that "Ministries involved in environmental protection, land management, highways, and resource industries have important

1. The speech was made at the Seaforth Armory in Vancouver on 8 August 1969.
2. *Calder v British Columbia* (AG) [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

Figure 1: BCTC Tic-Tac-Toe, 1993



roles in developing administrative policy (which the Ministry of Aboriginal Relations and Reconciliation coordinates), and in developing and funding treaty-related and interim measures" (Office of the Auditor General of BC 2006).

Unfortunately, officials soon turned the TRMs into fudge. Critics complained that provincial and federal bureaucrats had used TRMs mainly to fund paper planning exercises. In effect, this inaction amounted to a sneaky exit from the BCTC process.

Before long, it became obvious that Ottawa and Victoria had lost interest in the hard slog of treaty-making and the reconciliation of Crown and Aboriginal title. By 2005, litigator Thomas Isaac was arguing that Aboriginal grievances could be accommodated with economic agreements among the province, First Nations and resource developers. Such deals, which became known as "accommodation agreements," would provide certain benefits, jobs and service contracts to First Nations but, more importantly, they protected industry and provincial revenues. Isaac observed that "The ability of the Crown to engage in 'hard bargaining' may lead to an understanding that consultation and any resulting agreements may prove more efficient than the treaty negotiation process" (Isaac, Knox, and Bird 2005). Increasingly, the province chose accommodation agreements as "cheap and easy" alternatives to treaties. Yet these left Aboriginal rights undefined, and the question of self-government unanswered.

In 2006, when it became clear that a BCTC treaty might leave the Haida with title to only a tiny percentage of their inheritance, the Council of the Haida Nation, which asserts ownership of 100 percent of the Queen Charlotte Islands, (now officially renamed Haida Gwaii), walked away from the BCTC process. Instead, Haida leaders developed the vision of "co-jurisdiction," and they set about negotiating numerous agreements with the province, which are now encoded in a bipartite "protocol."[3]

Ten years on, it is clear that, while making great cultural and economic gains, an assembly of agreements covered by the BC-Haida Reconciliation Protocol amounts to much *co-management* and very little *co-jurisdiction.* The protocol demonstrated that while the province was willing to engage in cooperative management, it still lacked enthusiasm for the transfer, or even the sharing, of jurisdiction.

Indeed, these jurisdiction-weak accords soon earned the label of "shared governance." So the BCTC process watered down the substance of *Aboriginal self-government* and *Indigenous jurisdiction* found in the Yukon and Nisga'a treaties to "co-management" and "shared governance." All this reconfirmed the government's serious lack of interest in negotiating Aboriginal title and self-government.

Canada, BC and the First Nations Summit created the British Columbia Treaty Commission in 1992, but just twenty-five years later it sometimes seems to be on its last legs. When the three parties founded the Commission in the wake of successfully negotiated treaties with four First Nations in the Yukon Territory, optimists spoke of quickly wrapping up treaties. But, after the expenditure of almost a billion dollars resulted in the negotiation of only five treaties with relatively small First Nation groups, early hopes of reconciliation have largely vanished.

Negotiations crawled like snails, but many of Ottawa's risk-averse public servants actually seemed to prefer endless negotiation to win-win settlements. Indeed, officials from federal finance apparently championed endless treaty *negotiations* because they were *cheaper* than *treaty settlements*, a profoundly penny-wise, pound-foolish view. Treaty settlements should count as investments in reconciliation, but as one ex-Indigenous and Northern Affairs Canada (INAC) deputy minister admitted to me in a private conversation in 2006, "We capped the cost of settlements, but not negotiations." So, while the snail slimed Vancouver sidewalks, costs climbed the walls of government office towers in Ottawa and Victoria. The worst financial consequence of failed treaty negotiations is that BC First Nations have been saddled with half a billion dollars' worth of negotiation loans (Eyford 2015).

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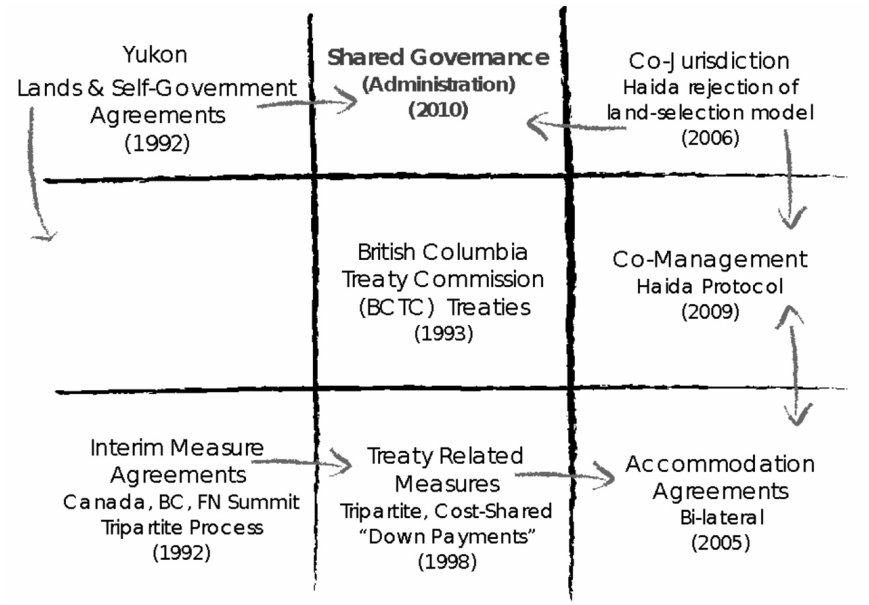
3. See Haida Nation, Council of—Province of British Columbia Reconciliation Agreements. Haida Kunst'aa guu—Kunts'aayah Reconciliation Protocol Amending Agreement—2016; Haida. Council of Haida Nation negotiations statuses, agreements, and supporting information relating to consultation. www2.gov.bc.ca/[...]/first-nations-negotiations/first-nations-a-z-listing/haida-nation-council-of

Figure 13.2: BCTC Tic-Tac-Toe, 2010



Support for the BCTC process dwindled. Some conservative commentators (Alcantara 2008) recommended that Indigenous Nations seek smaller, more modest, non-treaty agreements outside the tightly locked BCTC box at the centre of the tic-tac-toe squares. The Idle No More movement, which fights for land and jurisdiction, urged Nations currently sitting at treaty tables to disengage altogether.[4] The late Shuswap leader, Arthur Manuel, roundly denounced the BCTC process:

> First Nations [are] first surrendering their Aboriginal title and rights while the government decides what to grant them back during the negotiations. The stated goal of these skewed negotiations was clearly the old ceding and releasing of our rights, to be replaced by what amounted to, in the best case, slightly expanded reserves and the menu of municipal and non-profit organization powers that were defined in the policy. (Manuel and Derrickson 2015, 90)

Back in 1997, the Supreme Court of Canada ruled in *Delgamuukw* that Aboriginal title survived in British Columbia, and that Aboriginal title represented a collective right to the *exclusive* use and occupancy of the claimed territory (McKee 2009, 89). This SCC declaration briefly animated negotiations, but their sluggish pace,

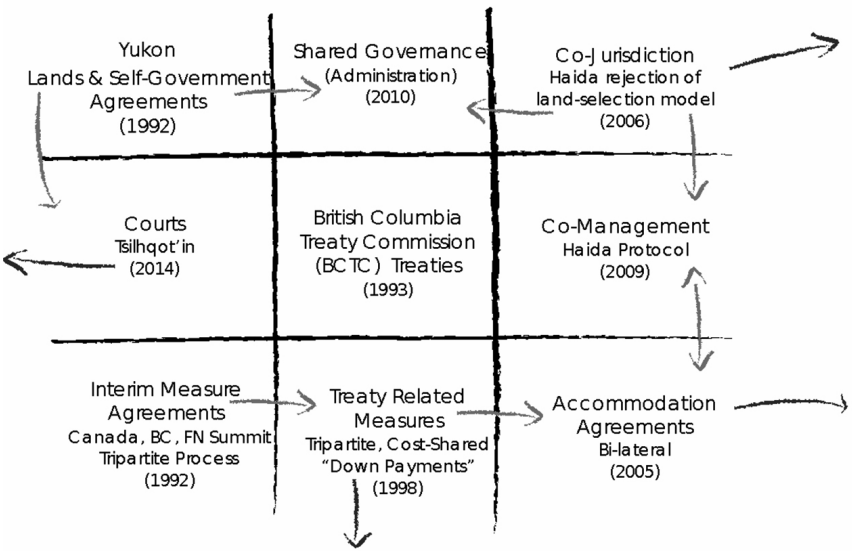
4 .Idle No More. "Turn the Tables." http://www.idlenomore.ca/turn_the_tables.

combined with the federal refusal to allow concurrent litigation and negotiation, caused more and more First Nations to choose litigation.

Twenty-five years after its birth, the British Columbia Treaty Commission, which began with great promise, has become a giant disappointment. Some First Nations, like the Haida, came to prefer models of reconciliation outside BCTC frameworks. The Tsilhqot'in went to court and won a breakthrough settlement and, one by one, other Indigenous parties have exited the BCTC process. While there has been much innovation, and some betrayal outside the BCTC box, inside it was dying for want of energy, imagination, and leadership.

Fifty-three negotiating tables remain, at which the parties nudge each other towards the distant goal of treaties, comprehensive land claims and self-government agreements (Indigenous and Northern Affairs Canada 2015). Many of these tables have been creeping along for more than twenty years. Consider the absurdity of that situation: BC and Canada ask educated young chiefs to give twenty years or more of their lives to negotiating agreements, the broad outlines of which are perfectly clear on the day they start to talk. Why would any young leader suffer such torture? The BCTC process, the great engine of reconciliation on the West Coast, has run out of gas.

Figure 13.3: BCTC Tic-Tac-Toe, 2014



TREATY-MAKING

In 2006, Douglas & McIntyre published my book, *Reconciliation* (2016)*,* about the numerous problems plaguing the British Columbia Treaty Commission process. A decade on, most of those problems persist. Reconciliation requires imagination and innovation, but a glance at my BCTC tic-tac-toe illustrates that the experimentation has happened largely *outside* the BCTC square. Obvious problems still plague the BCTC process:

- BCTC requires extinguishment of title, and imposes painful land selection processes.
- BCTC embraces manipulative federal mandates designed for endless negotiations rather than final settlements.
- BCTC processes encourage too much rent-seeking behaviour by consultants, public servants, and lawyers.
- British Columbia has used accommodation agreements as "cheap and easy" alternatives to treaties. Accommodation agreements do protect industry and provincial revenues with "transactional" deals. But they do *not* solve either of the two problems treaties are supposed to address: who owns *land;* and how it will be *governed*.
- Historically, BCTC simply has not seen the committed and concurrent leadership by federal, provincial, or First Nation governments that reconciliation requires.

Absent political will, BC will see few treaties. In tic-tac-toe terms, "winning" and "win-wins" require that for a single decisive moment, three squares need to be strategically aligned; the necessary formula is a perfect alignment at a certain point, of leaders from three levels of government: Indigenous, provincial, and federal: (Chiefs + PM + premier = treaties). Absent any one of these parties, a treaty in BC is impossible.

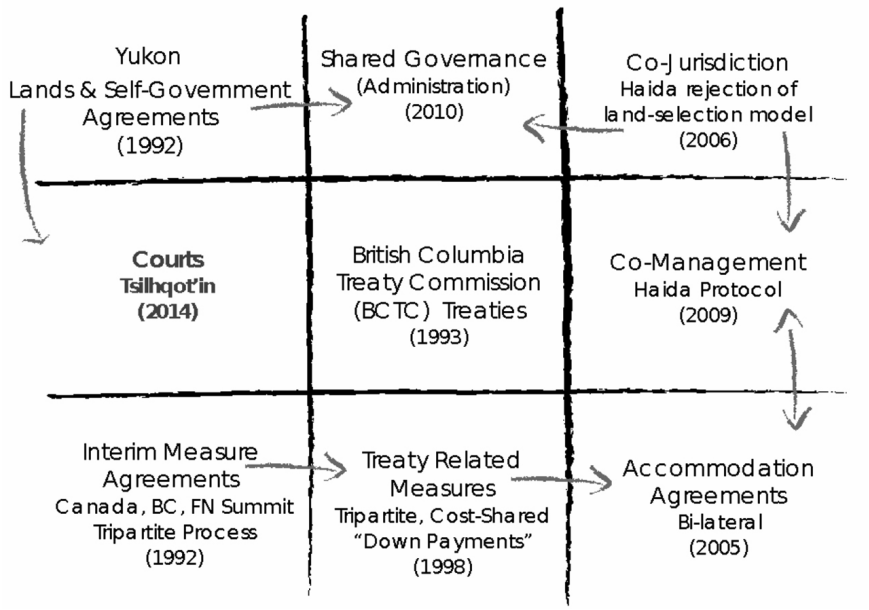
Once upon a time, Will Kymlicka (1995, viii) recognized treaties as a discredited but evolving instrument with unrealized utility. In the introduction to his work, *Multicultural Citizenship*, Kymlicka writes,

> Treaties are a common means of regulating the interaction between dominant groups and national minorities. They reflect the idea that the two nations in a multination state treat each other as equals, and respect each other's right to speak for and govern themselves. Many people view such treaties as outmoded or irrelevant, and they have generally been ignored or violated by the majority whenever they were inconvenient. However, I think the underlying idea is worth studying, and celebrating, and may indeed be vital to creating a more peaceable kingdom in the modern world. (1995, vii)

In the long shadow of BCTC's failures, BC's treaty parties need to build new models of reconciliation, and the new dawn of the Tsilhqot'in decision provides

one such opportunity. Because the courts now seem to be saying that Canada and BC may have been negotiating with the wrong parties; that the "rights-holders" may be Indigenous Nations and *not* First Nations, the Indian Bands created by Ottawa's Indian Act. British Columbia needs to take a hard look at what it is doing. The courts probably do not want government to abandon the dozens of First

Figure 13.4: BCTC Tic-Tac-Toe, 2017



Nations enduring the BCTC grind but rather to try something new—and completely different—at a new table.

