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Contents

Editors Address	1
Introduction	2
The Return of Federalism and Constitutional Politics: Analyzing the Role of the Supreme Court as an Arbiter in Contemporary Political Society Marjun Parcasio	5
<i>Stare Decisis</i> or Selective Judicial Reasoning? Precedent Application Analysis of <i>Quebec (Attorney General) v. Lacombe</i> Samuel Mosonyi	21
Canadian Federal Dynamics: Intergovernmental Relations as the Future for Quebec Jenna Herdman	29
Canada's Constitutional Monarchy Veronika Reichert	36
Compulsory Voting, Identity, and Nation Building- The Importance of the Compulsory Vote Joel Holdaway	43
So Near Yet So Far: The Extent of Aboriginal Inclusion in Canada Melanie Gillis	50
A Gay Federation: The Effects of Federalism on the Lesbian and Gay Movement in Canada Morag Keegan-Henry	58



Welcome to Federalism-e

Federalism-E is a peer reviewed undergraduate journal that encourages scholarly debate and research in the area of federalism by exploring topics such as political theory, multi-level governance, and intergovernmental relations. Papers were submitted from across the country and abroad, and then sent to other undergraduate students who volunteered to be a part of our peer review board. After extensive evaluation, this year's papers were selected and returned to the authors according to a double blind review process. The result is our 14th consecutive year of publication.

It is with great pleasure that we present this year's collaborative work. We are publishing Federalism-e in the hopes to encourage undergraduate students to contribute to the community of academic studies and to create a forum for better understanding the topic of federalism

Bienvenue à Federalism-E

Federalism-E est un journal universitaire de premier cycle également révisé par des universitaires, qui encourage les débats pédagogiques dans le domaine du fédéralisme et explore des sujets tels que les théories politiques, le gouvernement à plusieurs échelons ainsi que les relations intergouvernementales. Les essais furent soumis de partout au pays et même de l'étranger. Après de nombreuses évaluations, les essais qui vous seront présentés furent sélectionnés et retournés aux auteurs afin que ceux-ci fassent les corrections nécessaires pour leur publication. Le résultat vous est donc présenté dans le volume n°14 de cette année.

C'est avec grand plaisir que nous présentons le fruit de cette collaboration. Nous publions Federalism-e dans l'espoir d'encourager les étudiants de premier cycle à contribuer plus à la communauté universitaire et à créer un forum pour améliorer la compréhension sur le sujet du fédéralisme. Nous espérons que vous apprécierez l'édition de cette année.

Ethan Strong and Emily Morgan

Co-Editors, Federalism-e



Introduction to Federalism

ETHAN STRONG

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Federalism - the division of political authority across orders of government - is a form of political organization that has become increasingly important as a way to reconcile unity and govern despite diversity.¹

There are currently some twenty five countries that are either federal in character, claim to be federal, or exhibit the characteristics typical of federalism. These federal countries encompass about 40% of the world's population², including people on every continent with diverse societies.

¹ Reilly, Ben. *Democracy and diversity: political engineering in the Asia-Pacific* and Blindenbacher, Raoul, and Ronald Watts. "Federalism in a Changing World - A Conceptual Framework for the Conference."

² Introduction to federalism, Forum of Federations, <http://www.forumfed.org/en/federalism/introduction.php> (accessed: 1 Apr 2013).

The popularity of federalism as a means of governance can likely be attributed to the diverse interests of today's population. There is a desire for progress, increased living standards, and global economic competition that necessitates the influence of a large and powerful government. At the same time, the yearning for self-determination and a sense of identity necessitates the protection of a smaller, directly accountable government.

Federal systems are able to accommodate these dual pressures by having two or more orders of government that "share rule" with the objective of preserving and promoting distinct identities within the larger framework of a political union.

The main tenant of federalism, therefore, is the division of powers across various levels of government. While federalism has to be constitution-based, there is no universal model to follow. Each federal country must develop its own, unique form of federalism which

accommodates its unique history and social cleavages.³

This is no easy task. Roughly half of all created federal states have collapsed and even the prospering federations continue to struggle with their federal systems.

The study of federalism is broad and encompasses a variety of approaches. The many different subfields of federalism studies can be structured around four different dimensions⁴.

The first dimension is the development and design of federal institutions. This dimension is of particular importance as democratization remains a persisting phenomenon. For old and new federations alike, the development and design of federal institutions is crucial to understanding how, and when, federalism works. Moreover, how do these institutions operate and how are they controlled to remain within the fold of federalism? The study of federal institutions is vast and very important to understanding the functioning of federalism.

The second dimension is federalism and democratic participation, representation and accountability. How these processes manifest themselves in a federation will determine the characteristics of federalism in that country; is it a representative, decentralized federation, a strongly centralized government or somewhere in between?

The third dimension can be identified as federalism and the accommodation of ethnic, cultural and linguistic differences. Federalism is

³ Sadik, Nafis. "Federalism, Decentralisation and Conflict Management in Multicultural Societies ."

⁴ These four dimensions are identified by Erk and Swenden in their book "New Directions in Federalism Studies", which provides an analytical framework to transcend the subfields of federalism.

often viewed as the best form of governance for diverse societies. For many federations, including the classic federations, the accommodation of minority groups is of concern to federalist studies. Whether, and how, a federation can accommodate minority groups is important to the field of federalism.

The final dimension is federalism and public policy. This includes the studies of how and why policy is made in a federation. From how institutions shape policy to the nature of policy in federations, this is a vast field which is important to federalism studies.

As the world changes with modernization and globalization, so too does the face of federalism. New, innovative forms of federalism appear to be emerging in countries like Belgium, Spain, South Africa and the United Kingdom.⁵ Moreover, evolving international military, economic and political arrangements such as the European Union bring to the fore the idea of supranational federalist tendencies.

In this edition of Federalism-e you will find one or more articles on each of these dimensions of federalism studies. The articles of volume 14 mainly deal with the case of Canada, as it struggles with federalism issues 146 years past confederation.

The vast nature of federalism across all of its subfields and dimensions makes federalism studies a broad field with many issues. The study of federalism is as vast as the wide range of issues that pertain to it. While classic federations continue to struggle with constitutionalism over 100 years past their conception, new federations are trying to adopt

⁵ Blindenbacher, Raoul, and Ronald Watts.

"Federalism in a Changing World - A Conceptual Framework for the Conference ."

a federal construct which is right for them. At the same time, modernization and globalization are changing the face of federalism and opening the door to new avenues of interest.

It is clear that Federalism will remain a relevant field of study as we move forward. Federalism-e is excited to continue on as a way of

encouraging research and scholarly debate among undergraduate students.

It is important to highlight that this is the collaborative work of undergraduate students across Canada. Federalism-e is a forum to encourage undergraduate participation.

Ethan Strong
Co-Editor

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The Return of Federalism and Constitutional Politics: Analyzing the Role of the Supreme Court as an Arbiter in Contemporary Political Society

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Since the ascendancy of the *Charter of Rights and Freedoms* as the centrepiece of a new constitutional order in Canada, there has been a distinctive decline of federal discourse in the courts and within the political sphere. Traditional cases pertaining to the division of powers at the Supreme Court have been eclipsed by the novelty of rights jurisprudence that has consumed the court in the past three decades¹. Moreover, constitutional issues have been considered an anathema since the failure of the negotiations at Meech Lake and Charlottetown, exacerbated by the near-death experience for federalism in the 1995 referendum in Québec. In recent years, however, the changing nature of Canada's political dynamics has signalled a return of federalism and constitutional politics. The

Supreme Court enshrined federalism as one of the four principal tenants of the Canadian constitution, arguing in its *Reference re Secession of Quebec* that federalism is “a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today”². With these realities changing in the face of new leadership and evolving environments, this essay will examine how and to what extent the judicial branch shapes Canada's distinct federal dynamics and assess its relationship with political actors in the twenty-first century.

We will examine this question in a tripartite manner, beginning firstly with an overview of the legal principles and academic literature pertaining to federalism. The court's jurisprudence and key doctrines regarding the constitutional division of powers since

¹ Wayne MacKay, “The Supreme Court of Canada and Federalism – Does \ Should Anyone Care Anymore,” *Canadian Bar Review* 80 (2011), p. 243.

² *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, s. 32.

Confederation will be briefly examined³, along with the theoretical foundations of federalism within the political science literature. In this manner, the relevant case law and academic work can be used to situate and comparatively analyze the contemporary era with its historical development. But given the broad nature of federalism studies in political science, our methodological approach throughout this paper will necessarily be limited to federalism as it has manifested itself in the courts, paying particular focus on the issues faced by the McLachlin court since the Conservative Party of Canada came into power in 2006. In so doing, this paper hopes to offer innovative reflections on the government's position on federalism vis-à-vis the Supreme Court, using recent developments in a relatively unexplored subdomain within the field.

The second section will begin the substantive matter of our discussions. The Conservative Party since its election victory in 2006 has touted a vision of "open federalism" to guide federal-provincial relations, a purported change to Canada's federal order⁴. This approach, which conforms to classical federal theory, aims to re-establish a commitment towards the classical model of 'watertight compartments' for federal and provincial jurisdiction⁵. However, an analysis of case law and examples such as the decision on the national securities regulator⁶ and the landmark *Insite* judgment⁷ suggests that the

federal government's idyllic notion of federalism is more a product of political posturing than a normative governing philosophy. It will be argued that this approach signals a move towards greater unilateralism on the part of the federal government whilst exacerbating tensions amongst Canada's regions, thus undoubtedly involving the Supreme Court as a regulator and facilitator amongst the different units of the federation. The Supreme Court, as a result, has remained consistent in the face of ambivalent political positions and places itself as an actor promoting cooperation, compromise, and discussion between the federal and subnational governments of Canada's federation.

The final section will conclude with an analysis of the Supreme Court's place within Canada's institutional framework. Emerging contestations will undoubtedly place the court in a fragile position. With the political attention garnered by Bills C-7⁸, C-10⁹, and C-19¹⁰, all of which have been contested by several provinces with impending legal action, it will be the task of the courts to adjudicate between highly conflicted and sensitive positions. The divisive nature of the government's legislative agenda is further indication of its inconsistency and the threat it poses to national unity. More importantly, these conflicts are cogent reminders that the legacy of federal problems in Canadian history have not disappeared and that the Supreme Court's role in balancing the elements of the constitution remains a

³ Patrick Monahan, *Constitutional Law*, 3rd ed. (Toronto: Irwin Law, 2006), p. 230-252.

⁴ Prime Minister of Canada, "Prime Minister promotes open federalism," Apr. 21, 2006, <http://pm.gc.ca/eng/media.asp?id=1123>.

⁵ Peter C. Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court," *Public Law at the McLachlin Court: The First Decade*, eds. David A. Wright and Adam M. Dodek, (Toronto: Irwin Law, 2011), p. 172.

⁶ *Reference re Securities Act*, [2011] SCC 66.

⁷ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

⁸ Bill C-7, An Act respecting the selection of senators and amending the Constitution Act, 1867, in respect of Senate term limits, 1st session, 41st Parliament, 2011.

⁹ Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st session, 41st Parliament, 2011.

¹⁰ Bill C-19, An Act to Amend the Criminal Code and Firearms Act, 1st session, 41st Parliament, 2011.

fundamental component of Canada's system of federal governance.

This role, while welcomed, has limitations. The necessity for judicial independence and the importance of a neutral arbiter is threatened with an increasingly active Supreme Court, particularly in areas of extensive political debate¹¹. The Supreme Court must therefore play an enabling role in federal-provincial conflicts, acting in a meta-political role in its decision-making process through the promotion of a vision of federalism that calls for collaboration amongst Canada's federal entities¹². However, it must be understood that the decisions on the future of federalism and the direction it will unfold in the future is not wholly decided by the Supreme Court. This paper, in highlighting the importance of the Supreme Court in federalism, is qualified by an understanding that the court is surrounded by a divisive political arena which generates the inputs for eventual litigation. It is therefore political actors, in expressing their political will, who must ultimately provide a vision for federalism in Canada, with the Supreme Court providing the necessary guidance to ensure that this vision conforms to the limits prescribed by constitutional law.

Historical and Legal Foundations for Federalism: The Case of Canada

Federalism in Canada has operated upon a number of principles, and shaped by over a century of court jurisprudence that is deeply rooted within Canada's history. The Honourable Senator Nolin describes the foundations of Canadian federalism as a result

of a wide set of factors that necessitated political union within British North America in 1867:

Au milieu du XIXe siècle, la fin anticipée du Traité de Réciprocité entre les colonies britanniques d'Amérique du Nord et les États-Unis d'Amérique, doublé de la fin des tarifs préférentiels avec la métropole britannique, il devenait de plus en plus nécessaire pour ces colonies de s'unir dans un État, entre autres pour des raisons économiques. La négociation, qui aboutirait à la création du Canada, déboucha sur un compromis politique provoqué par les oppositions tant démographiques, que géographiques, religieuses et linguistiques, des participants.¹³

We can determine that the federal compact, at its core, was underpinned by an implicit acknowledgment of diversity within the federation and the need to preserve the character of its governing entities. It is from this agreement that the *British North America Act* of 1867 was forged¹⁴, and with it, the allocation of powers between the two levels of government and the creation of a judicial system of appeals, both of which feature prominently in our modern discussion on federalism.

The Canadian constitution thus specified the powers allocated between the provincial and federal governments within sections 91 and 92 of the Act¹⁵. Despite its centralist tendencies, the constitution's attempt to exclusively regulate provincial and federal domains of jurisdiction was blissfully ignorant of the overlapping tendencies of the heads of powers and the evolution of jurisdictional boundaries that were necessitated by the

¹¹ Shannon Ishiyama Smithey, "The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada," *Publius* 26:2 (1996), p. 83.

¹² James B. Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor," *Publius* 35:2 (2005), p. 218.

¹³ The Honourable Pierre-Claude Nolin, interview by Marjun Parcasio, Senate of Canada, May 3, 2012.