TSILHQOT'IN

By 2014, BCTC had only a handful of treaties to show for its efforts. Then something extraordinary happened. In June, the Supreme Court of Canada recognized the Aboriginal title claim of the Tsilhqot'in Nation. This dramatic decision indicated the Supreme Court's deep displeasure at the dithering by federal and provincial authorities. Inevitably, the decision has led even more Indigenous groups to choose litigation over negotiation, and, for a few, direct action rather than political engagement.

What happened? In June 2014, for the first time ever, with *Tsilhqot'in* the Supreme Court recognized a Nation's title without sending the issue back to the negotiating table. The decision represented a knockout punch to treaty negotiating as is.

Consider some implications of the *Tsilhqot'in* decision: neither the province nor the federal government can ignore Aboriginal title or regard it as a fossilized remnant from the pre-colonial era. After *Tsilhqot'in*, government actions that threaten an Indigenous group's interests in their lands clearly require the rights-holder's consent. Absent consent, a government must justify its infringement by demonstrating a compelling public interest in which the benefits outweigh the negative impacts on the Indigenous community. *Consent* does not mean *veto* but rather that Indigenous concerns *must* be addressed. Essentially, Canadian courts have announced that Aboriginal title is alive and well. Furthermore, as John Borrows argues, the rediscovered Indigenous laws of historic Nations may now generate obligations in Canadian common law (Borrows 2015).

Certainly, the Supreme Court finding means that the Tsilhqot'in Nation rules a sizeable part of its traditional territory. Neither Ottawa nor Victoria can ever argue again that Aboriginal title attaches only to remote trap lines and tiny village sites. Chief Justice McLachlin's brief but beautifully written decision should greatly improve the public's understanding of Aboriginal title and relations between Indigenous Nations and the Canadian Crown. Nevertheless, distinct features of the *Tsilhqot'in* case do not mean that other such cases will easily navigate the legal mazes. There were, for example, few overlapping claims to *Tsilhqot'in* lands from neighbouring Nations. Besides, the $40 million costs of litigating *Tsilhqot'in* could prove prohibitive for many Nations. Therefore, finding new paths to reconciliation is imperative.

Legions of lawyers have no doubt pawed over the pages McLachlin penned in *Tsilhqot'in*, and some might feel it is the new floor for such cases (Morris et al. 2017). On the other hand, government solicitors might see it as the ceiling. Unfortunately,

in my experience as a negotiator, officials tend to look for the "minimum necessary" response to court decisions, which, in this case, might be a serious error.

For a start, the Crown authority's claim to underlying title and its negotiation of "infringement accords" in the form of accommodation agreements both need re-examination. The 1982 Constitution Act protected Aboriginal rights under section 35, and the Supreme Court of Canada acknowledged in the 1997 *Delgamuukw* decision that Aboriginal groups demonstrating exclusive, continuous, and sufficient occupation should be recognized as the rightful title holders. Regardless, federal and provincial governments have loaded the burden of proof on Indigenous communities. So here we are in 2017, when most BC First Nations have no treaties and few pre-colonial Nations have ever been invited to negotiating tables.

For hundreds of years, the Tsilhqot'in Nation occupied lands in central British Columbia, where they hunted, trapped and, in the nineteenth century, fought off invading settlers. Their legal battle dates back to the 1980s, with a blockade of a logging road and a petition for a logging ban. In 1998, the Nation amended their original suit to include a claim for Aboriginal title on behalf of all Tsilhqot'in people. The Nation designed its claim for five percent of their traditional territory to circumnavigate certain legal barriers, and avoided private properties and subsurface lands.

Over five years, the BC Supreme Court heard 339 days of testimony, and in 2007 BC Supreme Court Justice David Vickers found that the Tsilhqot'in people were, *in principle*, entitled to a declaration of Aboriginal title over the land in question. For procedural reasons, the BC Supreme Court did not formally declare Aboriginal title (SCC 2014, para 7). The Tsilhqot'in appealed the decision to the BC Court of Appeal and, then, the Supreme Court of Canada. In June of 2014, Supreme Court judges' unanimous decision declared Aboriginal title over the territory claimed by the Tsilhqot'in. As John Borrows notes, *Tsilhqot'in* is the first case in Canadian history of legal recognition of Aboriginal title outside a reserve (Borrows 2015).

The court's reaffirmation of the Crown's underlying title probably limits the scope of Aboriginal title. Both Indigenous leaders and legal scholars may wonder how, and under what circumstances, the Crown acquired this underlying title. In this respect, the Court's decision is contradictory; the *Tsilhqot'in* occupied their lands at discovery, but the Crown has underlying title; and government regulators may continue to infringe on the Nation's title, making it a weaker form of title than that enjoyed by settlers. Nevertheless, *Tsilhqot'in* bolsters the requirement of governments to obtain free, prior and informed consent from Aboriginal Nations where there is even the *suspicion* of Aboriginal title. Government and industry are warned. University of Calgary law professor Nigel Bankes (2015) believes infringement decisions must also consider intergenerational impacts beyond conventional cost-benefit analyses.

McLachlin restated the Supreme Court's long-stated preference for good-faith negotiations between Indigenous groups and governments, federal and territorial. Whether they will heed her call, time will tell. When, in 2015, the First Nations

Summit asked the province for a "transformed relationship," a deputy attorney general replied, "There is nothing in the *Tsilhqot'in* decision to 'implement' outside of the declared Aboriginal title area identified by the court" (Palmer 2015). In *Tsilhqot'in* the Supreme Court again found that BC had breached its duty to consult. *Plus* ça *change?*

In 2017, British Columbia elected a new government with a reconciliation mandate but will the *Tsilhqot'in decision* reinvigorate the treaty process in BC? One might argue that Canada, BC and First Nations should completely overhaul the treaty process *and* encourage Nations to join the BCTC operation. That would have been a brilliant idea in 1992. However, since BCTC is evidently an inadequate process, that may no longer be the best option.

While some Indian Act bands in the Far North remain impoverished, the lives of Yukon First Nation communities with self-government agreements have markedly improved in the twenty-some years since the parties achieved their agreements. Villages with self-government agreements now enjoy quasi-provincial powers and the economic benefits of those powers, plus federal investment. Yet important aspects of those agreements are not well understood, and they have not been replicated in BC. All provinces, BC included, naturally fear a loss of control; but in some measure that is what a mature relationship with Aboriginal peoples requires.

To avoid accumulating any more debt, many BC First Nations with little hope of progress have abandoned the treaty process. On the heels of *Tsilhqot'in*, some obviously see litigation as their best bet. They are not alone. Too often, Ottawa and Victoria punt important decisions to the courts and then grumble about the results.

Our neighbour, the United States, has long experience with overlapping jurisdictions and the interrelationship of laws among tribes, states, and the federal government. Section 91(24) of Canada's Constitution Act could provide space for federal legislation to enable First Nations governments to exercise more jurisdiction. A Canadian transition to shared decision-making models based on overlapping jurisdictions, and appropriate intergovernmental arrangements, would be a healthy outcome.

RHETORIC

Over the last few months, Canada has heard much talk about "reconciliation," but reconciliation demands energy, imagination, and hard work! Reconciliation must be more than rhetoric.

In concrete terms, what might new approaches to reconciliation mean? Let me suggest a couple of things. First, a new approach could build on John Borrows's work on *Indigenous law* rather than *Aboriginal law* (the field pioneered by Thomas Berger and others of his generation). Indigenous law brings a new (and very old perspective—assertive Indigenous points of view—to public debates. On 3 April 2017, Haida leader Miles Richardson told my class in Masters of Public Policy at

Simon Fraser University that when the RCMP arrested Indigenous elders opposing the clear-cutting of ancient cedar on Haida Gwaii, his people were not "protesting"; rather, they were obeying Haida law in protecting their forests and lands. Today, many young scholars are choosing to explore Indigenous legal traditions and ancient cultural practices as foundations for building new relationships with the dominant society.

Second, having won their historic court battle, the Tsilhqot'in have discovered that they must now negotiate—with almost everybody. Moreover, in his BC Supreme Court ruling on the case, Justice David Vickers suggested that governments may have been negotiating with the wrong parties; it is pre-colonial Indigenous Nations—*not* Indian Act (INAC) bands—which are the proper rights and titleholders. Vickers's identification of pre-colonial Nations as rights holders rather than INAC bands has reverberated across tribal territories in British Columbia. The provincial government seems not to have fully digested the SCC ruling yet, which has profound implications, not least the issue of capacity. Nowadays, unless the First Nations in their tribal family support them, as in the case of the Council of the Haida Nation, many pre-colonial Nations have no funding, staff, or lawyers because Ottawa has been funding only Indian Act bands and occasionally tribal councils.

The Government of Canada recently announced a Review of Laws and Policies related to Aboriginal People in Canada, and a working group will report within the next eighteen months. They are also engaging in exploratory discussions to "seek ways to address [First Nations'] rights, needs and interests through joint priority-setting and collaborative development of negotiation mandates" (Indigenous and Northern Affairs Canada 2017). Is this a major initiative with potential to shift the relationship between the federal Crown and Aboriginal Peoples towards a nation-to-nation relationship? We shall see.

NATIONAL TABLES

In seeking reconciliation after *Tsilhqot'in*, British Columbia could create "Nation tables" for open-ended talks with Indigenous Nations, rights-holders to land, and government. Last summer, during Trans-Mountain Pipeline hearings, Shuswap (Secwepemc) chiefs affirmed Justice Vickers's view; they had first petitioned Prime Minister Wilfred Laurier about their title rights in 1910. Both BC and Canada must now reckon with the potential that Indigenous Nations, not Indian Act bands, are the legitimate Aboriginal rights holders to tribal lands and the proper authorities in tribal governments. To scope out new pathways to reconciliation, Victoria needs to arrive at Nation tables without fixed agendas, prescriptive mandates, or settlement formulas. Representatives of the province should come with humility, listen with open hearts and minds, and see where the dialogue takes them.

Nations

Because most Nations—unlike First Nations—have no budgets, researchers, or administrative supports, early encounters between pre-colonial Nations, the province and/or Ottawa might be scoping exercises to explore the implications of the *Tsilhqot'in* decisions for Aboriginal title and tribal governance. For Indigenous leaders, both elected and hereditary chiefs, exploratory tables with Nations could provide an opportunity to renew the treaty process without the dead hand of INAC mandates and BCTC strictures.

Province

Given the historic divides between Indigenous Nations and the province on questions of title and governance, British Columbia should convene tables in an open-handed manner. It should park its accommodation agreement agenda and listen carefully to the chiefs representing the Nations. *Tsilhqot'in* likely added to the uncertainties that trouble resource industry investors and, if the province fails to act decisively, a "capital strike" may haunt rural BC. Twenty years ago, fishery, forests, and mining sectors might have blamed First Nations for this uncertainty. Nowadays, corporate CEOs are more likely to express frustration with the provincial government's inability to seriously address the Aboriginal title question. Nevertheless, at an initial heads-of-government meeting, the table might agree that chiefs and the premier or senior minister might gather without advisers, consultants and officials or lawyers, in order to foster a "government to government" relationship. There will be much to discuss, and the initial engagement might produce nothing more than an agenda for future meetings.

In time, a nation table (or tables) might well visit Truth and Reconciliation Commission issues yet to be addressed by parliament or the provincial legislature, such as Indigenous language revitalization and, eventually, the need for a province-wide mapping of tribal lands, as has been suggested by Connor Morris, one of my SFU MPP students. Morris proposes that BC, in partnership with Indigenous Nations and the federal government, consider a BC-wide mapping of Aboriginal title to document claims and identify overlapping claims, "while fostering a deeper and more nuanced consideration of Indigenous interests where Aboriginal title potentially exists." (Morris et al, 2017). Start with one table, listen, learn, and treat.

Canada

With so many issues in the federal domain, a BC/Nations table might eventually invite Ottawa to join their talks. Entering such an arena, Ottawa could build trust

and demonstrate good faith by recognizing Aboriginal title rather than resisting it. Public recognition of the co-existence of Crown and Indigenous title to BC lands would help Canadians understand their own history as residents of Indigenous territories, help them recognize a debt to Indigenous Nations and, also, the bounty Indigenous lands and resources provided generations of settlers.

On the issue of reconciliation, British Columbia and Canada have agreed to work together but, perhaps, it is now up to BC to make the first move. Fortunately, it can look to existing approaches for models. The British Columbia Treaty Commission process has failed, in part, because governments used it to manage the "Indian issue" (Penikett 2006, 171) rather than negotiating treaties or achieving reconciliation. By contrast, after almost thirty years, Yukon villages with self-government agreements seem to be enjoying a high measure of peace and prosperity, as is the Tsawwassen Nation in BC. Treaties can address some of the democratic deficits at issue in this volume.

POSTSCRIPT

It is too soon to tell whether Justin Trudeau's reconciliation agenda will succeed but Simon Fraser University's "Reconciliation: When do we get to the Hard Stuff?" (16 March 2018) policy forum[5] heard Justice Minister Jody Wilson-Raybould describe her government's commitment to moving beyond denial of rights to "full box" recognition of section 35 rights. For example, she said: "The Department of Justice is reviewing their litigation strategy when it comes to directives to counsel, but it is not now putting forward standard defenses." Speaking after Wilson-Raybould, BC Attorney General David Eby endorsed the federal agenda. BC wants to be a leader among provinces on reconciliation, he affirmed. "My bias is towards urgent action as much as possible."

Later in the policy forum, Joe Wild, senior assistant deputy minister, treaties and Aboriginal government, Indigenous and northern affairs Canada, spoke of major reforms to the BC treaty process, including abandonment of the problematic "inherent right" policy and a billion-dollar commitment to replace negotiation loans to First Nations with non-repayable contributions. Wild's provincial colleague, ADM Jessica Wood, spoke of building the competence of the BC public service to work with reconciliation policies and new federal principles. "Indigenous teachings are as old as time immemorial. Teachings and policy are not separate," she said. "The potlatch *is* an economic system." The contributions from senior policy makers at SFU's forum probably do mark strategic departures.

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5. Ginger Gosnell-Myers and Tony Penikett, co-chairs, "Reconciliation: When do we get to the hard stuff?" 16 March 2018 Policy Forum, SFU Wosk Centre for Dialogue, Coast Salish Territory/Vancouver.

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INTERGOVERNMENTAL RELATIONS

14

IMAGINING CANADA: NARRATIVES OF FEDERALISM IN INTERGOVERNMENTAL ORGANIZATIONS

Jennifer Wallner, University of Ottawa

Intergovernmental relations are the workhorse of many federations. Whereas the constitutional division of powers between at least two orders of government structurally defines a federal system, the exercise and practice of that division of powers unfolds through the interactions of the actors who inhabit the system. It is thus through intergovernmental relations that political leaders address common problems, contend with issues that transcend the formal division of powers, and work to secure the well-being of a federal polity.

The study of intergovernmental relations by political scientists considers a range of issues, including the formation of intergovernmental organizations, examinations of their effectiveness, and the overall performance of these organizations assessed according to such metrics as democratic legitimacy and participation (Bakvis and Skogstad 2012). Using a rational choice approach, Bolleyer (2009), for one, accounts for divergent patterns of institution building in federal systems addressing the question of why some federations, like Switzerland, have highly institutionalized arrangements while others, like Canada, do not. In the meantime, reforms that endeavour to adjust or sidestep the division of powers in such federations as Germany, Switzerland, the United States, Australia, and Canada, have garnered considerable interest. Scholars are now unravelling the implications that such institutional modifications have on the relative degree of centralization or decentralization in a federal system, the degree of intrusiveness exerted by the central government in areas falling under the purview of the constituent members, and the engagement of non-governmental actors (Lecours and Béland 2011; Broschek 2015; Füglister and Wasserfallen 2014; Savage 2016; Simmons 2012).

The 2002 volume of *The State of the Federation* included a series of chapters on the effectiveness and performance of various intergovernmental organizations in the Canadian federation (Meekison, Telford, and Lazar 2004).

Here, I tackle the subject along a different track. In Canada, there are multiple narratives that offer alternative interpretations for the foundation and purpose of the federation. Two of the most familiar are the nationalizing vision of Canada, most famously advanced by Sir John A. Macdonald, and the compact theory, which envisions Canada's federation as a union among equal provinces who share sovereignty with the federal government. The research here starts from the premise that narratives should not be dismissed as simple examples of scholarly story telling. Rather, as Bouchard advances (2013, 2015), these narratives are part of the founding myths of the country and carry tangible effects by establishing emotional bonds among members of the polity and providing symbolic resources to mobilize particular communities.

This chapter considers the ways in which the design and operation of intergovernmental arrangements may reflect and reinforce alternative narratives of the federation. In pursuing this investigation, the chapter begins to lay the foundation for an additional means to evaluate Canada's intergovernmental machinery and consider their effects on intergovernmental relations. Specifically, the perceived legitimacy of various intergovernmental organizations may be influenced by the specific narrative that undergirds their structure. Furthermore, the embedded narratives may also influence the way that particular actors work within a specific organization and the concomitant outcomes of that organization. Through an exploration of the Health Council of Canada (HCC) and the Council of Ministers of Education, Canada (CMEC), I work to identify the normative assumptions of Canadian federalism that may be woven into the institutional rules of these organizations, which may in turn influence the actions of political actors within them and the outcomes achieved.

The chapter opens with a discussion of this idea of narratives of Canada, focusing on the nationalizing and compact understandings of the federal union. The subsequent section provides the theoretical anchors, forging the links between ideas and institutions. The third and fourth sections detail the two examples I mobilize to illustrate my central claims. I conclude with a discussion of the implications of this research, which are important to bear in mind as political leaders engage in a new round of institution building to oversee the management and operation of intergovernmental relations in Canada.

NARRATIVES OF THE CANADIAN FEDERATION

Ideas about federalism in Canada are contested. There are alternative, if not at times conflicting, narratives of the foundation of the division of powers, the means by which the federation came to be, and the construction of the political communities

that together constitute the Canadian polity (Bakvis, Baier, and Brown 2009; Gagnon and Iacovino 2007; Jenson 1995; Ladner 2003; Mallory 1977; Rocher and Smith 2003; Smith 1998; see also Nath 2011).[1] "The evolution of Canadian federalism," write Rocher and Smith (2003, 21), "has been shaped by profoundly contrasting or diametrically opposed concepts, norms, and values, so that both political actors and citizens who talk about federalism often mean different things by the term." In fact, Livingston's (1952, 84) seminal work on federalism laid the groundwork to expose the possibility of contesting narratives maintained by different groups within a federation when he declared that: "federal governments and federal constitutions never grow simply and purely by accident. They arise in response to a definite set of stimuli (namely economic, social, political, and cultural)"; a federal system is consciously adopted as a means of solving the problems represented by these stimuli. Variations among groups and across communities in their experiences with and salience of different stimuli can translate into markedly different narratives of that federal system.

It is precisely these alternative narratives of Canada's constitution that Rocher and Smith (2003; see also Gagnon and Iacovino 2007) map out. The authors provided a detailed look at four visions of Canada's constitution, each of which rest upon different political identities, are supported by different conceptualizations of the relationship between state and society and can be concurrently observed at various points in time. These visions are nationalizing federalism, the compact theory, asymmetrical federalism (or nation-to-nation-to-nation federalism), and the rights-based constitutional vision.[2] While elements of all four visions are likely observable across various intergovernmental arrangements, due to space considerations, this chapter concentrates on the first two narratives and their manifestation in Canadian intergovernmental relations.

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1. Furthermore, as Nisha Nath (2011) has demonstrated, there is an absence of "race" in the narratives of Canadian political science and also in the visions of the Canadian constitution. According to Nath, this has created a blindspot in Canadian political science, whereby "even when structures of identification are taken into account, they are rarely acknowledged as a political production or an exertion of political power" (2011, 181). It is for this reason that Nath, whose work provides inspiration here, underlines the importance of unpacking narratives in political science.

2. The asymmetrical vision refers to the perception of Canada as a multinational federation, whereby differential powers are afforded to founding groups like the Québécois and Aboriginal peoples. This vision is what some others in Canada refer to as the "compact theory." The rights-based constitutional vision, in the meantime, draws its roots from in the 1982 Charter of Rights. It is thus not based on a territorial political identity. Rather, the vision is based on individuals and groups are rights-bearers and the constitution provides the mechanism for protecting these rights (Rocher and Smith 2003, 21–44).

One of the undeniable champions of the nationalizing vision of the Canadian federation was Sir John A. Macdonald. As a leader who favoured a legislative union over federalism, Macdonald (quoted in Stevenson 1982, 44) made his ambitions clear: "(…) 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." Concrete measures embedded in Canada's constitutional architecture to realize this image of a centralized union included the federal power of reservation and disallowance, federal intervention in the national economy, and federal influence in key areas of provincial jurisdiction to foster the creation of the welfare state. The critical implication of this vision of Canada for intergovernmental relations is thus the elevation of the federal government as the privileged order and primary leader of the Canadian polity.

The compact theory stands in contrast to this nationalizing image of the Canadian federation. According to its proponents, Canada is a creation of the provinces generated through a compact entered into by the provinces and the United Kingdom. An early defence of this position can be found in a submission composed by Nova Scotia Premier Angus L. Macdonald for the Royal Commission, Provincial Economic Enquiry (Jones Commission) in 1934. He rested it on the image of a "great church" as a metaphor for the federal and provincial governments with a "large building and a set of smaller buildings standing on the same ground, yet distinct from each other. *It is a combination sometimes seen where a great church has been erected over more ancient homes of worship … The identity of the earlier buildings has however not been obliterated*" (quoted in Smith 1998, 11; emphasis added). This vision of Canada as a great church thus intends to accommodate some federal presence in areas of shared jurisdiction while simultaneously regarding all provinces as sovereign entities in the areas that fall under their purview. The compact theory also advances a principle of symmetry across the jurisdictions to achieve equality among the provinces (Gagnon and Iacovino 2007, 75). Equality, as Rocher and Smith (2003, 26) sagely note, does not imply uniformity. Instead, the compact theory rests on a theme of provincial equality built on diversity. In the context of intergovernmental relations, the key implication of this vision is that "provincial premiers have as much right to represent citizens as does the Prime Minister of Canada. The total is neither more nor less than the sum of its parts" (Rocher and Smith 2003, 24).

These narratives are not just mere tales concocted by scholars. Consider the vitriol Canadian journalist Andrew Coyne recently dispensed in a *National Post* column (2017). Reflecting on the release of Quebec's document, "Quebecers: Our Way of Being Canadian," Coyne opined:

> What is astonishing—beyond the suicidal madness of the whole exercise—is how little has changed … There is the same tendentious history, the same omission of in-

> convenient facts or contrary interpretations. Thus for example the "compact theory" of Confederation is treated as if it had some significance to the people who actually negotiated it, instead of being dreamt up in subsequent decades to rationalize the ambitions of the premiers of Ontario and Quebec.

In his attempt to dismiss the compact theory, Coyne in fact confirmed its potential force; visions offer powerful symbols providing a means to mobilize political communities and rally around an understanding of the federation. How, then, might we see the imprint of images of Canadian federalism in intergovernmental relations?

IDEAS AND INTERGOVERNMENTAL RELATIONS

The policies and practices of a state are not merely rational and technocratic decisions made by agents with clear and consistent preferences. Instead "of seeing politics as a contest among people who have clear and stable interests … (we develop) a vision of politics as the struggle for power and control among people who are motivated by myriad ideas" (Béland and Cox 2010, 3). Kymlicka (1995), for one, affirms that a state cannot be culturally neutral. Through such instruments as public holidays and other symbolic state markers, implicit recognition is afforded to dominant national majority groups. Reflecting on language policies, Gagnon (2014, 20) further declares that the alternative regimes for bilingualism at work within Canada reveal particular visions of the country that, in turn, are "rooted in distinct conceptualizations of federalism." Once established and accepted by a given population, the implicit norms embedded within policy regimes condition subsequent action. Operating in the background and ensconced within programs, ideas "may come to structure peoples' thoughts" and gradually limit the "range of alternatives that élites are likely to perceive as acceptable, while serving as guides to public actors for what to do and/or as sources of justification and legitimation for what such actors can or should do" (Carstensen and Schmidt 2016, 329–330). Ideas, thus conceived, carry clear implications in the construction of particular structures and the subsequent evolution of those structures and the people associated with them. What role, then, may ideas play in the construction of intergovernmental organizations and how can we uncover them?