¹⁴ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

¹⁵ *Ibid.*, s. 91 and 92.

document's ambiguity and open-ended nature¹⁶. Nevertheless, in its formative years, the judiciary sought to ensure the protection of provincial domains from undue federal interference. It is from the resulting jurisprudence of the Judicial Committee of the Privy Council (JCPC), then Canada's highest court of appeal, that the notion of "watertight compartments" aimed at minimizing overlap between federal and provincial jurisdictions became prominent¹⁷. The Harper government's view in invoking this form of classical federalism not only ignores certain political realities but also diminishes the impact of the legal doctrines developed throughout the years, as we will discuss in the subsequent section.

The replacement of the JCPC by the Supreme Court as the court of last appeal in 1949 signalled a new era for Canadian federalism, both in doctrinal aspects and its overall approach. The post-war period saw the rise of cooperative federalism, with the growth of government in economic and social spheres necessitating the need for shared jurisdictions and coordination amongst the federal units¹⁸. The court also bolstered its pith and substance analysis, developing further the double aspect doctrine in recognizing that legislative actions taken by both the federal and provincial governments on the same subject can be considered valid¹⁹. The Honourable Senator Segal describes this period as one in which:

the Supreme Court...[forced] governments at the federal or provincial level to put some water in their wine. Its decisions in the period leading up to the 1982 constitutional accord that gave us patriation of the *British North America Act* from the UK Parliament and the Charter of Rights essentially told both levels of government that they needed to work together, and neither level could block or proceed unilaterally.²⁰

In the face of the executive federalism of the 1970s and 1980s, however, it was evident that the federal government nevertheless continued to exercise a substantial degree of influence in the operation of the federation. The literature describes this period as one in which the "Supreme Court demonstrated a consistent centralist stance"²¹. The court's formative development as an independent body and its establishment of over a century of legal jurisprudence are important considerations to retain as we examine what scholars call the modern era of the Supreme Court.

As alluded to earlier, the *Charter of Rights and Freedoms* did much to change the direction of the court from a substantial focus on the division of powers to the need to develop a new regime of rights jurisprudence. To this end, the court aimed at "stabilizing and clarifying legal federalism and of reducing the volume of litigation"²²; this was achieved in a

¹⁶ Patrick Monahan, *Constitutional Law*, p. 231.

¹⁷ *Ibid.*, p. 233. See also the decision of *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, paragraph 354.

¹⁸ James Bickerton, "Deconstructing the New Federalism," *Canadian Political Science Review* 4:2-3 (2010), p. 57.

¹⁹ Peter Oliver, "Canadian Legal Federalism since 1982" (paper presented at the Checking our Constitution@30 Conference, University of Ottawa, Ottawa, April 17-18, 2012), p. 2. The doctrine was first established in the case of *Hodge v. R.* (1883), 9 App. Cas. 117 (P.C.): "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within

sect. 91." However, a detailed analysis of legal doctrine and analysis falls outside the scope of this paper. Further details can be found in Monahan's *Constitutional Law* or Oliver's "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court."

²⁰ The Honourable Hugh Segal, interview by Marjun Parcasio, Senate of Canada, May 1, 2012.

²¹ André Bzedra, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science* 26 (1993), p. 5.

²² Oliver, "Canadian Legal Federalism since 1982," p.

number of cases that solidified the division of powers and a number of the court's remaining legal doctrines. In the case of *General Motors of Canada Ltd. v. City National Leasing*, the Supreme Court established the criteria for acts taken under the trade and commerce power in section 91(2), thereby contributing to further codification of the heads of powers determined by the constitution²³. Moreover, in the *Multiple Access* case, the paramountcy provision in the constitution, which deemed the federal law to be paramount to its provincial counterpart in areas of conflict, became institutionalized in a test that limited its application²⁴. The importance of these cases and various doctrines must be highlighted, for they consist of the landmark decisions that have helped shape the reaction of the McLachlin court in response to the agenda of the Conservative government in recent years. Legal federalism, it seems, became the subtle background to a country preoccupied with protecting individual rights and exhausted by the constitutional debacles of the 1980s and 1990s.

It is with this history in mind that we turn to the twenty-first century, particularly the court under Chief Justice Beverly McLachlin, to ascertain how legal federalism has shifted and what challenges it has faced and will face in the future. We must remain cognizant that the law and the Supreme Court do not exist in convenient vacuums easily delineated by arbitrarily-assigned boundaries of jurisdiction and scope. The Canadian judicial system is resilient, and in-keeping with the metaphor of the constitution as a "living tree," it adapts itself to the challenges posed by governments and citizens in contemporary political society²⁵. With

²³ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641

²⁴ *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161

²⁵ Katherine Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada," *Law and Contemporary Problems* 55:1 (1992), p. 126. See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, Question 1: "our Constitution is a living

interjurisdictional and federal-provincial conflicts becoming increasingly pronounced in Canadian politics, the eyes of the nation will fall on the Supreme Court and how it reacts to this resurgence of federalism and constitutional politics.

Federalism under the Harper Conservatives: A Case of Inconsistency

An examination of federalism under the period of Conservative rule remains a difficult task, given that we do not have the necessary distance from the events of the past six years to take advantage of historical hindsight and analysis. Nonetheless, after three elections producing consecutive Conservative governments, there is much to be said regarding the direction the government has approached federal politics. In assessing the Harper government's record on federalism, it is argued that the government's theoretical approach fails to achieve its purported aims and instead fosters discord amongst the regions. The two case studies of the national securities regulator and the *Insite* judgment in British Columbia will reveal, in contrast, the court's sympathy towards cooperative federalism, thereby placing the onus on the Supreme Court to bridge the gap between the presumptuous approach of unilateralism by the federal government and an increasingly vocal set of provinces asserting their constitutional rights.

The Conservatives under the leadership of Stephen Harper have been remarkably consistent on their public approach to federalism. Even prior to forming government, Harper in an editorial to the *National Post* argued for "renewed respect for the division of powers between the federal and provincial

tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."

governments”²⁶. This principle was reflected soon thereafter in the first platform of the Conservative Party in the 2006 election, whereby they call for the “federal government to establish a new relationship of open federalism within the provinces,” while acknowledging that “preserving the country’s unity is the federal government’s foremost responsibility”²⁷. In the subsequent 2008 and 2011 elections respectively, the need to “respect the jurisdiction of the provinces and territories in the Constitution Act, 1867”²⁸ and to “work collaboratively with the provinces”²⁹ was duly emphasized. The concept of open federalism is one which resets the clock on federalism, bringing back the concept of watertight compartments seen under the Judicial Committee of the Privy Council. It is built on the assumption that exclusive jurisdiction between the heads of powers in sections 91 and 92 of the Constitution can be effectively maintained, and furthermore, that this form of federalism is in fact beneficial for Canadian society. Decentralization and mutual respect for constitutional mandates are the pillars upon which the Harper Conservatives proposed a different federal vision for Canada.

However, the reality of the past six years of Conservative governance has been far

from the rosy picture of respected jurisdictional boundaries and mutual trust touted by the federal government. In a number of instances, the government has chosen to proceed with a legislative agenda that, despite having major repercussions on the subnational units of the federation, fails to include them within considerations. This approach “is consistent with a broader neoliberal approach to federalism which, among other aims, seeks to use institutional reforms to lock in more market-oriented public policies”³⁰. In this sense, the call for open federalism à la Harper is one in which the government merely chooses to flex its powers, assuming that its ancillary effects on the provinces are ones which can be conveniently ignored. Open federalism is therefore a misnomer: it is closed, isolated, and fails to adequately engage with the provinces and territories of the Canadian federation.

When government ideology replaces principle, it is incumbent on the courts to ensure that the core principles which underpin the country remain steadfast. The case of the proposed national securities regulator provides one such example. The Conservative government, supported in this case by the Attorney General of Ontario, sought to consolidate the thirteen separate agencies run by provincial governments under one national regulator. Its arguments were based on the idea that the action fell under section 91(2), the trade and commerce clause of the constitution³¹. It faced a slew of opposition from a number of provinces, including Alberta, Québec, Manitoba, and New Brunswick, that claimed the power fell under section 92 over property and civil rights³². The Supreme Court’s decision to rule in favour of the provinces and its reasoning for doing so is a rebuff on the presumption that the government can proceed

²⁶ Stephen Harper, “My Plan for Open Federalism,” *National Post*, A19, October 27, 2004, <http://www.jamesmoore.org/harperpostoct27.htm>.

²⁷ Conservative Party of Canada, “Stand Up for Canada: Conservative Party of Canada Federal Election Platform,” 2006, p. 42, http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf.

²⁸ Conservative Party of Canada, “The True North Strong and Free: Stephen Harper’s plan for Canadians,” 2008, p. 26, <http://www.conservative.ca/media/2008-Platform-e.pdf>.

²⁹ Conservative Party of Canada, “Here for Canada: Stephen Harper’s Low-Tax Plan for Jobs and Growth,” 2011, p. 30, http://www.conservative.ca/media/ConservativePlatform2011_ENs.pdf.

³⁰ Adam Harnes, “The Political Economy of Open Federalism,” *Canadian Journal of Political Science* 40:2 (2007), p. 418.

³¹ *Reference re Securities Act* [2011] SCC 66, par. 4.

³² *Ibid.*

in a legislative action of this magnitude without the necessary agreement from the federation's composing members.

The court used the criteria as established in *General Motors* and found that the sweeping nature of the legislation would be a complete takeover of securities industry that ran contrary to the constitution, despite favourably looking upon the need for economic regulation on a national level³³. It has been suggested, as a result, that the Supreme Court's decision was tantamount to a setback to national unity and to the effective use of coordination in policy, thus harming federalism in Canada³⁴. While the economic arguments for a regulator are compelling, the court noted that:

It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.³⁵

While considerations of political or economic expediency or efficiency may be logical reasons within the political arena, the means through which changes are achieved in the political arena must necessarily conform to the constitutional limits prescribed by law. "A

functional effectiveness approach," writes political scientist Jean Leclair, "will undermine the very values that federalism is meant to promote"³⁶. The federal government, in blatantly proceeding without taking into account these limits, was understandably reproached by a Supreme Court where balance and dialogue continue to remain important principles to maintain Canada's operational framework.

The decision that the *Securities Act* was *ultra vires* of the Parliament's constitutional power was understandably disappointing to the federal government. However, the Supreme Court nevertheless recognized the possibility of a national scheme that would be predicated on the government taking a "cooperative approach" with its provincial counterparts³⁷. This provision speaks to an extension of the form of cooperative federalism promoted by the Supreme Court, which has in the twenty-first century been less expansive in its application of powers such as the trade and commerce power³⁸. Open federalism, in its idealistic form, remains a myth: the delineation of exclusive spheres of jurisdiction is impossible in a world where globalization of markets and interconnectedness have become a norm. Ironically, the government's actions in the national securities regulator only demonstrate a lack of principled commitment to the concept in the face of neoliberal and ideological pressures.

Within the constitutional framework, however, the Supreme Court has not limited itself to the strict division of powers to protect federalism in Canada. The case of *Canada (Attorney General) v. PHS Community Services*

³³ *Ibid.*, par. 128.

³⁴ Gord DiGiacorno, "Take-away lessons from the SCOC's decision on the Securities Act," iPolitics.ca, March 22, 2012, <http://www.ipolitics.ca/2012/03/22/gord-digiaco-mo-securities-act-decision-not-helpful-to-canada/>. See also the response of the Canadian Banker's Association, one of the interveners in the *Reference re Securities Act* case at <http://www.cba.ca/en/media-room/65-news-releases/600-cba-response-to-supreme-court-of-canada-decision-on-securities-regulation->.

³⁵ *Reference re Securities Act* [2011] SCC 66, par. 7.

³⁶ Jean Leclair, "The Supreme Court's Understanding of Federalism: Efficiency at the Expense of Diversity," *Queen's Law Journal* 28 (2003), p. 411, <https://papyrus.bib.umontreal.ca/jspui/handle/1866/1431>.

³⁷ *Reference re Securities Act* [2011] SCC 66, par. 130.

³⁸ Oliver, "Canadian Legal Federalism since 1982," p. 7.

Society, known colloquially as the Insite decision, is a further case study in which the courts challenged the abrasive approach of the federal Conservatives using a full range of constitutional analyses. The decision reflects not only an application of a wide range of legal doctrines, but also serves as a reminder about the complementary role that the *Charter of Rights* plays in addition to the constitutional division of powers in the constitution.

The Insite facility, located in downtown Vancouver East Side, was aimed at providing a supervised injection site for drug users to minimize the health and mental risks associated with drug use. Premising their actions on moral implications and social conservatism, the Conservative government sought to shut down the facility. The Supreme Court was thus faced with two questions to determine the validity of the federal government's case on cross-appeal: whether the ability to shut down the site fell within the division of powers, as well as whether its actions were consistent with the rights in section 7 of the *Charter*³⁹. The first question was considered with respect to the doctrine of interjurisdictional immunity. This doctrine, a relic of the watertight compartments direction of the court, posits that powers within either sections 91 or 92 consist of a core element that is immune from the effects of legislation based in the other set of powers⁴⁰. However, the McLachlin court in its previous decision in *Canadian West Bank* had already downgraded the doctrine's application

and thus its relevance in the modern age⁴¹. The Supreme Court, when considering the applicability of interjurisdictional immunity for Insite, submitted that its "premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism"⁴². Paradoxically, while the doctrine was used in an attempt to maintain the Insite facility, the court's reasoning illuminates further an approach that stresses the need for cooperation rather than seclusion when it comes to the division of powers. Moreover, the government's attempt to shut down Insite based on an ideological position rather than the scientific evidence betrays its supposed commitment to open federalism and a respect for provincial matters of jurisdiction.