Interestingly, scholars of international relations have long been attuned to the ideational underpinnings of international organizations. Within a particular international order and international regime, states construct institutions or organizations that "codify a baseline social and ideational consensus, serve as benchmarks to judge behaviour, and frequently are touchstones for institutional spin-offs" (Cottrell 2016, 19). International organizations are thus designed in a way that both reflects and refracts principles at work within a particular regime. Through an examination of new multilateral institutions in the Asia-Pacific region, Acharya (1997), for example, aimed to ascertain the extent to which institution building was being influenced

by a specifically "ASEAN way" of regional cooperation. He outlines the ways in which the localization of universal principles of multilateralism, as well as the spread of alternative concepts and practices of cooperation that differed from the dominant hegemonic Western variants, were crucial in the successful formation of multilateralism in the Asia-Pacific region. In other words, those who endeavoured to build new institutions, needed to construct them in a way that resonated within the region and drew upon the prevalent norms to garner the necessary legitimacy for success.

This work on international organizations helps to map out the ways in which ideas—or more specifically alternative narratives of a federation—may be encoded in the intergovernmental machinery of a federation. According to Bolleyer (2009), "intergovernmental arrangements can range from irregular ad hoc coordination between ministries, as in Canada and Spain, to intergovernmental secretariats with dozens of employees, as in Switzerland and the United States." As a result, they can include a vast array of forums composed of a variety of actors, from political elites and their officials to representatives from non-governmental interests and members of society at large. Intergovernmental arrangements are thus governed by their own sets of formal and informal rules of engagement and expectations of their driving objectives. These rules and expectations do not simply materialize out of thin air. Rather, they are the result of choices made by actors as they construct an arrangement to manage their relations. By unpacking these rules and identifying the underlying assumptions that underpin them, potential visions or images of a federation may be revealed. Three elements are particularly salient in this regard.

First, the accepted participants of an intergovernmental organization send signals, both to the participants and the polity at large, of who commands authority and exerts legitimate power over a particular policy field—an issue that is a fundamental question in many federations. Second, core rules of operation, such as decision-making practices and appointment procedures indicate the relative power of the various players. To draw an example from the international arena, the veto power held by five permanent members of the United Nations Security Council clearly elevates the authority of those countries over all other member states. Similarly, in intergovernmental arrangements, if one order of government has greater power over appointments, this would install a hierarchical facet to the body, privileging that order over the other constituent members. Third and finally, the general objectives or goals of an intergovernmental arrangement both reflect an existing order and may act as a constraint while simultaneously creating new opportunities for those working within the pertinent sector. Bernstein and Cashore (2012) observe that international organization may be used to develop and impose rules to which states or firms commit or foster the dissemination of shared norms of behaviour and encourage the adoption of best practices. Organizations oriented to such goals implicitly involve a potential transfer of authority away from the domestic realm towards the supranational sphere. Put simply, domestic autonomy may be curtailed due to the decisions made by actors in such organizations.

Consider for a moment what some have referred to as "the apex" of Canada's machinery for intergovernmental relations: first ministers' conferences (FMC). Called exclusively by the prime minister of Canada and operating with only the most minimal of fixed procedures, these conferences are perhaps the most publicly recognized intergovernmental arrangement in Canada. Despite such standing, however, FMCs are only weakly institutionalized and convened only when it suits the federal prime minister's interests (Papillon and Simeon 2004; Wallner 2017). Prime Minister Stephen Harper, for example, only convened two meetings of all the first ministers. The prime minister chairs the meetings, the provinces typically speak in the order of their entry into Confederation, and no votes are taken during these meetings, which are generally held behind closed doors shielded from public scrutiny (Government of Canada 2017a). These features of the FMC thus seem to rest in part upon an image of the Canadian federation in a hierarchical configuration with the federal government at its peak, leading consultations with the leaders of the constituent jurisdictions while retaining the formal power and authority over all the proceedings. Far from *primus inter pares*, the federal prime minister stands apart in FMCs, which reflects a more nationalizing vision of the Canadian federation.

Before advancing to the empirical heart of the paper, it is important to acknowledge that intergovernmental arrangements are multifaceted and complex. It is thus doubtful that they would neatly capture one specific narrative of the Canadian federation. FMCs, for example, have rarely involved the imposition of formal agreements by the federal government or the establishment of mandatory programs dictated by the federal government, despite encoding a more nationalizing narrative of Canada. Furthermore, in pursuing this line of analysis, I am not suggesting that every action taken, both to set up arrangements and the subsequent behaviour within them, are explicitly and intentionally oriented towards a clear vision. Rather, working from Campbell's (2002) notion of norms operating in the background, through the identification of members, the codes of conduct, the rules for decision making, and the scope of action for the body, an image of the country can become embedded in the arrangement, capturing and refracting a particular set of ideas, influencing the interactions among the officials and potentially the results that emerge.

Health Council of Canada—Nationalizing Vision

From a federalism perspective, the health sector has emerged as one of the most contentious jurisdictions in Canada. Section 92(7) of the constitution assigns exclusive provincial control over hospitals and psychiatric institutions. However, as the preeminent constitutional expert Peter Hogg (1998, 445) once stated: "Health is not a single matter assigned by the Canadian constitution exclusively to one level of government. Like inflation, and the environment, health is an 'amorphous topic.'" Since the post–World War II expansion of the welfare state, the federal

government has used its spending power to intervene in this policy arena that was "previously considered provincial responsibility" (Leeson 2002, 5). With more than 9,000 public servants in 2016 (Government of Canada 2017b), Health Canada is a robust federal department despite the fact that the provinces and territories manage and oversee the delivery of healthcare for each of their systems. Federal financial support for provincial and territorial health systems materialized as a key challenge in federal/provincial/territorial (FPT) relations, with one of the most cantankerous aspects being the legitimacy of federal conditions associated with those funds (Wherry 2017). Detailed below, the development and subsequent dismantlement of the HCC from 2003 to 2014, reveals some of the challenges that accompany the building of intergovernmental arrangements in areas where contested narratives of the authority over a sector prevail.

In September 2003, during the course of a major first ministers' conference called by Prime Minister Paul Martin, Canada's first ministers set out an action plan on healthcare renewal that reflected a "renewed commitment by governments to work in partnership with each other, with providers, and with Canadians in shaping the future of our public health care system" (NA 2003, 1). Referring to the Accord as a "covenant," the initiative sought to ensure that Canadians had access to timely, effective healthcare, which was also patient-centred, safe, and sustainable. To achieve these goals, the federal government committed major funds to support provincial and territorial actions in various areas while nevertheless explicitly recognizing that "provinces and territories are at differing stages of reforms in these areas" (2).

It is at the very end of the Accord (8) that the following sentences can be found:

> First Ministers recognize that Canadians want to be part of the implementation of this Accord. Accordingly, they agree to establish a Health Council to monitor and make annual public reports on the implementation of the Accord, particularly its accountability and transparency provisions. The Health Council will publicly report through federal/provincial/territorial Ministers of Health and will include representatives of both orders of government, experts, and the public.

From this last provision, it seemed that the Health Council was also intended to pioneer a new participatory vision of the Canadian federation by engaging members of the public directly, thus breaking the dominance of political executives and their officials in intergovernmental relations (Smiley 1987). What is more, this Accord seemed to advance a narrative that respected the responsibilities of the various orders of governments in the area of health somewhat in line with the compact understanding of the federation.

The inspiration for the Council is found in the pages of the Commission on the Future of Health Care in Canada (the Romanow Commission). To foster "national leadership in health," Romanow called for a Health Council of Canada to be "established by the provincial, territorial and federal governments" (Commission on the Future of Health Care in Canada 2002, 52). The organization should be oriented towards establishing benchmarks, coordinating existing activities in health

technology assessment, and developing national strategies for healthcare renewal (Commission on the Future of Health Care in Canada 2002, 52). Upon its establishment, the Council comprised corporate members, led by the federal minister of health and ministers of health from eleven of the thirteen jurisdictions. Both Quebec and Alberta refused to join the Council, although Alberta eventually became a member later in its mandate (Health Council of Canada 2006, 14). However, much of the work was done by the member elected Council—which consisted of thirteen councillors and one ex-officio councillor representing six regional groupings: (1) BC and Yukon; (2) Alberta; (3) Manitoba, Saskatchewan, Nunavut, NWT; (4) Ontario; (5) Nova Scotia, New Brunswick, PEI, Newfoundland and Labrador; and (6) the Government of Canada and seven non-government councillors elected by the corporate members through a nominating committee (KPMG 2013, 10). In other words, rather than equal representation of all the provinces as would be advanced under the compact narrative of the federation, the HCC fostered a regionalized representation overseen by federal leadership and was marred by Quebec's abstention.

A review of the minutes from the Council's meetings over a ten-year period confirms that it was primarily oriented around the identification of best practices, the development of performance measures to evaluate various programs, and also encourage collaboration among certain provinces. Tabling more than ninety substantive reports during its tenure, in addition to regular annual reports and progress reports, the HCC offered detailed research addressing a range of topics including Aboriginal health, access and wait times, electronic health records, health human resources, health promotion, health status and health outcomes, home and community care, pharmaceuticals management, and primary healthcare. In fact, in 2012, KPMG was retained by the HCC and the Government of Canada to evaluate the organization (KPMG 2013). Despite providing an overall positive assessment of the body—including the fact that it was cost-efficient and effective—the Council was dismantled in 2014, when the Health Accord expired. Aspects of its foundation, rules of engagement, and orientation likely all contributed to its demise.

First, despite Romanow's explicit call for FPT collaboration, the HCC was created without the clear engagement of the provinces and territories. The federal government quickly and somewhat unilaterally assembled the organization and set out its baseline structure. As such, while it was technically arm's-length from the federal government and based in Toronto, the Council appeared to remain a creature of that order of government. What is more, while ministers of health from all the provinces and territories were supposed to participate, Quebec never engaged. Quebec's position on federal engagement in healthcare remains consistent and clear: "Successive Québec governments have constantly and unequivocally denounced this attempt at federal government appropriate of Québec's capacity to set its own priorities" (Sécreatiat aux Affaires intergouvernementales canadiennes 1998, 1). Finally, rather than a broad mandate as Romanow recommended, the Council was instead "uniquely charged with tracking" the implementation of the ten-year plan to strengthen healthcare "and reporting its progress to Canadians. The Council sees

its job as one of witness and advisor: we review progress, we assess success and we advocate for change when we see a need" (Health Council of Canada 2006, 1). Put together, these features of the HCC did not engender strong provincial and territorial buy-in to the organization, despite their authority in the sector.

Second, because the Council was originally established to monitor the Accord, the federal government, when led by Conservative Prime Minister Stephen Harper, had a convenient reason to wind down funding in 2014 when the agreement expired (Library and Archives Canada 2013a). The Council relied entirely on federal funds to support its operation. When informed of the decision, John Abbott, the chief executive officer of the Health Council of Canada, wrote a quick reply: "the letter and the phone call with Councillors came as a complete surprise and disappointment to the Health Council and its secretariat." Abbott continued by saying: "We believe that with our demise there will be an obvious gap in the independent monitoring of performance of Canada's healthcare system(s), a lost platform to share innovative practices" (Library and Archives Canada 2013b). The federal minister of health at the time, Leona Aglukkaq, indicated that the provincial and territorial governments could step in and fill the funding gap if so desired: "I should emphasize that this is a decision about federal funding for the council, and that formal decisions about its future as an entity will need to be made collectively by us, the council's corporate members." Soon after, then Alberta Minister of Health Fred Horne acknowledged that provinces would consider filling the funding gap, but the premier of Prince Edward Island quickly countered saying that the federal government should "continue footing the bill" and provide national leadership in the arena (quoted in Galloway and Andreatta 2013). Combined with Quebec's consistent refusal to participate, the provinces and territories could not garner the necessary consensus to provide the additional funds themselves to maintain the HCC.

Third, and finally, we must consider the stated goals and objectives of the HCC. In this regard, the federal government adhered to Romanow's recommendations that encouraged the HCC to provide a "national voice" for healthcare in the country and act as arbitrator of best practices. Such a goal nevertheless carries certain risks for provincial and territorial policymakers. Similar to the ways in which international organizations can act as a policy advocate for certain strategies by giving an external stamp of approval, enabling the HCC to identify best practices implies that to some extent provinces and territories symbolically turn over their independent appraisal capacities to an intergovernmental arrangement. Additionally, the federal government could leverage the potential credibility of the HCC to foster the dissemination of uniform practices, compromising the policy autonomy of the individual provinces and territories. While some provinces and territories may have welcomed such interventions, others—most notably Quebec—would not. Put together, these features and elements of the HCC appear to have reflected and refracted elements of a nationalizing vision of the Canadian federation, influencing the organization's activities in this area of contested jurisdiction.

The Council of Ministers of Education, Canada (CMEC) and the Compact Theory

Under section 93 of the constitution, the power over elementary and secondary education falls to the provinces. In contrast to the incremental expansion of federal engagement in other policy arenas, like healthcare, federal participation in the schooling of Canadians remains relatively indirect. The federal role is limited to the schooling of First Nations children who live on reserves, children of military personnel on bases, protecting the rights of religious minorities who had school boards prior to Confederation, protecting the rights of minority language communities to education in their provinces, and providing occasional piecemeal funding for targeted projects. Unlike almost all other federations, there is no federal department of education or federally elected minister responsible for the field. The evolution of the CMEC reflects perhaps some of the advantages of building an arrangement in an area of clear jurisdiction, while nevertheless revealing the ways in which a vision of the federation may directly and indirectly shape institutional dynamics.

Created in 1967, the CMEC serves as a forum for the provincial—and now territorial—ministers of education and their senior executives to discuss policy issues, provides a mechanism through which to undertake actions in areas of mutual interest, and offers a means by which to collaborate with other national education organizations and the federal government. While concerned with facilitating information exchanges and occasionally producing common benchmarks (see, for example, CMEC 2017a, 6), in contrast to the HCC, the CMEC does not prioritize the identification of "best practices" or act as a policy advocate for the dissemination of uniform strategies. Instead, as a guardian of the provincially guaranteed authority for education, it is up to the ministers and their advisers alone to decide whether or not to participate in potential joint activities.

Participation in CMEC is restricted to government actors alone. Any consultation with stakeholders is done within each individual province and territory, and policy experts are seconded as required by the respective ministries of education (Wallner 2014). As such, the CMEC Secretariat is not entrusted with appointing advisers; rather, this task rests explicitly in the hands of each province and territory equally. A chair is elected every two years on a rotating basis among the members (CMEC 2017b). Interestingly, 2019 will mark the first time that CMEC will be chaired by a territory. Under the terms of the 2016 Accord, territorial ministers with responsibility for education were made full members of the Council. Prior to this new agreement, territories were only granted observer status in the Council and were thus ineligible to chair the organization. This previous asymmetry in status likely derived from the fact that the territories do not share the same de jure status as provinces. Rather, it is only over the course of almost three decades of devolution that the territories are gaining comparable de facto status as provinces within the federation. Finally, under the auspices of a standing agreement with the

federal ministry of foreign affairs, the CMEC's executive represent Canada abroad, participating in such organizations as the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN). Consequently, through the CMEC, provincial (and now soon territorial) ministers of education provide Canada's formal voice on the international stage. These features of the CMEC clearly reflect the compact vision of the Canadian federation wherein the provinces can provide a legitimate voice for the policy arena of the country.

Supported by a permanent secretariat based in Toronto, the CMEC is the most institutionalized of all intergovernmental arrangements in Canada. Multiple meetings are held each year that bring together all the ministers and their officials from the thirteen jurisdictions, either in the form of face-to-face encounters or conference calls. Separate committees for the assistant deputy ministers are also convened regularly throughout the year to ensure the successful execution of shared initiatives and further detailed information exchanges on developments within the respective jurisdictions. In addition to the regularity and frequency of meetings, the CMEC also directly administers a variety of programs, including Canada's national official languages programs; produces indicators to evaluate the strengths and weaknesses of the provincial schooling systems; sponsors research in education-related statistics; and assesses the skills and competencies of Canadian students.

Decisions are made according to consensus, but unanimity is not required to pursue an initiative. Evidence of this decision-making protocol in action is found in one of the CMEC's most significant endeavours: universal assessments. Under the auspices of the CMEC, the provinces developed a universal assessment protocol originally known as the School Achievement Indicators Program (SAIP). At the time of its creation, both Ontario and Saskatchewan decided to abstain from the initiative; the SAIP moved forward nonetheless, and within two years both provinces had decided to participate in the program. This decision-making procedure thus respects individual autonomy without hamstringing the Council's capacity to move forward on initiatives.

When developing the SAIP, the CMEC partnered with Statistics Canada to create the Canadian Education Statistics Council (Canadian Education Statistics Council 2003). In other words, an agency of the federal government was engaged to work with the Council. Run by the same committee of assistant deputy ministers, which meets frequently through the year, the goal of this body is to improve descriptive education and training statistics in Canada, ensure broad access to data that nevertheless respects privacy of personal information, and maintain a core comparable database of information on education in Canada. In contrast to the Health Council of Canada, this education statistics council is thus focused exclusively on the collection and dissemination of information, leaving the respective provincial and territorial ministries of education and other stakeholders within the education sector the responsibility to evaluate the implications of the information, determine a course of action based on that information, and draw their own conclusions regarding best practices. The generation of best practices by an overarching organization that

could be perceived to be an intrusion on provincial and territory autonomy in the field is explicitly avoided.

It is also in the creation of universal assessments that the important yet indirect federal role in this area of provincial-territorial jurisdiction is revealed. It was the federal government that agreed to provide seed money for the School Achievement Indicators Program, which provided critical fiscal resources that were necessary to launch the assessments (CMEC 1996). Aside from some broad statement on reporting requirements, however, the federal government did not play a direct role in the substantive development of the protocol. The substance, organization, and implementation of the program were left entirely in the hands of provincial experts. Participating jurisdictions contributed their own funds to support the SAIP, covering the indirect costs of the implementation of the program in each of the systems.

In 2000, to cover the direct costs associated with a new international assessment program launched by the OECD, the federal government shifted its financial support away from the domestic assessment. Rather than mothballing the domestic program, however, the provinces and territories decided to step in and fill the funding gap to secure its continuation. What is more, they immediately engaged in a major review of the SAIP, ensuring that the "assessment instruments were designed, developed, and reviewed by representatives of the ten provinces and the three territories, working together under the leadership of a development team" (CMEC 2001, 116). Then, in 2007, the provinces and territories replaced the SAIP and launched the Pan-Canadian Assessment Program (PCAP; CMEC 2016). With students sitting for the assessment every three years, PCAP is based on curriculum areas that are common across the country to allow "comparisons to be made across jurisdictions of students at a comparable point in their schooling" (CMEC 2016, 1).

From this outline of the Council's fundamental goals, general rules, and authoritative participants, the alignment of the organization with the compact theory of Canadian federalism becomes clearer. The CMEC respects and reinforces the clear jurisdictional authority of the provincial and territorial ministers over their respective educational systems as it is oriented to information exchanges and collaboration without the requiring the installation of uniform practices. The rules of decision making respect the principle that all the jurisdictions are equal while in practice ensuring that a small group of provinces cannot veto desired actions. Furthermore, and quite striking, is the fact that the Council has secured the acknowledgement of the Government of Canada to speak on behalf of Canada on the international stage. Finally, while the territories are now full participants in the CMEC, it is only in the most recent accord that it seems they are going to be able to chair the Council. Until this recent change adopted in 2016, the differential status of the territories was a symbolic reminder of the differential status that separates the provinces from the territories as embodied in the compact image of the Canadian federation.

CONCLUSION

Intergovernmental arrangements are not simply neutral structures emerging from a purely "rational" and "objective" decision-making process devoid of norms and ideational principles. Rather, as a product of human action, interpretations of the legitimate allocation of authority and the scope of jurisdictional responsibilities within a federation indirectly shape and inform the establishment of intergovernmental organizations. Using Rocher and Smith's (2003) discussion of constitutional narratives, and focusing specifically on the nationalizing and compact understandings of the federal union, this chapter unpacked the ways in which alternative images of Canadian federalism may become embedded in intergovernmental organizations. Drawing insights from both public policy and international relations, visions of federalism can be revealed in three features of intergovernmental arrangements: the accepted participants, the core rules of operation and decision making, and the driving goals of the organization. These features of intergovernmental arrangements reflect and refract ideas about a federation.

While not a conventional intergovernmental organization in the Canadian context, because of its inclusion of non-governmental representatives as authoritative contributors, the analysis of features of the Health Council of Canada revealed a more nationalizing vision of federalism. As the primary architect and promoter, the federal government set the stage as the key sponsor of an intergovernmental arrangement in an area of contested jurisdictional authority. Moving forward without clear provincial and territorial engagement, and operating without Quebec, the federal government sent a signal to Canadians that they were the order of government responsible for creating a national organization for healthcare in the country. Furthermore, as an identifier of best practices, the HCC was intended to become somewhat of an arbitrator of policy strategies to nurture greater interprovincial-territorial cohesion in the sector. Even the language of the Romanow Report (Commission on the Future of Health Care in Canada 2002, 47), a core inspiration for the HCC, deployed a national discourse in its discussion of intergovernmental relations and healthcare: "What is needed is a truly national approach to medicare in the 21st century—an approach that sets aside the differences of provinces, territories and the federal government, and puts new and more effective governance approaches in place."

The rhetoric of setting aside differences and the objective of identifying best practices in healthcare, while perhaps pragmatic in the eyes of some, carries considerable risk to the preservation of the division of powers in the eyes of others. On a practical level, best practices could be universalized, compromising the autonomy and the authority of the individual jurisdictions. Symbolically, akin to the role played by some international organizations, the HCC in some ways may have represented a potential transfer of authority to the federal government, empowering that order of government to legitimize and validate actions taken by provincial and territorial decision makers in an area that technically falls under their jurisdictional

purview. Such a move would be anathema for some provincial leaders and stands in contradiction to other images of the Canadian federation.

The CMEC was presented as an example of an arrangement that embodies the compact vision of Canadian federalism. Going to great lengths to preserve and protect provincial autonomy in K–12 education, the CMEC focuses on information-sharing and facilitating voluntary collaborations among the governments rather than acting as a policy advocate and identifier of specific best practices. Representing Canada internationally, the chair of the CMEC further confirms the idea that provinces, and now the territories, have as much right (if not more) to speak on behalf of citizens as does the federal government in that policy sector. Perhaps one of the clearest encapsulations of the compact image of Canada emerges on the issue of territorial representation. It is only since the acceptance of the new memorandum in 2016 that territories have gained equal standing in the CMEC, since the rounds of devolution commenced in the 1980s and 1990s (Alcantara 2013).

Acknowledging the ways in which images and narratives of the Canadian federation can become embedded in intergovernmental arrangements may perhaps bring new insights as the governments of Canada embark on institution building in the future. Today, one of the most significant issues on the intergovernmental landscape is the representation and standing of Indigenous peoples in various intergovernmental fora. Put simply, the inclusion of Indigenous peoples ushers in an alternative vision of the Canadian federation—that of asymmetry with multiple *nations* coming together to form the federation. In July of 2017, and repeated again in 2018, the issue came to a head when three leaders for national Indigenous organizations boycotted a meeting with the Council of the Federation (COF). "We are not just another special interest group," declared Assembly of First Nations National Chief Perry Bellegarde. "An effective process for intergovernmental participation must reflect our status under the Constitution and international law as peoples and nations with inherent rights, title and jurisdiction" (quoted in Windspeaker 2017).

Representatives from the three organizations wanted full standing in the COF, as opposed to a separate meeting before the start of the formal proceedings. Such a request thrusts the competing images of the Canadian federation front and centre. To quote one observer (Kheiriddin 2017):

> A First Ministers meeting, by definition, is a meeting of people who have been elected to govern a province or territory. To grant full participation to those who have not obtained their office by popular suffrage and uniform standards would change the notion of the meeting entirely, and open the door to any group which considers itself worthy of that status.

Once again, the potential power of norms and principles wrapped up in institutional arrangements becomes clear. Ideas and images of Canadian federalism are not insignificant stories. Rather, we must be cognisant of the background assumptions and often unarticulated notions of the federation that can become embedded

in different structures and subsequently shape behaviour as they contribute to the management of the federal union.