The second question before the court regarding the *Charter* was answered in the negative. To eliminate the safe injection facility would be to violate section 7 rights on "life, liberty and security of the person," as well as contravene the "principles of fundamental justice"⁴³ set out in the *Charter of Rights*. Although falling outside the scope of the division of powers, it is interesting nevertheless to note that "the Court will not hesitate to bring Charter arguments to the fore where the recently stabilized and clarified rules of cooperative federalism cannot produce a satisfactory solution"⁴⁴. This development also speaks to the incongruity of open federalism under Prime Minister Harper. To attempt to resurface idyllic notions of exclusivity within the constitution is to conveniently and willfully ignore the fact that the constitution and the

³⁹ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R., par. 36.

⁴⁰ Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court," p. 171. Further elaboration on the intricacies of the interjurisdictional immunity doctrine and its evolution can be found in Oliver, "Canadian Legal Federalism since 1982," p. 4 and Monahan, *Constitutional Law*, p. 120-126.

⁴¹ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22. See also Oliver, "Canadian Legal Federalism since 1982," p. 5-6.

⁴² *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R., par. 70.

⁴³ *Ibid.*, par. 94 and 107.

⁴⁴ Oliver, "Canadian Legal Federalism since 1982," p. 7.

society in which it operates has changed since 1867. Governments of the twenty-first century must recognize the “continued intermingling of government roles and jurisdictions as a functional necessity in the future”⁴⁵. In a context whereby the division of powers has benefitted from clarifications in various legal doctrines, and where the *Charter* can provide another means of protection for Canadians and their provincial governments, the Supreme Court is poised to face the challenges of the impacts of the ill-fated concept of “open federalism” with a wide range of tools at its disposal.

The Supreme Court, under the direction of Chief Justice McLachlin, has clearly committed to a vision of cooperative federalism that has developed over a century of jurisprudence on the division of powers. In contrast, the federal Conservatives have presented an unclear federal vision, the product of a definitive disconnect between their theoretical policy and its operationalization. The Conservative Party, nevertheless, continues to extol their success on federalism, pointing to things such as the potential for greater innovation in health care⁴⁶, or the economic opportunities it offers to individual provinces in energy and natural resources⁴⁷. Certainly, in some respects the government has been effective in moving towards greater decentralization, a debate on its merits being the matter for another study. However, it would be a stretch to suggest that decentralization necessarily equates to a successful

implementation of open federalism. The federalism which the Harper Conservatives proposes is one which is outdated and ill-fitted to meet the challenges of the twenty-first century, rooted in an impractical conception of the constitution as one which can be easily separated into convenient spheres. Despite the decline of cases dealing with the division of powers, the Supreme Court, for its part, has ensured that cooperative federalism remains a fundamental guiding element in its deliberations, ensuring the concept’s survival in a new age of federal politics.

Judging the Future of the Supreme Court: The Case for Renewed Leadership

The question remains of where these developments leave the Supreme Court, particularly when facing the upcoming challenges since the third victory of the Conservative Party, garnering them their long-awaited majority government. Without the compromising element inherent in the government’s minority situation in the past five years, the government’s legislative agenda has taken a bolder and more aggressive form, exacerbating the impact of a philosophy of “open federalism” which has promoted more discord than harmony. An investigation into the elements of this agenda and its reaction in the provinces suggests that the Supreme Court will face a substantial challenge in reconciling multiple and very different positions. Therefore, it is incumbent for us to ask: how will the Supreme Court respond to the politicized nature of these legislative conflicts, and what does this mean for not only the future of the judiciary, but the future of Canada’s federal framework?

Three key pieces of legislation introduced in the 41st Parliament provides a key point of departure, particularly since all three are hotly contested by a number of provinces and have found themselves wound up in the judicial system. From the opposition on the federal omnibus crime bill, the elimination of

⁴⁵ Bickerton, “Deconstructing the New Federalism,” p. 67.

⁴⁶ Conservative Party of Canada, “Balanced and Sustainable Investment in Health Care,” December 21, 2011, http://www.conservative.ca/press/news_releases/balanced_and_sustainable_investment_in_health_care.

⁴⁷ Conservative Party of Canada, “Economic Action Plan 2012,” March 29, 2012, http://www.conservative.ca/press/news_releases/economic_action_plan_2012.

the gun registry, and the Senate elections proposal, it is argued that the government agenda serves to aggravate regional tensions in the Canadian federation which have remained relatively dormant since the turn of the century⁴⁸. In this respect, cooperative federalism has been ignored, as the Conservative government adamantly adopts a unilateralist approach to intergovernmental relations.

Bill C-10, officially referred to as the *Safe Streets and Communities Act* but known derisively as the omnibus crime bill by its critics, is an amalgamation of a number of initiatives brought forward by the government in its previous minority governments. It includes provisions for mandatory minimum sentencing and harsher sentences for young offenders, among others⁴⁹. There is no doubt that the government holds the constitutional right to legislate on matters of criminal law⁵⁰. However, given that the administration of justice is a provincial responsibility under section 92(14)⁵¹, the brunt of the costs will fall on provincial governments already strapped by limited budgetary funds in a time of fiscal austerity. The provinces of Ontario and Québec in particular have refused to shoulder these costs, calling on the government to provide the necessary funds needed to enforce the plethora of provisions contained within the bill⁵². Moreover, the

government of Québec recently announced its intention to circumvent a number of its provisions, where Minister of Justice Fournier has said “he will issue a directive to various players in the justice system to avoid applying the strictest provisions of the crime bill”⁵³. While the constitutional validity of these actions may be questionable, it illustrates how far the breakdown of the federal-provincial relationship has progressed when provinces threaten to shirk their constitutional responsibilities in the face of an unreceptive federal government.

It is clear that the government’s law and order agenda, which include the mandatory minimum sentences in Bill C-10 but also the elimination of the long-gun registry in Bill C-19 have elicited a vigorous response from the central provinces. However, the court system has also reacted to the legislative changes brought forward by the Harper government. In a judgment for the case *R. v. Smickle*, Ontario Superior Court judge Anne Molloy found that the application of mandatory minimum sentence provisions “would constitute cruel and unusual punishment within the meaning of s. 12 of the *Charter*”⁵⁴. Although the matter was determined in provincial jurisdiction and in a limited context, we must admit the consequences of the legislation may yet manifest itself on future legal action on *Charter* grounds. If the *Insite* case is any indication, the Supreme Court will not hesitate in using the *Charter* as a means of maintaining the effective balance in Canadian federalism.

⁴⁸ Smithey, “The Effects of the Canadian Supreme Court’s Charter Interpretation on Regional and Intergovernmental Relations in Canada,” p. 83.

⁴⁹ Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts, 1st session, 41st Parliament, 2011.

⁵⁰ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s. 91(27).

⁵¹ *Ibid.*, s. 92(14).

⁵² The Canadian Press, “Quebec, Ontario won’t pay costs of federal crime bill,” Nov. 1, 2011, <http://www.ctv.ca/CTVNews/TopStories/20111101/>

[quebec-justice-minister-jean-marc-fournier-says-province-wont-pay-costs-of-new-federal-crime-bill-111101/](http://www.thestar.com/news/canada/politics/article/1145322--omnibus-crime-bill-quebec-vows-to-circumvent-new-federal-crime-bill)

⁵³ Andy Blatchford, “Omnibus crime bill: Quebec vows to circumvent new federal crime bill,” The Canadian Press, March 13, 2012, <http://www.thestar.com/news/canada/politics/article/1145322--omnibus-crime-bill-quebec-vows-to-circumvent-new-federal-crime-bill>

⁵⁴ *R. v. Smickle*, [2012] ONSC 602, par. 79.

The long-gun registry was also brought to court in Québec, in the case of *Québec (Procureur général) c. Canada (Procureur général)*. The federal government's decision to eliminate gun registry records, irrespective of provincial desires to maintain these records, was challenged and the Québec government succeeded in obtaining an injunction, the court finding a fundamental dilemma at the heart of the issue:

Deux gouvernements, tous deux démocratiquement élus, proposent une vision diamétralement opposée de ce qu'il convient d'appeler le bien commun. A l'évidence, le remède recherché par le Québec mènera à la négation de la volonté du Canada, alors que la volonté de ce dernier prive le Québec, selon cette dernière, de la possibilité de mettre en oeuvre un registre québécois des armes à feu englobant les armes d'épaule réellement efficace et à jour.⁵⁵

Indeed, the Québec Superior Court's reasoning can be extrapolated to the crisis at the heart of the new federalism of the century. The difficulty in reconciling the wills of democratically elected governments, both at the federal level and the provincial level, falls within the domain of the courts who act as arbiters. The failure to resolve conflicts through a basic medium of dialogue, however, threatens to debilitate the judicial system through increased litigation which places players in a zero-sum game.

Finally, the quagmire of Senate reform was revived in the parliamentary session with Bill C-7, which seeks to establish a voluntary system of Senate elections⁵⁶. But as the Honourable Stéphane Dion recalls, "the

Supreme Court of Canada said in 1980 that Parliament cannot alone, without the provinces, alter "the essential characteristics of the Senate"⁵⁷. Given the dubious constitutionality of such provisions, the government of Québec recently filed a reference motion to the Court of Appeal challenging the legislation⁵⁸ and there is a strong likelihood that the Supreme Court will be called on to add clarity to the debate. The Honourable Sénateur Nolin posits that:

Les Pères de la Confédération ont ainsi organisé le compromis législatif qui allait permettre la naissance du Canada. C'est avec grande circonspection que la cour suprême acceptera de décortiquer ce compromis politique afin de reconnaître son rôle séminal ainsi que son importance organique dans le but d'analyser toute mesure législative fédérale unilatérale visant à en modifier les composantes.⁵⁹

Despite federalism's relative decline in the post-Charter era, the constitutional conflict on the Senate underscores how long-standing issues continue to fester within Canadian federalism.

The common thread connecting these bills is that they reflect substantial social, demographic, and political changes that have accompanied the return of federalism to Canadian politics. With the changing political economy of the nation and the shifting balance of power to the west, the difficulties in

⁵⁵ *Québec (Procureur général) c. Canada (Procureur général)*, [2012] QCCS 1614, par. 22.

⁵⁶ Bill C-7, An Act respecting the selection of senators and amending the Constitution Act, 1867, in respect of Senate term limits, 1st session, 41st Parliament, 2011.

⁵⁷ The Honourable Stéphane Dion, "Senate reform bill a recipe for grievance, gridlock," The Chronicle Herald, March 24, 2012, <http://thechronicleherald.ca/opinion/77028-senate-reform-bill-recipe-grievance-gridlock>.

⁵⁸ Gouvernement du Québec, "Projet de loi C-7 sur la réforme du Sénat - Le gouvernement du Québec conteste la validité de la loi fédérale devant les tribunaux," May 1, 2012, <http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPQF/Mai2012/01/c2855.html?slang=en>

⁵⁹ The Honourable Pierre-Claude Nolin, interview by Marjun Parcasio, Senate of Canada, May 3, 2012.

reconciling provinces will only continue to grow⁶⁰. In the crime bill, the long-gun registry, and the Senate reform proposals, the positions of western provinces such as Alberta and British Columbia have diverged from the traditional powers of the federation located in central Canada: Ontario and Québec. The government's legislative agenda only serves to foster this regional divide, exploiting the weaknesses within the fabric of Canadian federalism. Stephen Harper and the Conservative Party are thus engaging in the politics of fragmentation - and it seems to be working. The results of the 2011 federal election indicate that governing the country can be achieved without the support of Quebec, relying on the solidarity of the Western provinces as a base for popular support⁶¹. With the return of federalism, therefore, we will undoubtedly see the Québec conundrum resurface, and intergovernmental concerns continuing to rise in the face of an obstinate government in Ottawa.

The repercussions of this dangerous form of politics will be acutely felt by the Supreme Court of Canada. In the absence of firm political leadership and the lack of coherent vision for federalism by the federal government, the court must necessarily remain steadfast in its promotion of cooperative federalism. However, the politicized nature of these conflicts places the court in a delicate balancing position. Since the advent of the *Charter*, the dangers of the "judicialization of politics" have been widely discussed in the literature, with commentators arguing that the regime of individual rights serves to circumvent the will of democratically elected

governments⁶². As alluded to by the Quebec Superior Court in *Procureur général (Québec) c. Procureur général (Canada)*, the attempt to reconcile competing visions of democratic governments in their interpretation of the division of powers also poses a similar and significant challenge which must be confronted⁶³.

As a result of the position of the Supreme Court, we can argue that the theory of judicial independence typically associated with the courts in liberal democratic systems is more a theoretical construct than a pragmatic reality⁶⁴. While this certainly does not mean to suggest that the court has failed to maintain a necessary distance from actors in the political sphere, it does recognize that modern society does require the court to play multiple roles. Beyond its role as an arbiter, the Supreme Court, in advancing a separate vision of federalism different from the one proposed by the federal government, also plays the role of a facilitator and an enabler to operationalize this vision through its judgments. It is in this regard that Kelly and Murphy have characterized the court as a "meta-political actor" wherein the "management of Canada's federal constitutional architecture is a responsibility the courts share with key political actors"⁶⁵. It must do so, they argue, in such a way that it provides minimal, if any, impediment to political actors but nonetheless provides the foundation upon which political actions can be taken⁶⁶.

How best, then, to reconcile this seemingly paradoxical position? The Supreme

⁶⁰ Joe Friesen and Bill Curry, "Canada's future is in the West: 2011 census," *The Globe and Mail*, February 8, 2012, <http://www.theglobeandmail.com/news/national/canadas-future-is-in-the-west-2011-census/article2330716/>.

⁶¹ Elections Canada, "Map of Canada – Official Results of the 41st General Election," 2011, http://www.elections.ca/enr/help/map_41ge2.pdf.

⁶² Smithey, "The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada," p. 87.

⁶³ *Québec (Procureur général) c. Canada (Procureur général)*, [2012] QCCS 1614, par. 22.

⁶⁴ Bzedra, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," p. 3.

⁶⁵ James B. Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor," p. 217.