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15

THE POLITICS OF FEDERAL-LOCAL INTERGOVERNMENTAL RELATIONS IN CANADA

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INTRODUCTION

In his 1970 book, *Urban Canada*, economist N. Harvey Lithwick argued that, "the federal government has used the constitution as an excuse to abstain from playing a responsible urban role, despite overwhelming evidence that it is the principal actor in the urban political reality" (1970, 577). Despite being many decades separated from Lithwick's assertion, very little has changed. The federal government gets formally involved in urban policy in fits and starts, rarely remaining long enough to establish lasting relationships or make (according to many urban policy wonks and politicians at least) any meaningful change. The frustration felt by many in cities is understandable given what Stoney and Graham (2009, 373) refer to as the "basic paradox at the heart of federal-municipal relations in Canada": nearly everything the federal government does or spends money on has a direct or indirect impact on municipalities in Canada, but the federal government has no formal powers over local government. This lack of formal powers, as Lithwick reminded us above, creates a basic rationale for the federal government to abstain from involving themselves in the challenges and opportunities present in Canada's urban centres.

The British North America Act of 1867 established a distribution of powers between the federal and provincial governments that placed responsibility for municipalities with provincial governments (Côté and Fenn 2014). This was reinforced during the patriation of the constitution in 1982. As it currently stands,

provincial governments control the functions, structures, finances, and even the very existence of local governments within their jurisdiction (Tindal et al. 2013). On the surface, then, it appears that there is no room for federal involvement in urban policymaking. As we see above, however, the actions of the federal government undoubtedly affect local decision making. The federal government is a major land owner in Canada and holds an extraordinary portfolio of property, including office buildings, laboratories, defence installations, transportation and communications infrastructure, post offices, national parks, and museums across the country (Wolfe 2003). The federal government is also a large employer in many urban centres around the country—most notably the in the National Capital region—and has a powerful role in housing through the Canada Mortgage and Housing Corporation (Wolfe 2003).

At times, the federal government has acknowledged this reality and even created institutions to manage these relationships. These formal institutions, however, have been mostly short lived. Despite the absence of formal engagement with cities, the federal government has always maintained some type of presence in urban policy. The federal government's early interventions were unilateral and placed great emphasis on social policy, focusing on using federal policy tools to cure perceived social ills, such as poverty, disease, and crime in urban centres. At this time, the federal government was reactive and responded to public outrage in a very selective manner. As such, policymaking in these areas was generally done without consultation with local or provincial actors. Over time this trend has shifted. Federal action in urban affairs sparked a backlash of sorts, leading to more inclusion of provincial governments and, by extension, municipal officials. The federal government's focus became more proactive and centred mostly on physical, rather than social, infrastructure. Contemporary urban policy has mostly focused infrastructure spending during the governments of Stephen Harper and Justin Trudeau.

In this chapter, I explore the history of Canada's federal-urban relationship. As we will see, this relationship has ebbed and flowed, but was constantly overshadowed by provincial intervention. In the following section, I examine national urban policy in comparative context. I then explore the federal government's early history in the urban policy realm, before examining two eras of formal federal engagement in Canada's cities—namely the creation of the Ministry of State for Urban Affairs and the Ministry of State for Infrastructure and Communities. I conclude the chapter by examining contemporary efforts in federal-urban policy and examining general trends in the federal-urban relationship.

NATIONAL URBAN POLICYMAKING

Most countries have some sort of national urban policy. For the most part, these exercises are best described as a vision, guiding principles, and a set of linked

actions by national governments aimed at addressing problems arising from the concentrated growth of population and economic activity in urban areas (UN-Habitat 2014). Such a policy covers the intentions of national governments in urban areas as well as the actual effects of their presence and policies. These policies evolve along the following broad trajectories: (1) a reaction to urban growth pressures, (2) efforts to control and steer growth elsewhere because of the costs of congestion and overcrowding, (3) efforts to ameliorate the impact of decline and poverty through social and environmental programs and (4) the creation of new cycles of urban growth and development (UN-Habitat 2014).

A useful distinction can be made between *implicit* and *explicit* national urban policy.[1] Countries with implicit national urban policy are marked by a federal awareness of the impact of their actions on municipalities but lack a more comprehensive policy targeting distinct local issues (Friendly 2016). As such, the federal government is aware of the impact of their actions upon cities but does not have a comprehensive set of policies aimed to mitigate that impact. As well, there is generally not a comprehensive dialogue opened with local decision makers regarding such implicit policy.

Explicit national urban policy is much different. In this, national governments form a comprehensive policy aimed explicitly at cities (Friendly 2016). Programs and policies such as the federal gas tax program could fit into this category. During this process, local decision makers are consulted and there is an effort to cooperatively pursue shared policy ends. Higher order explicit national urban policy could include formal ministries aimed at urban or local communities in Canada. Two such efforts—the Ministry of State for Urban Affairs and the Ministry of State for Infrastructure and Communities—are explored below.

The key distinction, then, between implicit and explicit national urban policy is the presence or absence of a comprehensive urban plan to address the effects of federal policies. We can also identify degrees of strength between these two positions. For instance, a federal government that creates a plan to not only mitigate federal policy in urban areas, but also engage in meaningful consultation with local actors, would have a very strong explicit national urban policy. A federal government that creates formal institutions to address urban issues would, for instance, have an even stronger policy.

The distinction between implicit and explicit national urban policy and our ability to define strong and weak positions with both provides a useful tool to evaluate the federal government's approach to federal-urban policymaking and, by extension, the quality of Canada's institutions and practices in this this area. The federal government has mainly pursued implicit national policy. At times, however, the federal government has gotten deeply involved in the life of urban areas

1. For an expanded and comparative discussion of national urban policy please see Friendly (2016).

Figure 15.1: Forms of National Urban Policy Making

Implicit	Explicit
Unilateral Federal Action	Signed MOUs
Bilateral Relations with State-level Actors	Project Collaboration
Engagement with Municipalities	National Urban Policy

across the country through two major formal initiatives: the Ministry of State for Urban Affairs and the Ministry of State for Infrastructure and Communities. This chapter details both of these efforts and discusses shifts in the federal government's approach to cities over time.

CANADA AND MUNICIPALITIES: A LONG COURTSHIP

The federal government has had a large impact on municipal government in Canada. As mentioned earlier, the federal government owns a great deal of land across Canada and is active through institutions, such as the Canada Mortgage and Housing Corporation and Canada Lands, a Crown assets disposal corporation that owns many key urban sites across the country, which greatly affect patterns of land use in hundreds of communities (Wolfe 2003). Additionally, the federal government controls monetary policy and most of the social, environmental, trade, and economic policy in the country (Wolfe 2003). It goes without saying, then, that there are few areas in which federal decision making does not affect local government in Canada. This, of course, is not a new phenomenon. The federal government has always had an impact on municipal government in Canada.

National urban policy has waxed and waned since confederation. As Wolfe (2003) argues, national interest in cities has tended to emerge in the face of distinct urban challenges. For instance, the urban reform movements at the turn of the twentieth century focused on curbing corruption and crime, beautifying urban areas, and promoting equity, and this focus inevitably drew the federal government into certain areas of intervention (Rutherford 1974). After the First World War, fears of civil unrest prompted the federal government to provide $25 million in loans to provincial governments to build housing in urban centres (Jones 1978, 1). At the height of the Great Depression, the federal government created the Dominion Housing Act (1935)—many of the core attributes of which would later be adopted during the creation of the Canada Mortgage and Housing Corporation (CMHC)—to alleviate poor conditions in housing in urban Canada and help promote home ownership across the country (Wolfe 2003). The CMHC would go on to provide

Table 15.1: Urban Crises and Federal Responses*

Perceived Crisis	Federal Response
Early 1900s Rapid Growth/Immigration Overcrowding Poor Housing Vice/Crime Municipal Corruption Returning Veterans Fears of Civil Unrest	1918 Housing Program
Great Depression High Unemployment Poverty Poor Housing	1935 Dominion Housing Act 1944 Curtis Report
Post WWII Overcrowding Poor Housing Returning Soldiers	1944 National Housing Act 1945 CMHC

* For an expanded and comparative discussion of national urban policy please see Friendly (2016).

direct loans for housing to the public and eventually move into public housing in the 1940s, provide mortgage insurance and funding for urban renewal in 1950s, and grant loans for municipal infrastructure in the 1960s (Wolfe 2003).

The federal government's efforts in urban Canada to this point were small in scale and generally reactive in nature. Urban challenges began to compound in the 1960s and the federal government was increasingly seen as a possible partner to help find solutions. Pressure began to mount for the federal government to act, which eventually led to Canada's first explicit national urban policy framework.

The Ministry of State for Urban Affairs

The Ministry of State for Urban Affairs (MSUA) formally came into being in 1971. MSUA's creation, however, was the culmination of many years of advocacy by local politicians and urban activists (Spicer 2011a). In the early 1960s, Canada experienced what can be referred to as a "politicization of urban life," during which time attention focused on the condition of urban centres and the equality of opportunity for those who chose to live in Canada's largest cities (Tindal and Tindal 2004, 307). Coalitions of activists from a variety of backgrounds banded together to oppose "urban renewal" projects, which were seen as promoting spatial

inequality, reducing housing availability, and harming the livability of urban communities (Spicer 2011a). In nearly every major city of Canada, these groups brought attention to a variety of renewal projects, such as freeway construction through Vancouver's city centre (Gutstein 1983), Mayor Jean Drapeau's housing developments in Montreal (McAllister 2004), and the Spadina Expressway in Toronto (Magnusson 1983). Over time, under intense public pressure, city councillors began addressing these concerns with federal and provincial governments (Purdy 2004; Whitzman and Slater 2006).

Canada's big cities demanded help in responding to inequality. Coupled with specific municipal requests, was an array of demands coming from the Federation of Canadian Municipalities (FCM) throughout the 1960s. The FCM argued for a greater federal role in municipal affairs, including help eliminating municipal debt, amending municipal bond legislation, and increased funding for transportation and city beautification (Spicer 2011a).

The federal government ignored most of these calls to action from Canada's municipalities. Prime Minister Pearson showed little interest in urban affairs. His successor, Pierre Trudeau, generally viewed the Canadian federation as highly compartmentalized, where each level of government operated within its own jurisdiction (Spicer 2011b). Municipalities, accordingly, were the constitutional responsibility of the provincial governments, meaning that Prime Minister Trudeau saw urban issues as resting comfortably outside his purview.

Trudeau, however, would slowly begin to get pressure from within his own caucus to change his position. One of his most prominent critics was Paul Hellyer, then serving as Trudeau's minister of transportation, who frequently sparred with the prime minister over housing funding (Spicer 2011b). Pressing the government to establish a national housing policy and a stand-alone urban affairs ministry, Hellyer eventually resigned from Cabinet when it became clear Trudeau would not budge. Hellyer called Trudeau's opposition "illogical, if not inconceivable, that the Government of Canada could have ministries dealing with fisheries, forestry, veterans affairs, and other matters which involve a minority of the population, but none to deal on a full-time basis with the urban problems which involve more than seventy percent of the population, not to mention housing which involves virtually everyone" (Cullingworth 1987, 34). When pressed by the media, Trudeau argued that, "the government believes in an active role of leadership in the field of housing and urban living…our government also believes that real leadership consists in getting all levels of government to work together for the benefit of all Canadians" (Spicer 2011b).

Another of Trudeau's critics was the Liberal member of York West and former mayor of Toronto, Philip Givens. In the wake of Hellyer's resignation, Givens emerged as a vocal critic of Trudeau's approach to housing and urban issues. At a 1970 trade conference in Toronto, Givens argued the Trudeau government was neglecting cities and called for increased federal aid to Canada's urban centres (Newman 1970a). The problem, he argued, was that Canada's cities have no

constitutional standing. Using the example of first ministers' meetings, Givens lamented the fact that Alex Campbell, the premier of Prince Edward Island who represented just over 100,000 people at the time, was given more respect in Ottawa than Ab Campbell, the chair of Metropolitan Toronto, who represented more than two million people (Newman1970a). Hellyer's and Givens's attacks were followed by other prominent Liberals, such as Lloyd Axworthy, then the director of urban studies at the University of Winnipeg, and Ontario Liberal Party leader Robert Nixon (Spicer 2011b).

Outcry from his caucus and prominent supporters were bad enough, but Trudeau was beginning to realize he would face electoral consequences if he maintained his position. Perry Ryan, the Liberal member of parliament for Spadina, defected to the Progressive Conservative caucus citing Trudeau's "shameful neglect of Toronto and its problems" (Newman 1970b). Opposition leader Robert Stanfield aimed to capitalize on Trudeau's lack of action in urban affairs, holding a series of meetings with municipal politicians across the country and speaking at "The City is for the People Day" events in Toronto in 1970, where he argued that, "the federal government could be much more active in urban policy today, without changing a comma in our constitution…you can find constitutional problems in every box of soap if you want to look for them" (Crane 1970). The Progressive Conservative leader began to lay out his plan for cities at the 1970 meeting of the Canadian Federation of Mayors of Municipalities, arguing funding increases would not solve the problems Canada's cities were currently experiencing. Rather, Stanfield argued that Canada needed a coordinating agency or ministry that would deal solely with urban issues and reverse the federal government's current "fragmented" approach (MacKenzie 1970). Stanfield continued: "The federal government is already in cities, causing problems if not solving them…whenever a federal contract is awarded or cancelled and men get jobs or are laid off, federal policy affects cities and by its policies in trade, in tariffs, in military establishments, it can dictate health or illness or even life or death for a community" (MacKenzie 1970). Stanfield followed up with a caucus task force on urban issues, which was chaired by MP Alvin Hamilton, and eventually, proposed a system of regional agencies that would assist municipalities (Seale 1970). By this point, Stanfield was clear that if Trudeau would not act, the Progressive Conservative Party certainly would.