⁶⁶ *Ibid.*, p. 241.

Court, surely, cannot be political in its push for cooperative federalism, while at the same time apolitical in its role as an arbiter in contemporary society. The necessity to resolve this conflict is one which the Chief and Puisne Justices of the court are well-aware. It is in their seminal judgment in *Canadian Western Bank* that a reconciliation of these elements was expounded upon:

The [constitutional] doctrines [developed by the courts] must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity [and] they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called “co-operative federalism”.⁶⁷

As such, the position of the courts is solidified based on historical precedent and legal jurisprudence. Irrespective of the ideological values of the government, the court ensures its relevance in a new era of federalism. It will continue to recognize a Canada built on two levels of government, and thus any disregard for the other partner in the federal arrangement will be decried and reprimanded. It is this concept of Canada which has existed since 1867, and will continue to endure throughout the length of the twenty-first century.

It is a sad day in Canada when Canadian citizens have to look towards the courts for leadership, rather than their elected officials. In a federal country, the responsibility of the federal government lies on fostering unity and bringing the stakeholders of the federal union together at the same table. Given the contradictory nature of open federalism under the Harper government, and its tendency to

sow the seeds of division amongst the provincial and territorial entities, the Supreme Court has endeavoured to reconcile these political differences. But because of the distance the court must place itself vis-à-vis the realm of politics, the real push must necessarily come from the federal government. If the Conservatives truly wish to present themselves as a federalist party, and one which will be a sustainable and viable alternative in the years to come, they must abandon their blind adherence to ideology and commit to dialogue with the provinces. Only then will cooperative federalism be truly achieved in Canadian society.

The Supreme Court, as evidenced by its balanced approach in applying legal doctrines and jurisprudence, has taken a primarily role in advancing cooperation amongst the central and subnational units of Canada’s federation. But true leadership cannot originate from the nine seats at 301 Wellington. It must be founded on an attitude of collaboration by political leaders in Victoria, Edmonton, Toronto, and Québec, among others. Most importantly, the decision by the leaders of its institutional neighbour down the street at 1 Wellington to foster, rather than sever, relationships with the provinces will undoubtedly shape the future and direction for federalism in Canada.

⁶⁷ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, par. 24.

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Stare Decisis or Selective Judicial Reasoning?

Precedent Application Analysis of *Quebec (Attorney General) v. Lacombe*

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The division of powers has remained a contentious issue in Canada since Confederation. Judicial precedents set in federalism cases can be inconsistently applied. This paper will serve as a case study which will examine one such example that arose in the 2010 Supreme Court case *Quebec (Attorney General) v. Lacombe*.¹ We will begin by highlighting the legal dispute that occurred in this case and its relation to federalism. In essence, there is a conflict between a federal law relating to the construction of aerodromes (landing areas for aircraft) within a specific area, and a municipal by-law, which prohibits it. After discussing the conflict, we will then highlight the numerous viewpoints and doctrines relating to federalism which arise in *Lacombe* and rely on two lower court decisions to show how they are inconsistently applied.

Beverley McLachlin, Chief Justice of Canada (C.J.), writing for the majority, ruled that the municipal by-law is invalid, as it regulates a federal power not saved by the ancillary power. LeBel, Justice (J.) on the Supreme Court of Canada, concurs and cites the doctrine of federal paramountcy. Deschamps J. dissents by ruling the by-law valid, applicable, and operable, and thus, constitutional. While this case is relatively new, it highlights the inconsistency within Canadian federalism jurisprudence in three ways. Firstly, applying the same methodology cited in one precedent can lead to a different result. For example, McLachlin C.J.'s centralizing argument is arrived at through a pith and substance and legislative jurisdictional analysis, but this same analysis leads Ross J. of the Alberta Court of Queen's Bench to rule in favour of the provincial power in *R. v. Keshane*.² Secondly, both McLachlin C.J.'s decision and Deschamps J.'s dissent capture crucial legal principles, and while not explicitly cited in lower-court decisions, they

¹ *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38.

² *R. v. Keshane*, 2011 ABQB 525.

result in contradictions in precedent application. Thirdly, sometimes elements of both of these fundamentally differing decisions are cited in the same decision, as in the Quebec Court of Appeal's Forget J. in *Quebec (Procureur general) c. Canada (Procureur general)*,³ raising the question of selective reasoning by judges.

The *Lacombe* Precedent Case History.

In *Lacombe*, a dispute arose between the directors of an air excursion company operating in Globeil Lake and the Quebec municipality of Sacré-Coeur relating to the operation of aerodromes. The owners of summer homes on Globeil Lake asked their municipal government to take measures to prevent the operation of aerodromes which disturbed the peace in the area.⁴ The municipality passed by-law no. 260 to amend an older by-law no. 210 to allow the construction of aerodromes in a specific zone outside of Globeil Lake.⁵ The municipality argues that the business violated the zoning regulations in the newly passed by-law no. 260 for Globeil Lake by operating aerodromes within an unauthorized area. The federal Department of Transport, however, provided a licence to the respondents to operate aerodromes from Globeil Lake, pursuant to the *Canadian Aviation Regulations* and the federal *Aeronautics Act*.⁶ A conflict thus arises between the federal law, which allows the operation of aerodromes within Globeil Lake, and the municipal by-law, which bans it. While the Constitution does not recognize the municipality as a legal entity, the provinces are able to delegate authority to municipalities and provide authorization to legally exercise the

provincial law power.⁷

Majority Argument.

The purpose of the by-law is one of the main points of dispute between Justices McLachlin and Deschamps. McLachlin C.J. argues that the purpose of the by-law is to prohibit aerodromes. Since aerodromes are specifically authorized in one zone, wherever they are not mentioned, they are effectively prohibited.⁸ McLachlin C.J. first sets out to determine whether this prohibition is valid provincial law by analyzing its "pith and substance." She argues the municipal council intended to remove the float planes which were disturbing homeowners on Globeil Lake, and thus, the substance of the law is the regulation of aeronautics, an exclusive federal power.⁹ Since the by-law is *ultra vires*, or outside its jurisdiction, McLachlin C.J. then analyzes whether or not it can be saved under the ancillary powers doctrine. This provision applies if the measures taken are "an integral part of a legislative scheme that comes within provincial jurisdiction."¹⁰ Zoning law in general "treats similar areas similarly" and avoids stand-alone prohibitions.¹¹ Since by-law no. 260 bans aerodromes in a single area, it functions as a prohibition. It is thus not rationally and functionally connected to zoning legislation and cannot be saved under the ancillary powers doctrine, according to McLachlin C.J.¹²

³ *Quebec (Procureur general) c. Canada (Procureur general)*, 2011 QCCA 591.

⁴ *Ibid.* at para. 1.

⁵ *Ibid.* at para. 14.

⁶ *Ibid.* at para. 5.

⁷ Michael Dewing, William R. Young, and Erin Tolley, "Municipalities, the Constitution, and the Canadian Federal System," prepared on behalf of the Parliamentary Information and Research Service (Ottawa: Library of Parliament, 2006), 2.

⁸ *Lacombe*, 2010 SCC 38 at para. 14.

⁹ *Ibid.* at para. 22, 23.

¹⁰ *Ibid.* at para. 32.

¹¹ *Ibid.* at para. 50.

¹² *Ibid.* at para. 58.

Dissenting Argument.

Deschamps J. contests many of the arguments raised by McLachlin C.J. She argues that the by-law is constitutional using a three-pronged test: validity, applicability, and operability.¹³ To be valid, a rule must be within the jurisdiction of the government which adopted it. Firstly, Deschamps J. argues that the pith and substance of by-law no. 260 is to set out certain uses of territory, which is within the provincial responsibility and is valid.¹⁴ However, she argues that “contrary to what the Chief Justice is suggesting,” that specifically allowing a use in one zone does not mean it is prohibited in other zones: rather, it is “generally authorized.”¹⁵ Secondly, Deschamps J. analyzes the by-law’s applicability. She argues that the Chief Justice does not consider the recent precedent applied in *Canadian Western Bank v. Alberta*:¹⁶ for a law to be inapplicable, it must not only overlap the other power, but impair it. McLachlin C.J. only states that the by-law and the federal power overlap but she does not analyze impairment.¹⁷ In Deschamps J.’s view, the by-law allows sufficient space for aviation activities, and thus, does not impair the federal core over aviation, contrary to the Chief Justice’s opinion.¹⁸ The by-law is thus applicable. The third prong of the analysis tests for an operational conflict between the by-law and the federal power. The federal act does not regulate land usage. The federal certificate issued does not give the respondents a right to that territory, since the certificate deals with safety.¹⁹ Thus, the by-law is operable. Since all three tests have been met, Deschamps J. argues that the by-law is constitutional.

Concurring Argument.

LeBel J. concurs with the majority decision for different reasons. He does agree with Deschamps J. that by-law no. 260 was a valid exercise of the municipality’s land use power and not a major intrusion on the core of the federal aeronautics power.²⁰ However, he disagrees with Deschamps J.’s argument that the land use certificate does not give the respondents absolute rights to operate in their territory.²¹ He argues there is an operational conflict since the federal government granted authority within that specific area, and thus, the federal authorization must prevail due to the doctrine of federal paramountcy.²² He reaches the same decision as McLachlin C.J., but for ultimately different reasons. While both LeBel J. and McLachlin C.J. ultimately read down the by-law, the latter does so because the pith and substance of the by-law is outside the provincial power and cannot be saved under the ancillary powers doctrine, while the former takes a more centralizing approach. LeBel J. argues simply that a conflict exists and that the federal power is supreme in such cases. He thus decides to dismiss the appeal and concurs with the majority.

Lacombe’s Application by the Lower Courts

The *Lacombe* precedent is fairly recent and deals with a very specific issue. As such, it has not been extensively cited in subsequent cases. It has been followed in only two cases, considered in four, and referred to in three. However, it addresses a particularly contentious issue of the division of powers in the Canadian political system. The jurisprudence surrounding its interpretation is thus still evolving. I will focus on two cases, *Keshane* and *Quebec c.*

¹³ Ibid. at para. 95.

¹⁴ Ibid. at para. 134.

¹⁵ Ibid. at para. 141.

¹⁶ *Canadian Western Bank v. Alberta*, 2007 SCC 22.

¹⁷ *Lacombe*, 2010 SCC 38 at para. 158.

¹⁸ Ibid. at para. 168.

¹⁹ Ibid. at para. 179.

²⁰ Ibid. at para. 71.

²¹ Ibid. at para. 72.

²² Ibid. at para. 73.

Canada, to highlight how lower courts can selectively consider the *Lacombe* precedent.

R. v. Keshane.

In *Keshane* (2011), a dispute exists between the federal and provincial division of powers, similarly to *Lacombe*. In this case, the respondent, Keshane, was slapped by a man outside a bar and fought back, engaging the aggressor in a fistfight. Police arrived and gave Keshane a municipal violation ticket for fighting in public.²³ The respondent argues that the by-law violated the *Constitution Act, 1867* because it infringes federal jurisdiction over criminal law. The Alberta trial court judge agrees, stating that the by-law possesses all the prerequisites of criminal law, namely that it is in pith and substance a valid criminal law purpose backed by a prohibition and penalty.²⁴ Additionally, the trial judge says that it cannot be saved by the double aspect doctrine as the by-law does not relate to the control of property. Ross J., of the Alberta Court of Queen's Bench, follows the steps employed by the majority in *Lacombe*. Thus, the first step in determining whether a provision is outside the jurisdiction of the *Constitution Act, 1867* is to determine its "pith and substance," and secondly to determine which level of government has jurisdiction to enact laws.²⁵ This is the only explicit reference to the *Lacombe* precedent given by Ross J., but much of her decision-making is shaped by the same factors guiding McLachlin C.J.'s decision.

To determine the pith and substance of the legislation, Ross J. argues that both the purpose of the legislation and the effect must be considered; indeed, this is precisely what McLachlin C.J. decides.²⁶ Both also rely on the

same precedent.²⁷ The Appeal Court in *Keshane* affirms this line of reasoning and relies on the same paragraph by McLachlin C.J.²⁸ To determine pith and substance, Ross J. analyzes intrinsic and extrinsic evidence as well as the practical effect of the by-law. In determining intrinsic evidence, the appellant argues that the purpose clause in the by-law outlines legislative intent and supports the view that the by-law is aimed at making public places safe, while the respondent argues the by-law as a whole deals with a diverse set of subjects with no clear theme.²⁹ Ross J. agrees that legislative intent should be considered, and that the pith and substance is directed at providing safe and enjoyable public space.³⁰ McLachlin C.J. also argues that legislative intent should be analyzed, and both intrinsic and extrinsic evidence is crucial.³¹ Indeed, both judges analyze the statements made by city council and arrive at their determinations of the pith and substance of the legislation based on this intrinsic evidence. Ross J. argues that the legislation's practical effect must be considered in determining the pith and substance of the by-law, a view identical to Deschamps J.'s in *Lacombe*.³²

Ross J. proceeds to determine which level of government this appropriately falls under, as per McLachlin C.J. in *Lacombe*.³³ Specifically, s. 91(27) of the *Constitution Act, 1867* assigns criminal law as a federal power, while ss. 92(13) and 92(16) give the province the power over property, civil, and local matters. Ross J. cites the double aspect doctrine: some subjects can fall under both federal and provincial jurisdiction depending on

²³ *Keshane*, 2011 ABQB 525 at para. 2.

²⁴ *Ibid.* at para. 7.

²⁵ *Ibid.* at para. 13, citing *Lacombe*, 2010 SCC 38 at para. 20 and 24, per McLachlin C.J.

²⁶ *Ibid.* at para. 15, citing *Lacombe*, 2010 SCC 38 at para. 20, per McLachlin C.J.

²⁷ *Kitkatla Band v. British Columbia*, 2002 SCC 31.

²⁸ *R. v. Keshane*, 2012 ABCA 330 at para. 16.

²⁹ *Keshane*, 2011 ABQB 25 at para. 49.

³⁰ *Ibid.* at para. 61.

³¹ *Lacombe*, 2010 SCC 38 at para. 20.

³² *Keshane*, 2011 ABQB 25 at para. 58; *Lacombe*, 2010 SCC 38 at para. 185, per Deschamps J.

³³ *Keshane*, 2011 ABQB 25 at para. 59.

the context.³⁴ Provincial law can be declared invalid if in pith and substance it is criminal law.³⁵ The appellant argues that the purpose of the by-law is to maintain safe and enjoyable public places, while the respondent Keshane states that it is done to achieve the *Criminal Code* purposes to preserve public order and peace.³⁶ Ross J. finds that the double aspect doctrine applies: she looks at the by-law in context and finds that it regulates a variety of activities, like littering, bullying, and smoking, which “by their very nature interfere with the safe and enjoyable use of public spaces.”³⁷ The by-law offence bans all fighting, while the *Criminal Code* offence of assault does not treat consensual fighting as a crime. Thus, the by-law and the criminal offence are intentionally different and serve different purposes.³⁸ As a result, Ross J. concludes that the by-law, in pith and substance, relates to providing safe and enjoyable public spaces, and is thus within provincial legislative authority under the ss. 92(13) and 92(16) provincial powers.³⁹ This interpretation was upheld unanimously by the Court of Appeal, which found that the by-law “substantially overlaps both domains” of criminal law and “property and civil rights” and that both of these aspects are roughly equal in importance.⁴⁰

While Ross J. uses the steps employed by McLachlin C.J. in *Lacombe*, her reasoning more closely mirrors Deschamps J.’s. McLachlin C.J. rules that the by-law restricting aerodromes is in pith and substance a federal power and so she rejects the double aspect doctrine, which can only be used if a law is within its jurisdiction.⁴¹ In contrast, Deschamps J. cites *Canadian Western Bank’s* double aspect

doctrine, which allows both Parliament and the provincial legislatures to adopt valid legislation depending on the aspect of the matter in question.⁴² Ross J. uses this precedent to highlight that the practical effect of the law is context-dependent.⁴³ Furthermore, Ross J. analyzes the specific contested provision within the general regulatory sphere of the by-laws, similarly to Deschamps J.⁴⁴ Ross J. and Deschamps J. also reach similar, decentralization-friendly conclusions: that the contested by-laws are not, in pith and substance, purely federal matters due to the double aspect doctrine and declare the by-laws are not *ultra vires*.⁴⁵ Thus, it is evident that while McLachlin C.J.’s steps were followed, Ross J.’s reasoning is more consistent with Deschamps J.’s, indicating the contradictions inherent in federalism decision-making in Canada.

Quebec c. Canada.

In *Quebec c. Canada*, a reference question was posed to the Quebec Court of Appeal regarding the constitutionality of a proposed national securities regulator.⁴⁶ The *Lacombe* precedent is cited only once by Forget J., writing for the majority, who explicitly rejects the rational function test employed by McLachlin C.J., stating that a more thorough analysis is needed. Forget J. considers the legislation as part of a general regulatory scheme, citing the *General Motors of Canada Ltd. v. City National Leasing* precedent.⁴⁷ Ultimately, Forget J. finds the *Securities Act* would violate the requirement in *General Motors* requiring provinces to be constitutionally incapable of enacting similar legislation.⁴⁸ Deschamps J. in *Lacombe* criticizes

³⁴ Ibid. at para. 67.

³⁵ Ibid. at para. 70.

³⁶ Ibid. at para. 90.

³⁷ Ibid. at para. 107.

³⁸ Ibid. at para. 113.

³⁹ Ibid. at para. 118.

⁴⁰ Keshane, 2012 ABCA 330 at para. 41, 42.

⁴¹ Lacombe, 2010 SCC 38 at para. 37.

⁴² Ibid. at para. 99.

⁴³ Keshane, 2011 ABQB 25 at para. 19.

⁴⁴ Lacombe, 2010 SCC 38 at para. 135.

⁴⁵ Ibid. at para. 135; Keshane, 2011 ABQB 25 at para. 104.

⁴⁶ Quebec c. Canada, 2011 QCCA 591 at para. 1.

⁴⁷ Ibid. at para. 348, citing General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641.

⁴⁸ Ibid. at para. 363.

this test, saying it has tended to benefit mainly the federal government and has upset the balance of Canadian federalism, instead applying the *General Motors* test.⁴⁹ Thus, in this case, the majority decision in *Quebec* rejects the majority's reasoning in *Lacombe* and instead applies Deschamps J.'s argument and comes to a similar, province-friendly conclusion. However, Forget J. upholds the offences contained in the *Securities Act* as they fall under the federal criminal law power, as well as sections 295 and 296 of the *Budget Implementation Act*, as they are valid under the federal spending power.⁵⁰ Ultimately, Forget J. highlights the importance of abiding by co-operative federalism, similarly to Deschamps J. in *Lacombe*.⁵¹ The *Securities Act* is ultimately ruled *ultra vires* to Parliament, save for the criminal provisions.

Robert C.J. in *Quebec c. Canada* similarly rules that the *Act* is *ultra vires* the Parliament, except for the criminal law provisions, and also allows ss. 295-297 of the *Budget Implementation Act*. Similarly to Ross J., Robert C.J. arrives at a province-friendly conclusion by using the methodology employed by McLachlin C.J. Firstly, Robert C.J. undertakes a pith and substance analysis of the purpose of the *Securities Act* by analyzing both the purpose and legal effect of the law.⁵² He analyzes the purposive clause as intrinsic evidence and Parliamentary debates and statements as extrinsic legislation, applying the precedent in *Kitkatla Band* which is also used by McLachlin C.J.⁵³ Robert C.J. finds that the pith and substance is the regulation of the securities trade which falls under exclusive provincial jurisdiction.⁵⁴ He also considers the double

aspect doctrine, and, like McLachlin C.J., ultimately decides that no concurrent pith and substance exists which would be allowed under this section. However, his judgment favours the provincial government, unlike McLachlin C.J. Additionally, Robert C.J. argues that a single securities regulator would threaten the balance of powers and the federal compromise, similar to the principles guiding Deschamps J.'s dissent in *Lacombe*.⁵⁵

Dalphond J., in his lone dissent, argues that securities are not an enumerated ground within the *Constitution Act, 1867*.⁵⁶ Additionally, he cites precedent which accepts the validity of federal securities regulation under the double aspect doctrine.⁵⁷ He also relies on the *General Motors* test precedent which is utilized by McLachlin C.J.⁵⁸ While Forget J. uses the same test and decides in favour of the provincial power, Dalphond J. finds that all contested provisions of the *Securities Act* are valid because "the tie that is required under *General Motors*" exists in this case.⁵⁹ McLachlin C.J. uses a similar rational-functional test from *General Motors* and ultimately decides that it falls under the federal power.⁶⁰ Dalphond J.'s philosophy is most closely aligned with the majority's decision in *Lacombe*, and thus, he follows the precedent used instead of distinguishing it. Contrastingly, Justices Forget and Robert are more convinced by principles of co-operative federalism, and their decisions closely mirror Deschamps J.'s dissent in *Lacombe*. From the contradictions between the majority and minority, including Robert C.J.'s reasons, it is evident that a single precedent can be interpreted differently and arguments can be selectively chosen by judges based on their preferences.

⁴⁹ *Lacombe*, 2010 SCC 38 at para. 104.

⁵⁰ *Quebec c. Canada*, 2011 QCCA 591 at para. 391.

⁵¹ *Ibid.* at para. 393; *Lacombe*, 2010 SCC 38 at para. 106.

⁵² *Quebec c. Canada*, 2011 QCCA 591 at para. 46.

⁵³ *Ibid.* at para. 55; *Lacombe*, 2010 SCC 38 at para. 20.

⁵⁴ *Quebec c. Canada*, 2011 QCCA 591 at para. 121.

⁵⁵ *Ibid.* at para. 186.

⁵⁶ *Ibid.* at para. 412.

⁵⁷ *Ibid.* at para. 424.

⁵⁸ *Lacombe*, 2010 SCC 38 at para. 99.

⁵⁹ *Quebec c. Canada*, 2011 QCCA 591 at para. 530.

⁶⁰ *Lacombe*, 2010 SCC 38 at para. 58.

Conclusion

Both McLachlin C.J.'s methodology and the principles espoused in Deschamps J.'s dissent are central principles in Canadian jurisprudence. While a blanket statement concerning precedent cannot be developed from this sample, it is clear from these two examples that precedent is not always applied consistently. Additionally, using the same methodology from a precedent can often lead to radically different results, as evidenced by McLachlin C.J.'s undertaking of the pith and substance and legislative jurisdiction analysis, who ruled in favour of the central government, while Ross J. in *Keshane* reached the completely opposite conclusion. However, certain precedents feature prominently in all three cases, even though they are distinguished and followed to differing extent, including *Kitkatla Band*, *General Motors*, and *Canadian Western Bank*. Additionally, the majority in *Quebec* and the judge in *Keshane* both consider the federalist compromise heavily in their decision-making, similarly to Deschamps J.'s minority in *Lacombe*.

It is evident that certain principles of federalism, including the dual aspect doctrine, federal paramountcy, interjurisdictional immunity, and pith and substance analyses heavily influence decisions involving division of powers cases. Additionally, both the majority and the minority's decision in *Lacombe* have been shown to guide the same decision. Thus, judges can address multiple aspects of a case and ultimately pick the strongest argument. However, they are also able to gloss over certain arguments, as evidenced in the three different judgments in *Quebec c. Canada* which ultimately do not consider all arguments. This is supported by Dalphond J. when he states "my colleagues in the group of three avoid that point, undoubtedly being aware that it jeopardizes their hypothesis."⁶¹ Thus, precedent

can be followed, distinguished, or even selectively discussed. This case study shows that while *stare decisis* is a crucial legal principle in the common-law system, a variety of other subtle factors are responsible for shaping judicial decision-making, leading to inconsistency in Canadian federalism jurisprudence.

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⁶¹ *Quebec c. Canada*, 2011 QCCA 591 at para. 489.

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Canadian Federal Dynamics: Intergovernmental Relations as the Future for Quebec

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Quebec's desire for recognition as "pas comme les autres" has defined fifty years of Canadian politics. In Canada, citizens have multiple layers of identity, including their dual allegiance to the federal nation and provincial culture. In the case of Quebec, these two identities often come into conflict with each other. Quebec nationalist sentiment which manifests itself through threats of sovereignty and demands for constitutional recognition, through negotiation with the federal government, has characterized the nature of Canadian federalism. Quebec has already been greatly accommodated and is privileged in the federal system in comparison to the other provinces. Moreover, the failure of the Liberal governments to create a pan-Canadian identity that Quebec accepts, as well as the Conservatives' failed attempts to modify the constitution, demonstrate the inability for constitutional reform to recognize Quebec as distinct throughout the past fifty years of Canadian federal relations. The door has therefore been left open for Quebec's question of distinctness to be resolved through intergovernmental relations/negotiations. Through such negotiation Quebec can develop and

enhance its unique status at the inter-provincial level and thus further enhance its unique status in the federal system. In the last fifty years, the threat of Quebec secession and the pushes from Quebec for constitutional change have changed the face of federalism. These attempts, and their failures, have proven that the question of Quebec must be addressed through intergovernmental relations, instead of changing the actual structure of the federation through secession or constitutional reform. This essay will argue that the secession of Quebec would be a disastrous choice for both Quebec and Canada; Quebec's needs are already promoted within Canada, secession would undermine the attributes of federalism, and the independent government of Quebec would not protect minorities.

A Distinct Province: The Case of Quebec

To understand how Quebec should be accommodated within the Canadian federation, one must first understand why Quebec sees itself as being distinctly different from other provinces. The Quebecois are the largest language minority in Canada, and French Canadians comprise one of the

two founding peoples of Canada.¹ Some historians suggest that Quebec was responsible for Canada becoming a federation because while some political leaders, including Sir John A. MacDonald, would have preferred a unitary union, Quebec was insistent on becoming a federation. Most Canadian federalists interpret confederation as a multi-lateral agreement and union between multiple, equal provinces. In contrast, Quebec nationalists see Confederation as a pact between the two founding peoples, English Canada in its entirety and Quebec. Quebec therefore sees itself as a community with cultural uniqueness that begs protecting.

The Quiet Revolution of the 1960's, a period of rapid economic growth and increased solidarity, saw Quebec change from a rural, religious society in which the French were a minority within their own province, to one of the most secular provinces in Canada. The Quebecois migrated from the countryside to an urban economic setting and French became the official language of business in Quebec.² The Quiet Revolution led to the Quebecois becoming a powerful majority in the province, and created a "deeply felt desire to protect and advance nationalism, language, and civilization of French Canada".³ In the 1970s, there was the emergence of the Parti Quebecois (PQ), a provincial ruling party, and the Bloc Quebecois (BQ), a federal party whose candidates ran solely in Quebec. The BQs candidates ran for Parliament with the goal of Quebec eventually seceding from that Parliament;⁴ Trudeau warned Quebecers that "a vote for the BQ was a vote for sovereignty".⁵ Indeed, this period resulted in the aggregation of Quebec interest and brought to the forefront of federal discourse the issue of Quebec

distinctness. With the nationalist sentiment of the Quebecois, their control of the province and the PQ and BQ promoting independence, the idea of Quebec secession became paramount to Canadian federal dynamics.

The idea of Quebec's secession from Canada was promoted as a vision of continued economic association with Canada, but with the Quebecois as "maîtres chez nous," and thus with complete legislative jurisdiction over their province.⁶ Many extreme nationalists in Quebec fought to promote this vision. Although English Canada opposed this vision, the emergence of Quebec as a national player in Canada identified the need for some sort of reform of the federal system.⁷ Hence, for twenty years and through two referendums, Quebec used the threat of secession to force Canada to try and meet Quebec's demands.