The Liberals had a clear problem in urban areas, which were their traditional area of electoral strength. In 1970, *Globe and Mail* journalist Geoffrey Stevens argued that, "urban affairs poses a problem for the Liberals who must make political inroads in Ontario's cities before the next election" (1970, 27). Trudeau responded by appointing Housing Minister Robert Andras as the "spokesman on urban affairs" and tasked him with finding a political solution to the growing chorus of discontent at the municipal level (Cullingworth 1987, 34). Andras established a commission led by Carleton University professor N. H. Lithwick to study the federal government's responsibility towards municipalities. Lithwick later issued a report that

recommended the creation of MSUA (Cullingworth 1987). With that, the federal government was now formally in the business of urban affairs.

MSUA came into being on 30 June 1971 with a somewhat broad mission statement: "the development and application of policies to influence the urbanization process" (Ministry of State for Urban Affairs 1972, 1). Throughout its history, MSUA moved through three distinct stages, going from a coordinating ministry as envisioned by Stanfield to a project partner, an incarnation that greatly upset provincial premiers. Table 15.2, below, details these changes.

After MSUAs inception, the provinces were wary of the new ministry. At the first tri-level meeting in 1972, Saskatchewan Premier Allan Blakeney told the assembled group that "we [the provinces] want our constitutional rights respected" (Watkins 1972, 3). The federal government was on notice: tread carefully when addressing urban issues. Those leading MSUA at the time shared these sentiments. Minister Stanley "Ron" Basford was clear in how he viewed the ministry, arguing MSUA's main purpose was inter-departmental and inter-governmental cooperation and coordination, not funding (Barker 1973, 9).

Barney Danson replaced Basford as minister in 1974 and the focus of the ministry began to shift towards project funding. For example, in 1974–75, MSUA helped Toronto develop its waterfront, assisted in the design and development of 400 acres of publicly held land in Calgary and helped fund the expansion of Vancouver's airport (Ministry of State for Urban Affairs 1975, 4). MSUA expanded funding

Table 15.2: MSUA Lifespan*

	A Coordinating Ministry	A Funding Ministry	A Project Partner
Time Frame	1971–1974	1974–1976	1977–1979
Focus	Planning, multi-level co-ordination, establishment of tri-level meetings, inter-departmental cooperation	Project funding, inter-governmental and inter-departmental cooperation and coordination	Project planning and delivery
Size and Capacity	92–223 staff 53 consultants	296–301 staff	185–210 staff
Ministerial Divisions	Coordination, Research	Projects and Planning, Inter-Governmental Affairs, Inter-Departmental Working Group	Urban Analysis, Urban Coordination
Minister	Stanley "Ron" Basford	Barney Danson; André Ouellet	André Ouellet

* For an expanded and comparative discussion of national urban policy please see Friendly (2016).

the following year, supplying funding to a variety of projects across the country (Ministry of State for Urban Affairs 1976, 2). In 1976, André Ouellet replaced Danson and began to reduce the size of the ministry. The number of overall staff declined, as did the number of units within the department. In 1977, MSUA listed only two units after the re-organization: Urban Analysis and Urban Coordination (Ministry of State for Urban Affairs 1977, 13). At this point, MSUA also began to assist in project planning and selection. No longer would MSUA only coordinate policy activity or prepare funding for already designed or approved projects. Rather, MSUA got deeply involved with large infrastructure projects. Some of these projects involved federal land, such as the redevelopment of the Old Port of Montreal, but more often than not, MSUA was engaging in project planning and prioritization in areas of cities where the federal government had no direct interest or land ownership (Ministry of State for Urban Affairs 1977).

Over its lifetime, the context of MSUA changed. The 1973–74 report states that the primary role of the ministry was "urban policy planning," which would be accomplished through policy development, urban research, and coordination with different levels of government (Ministry of State for Urban Affairs 1974, i). In 1975–76, MSUA began describing itself as an agency designed for "formulating a set of national objectives for Canada's future urban development" (Ministry of State for Urban Affairs 1975, 1). In 1975–76, the ministry's focus turned to the "development of urban-sensitive federal public-policy" (Ministry of State for Urban Affairs 1976, 1). In MSUA's 1977–78 annual report, the tone and mission changed once again, noting that the ministry was primarily a, "coordinating agency of the federal government concerned with ensuring, as far as is possible, that federal policies, programs and projects are undertaken with an awareness of their implications for the social, cultural and economic well-being of urban areas in Canada" (Ministry of State for Urban Affairs 1978, 3). In 1976–77, the government began to recognize its place in the urban sphere, stating plainly in its 1976–77 report, in a preface entitled "The Federal Role in Urban Affairs," that:

> Constitutionally, responsibility for Canada's municipalities and matters of local concern rests solely with the provincial and municipal governments. The federal government recognizes and supports this arrangement. The federal government also recognizes that it has constitutional responsibilities to carry out, and in doing so, federal policies, programs and projects affect the pattern, economic base and quality of life in Canadian settlements. This situation means that the federal government, given its concern with how it affects all Canadians, has a responsibility to ensure that its activities are beneficial to urban areas and that federal initiatives take into account provincial and local objectives and plans. (Ministry of State for Urban Affairs 1977, 3)

This attempt to situate the ministry within a federal-urban context was intended to counter the growing criticisms of the provinces during this period. The 1977–78 report also took a more cautious tone towards the provinces, stating that, "the ministry cooperates with other federal departments and agencies, the provinces and, through them, their municipalities" (Ministry of State for Urban Affairs 1978, 3).

The 1977–78 annual report repeated this point: "the purpose of such cooperation is to seek provincial and municipal views and policy positions on urban issues" (Ministry of State for Urban Affairs 1978, 4). While such description was useful, the ministry's actions spoke louder than its words.

In November 1978 it was announced that MSUA would close the following year. Provincial governments had a large role to play in MSUA's closure. Peter Oberlander, the former deputy minister of MSUA, argues that his ministry was "undercut" by the provinces to reassert their "explicit and exclusive" jurisdiction in municipal affairs (1987, 132), a conclusion reached by others as well (Spicer 2011a). The province's reaction to MSUA's evolution, however, should not be surprising. As demonstrated by Allan Blakeney's warnings at the first tri-level meeting in 1972, the provinces were wary about MSUAs goals. Over the course of its tenure, MSUA fulfilled the worst fears of the premiers—starting as a coordinating ministry, MSUA evolved into a project funder and partner and eventually cut the provinces out of the equation in some large infrastructure projects. Speaking on behalf of the other premiers, Blakeney argued that "we [the provinces] want our constitutional rights respected" (Watkins 1972, 3) and MSUA largely failed to do so.

The Ministry of State for Infrastructure and Communities

Nearly thirty years after the closure of MSUA, another formal federal entry into local politics would begin to take shape. The intervening years between MSUA and the federal government's next major efforts in urban policy have been described as "uncoordinated" and one of the "least ambitious" since the 1960s (Stoney and Graham 2009, 387). Regional initiatives, such as the general development agreements, the Ministry of State for Economic and Regional Development, the Federal Economic Development Initiative of Northern Ontario, and the Atlantic Canada Opportunities Agency, defined this era. There was a great deal of deconcentration in economic development activity away from Ottawa, creating more regional and local initiatives. However, this should not be confused with explicit national urban policy and had little relation to ambitious initiatives such as MSUA. As Stoney and Graham (2009, 390) argue, this period saw the federal government adopt "a more low-key approach based on establishing regional capacity and programs."

This "low-key" approach to federal-provincial-municipal relations began to change in the late 1990s and early 2000s. After assuming his role as prime minister in 2003, Paul Martin began the process of creating the Ministry of State for Infrastructure and Communities (MSIC). While created with similar goals to MSUA, MSIC would find much more success with provincial governments and its fellow departments, largely because of its more cautious approach to intergovernmental and interdepartmental relations.

During the 2000 election, the platform of the governing Liberal Party of Canada contained a promise to establish a Prime Minister's Task Force on Urban Issues

(Spicer 2010). The Liberals would eventually win the election and the campaign pledge was enacted, establishing the taskforce with Toronto MP Judy Sgro as chair. After months of study and travel to meet relevant stakeholders, the Task Force argued the government should implement a national urban strategy to further investment and provide support for Canada's growing urban centres. The final report produced by the Task Force argues this would entail the creation of a renewed relationship between the Government of Canada, provincial and municipal governments, the private sector, community and business leaders, and the voluntary sector (Prime Minister's Caucus Task Force on Urban Issues 2002, 5). The Task Force envisioned this as a multilateral engagement, involving multiple actors, perhaps to avoid some of the pitfalls experienced by MSUA.

In the final report, the Task Force recommended that a cabinet minister be designated with the responsibility of coordinating the federal government's efforts and investment in urban centres (Prime Minister's Caucus Task Force on Urban Issues 2002, 8). At the same time, this minister would act as the "voice" for cities around the cabinet table, ensuring that the federal government could not overlook pressing urban issues (Prime Minister's Caucus Task Force on Urban Issues 2002, 8).

The Task Force's recommendations walked a fine line, recreating some of the early initiatives of MSUA—including a dedicated minister—but stopped short of addressing a new ministry mandate. These recommendations went largely unfulfilled during the conclusion of Jean Chrétien's term as prime minister, who instructed the Task Force to avoid specific commitments (Winsor 2002). In fact, Chrétien, who served in Pierre Trudeau's government at the time of MSUAs creation and conclusion, shared many of the same feelings as his old boss in terms of jurisdiction, arguing, "the cities are under provincial responsibility; we are not in a position to give them more power" (Winsor 2002).

Despite Chrétien's cautious approach, the Prime Minister's Task Force did encounter resistance from provincial actors. Ontario Finance Minister Janet Ecker warned the federal government not to address taxation powers, adding "we are willing to join the emerging dialogue about a new deal for cities—if it's the right one" (Lewington 2002, A6). Ecker continued, arguing that any new taxation authority for municipalities had to come with a "precondition" between the federal government and the provinces that would "restore balance between revenue and funding responsibilities for all levels of government in Canada" (Lewington 2002, A6).

Despite Chrétien's trepidation and some provincial complaints, the federal government's renewed interest in urban Canada pushed forward. In 2002, committed to improve urban housing, provided a $76 million urban transit grant to the City of Toronto and the created the Office of Infrastructure and Crown Corporations with a mandate to coordinate the public service's existing infrastructure (Spicer 2010). The 2002 budget also allowed for the creation of the Canadian Strategic Infrastructure

Fund (Spicer 2010).[2] As his track record in 2002 would demonstrate, Chrétien had an interest in urban Canada but was unwilling to create a formal federal ministry to address local issues. His successor, however, would go much further.

The Liberal Party of Canada experienced a leadership shake-up in 2003, with former Finance Minister Paul Martin succeeding Chrétien as party leader and prime minister. When running for the leadership of his party, Martin talked widely about a "new deal" for Canada's cities, insisting that he was willing to re-examine the federal government's relationship and commitment to urban Canada. His initial musings, however, were short on specifics, but he initially rejected the notion of sharing gas tax revenue (Scoffield 2002a). Eventually Martin began to add some details to his plan and conceded he was open to sharing some taxation sources to municipalities in order to reduce dependence on the property tax (Scoffield 2002b). Musing about taxation policy caught the ire of the provinces very early on in the process, with Quebec officials arguing Martin's "new deal" would siphon funding from grants for health and education services (Scoffield 2002b). Martin reiterated his commitment to working with the provinces, arguing that, "without the full co-operation of the provinces, a 'new deal' doesn't have a chance to get off the ground" (Scoffield 2002b, A4). The message was clear: the federal government will not act unilaterally in this area.

In 2003, after finally being installed as prime minister, Martin moved forward with his plan, appointing caucus veteran John Godfrey as his parliamentary secretary with an emphasis on cities (Spicer 2010). Godfrey did not have an expressed mandate but was given the duty of listening to the concerns of municipal actors and recommending a path forward for the federal government (Rusk 2003). Godfrey, like Chrétien and Martin, conceded there would be no action without provincial approval, arguing that, "we've got to work with the provinces to come up with goals that all three levels of government would say 'that's right'" (Rusk 2003, A18).