Exploring Secession: Quebec's Place in the Canadian Federation

Quebec does not require secession to support its status and achieve a reasonable degree of self-determination. Although a minority in a federation should be able to liberate themselves from a regime with which they do not identify, the federation of Canada already allows adequate decentralization of authority, distributive and legislative power to the provinces to accommodate Quebec.⁸ Sameer argues that minorities plagued by tyrannical regimes with different languages and opposing ancestries should fight for secession to win "recognition, liberty, and political autonomy." Quebec, however, shares ancestry and a long tradition of negotiating with English Canada. Moreover, Canadian federalism has a method by which Quebec can aggregate its interest through

¹ J Smith, *Federalism*, (Vancouver: UBC Press) 2004.

² R Gibbons, "Constitutional Politics," *Canadian Politics* (2009): 103-110.

³ Hugh Segal, "A Federalist Perspective," *Orbis* 41(1997): 461.

⁴ Doshi Sameer, "Quebec's Lesson," *Harvard International Review* 21 (1999): 19.

⁵ Thomas Courchene, "The changing nature of Quebec-Canada relations: From the 1980 referendum to the summit of the Canadas," *IRPP Working Paper* (2004).

⁶ P Oliver, "Canada's Two Solitudes: Constitutional and International Law in Reference re Secession of Quebec," *International Journal on Minority & Group Rights* 1 (1999): 65-95.

⁷ Gibbons, "Constitutional Politics," 103-110.

⁸ Hilliard Aronovitch, "Seceding the Canadian Way," *Publius: The Journal of Federalism* 4 (2006): 541-564.

intergovernmental relations, which places Quebec in a stronger position as a member of the federation than as a unitary state. This view is supported by historical Quebec leader and Canadian Prime Minister Sir Wilfred Laurier, who argued that Quebec's uniqueness is better preserved within Canada than "adrift in the homogenizing, anti-bilingual melting pot of America."⁹ Furthermore, Quebec has embraced "le virage vers les marchés," and Courchene argues that acceptance of this market-oriented perspective demonstrates that Quebec can be much more economically successful as part of a great federation as opposed to a tiny nation alongside the larger countries of the US and Canada.

In the 1980s, Prime Minister Trudeau attempted to create a pan-Canadian identity and accommodate minorities. During the threat of secession, Trudeau fought to create a new nation from the ground up of a unified Canada with a strong central government that could hold it together. Quebecers desired the supremacy and protection of the French language; accordingly, Pierre Trudeau promoted the rights of French Canadians both in and out of Quebec with the Official Languages Act, making French one of Canada's two official languages, effectively protecting it.¹⁰

Currently, Quebec possesses more unique responsibilities and power than any other province, but continually makes increasing demands and threats to the system.¹¹ For example, it receives different qualifications for Senators, a special role in immigration, and powers beyond those of other provinces. Quebec has effectively used the threat of sovereignty and claim to distinctiveness to gain unique administrative powers, such as in the arenas of taxation, pensions and immigration.¹² It is fighting to establish itself as a province that is not only "pas comme les autres," but more powerful than its formerly equal counterparts in the federation. Quebec has therefore already achieved a distinct status in Canada, both through the spread of the French language and its special powers.

⁹ Segal, "A Federalist Perspective," 461.

¹⁰ Oliver, "Canada's Two Solitudes," 65-95.

¹¹ Smith, *Federalism*.

¹² Oliver, "Canada's Two Solitudes," 65-95

Not only does Quebec stand to lose by secession, but the loss of Quebec would also undermine federalism, for multiple reasons. To begin, secession would result in a massive upheaval of Canadian society.¹³ Quebec is not being deprived of important rights; on the contrary, it has even greater appointed responsibilities than any other province. Therefore, it should not separate merely to become 'masters in their own house' at the expense of the federation.¹⁴ Secession is not only unnecessary, but the consequences would also be very dire for Canadian federalism. Quebec's secession would set a precedent for the rest of Canada, since, if a founding province can fight to separate then so too could other provinces. To have the ability to secede might increase the risks of struggle between groups and discourage compromise in government.¹⁵ Furthermore, Canada is a model for federal systems around the world. Having a founding member separate would undermine Canada's legitimacy in the international community.¹⁶ Canada is an international model for other countries pursuing federalism, and Oliver argues that failings in Canada's federal system, such as a distinct, founding province separating, would "deprive other nations of a long-standing example of the attempt to accommodate difference." Furthermore, Canada's diversity is ensured by the intergovernmental cooperation between the federal government and provincial governments, giving a voice to a variety of identities. A single government in a secular Quebec would not be able to accommodate minorities.

Minority Protection

Although Quebec argues that it is a marginalized minority in the federation of Canada, a crucial role of federalism is to preserve the diversity of its many components. Disadvantaging minority groups within Quebec itself would be another consequence of secession. Separatists presumably assume that Quebec's current borders are unquestionable, without consideration for aboriginal territories in

¹³ Aronovitch, "Seceding the Canadian Way," 541-564.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

northern Quebec.¹⁷ Despite Quebec's complaint of being a marginalized minority in Canada, Oliver argues that "recognition guaranteed to one national group should not be denied to smaller groups within,"¹⁸ and secession would force Quebec's own minorities of Anglophones, aboriginals and others to uproot their lives and decide whether they wish to belong to the new sovereign state of Quebec.

Aboriginals arguably have a role in Canada that is as distinct as that of Quebec: there is even an argument that aboriginals are one of three, instead of two, founding nations of Canada.¹⁹ Aboriginals with land claims in Quebec might believe that it is advantageous to leave Quebec and stay within the Canadian federation. In fact, a referendum of native people in Quebec showed that 97% refused to "be transferred along with their land from Canada into an independent Quebec."²⁰ Areas of Quebec, such as Montreal, also have a prominent Anglophone population. An example of how Anglophones might be disadvantaged in a homogeneous Quebec involves the French Language Charter, which requires that the French letters on store signs be twice as high as the English, and therefore upset merchants in predominantly Anglophone regions.²¹ Similar or more extreme measures might further alienate Anglophone or other minorities. The precedent that Quebec has set in disregarding minority interests is of concern. Since one constitutional responsibility of the federal state is to protect minorities, secession is unconstitutional because it would be a threat to minorities within Quebec. Therefore, Quebec's separation from Canada would lead to negative consequences for those groups that are not part of the Quebecois majority and whose interests are currently represented by the federal government.

Attempting to Solve the Quebec Question: Intergovernmental cooperation?

Quebec has survived two referendums without undergoing secession, however its demand for constitutional recognition has also shaped the past generation of politics. In 1982, Quebec was insulted that the Constitution Act was virtually silent on the issue of Quebec's distinctiveness. Furthermore, Quebec was incensed that the addition of the Charter of Rights and Freedoms and the new amending formula was done without obtaining the consent of the province of Quebec.²² Quebec essentially seeks constitutional recognition that would make it distinct from the other provinces but in the Constitution Act, Quebec is a province "like all others."²³ This demand for distinctiveness and special status in the constitution is both symbolic, reflecting a desire for recognition, and legislative, as some wish to expand Quebec's duties and provincial responsibilities beyond those delegated by the current constitution.²⁴ However, it is notable that in recent years Quebec's demands for more responsibilities have evolved into asking for more funding from the federal government to better apply its current constitutionally appointed powers.²⁵

Different federal governments have attempted to reconcile Quebec within the federal fabric; however, all such attempts have failed to reconcile Quebec and thus demonstrate that constitutional reform solely on the issue of Quebec is futile. Segal explains that Liberal governments have tended to develop "centralist solutions, such as national bilingual rules." Trudeau emphasized Canada's status as a bilingual nation and the equality of French and English outside the borders of Quebec.²⁶ Trudeau's goal was to ensure that Francophone Quebecers had opportunities beyond the boundaries of their province, and, accordingly, that Francophone Canadians across the country felt properly represented at the federal level of government.²⁷ However, this accommodation at the federal level was not enough for strong nationalists in Quebec.

¹⁷ Aronovitch, "Seceding the Canadian Way," 541-564.

¹⁸ Oliver, "Canada's Two Solitudes," 65-95.

¹⁹ Oliver, "Canada's Two Solitudes," 65-95

²⁰ Aronovitch, "Seceding the Canadian Way," 541-564.

²¹ Sameer, "Quebec's Lesson," 19.

²² Oliver, "Canada's Two Solitudes," 65-95

²³ Gibbons, "Constitutional Politics," 103-110.

²⁴ Smith, *Federalism*.

²⁵ Courchene, "The changing nature of Quebec-Canada relations."

²⁶ Oliver, "Canada's Two Solitudes," 65-95

²⁷ Ibid.

Trudeau's contemporary René Lévesque, founder of the PQ, focused on the state of French within Quebec instead of its status within the rest of Canada.²⁸ Lévesque's focus on French solely within Quebec demonstrates the PQ's lack of willingness to cooperate with the rest of the provinces, and an increased need for communication and collaboration with the rest of Canada. After the triumph of federalism in the 1995 failed Quebec referendum on seceding, the federal Liberal government rushed legislation through Parliament to recognize Quebec by "lending Parliament's veto to Quebec" so that Parliament couldn't pursue amendments without Quebec's support. However, the actual constitution was left unchanged, providing further ammunition for Quebec's insistence on constitutional reform.²⁹

In contrast to the Liberal governments' approach of attempting to bring Quebec closer to the rest of Canada by acknowledging the special status of French, Conservative governments have attempted to accommodate Quebec by changing the constitution.³⁰ Conservatives led by PM Brian Mulroney sought to renegotiate the constitution and decentralize the federation to aid Quebec in having a special status.³¹ The Meech Lake Accord of 1987 was seen as the "Quebec Round," of the constitutional debate, designed to formally address Quebec's concerns. Conditions concerning Quebec included: "constitutional recognition of Quebec as a distinct society, a greater role for Quebec in immigration, a provincial role in appointments to the Supreme Court of Canada, and the return of Quebec's traditional veto over constitutional amendments."³² The Accord was rejected by two provinces, and Quebec saw this as a further sign of Canada's rejection of Quebecois society's uniqueness.³³ One reason for non-Quebecers to reject the Accord was the idea that Quebec having a special status in a federation where all provinces were equal is in fact unconstitutional.³⁴

Another criticism of Meech Lake was that it did not address the needs of other groups or minorities in Canada. The subsequent Charlottetown Accord was the "Canada Round," to which the other provinces and other groups brought their demands. Charlottetown's agenda was therefore spread too thin, as everyone's needs were mentioned but nobody was entirely satisfied.³⁵ After the 1995 referendum, in which Quebec sovereignty was once again shut down, Quebec relaxed on the fight for a distinctive status via secession or constitutional reform. Nevertheless, Quebec nationhood is still essentially all about disallowing the federal government to "regulate, legislate, or dictate in areas of Quebec's constitutional jurisdiction," as was done in the 1982 Constitution Act.³⁶ Furthermore, significant differences between Quebec and the rest of Canada are still prevalent. A symbol of this divide and Quebec's disassociation with Canada was the absence of the Canadian flag at the Quebec National Assembly in September 2012.

It is mandatory that the issue of Quebec's distinctiveness is addressed in order to bring attention to other issues confronting Canadian federalism. However, this must be addressed not through threats of secession or constitutional change, but by negotiation between the Quebec government, the federal government, and the other provincial governments. "Referendum fatigue" reflects that Canadians are weary of the Quebec debate that has dominated Canadian discourse for decades. Gibbons explains how now that Quebec has calmed down, other issues have been added to the federal agenda such as prosperity in the West, under-representation of the Western provinces in Parliament, and the needs of aboriginal peoples -- previously these groups could only bring attention to their problems within the context of a crisis with Quebec.³⁷

Both secession attempts and constitutional change have been dangerous to the fabric of the country and thus unfeasible as solutions to the perceived problems. Therefore, intergovernmental

²⁸ Ibid.

²⁹ Gibbons, "Constitutional Politics," 103-110.

³⁰ Segal, "A Federalist Perspective," 461.

³¹ Oliver, "Canada's Two Solitudes," 65-95

³² Ibid.

³³ Ibid.

³⁴ Courchene, "The changing nature of Quebec-Canada relations."

³⁵ Oliver, "Canada's Two Solitudes," 65-95

³⁶ Courchene, "The changing nature of Quebec-Canada relations."

³⁷ Gibbons, "Constitutional Politics," 103-110.

relations, which are the negotiation between provinces and levels of government, are the best way to satisfy Quebec's demands for a distinct identity within Canadian federalism. The Calgary declaration involved the nine premiers outside of Quebec meeting to consider a non-constitutional recognition of Quebec as distinct within the provincial sphere, and this negotiation, though it does not entail changing the structure of Canada, is the most effective way to elicit change.³⁸ Courchene also argues that provinces have the ability to achieve the powers of a sovereign state and establish themselves on an international market within the context of the federation.³⁹ To preserve itself, Quebec needs to be satisfied to be a unique province within the Canadian federation. Its inclusive powers allow it to have a greater jurisdiction over its own people as well as a distinct identity within Canada. However, Quebec should be satisfied to negotiate the terms of its distinct status with the other governments.

Further evidence of steps taken to use intergovernmental relations instead of secession or constitutional reform to accommodate Quebec was the 2000 Clarity Act. The Clarity Act legislates that Quebec cannot unilaterally choose to separate from Canada. However, if a clear majority of Quebecois vote for secession, the rest of Canada is required to negotiate the terms of Quebec's sovereignty.⁴⁰ This legislation demonstrates a shift towards intergovernmental cooperation, and level of agreement within Canada which was not present in the Meech Lake or Charlottetown Accords. The implementation of the Council of the Federation, which Courchene describes as an "overarching institution embodying pan-Canadian values," is the coordination between the provincial governments to promote their interests and present a united front against the federal government. Quebec has been granted a special status in this union between provinces; for example, Quebec has the option to opt out of the Pharmacare Plan.⁴¹ This demonstrates the

other provincial governments' desire to work with Quebec and to recognize its distinct status as a historical founding nation and a culturally different province within the federation.

Conclusion

This paper has shown that the debates surrounding Quebec's status as a distinct nation have highlighted the importance of using intergovernmental relations instead of threats of secession and demands for constitutional reform to work within the federal system. It has been argued here that secession is not a valid goal for a variety of reasons -- it is not actually necessary for Quebec to achieve and maintain its language and culture, it contradicts the constitution, and it would threaten the welfare of minorities within Quebec. The era of executive federalism saw governments try to appease Quebec with attempts to manipulate the constitution to recognize Quebec's distinctiveness. This was addressed by attempting to integrate Quebec into a unified Canada, and alternatively creating Accords with the aim of modifying the constitution. Quebec's threats have been quelled for the time being, but divisions between French Canada and the rest of Canada continue. These failures are sufficient evidence in support of the view that the future course of action for resolving the divide between Quebec and the rest of Canada lies in intergovernmental relations and in the establishment of relationships that value accommodation and equality among the components of the federal system. As Quebec seeks to protect its status as "pas comme les autres," it will be able to negotiate its distinctness in conjunction with the rest of Canada.

³⁸ Gibbons, "Constitutional Politics," 103-110.

³⁹ Courchene, "The changing nature of Quebec-Canada relations."

⁴⁰ Ibid.

⁴¹ Ibid.

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Canada's Constitutional Monarchy

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Anytime a royal makes an appearance at an event, great public interest in royalty is generated, and with that the monarchy as an institution is brought to the attention of Canadians and the Commonwealth. There is a popular opinion that the monarchy no longer plays, and should no longer play, an important role in contemporary Canada, and with that a view that the monarchy is a useless appropriation of tradition, or even a harmful symbol of oppression, the latter view taken by Marc Chevrier who writes that "the Canadian *neomonarchy* feeds illusions of false grandeur that have no meaning in America and distract the people from thinking that they can be sovereign."¹ Others, however, see the monarchy as an important part of modern Canada, a "contemporary and relevant

Canadian institution."² Does the monarchy play an important, positive role in Canada today? Those who would answer "no" to its importance or its being positive have argued that we should abolish the Crown in Canada. However, by looking at the constitutional structures of Canadian institutions, the design of our federalist democracy, and aspects of the Canadian identity, I will show that the monarchy does play an important, and positive, role in contemporary Canada. Further, the criticisms of the monarchy would be better addressed through reform of the role of the Crown, in terms of preserving the important function the monarchy plays as well as being a much more accomplishable task.

One argument against the monarchy is that it is viewed as an archaic institution, and thus it should have no place in today's world, and especially not in a federalist democracy. This "medieval institution" encourages a concentration of power in the hands of one, the sovereign, and thus contradicts federalism,

¹ Marc Chevrier, "Our Republic in America," in *Vive Quebec! New Thinking and New Approaches to the Quebec Nation*, ed. Michel Venne and Louisa Blair (Toronto: James Lorimer & Co., 2001), 96.

² Kevin MacLeod, "A Crown of Maples: Constitutional Monarchy in Canada," *Department of Canadian Heritage*, 2008, 39.

as well as “confuses citizens about what their rights and duties are.”³ For Chevrier, the monarchy deprives citizens of their democratic honour; they are not actually citizens, but subjects with favours received “from a benevolent sovereign.”⁴ Our constitution is designed in such a way that all power is vested in the Crown by law.⁵ Regardless of the convention that the Crown must obey the elected officials, Chevrier still views this as undemocratic, and says Canada, or more specifically Quebec, should become a republic, a republic transcending the institutional order and being “a state of mind, a vision of politics.”⁶ Naturally, the republican sentiment is stronger in Quebec because the Crown is of British origin.⁷ But throughout Canada as well the Crown is seen as a foreign institution.⁸ Our official Head of State, the Queen of Canada, is British, not Canadian. In this light, the Crown can be seen as a symbol of colonialism: an echo of Canada’s colonial past and Britain’s imperialist one.

In 2002, the then Minister of External Affairs and Deputy Prime Minister John Manley proposed abolishing the monarchy, but support was not widespread.⁹ However, in 2005, fifty-five percent of Canadians favoured separation from the monarchy at the end of Queen

Elizabeth II’s reign.¹⁰ Indeed, the majority of Commonwealth nations are republics, “with their heads of state being chosen from among their own citizens.”¹¹ As the monarchy is viewed as outdated and colonial, many nations that have the Queen as their head of state are becoming increasingly republican, most notably in Australia, but even the U.K.¹²

However, turning Canada into a republic would likely be exceedingly difficult. First, our amendment formula makes it challenging to change anything regarding the constitution, and a transformation of such proportions of trading a constitutional monarchy for a republic would likely never be agreed upon.¹³ And regardless of whether it was agreed upon, the scale of the change itself would propose challenges. The Crown is so built into the federal and provincial government structures that it would be difficult to smoothly transition from constitutional monarchy to republicanism. Removing the monarch for an elected president alters “the whole constitutional apparatus.”¹⁴ Would it be a matter of name change only? Or would there be new elections, and a new electoral structure? Many other technical questions and issues arise, but a greatly significant one involves the agreements made between Canada’s Aboriginal peoples and the Crown.

Simply the extent to which the Crown is present in our constitutional structure shows that the monarchy still plays a relevant role in Canada. It is the basis for our constitutional and federalist governmental structure. “The Crown provides the legal foundation for the structure

³ Chevrier, “Our Republic in America,” 93.

⁴ Ibid., 96.

⁵ Patrick Malcolmson, Richard Myers, “The Crown and Its Servants,” in *The Canadian Regime*, 4th ed (University of Toronto Press, 2009).

⁶ Chevrier, “Our Republic in America,” 95.

⁷ Ibid., 92.

⁸ David E. Smith, “The Crown and the Constitution: Sustaining Democracy?” in *The Evolving Canadian Crown*, ed. D. Michael Jackson and Jennifer Smith (Kingston: Queen’s University School of Political Studies, 2012), 67.

⁹ Colin MacMillan Coates, “Introduction: Majesty in Canada,” in *Majesty in Canada: Essays on the Role of Royalty* (Toronto: Dundurn, 2006), 11.

¹⁰ Don Markwell and Jonathan Ritchies, “Australian and Commonwealth Republicanism,” *The Round Table* 95 (387): 2006, 733.

¹¹ Markwell and Ritchies, “Australian and Commonwealth Republicanism,” 728.

¹² Ibid.

¹³ Ibid., 733.

¹⁴ H. V. Hodson, “The Crown and Commonwealth,” *The Round Table*, 333 (1), 1995.

of government.”¹⁵ To begin with, the fundamental part of the Crown, or the Sovereign or the Queen, must be examined. Queen Elizabeth II is the Queen of Canada, “a role totally independent from that as Queen of the United Kingdom and the other Commonwealth Realms.”¹⁶ Thus, Canada is not ruled by a British Crown or a British monarchy, but a Crown and Sovereign of Canada. In fact, Canada was the first Commonwealth nation to proclaim Queen Elizabeth as Queen in 1952.¹⁷ The monarch is the embodiment of the constitutional concept of the Crown, the representative of constitutional power.¹⁸ The Crown is not simply an abstract form of power written in our constitution, but actually has a role as the source of power. Power is vested in the institution of the Crown, which is then “entrusted to governments to use on behalf of the people.”¹⁹ So, while Parliament has legislative power, royal assent is always needed. However, by convention, royal assent cannot be denied by the Crown.

It is in fact the Crown that holds all our conventions.²⁰ The parliamentary structure as it is cannot be found in the constitution. It is through our history with the Crown that our institutions came to be structured and organised as they are. Many of the conventions have to do with the relationships between the first ministers and their corresponding Crown representative. As Malcolmson and Myers have presented thoroughly, the Queen has a permanent representative in Canada. At the Federal level, this is the Governor General. The

Governor General represents our Head of State, and is the guardian of one of our most important conventions: responsible government. This means that the Governor General is “the official who ensures that we have a government that enjoys the confidence of the House.”²¹ It is up to the Governor General, then, to make sure our elected officials are doing what they should be doing. In order to do this, the Governor General has three reserve powers, Malcolmson and Myers continue to explain. A Governor General first has the power to appoint the Prime Minister. Despite our common way of talking about elections and politics, we do not directly elect a Prime Minister; rather, we elect a Parliament. And from this elected group, it is the responsibility of the Governor General to choose who is best to head the Parliament, normally (and conventionally) selecting the leader of the party with the majority of seats. The second reserve power is the “power to dismiss a prime minister who attempts to govern without the confidence of the House of Commons.”²² Though not used often, and never used federally, this power is especially important, because without it a Prime Minister could remain in office without resigning or calling for elections. Third, and related, Governor Generals can dissolve Parliament and call for elections.²³

Other responsibilities of the Governor General have to do with standing to represent the monarch in non-legislative roles. The Governor General is to preside over political ceremonies, represent Canada at events where official representation is necessary, and is the official head of the armed forces.²⁴ With our latest minority government, and prior to that during the Liberal majority government, we have seen increased publicity for the role of

¹⁵ Smith, “The Crown and the Constitution: Sustaining Democracy”, 63.

¹⁶ MacLeod, “A Crown of Maples: Constitutional Monarchy in Canada,” 10.

¹⁷ Peter Trepanier, “A Not Unwilling Subject: Canada and Her Queen,” in *Majesty in Canada: Essays on the Role of Royalty* ed. Colin M. Coates (Toronto ON: Dundurn, 2006), 142.

¹⁸ Hodson, “The Crown and Commonwealth.”

¹⁹ MacLeod, “A Crown of Maples: Constitutional Monarchy in Canada,” 16.

²⁰ Ibid. 19.

²¹ Malcolmson and Myers, “The Crown and Its Servants,” 101.

²² Malcolmson and Myers, “The Crown and Its Servants,” 101.

²³ Ibid.

²⁴ Ibid., 103.

Governor General, and the position seems to perhaps be moving into view as an efficient institution.²⁵ We have certainly been able to see recently the influence of the actions and power of the position of Governor General.

Quite importantly, the relationship between Canada and its Aboriginal peoples—the First Nations, Inuit, and Métis—is actually a relationship between Canada’s Crown and these peoples. The Crown originally and historically had a nation-to-nation relationship with Aboriginal peoples, and thus the agreements made were nation-to-nation agreements. The treaties (there are ninety-seven treaties and final agreements today) remain agreements held with the Canadian Crown.²⁶ This means that they are not signed with the federal Parliament, or the provincial legislatures, but directly with Canada’s source of power, the Crown. When Queen Elizabeth II presented a tablet from Balmoral Castle at the First Nations University of Canada in 2005, she said that the tablet represented “the foundation of the rights of First Nations peoples reflected in the treaties signed with the Crown...[and] will serve as a reminder of the special relationship between the Sovereign and all First Nations people.”²⁷ This presentation by the monarch demonstrates that it is with the Sovereign, the “concrete person” who acts with the power and the honour of the Crown, not simply an abstract concept, that the agreements are based upon.²⁸ Necessarily there must be a person who acts for the Crown, as these agreements are based on personal honour and promise, and more generally there needs to be a Crown, in order to uphold these covenants.

The Crown also has a strong role to play in Canada’s federalism. David E. Smith says that

while U.S. federalism is based on representation, Canadian federalism is based on jurisdiction.²⁹ In Canada, federalism is about dividing up power and authority amongst different levels of government, the provincial and federal governments, and though each presides over different aspects of society, they are to be seen as equals. This equality is clearly reflected through the Crown; the monarchy has a “vital provincial dimension.”³⁰ The provincial dimension is vital because the monarchy is represented at the federal level, and at the provincial. While federally we have a Governor General representing the Sovereign, each province has a Lieutenant Governor acting as a representative at the provincial level. It therefore can be said that Canada is a “compound monarchy,” composed of eleven Crowns.³¹ Each operates within their own jurisdiction, representing the Queen and performing the functions of the Queen as Head of State.³² Because Lieutenant Governors are also direct representatives of the Crown, they are not to be subordinated to the federal representative the Governor General. Each has the same relationship to the essential first minister of their jurisdiction, where they are to be consulted, to encourage, and to warn in their meetings with this minister; the Governor General to the Prime Minister, and the Lieutenant Governors to the Premiers.³³

The monarchy also plays a role in maintaining Canadian democracy. Our democracy is protected by the role of the

²⁵ Smith, “The Crown and the Constitution: Sustaining Democracy”, 62.

²⁶ Nathan Tidridge, *Canada’s Constitutional Monarchy*, (Toronto: Dundurn, 2011), 126.

²⁷ Tidridge, *Canada’s Constitutional Monarchy*, 128.

²⁸ *Ibid.*, 131.

²⁹ Smith, “The Crown and the Constitution: Sustaining Democracy”, 63.

³⁰ Jackson, D. Michael and Lynda M. Haverstock, “The Crown in the Provinces: Canada’s Compound Monarchy,” in *The Evolving Canadian Crown*, ed. D. Michael Jackson and Jennifer Smith (Kingston: Queen’s University School of Political Studies, 2012), 12.

³¹ *Ibid.*, 11.

³² MacLeod, “A Crown of Maples: Constitutional Monarchy in Canada,” 34.

³³ Jackson and Haverstock, “The Crown in the Provinces: Canada’s Compound Monarchy,” 18.