Martin also established a fifteen-member committee, chaired by former British Columbia Premier Mike Harcourt, which would oversee the creation of the "new deal" in conjunction with a permanent cities secretariat based in the Privy Council Office (Spicer 2010). In his first budget as prime minister, Martin eliminated the Goods and Services Tax on municipal expenditures and increased the amount of federal resources available to municipalities to nearly $7 billion (Spicer 2010).

After being returned to government in the 2004 federal election, Martin announced the creation of the Ministry of State for Infrastructure and Communities, appointing his former parliamentary secretary John Godfrey as minister (Clark

2. The decision initially had to be made whether to establish a foundation to distribute funds from the Canadian Strategic Infrastructure Fund or to create a small, bureaucratic department. Ultimately, the government opted to create a small department housed in the Treasury Board with responsibility for the portfolio assigned to cabinet minister Allan Rock. For more information see Spicer (2010).

and Lewington 2004). Reiterating that his approach to the provinces would not change in his new role, Godfrey argued that, "the job now becomes to work with the provinces…in consultation with the municipalities to find a formula that advances the needs of the municipalities" (Taber 2004, A1).

The federal government's commitment to the provinces went beyond rhetoric; MSIC was established with clear ground rules that were designed to avoid tension with provincial actors. First and foremost was that communication was established as an exclusive two-way channel between the federal government and the provinces (Spicer 2010). MSIC committed early to never negotiate with cities or their provincial municipal associations nor seek input from cities or invite cities to identify potential infrastructure projects, unless requested to do so by provincial governments (Spicer 2010).[3]

MSIC's first annual report went to great lengths to highlight past infrastructure programs, such as the Canada Infrastructure Works Program (1994), the Infrastructure Canada program (2000), the Canada Strategic Infrastructure Fund (2003) and the Prairie Grain Roads program (2001; Infrastructure Canada 2004, 8). Overall, the report noted a total infrastructure investment of over $12 billion since the Liberals originally took power under Jean Chrétien in 1993 (Infrastructure Canada 2004). The intended message here seemed to be that MSIC was merely a formal face to continue the types of investment provinces and municipalities had come to expect under the governments of Jean Chrétien and Paul Martin.

Part of MSIC's mandate was very similar to MSUA, in that the new department had a heavy focus on coordination. MSIC's first report made it clear a large focus of their efforts would be placed upon coordinating existing federal policy and aligning the needs of municipalities through several federal agencies (Infrastructure Canada 2004). Where MSIC diverged from MSUA was in its approach to funding. As far as MSIC was concerned, it had no role in identifying or managing projects; that was the responsibility of provincial and municipal governments (Infrastructure Canada 2004). As soon as a project was identified, MSIC moved to complete a memorandum of understanding that clarified the federal government's role in relation to its provincial and municipal partners (Infrastructure Canada 2004).

MSIC's second annual report (2005–2006) reiterated the department's philosophy towards the provinces:

> Constitutionally, municipalities are under provincial jurisdiction. Respect for this jurisdiction is a central principle of the New Deal. The complex challenges that play out in cities and communities require a coordinated approach if workable solutions are to be found. A partnered approach is essential and approaches must be tailored to address the circumstances of different communities: urban and rural, large and small. (Infrastructure Canada 2005, 10)

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3. British Columbia and Ontario requested that MSIC negotiate the gas tax transfer directly with the municipal associations within their jurisdictions

Again, MSIC was making it clear that jurisdiction would continue to be respected as the department moved forward.

MSIC's interdepartmental strategy also differed greatly from MSUA. Where MSUA frequently sparred with other departments over jurisdiction, MSIC employed a coordinated strategy to manage expectations. MSIC was envisioned as a funding ministry, with more than $5 billion to manage over a five-year period. As such, other ministries sought a portion of this for their own projects. To counter this urge, MSIC was established with two priorities for funding: federal projects would not be considered and each project had to be environmentally sustainable and contribute to Canada reaching its targets under the Kyoto Accord (Spicer 2010). Further, MSIC established two interdepartmental committees aimed at managing expectations and ensuring clear communication throughout the government: a working group for assistant deputy ministers and an interdepartmental infrastructure committee (Spicer 2010).

The Liberals' time in office came to a close after the 2006 federal election. In its place, incoming Prime Minister Stephen Harper and his Conservative party sought to run a leaner government, operating on the principles of "open federalism." MSIC would be amalgamated with the Ministry of Transportation to create a revamped Ministry of Transport, Infrastructure and Communities.

Despite its amalgamation, there is evidence those involved with MSIC learned from the failure of MSUA (Spicer 2010). Publicly, Chrétien, Martin, and Godfrey all acknowledged the constitutional right of the provinces to control municipal affairs. MSIC, and the efforts leading to the department's creation, espoused the idea that the federal policy had an impact on municipalities and there should be something in place to help coordinate those efforts to make them more responsive to cities. On the administrative side of the department, those in charge recognized MSUA "antagonized the provinces," leading to a concerted effort to be more collaborative with the provinces (Spicer 2010, 113). MSIC also worked to mimic MSUA's successes but avoid its failures. As such, those involved with MSIC wanted to see collaboration between governments and departments, while moving projects forward but not traversing into the final project funding and project partner stages that caused MSUA's untimely downfall (Spicer 2010). Much of this institutional learning came from the Privy Council Office (PCO), which intervened quite late in MSUAs operations in an attempt to "rationalize" planning and policy processes (Gertler 1987, 110). When MSIC came into place, the PCO housed the Task Force on Urban Issues as well as the Office of Infrastructure and Crown Corporations and the Cities Secretariat (Spicer 2010).

Contemporary Federal-Urban Policy

Since the amalgamation of MSIC, Canada has been without a formalized urban policy. Stephen Harper's Conservative government steered clear of discussing

formal engagement in Canada's cities, preferring instead to work towards addressing fiscal imbalances within the federation and placing the onus on the provinces to work through funding discrepancies amongst their municipalities (Friendly 2016). However, Harper maintained the previous government's gas tax transfer program and dispensed with billions of targeted project funding towards municipalities through the Economic Action Plan—a large stimulus package mainly intended to improve economic performance in the wake of the 2008 recession (Healy and Trew 2015). Local "shovel ready" infrastructure projects were a key part of this plan, as they were seen as having the most potential to spark job creation (Healy and Trew 2015).

Harper's efforts, however, were done with a cautious tone. Lawrence Cannon, the minister of the amalgamated Department of Transport, Infrastructure and Communities summed up the Harper government's position: "The Canadian Constitution—the very core of our country's success—provides for a direct link between municipal institutions and provincial governments…the federal government means to respect the letter and the spirit of this provision" (Friendly 2016, 9). As such, Harper's government was prepared to spend eagerly on infrastructure to generate local jobs in the face of economic downturn but was unwilling to entertain changes to the governance relationship between the federal government and municipalities.

Canada's current government has adopted a similarly cautious approach but has not shied away from addressing urban issues directly. Prior to the 2015 federal election, Liberal Party of Canada leader Justin Trudeau addressed the Federation of Canadian Municipalities (FCM) conference, arguing, "it's time for a new arrangement between our municipalities, provinces and our federal government" (Whittington 2015). Commentators have described Trudeau's enthusiasm for urban policy as a new "four-legged federalism," where federal, provincial, Indigenous, and municipal governments all have a stake and say in future policy direction (Warren 2016).

To date, this commitment has resulted in a large measure of infrastructure funding. For instance, the government carried through with an election campaign pledge and committed $180 billion to infrastructure projects over twelve years (Curry 2016; Young 2017). This pledge was similar to the commitment Harper made, although this particular commitment targets a number of the current government's top priorities, such as green and social infrastructure as well as public transit. Trudeau's government has invested $35 billion to create the Canada Infrastructure Bank, an arm's-length Crown corporation that uses federal funding to attract private sector and institutional investment to new revenue-generating infrastructure projects. In this sense, the Infrastructure Bank is set up to remove some of the risk of private investment in public infrastructure projects, which could make it easier to attract private capital to local projects, although some critics charge that this plan creates too much risk for taxpayers, who would ultimately be securing these large loans for private firms (Poillievre 2017).

While Justin Trudeau has shown a similar commitment to funding infrastructure as the Harper government, he likewise has shied away from governance conversations and demonstrated the same reluctance to engage in formal, urban policymaking, as his father, Pierre. While municipalities have no doubt appreciated the funding approach, Trudeau has yet to signal his readiness to build "a new arrangement between our municipalities, provinces and our federal government" as he did at the FCM conference prior to the 2015 election. To date, we still have not seen anything resembling a reincarnation of MSUA or MSIC, assuming we can hold either as a high-water mark for urban-federal relations.

DISCUSSION AND CONCLUSION

The federal government has a long history with urban Canada. Nearly everything the federal government does affects municipal governments and yet the federal government has had a very complex relationship with local governments across the country—at times deeply engaged with certain projects and causes and at others retreating and reverting to a more "uncoordinated" state. Jurisdiction in Canada is clear: municipal institutions are indeed solely under the purview of the provinces, but *urban issues* may be viewed differently. As Berdahl (2004, 27) argues "urban issues" simply refer to policy challenges that are important in an urban area. In this, the federal government has some leeway to act. Vander Ploeg (2002, 3) contends, "[w]hile many concerns can be tagged as 'urban issues' it does not logically flow that local governments are responsible for them." The federal government is already active in some of these policy areas. For instance, few would argue the federal government has no authority in act in areas such as immigration, trade policy, employment and skills training, or fiscal policy, but each of these areas has a profound impact on urban life and affects the decisions municipalities make. In this, the federal government either enhances the capacity of municipalities to act or limits the range of choices available to local decision makers.

The frequently cited high point of this federal-municipal relationship is MSUA—Canada's first and most significant formal efforts in federal-urban policy creation. Since then, this engagement has become more cautious, mostly because of the provincial reaction to MSUA. Over time, a number of trends have emerged:[4]

A move from centralization to decentralization. Much of the federal government's early efforts in urban policy were unilateral. In the early 1900s and carrying through the post-WWI, Great Depression and WWII eras, the federal government responded to specific urban challenges without much consultation from provincial or municipal governments. The federal government believed it had the authority

4. Stoney and Graham (2009) reached similar conclusions on the shift in federal approach since the 1960s. For more information, please see Stoney and Graham (2009, 384).

to act and responded to specific urban crises where federal officials believed they needed to respond. This approach showed signs of changing in the early days of MSUA, but the federal government quickly reverted back to a command and control approach before the provincial governments began to seriously oppose the ministries' efforts. After the dissolution of MSUA, the federal government's renewed focus on regional initiatives was much more collaborative and decentralized. This approach was carried forward into the 2000s and the creation of MSIC. The approach of today's government is very similar.

A shift in emphasis from social issues to physical infrastructure. Much of the early need for the federal government to engage in urban Canada was to improve the social conditions within cities. At this time, urban Canada was experiencing a host of problems, such as poverty, disease, crime and corruption. It was then believed the federal government had the resources and capacity to address these concerns, as they were a part of the fabric of virtually every city across the country. These issues were seen as national in scope, providing impetus to federal decision makers to act. The solutions focused on individuals, mostly in the form of housing. MSUA, MSIC and the federal government's current efforts have instead centred on solving the challenges presented by physical infrastructure in cities. While issues like poverty still mark cities in Canada, large infrastructure projects, such as ports, airports, highways, and transit are now the focus, with the provinces seen as mostly responsible for Canada's social infrastructure.

From reactive to proactive. Canada's early efforts to address urban challenges were mostly reactive, responding to emerging urban challenges instead of getting in front of them. When cities were decried as being dirty and dangerous, the federal government slowly responded. We have seen the same reaction in the 1960s with Pierre Trudeau's reluctant response to concerns about urban life. With the creation of MSIC and subsequent federal-urban policy, the focus is much more proactive. There is now recognition that cities are engines of productivity and help to drive our economy. They are increasingly seen as potential opportunities, rather than problems that need solving. As such, current efforts are designed to help cities reach their potential and are much more proactive in nature.

As a result of these shifts, the federal government has relied more upon implicit, rather than explicit national urban policy. At times when the federal government has practiced explicit urban policy, it has been a strong variety as it has been completed with formal institutions—the creation of MSUA and MSIC as examples. The federal government has a long, but cautious relationship with cities, often finding themselves in the precarious position of not having jurisdiction over municipal institutions, while simultaneously impacting urban space. As we discussed above, little prevents the federal government from acting in the realm of "urban affairs." This terrain, however, is relatively undefined. As such, the federal government has very carefully explored its limits, becoming both very ambitiously engaged in cities and then quickly retreating. In the intervening periods, Canada has relied

upon implicit urban policy—an uncoordinated series of policy interventions and consequences that ultimately force municipalities to be reactive to a policy process in which they are often not formally included.

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