Crown, not the elected government; hence the three reserve powers of the Governor General.³⁴ However, it is not simply the powers of the Crown that serve democracy. The non-partisan nature of the position serves democracy in that theoretically the Sovereign's representatives should be less biased; they are not seen as having vested interests like elected representatives of the people who desire to be continuously elected.³⁵ The Governor General is usually accepted as being "above" politics, not involved in the debates and conflicts, and thus at a clearer and less biased vantage point. And unlike the Queen in England, the Canadian Governor General requires the approval of our elected representatives to act.³⁶

The monarchy has a major influence on Canadian identity. Of course, firstly, there is the historical relevance of the Crown—both the British and French Crowns have roots here. And as with many of the aspects of the Canadian identity, the monarchy allows us to distinguish ourselves from the Americans. This may have roots in the very creation of our country; it was conflicts between the Crown and the Americans that shaped our society, with both the loyalist migration into Canada and the effects of the War of 1812.³⁷ This distinction from the U.S. has been cited as a reason for low republican sentiment in Canada, because both Canada and Canadians have a need "to differentiate themselves" from the United States.³⁸ Dramatically put, Chevrier says that English Canada "goes into convulsions at the prospect of any modernizing of the political system that would make it more like the American republic," which expresses the extent to which some feel we need to clearly be

distinct from Americans.³⁹ The Crown institutions themselves also express Canadian identity. The appointed positions of Governor General and Lieutenant Governors "highlight not only our social and cultural richness, but also the uniqueness of the Canadian Crown."⁴⁰ Our Crown representatives have been fairly diverse in ethno-cultural, linguistic, gender, and occupational terms, especially when compared to our Prime Ministers. We see the diversity and uniqueness of Canadian society embodied in the Crown representatives. The Crown also functions to "serve and embody who we are as a people and a country by representing the values, goals, and aspirations that we share."⁴¹ It is the Crown's role to protect our democratic values in the system, but also the diversity seen in the position serves to fulfill Canadian political values such as bilingualism and multiculturalism. But the monarchy also serves a less political aspect of identity. The Queen (and the other members of the royal family) promotes aspects of Canadian culture and life. Her Majesty and the royal family are patrons of many Canadian organizations, from the Canadian Cancer Society, to Waterski and Wakeboard Canada, to the Regina Symphony Orchestra.⁴² Through these patronages, we can see the Crown supporting various aspects of Canadian culture and lifestyle. The royal tours focus on and highlight Canadian culture and achievements; they focus on showcasing Canada, and not simply the royal British visitors.⁴³ The tours also allow for "very personal contact with the people [the Crown] represents—all Canadians, regardless of language, race, colour, or religion."⁴⁴ Royalty transcends the political aspects here, and can

³⁴ MacLeod, "A Crown of Maples: Constitutional Monarchy in Canada," 25.

³⁵ Smith, "The Crown and the Constitution: Sustaining Democracy", 68.

³⁶ Ibid.

³⁷ Tidridge, *Canada's Constitutional Monarchy*, 141.

³⁸ Markwell and Ritchies, "Australian and Commonwealth Republicanism," 733.

³⁹ Chevrier, "Our Republic in America," 94.

⁴⁰ MacLeod, "A Crown of Maples: Constitutional Monarchy in Canada," 10.

⁴¹ MacLeod, "A Crown of Maples: Constitutional Monarchy in Canada," 51.

⁴² Tidridge, *Canada's Constitutional Monarchy*, 111-112.

⁴³ Ibid., 179.

⁴⁴ MacLeod, "A Crown of Maples: Constitutional Monarchy in Canada," 54.

simply be a reflection and a display of the cultural identity of Canada.

Despite this strong and relevant role, there are still of course issues with the monarchy. One such issue lies in that it could easily be said that having an appointed position as the embodiment of constitutional power is not democratic. Of course, most simply, having the representative of the Sovereign as an elected post would make the constitution look more democratic, because though the Governor General's role and position would remain the same, there would be citizen involvement. There are many aspects to be considered for a change to an elected sovereign, such as election methods, and whether the distribution of power would remain the same. But the idea for change in terms of an elected sovereign is not broadly discussed. Around this issue, several suggestions have been put forth in order to more democratise the position of Governor General. One is that the chamber, not only the Prime Minister, must request to prorogue Parliament, thus, while not changing the Crown directly, the Crown's executive power can be reduced, as it would be responding to more than one official.⁴⁵ Such a policy would be generally more democratic, but would not involve a change to what many see as the main issue: the power centred in an appointed position. Another suggestion is that the Governor General should provide written statements of their decisions and actions. This requirement would "force the governor to examine whether the reasons are appropriate for modern Canada."⁴⁶ It would also mean that the Governor General would have to be more accountable to citizens, providing for them justification for the actions taken on behalf of the Sovereign. Also, there is the idea which has been proposed in the U.K. of redefining the role

of the monarchy, reducing its extent. In the U.K. the redefining of the role of the monarch included altering the "Civil List," which details what is to be given to the monarch.⁴⁷ In Canada, it would more likely involve redefining what role we have set for the Crown, and perhaps give more of the Crown's power to elected officials.

Any smaller reforms such as these are much more likely to occur than abolishing the monarchy altogether, which would require vast changes and be difficult with our amendment formula. But at the same time, I believe, it almost seems as though any changes would simply be "on paper;" our government and constitution would appear theoretically more republican and democratic, but in reality it would function the same way. Our government has been functioning in this Crown centred manner for a very long time, and so it seems that any minor changes would be quite superficial. Even a major change, like becoming a republic, seems like it would only alter the surface of our constitution, and not really alter the way democracy is done in Canada.

The monarchy does play an important and positive role in that it structures our constitutional format, maintains our democracy and federalism, and exhibits the Canadian identity. While many claim that the monarchy is an outdated, colonial institution that should be rejected and replaced with republicanism, we can see that this would be exceedingly difficult to accomplish, with the drastic nature of the change, and the challenge of our amendment formula. What is more likely to happen are reforms addressing specific issues with the monarchy in Canada in order to make the position more democratic, but even so and regardless of the success or failure of these reforms, any change should not be expected to be too great.

⁴⁵ Smith, "The Crown and the Constitution: Sustaining Democracy", 59.

⁴⁶ Smith, "The Crown and the Constitution: Sustaining Democracy", 60.

⁴⁷ Hodson, "The Crown and Commonwealth."

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Compulsory Voting, Identity, and Nation Building- The Importance of the Compulsory Vote

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One hundred twenty five euros. This is the fine that Belgian citizens are liable for if they abstain from voting more than once in a national election.¹ Not surprisingly, voter turnout in Belgium is one of the highest in the world and amongst the top three in industrialized liberal democracies. Between 1978 and 1999, the average voter turnout for registered voters in Belgium was ninety-three percent and the average turnout for those of voting age was eighty-seven percent.² This marks a clear departure from regimes such as France, wherein the registered voter turnout for the legislative elections during the same period was seventy-one percent.³ Though one may note that the

turnouts for registered voters in France and Belgium are within fourteen percentage points of one another, the unfortunate reality that the majority of those fourteen percentage points represent the lower socio-economic demographic inspires concern.⁴ Moving to the supranational level of the European Parliament, voter turnout is even lower. The most recent election (in 2009) motivated forty-three percent of voters to visit the polls.⁵ When the influence that these elected institutions have on public policy is considered, this number is troubling. If one were to evaluate how public policy decisions affect identity and nationalism, there is even more reason to be concerned. Thus, not surprisingly, there are a number of proposed methods, discussed by scholars and politicians alike, as to how to increase voter turnout.

¹ United Kingdom, Parliament, "The Electoral Commission," *Compulsory voting around the world Research report*, 2006.

² Jonathon Louth and Lisa Hill, "Compulsory Voting in Australia: Turnout with and without it," *Australian Review of Public Affairs* 6, no. 1 (2005): 32.

³ International Institute for Democracy and Electoral Assistance, "Voter Turnout Data for France (Parliamentary, Presidential, EU Parliament),"

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⁴ Louth and Hill, "Compulsory Voting in Australia: Turnout with and without it," 26-27.

⁵ European Commission, "Voter Turnout in National and EU Parliamentary Elections," Eurostat. http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=TSDGO310 (accessed 8 November 2012)

With Europe's history of government restriction of electoral lists, compulsory voting is not only socially responsible, but would greatly reduce the democratic deficit and prevent governments from limiting certain duties, rights and freedoms of citizenship. Where the current situation in European nations has mainly intellectuals and those of greater socio-economic standing supportive of the EU, compulsory voting at the Union level would also help to foster a sense of identity and potentially bring together individuals across all socio-economic backgrounds.⁶

This paper will address the complex relationship between voting, policy formation, identity formation, and nationalistic tendencies, allowing a subsequent prediction of how an ideal European Union might operate if compulsory voting was implemented at the national and supranational levels. This will be done first by breaking down the reasons (and misconceptions) behind identity formation and nation building, and then by describing the closed feedback loop that exists between voting and nationalism. Next, this paper will analyze the benefits of compulsory voting in the member states via a case study of France. Finally, this paper will speculate about how Europe might look if compulsory voting was implemented for the European Parliament, and the possible benefits that this offers not just to the Union's majority groups, but also to cross-border minority nations such as the Romani people.

Because this paper's analysis rests on a certain conception of the term *nation*, a brief overview of the term is essential. Several scholars have discussed nationalism and perhaps the most widely held description of a nation is Benedict Anderson's idea of nations as imagined

communities.⁷ Beyond the idea of nations as imagined communities, one major distinction between types of nations that is frequently discussed is Michael Ignatieff's (1994) differentiation between civic and ethnic nationalism. Ignatieff argues that civic nationalism is based upon citizenship. In other words, one describes her nationality based on which citizenship she holds and thus references the common protections and rights, and a shared set of political practices that exist amongst those who share that citizenship. This definition has its roots in the idea of the civic nation-state, where a nation is distinct from other nations because it has unique rights of self-government. Ethnic nationalism, on the other hand, is based on ethnicity, which consists of a shared set of one or more characteristics (for example, language, culture, ancestry, history, or religion). In this case, citizenship may or may not represent nationality as political rights do not define a nation. One thing that is common to both definitions, however, is loyalty and a sense of belonging to a set of common experiences (whether those experiences are of a set of institutions, or a shared history, language, and culture).

When looking at these distinctions in the context of the European Union, civic nationalism is not representative of reality, as this would mean that the EU is already a nation. Citizens have shared political rights, a shared set of institutions, and they have "European Union" printed above the member state designation on their passports. This, however, does not mean that they see themselves as part of an overarching nation. Common experiences of religion, history, and culture continue to limit a European's allegiance to that of her home country.

Even if one disagrees that the EU currently has enough shared civic institutions to define itself as a nation, Ignatieff's two kinds of nationalism (civic and ethnic) continues to

⁶ Jean-Yves Dormagen and Daniel Mouchard, *Introduction à la sociologie politique*, (Brussels: De Boeck Supérieur, 2008).

⁷ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (New York: Verso, 2006).

present a barrier to positive European integration. This happens because one is faced with a dilemma. From a purely ethnic nationalist perspective, Europe consists of several nations that should cleave to their own independent nation-states. From a civic nationalist perspective, the current situation in Europe is unfavourable when one considers how successful civic nations (such as Canada or the United States) came into being. On the one hand, an evaluation of Canadian history reveals that citizens originally approached nationalism from an ethnic perspective but were forced into a union by an imperial power. The creation of the United States, on the other hand, reveals that union occurred due to the external threat of being conquered. In neither situation did union occur by citizens voluntarily placing their trust in shared institutions. Though European integration began with the European Coal and Steel Community, due to the need for a strong Europe to stand against the threat of Soviet expansionism, it is difficult to provide a convincing argument that Europe must further integrate in order to ensure its survival. Thus, continued integration, where a central government obtains more power, is only possible if citizens see themselves as part of a larger entity and trust fellow constituents of this entity. Since democratic change occurs through the will of the people, nation-building must begin with citizen participation in a shared experience. Compulsory voting could assist citizens in realizing this reality through greater and more equal participation in the Union.

There are an infinite number of ways in which individuals may have common experiences, and each common experience may influence individuals to different degrees. In industrialized liberal democracies (such as those found in Europe today), state institutions are the primary means through which citizens share common experiences. Take, for example, a commune in France. With the exception of the relatively small number of personal relationships that individuals have with one another, residents are connected to their fellow citizens via their

employment, media sources, laws and regulations, and public policy initiatives. All citizens are subject to laws as well as influenced by regulations enacted by the state and evidence shows that nearly half of individuals are either directly or indirectly influenced by the state.⁸ In this case, even the most basic interactions with one's employer are influenced by government policy. The fact that every citizen has a relationship with the government, and that most actions taken by the government affect more than one individual, demonstrate the daily, common, state-mediated experiences of citizens. In liberal democratic regimes, these policy initiatives begin and end with the elected bodies that citizens influence through voting. Thus, nation-building occurs because individuals are subject to common experience. If certain residents are excluded from the franchise, public policy (as a common experience that everyone in society faces) is less representative of the general population. It is therefore necessary to have universal suffrage and for elected persons to represent all demographics as equally as possible.

In researching regimes that changed from compulsory to voluntary voting, Jonathan Louth and Lisa Hill (2005) found that "an immediate consequence was an increased variation between subgroups."⁹ Though compulsory voting is not the only means to ensure equal representation from all demographics or subgroups, it is certainly a "more than satisfactory solution to the problem of low and socially unequal turnout."¹⁰ Traditional tensions of ethnic nationalism in France have resulted in large sub-groups tending not to have citizenship or in them residing in the lowest socio-economic status. The fact that they are not enfranchised and that they are not required to vote (and tend not to vote in the

⁸ Rand Dyck, *Canadian Politics: Critical Approaches*, (Toronto: Nelson Education Ltd, 2011), 257.

⁹ Louth and Hill, "Compulsory Voting in Australia: Turnout with and without it," 27.

¹⁰ Ibid.

same numbers as the rest of the population) means that their voices are less likely to be considered in public policy initiatives. This has an effect on common experiences and, accordingly, in the development of national identities. Whether it be national policies on health or immigration, or approaches to substance abuse, policy making will always have an effect on the population subject to the laws, rules and regulations of the state. Take, for instance, the recent controversy in Paris over access to public transit. Due to the high number of crimes committed against travellers going to the airport, elected officials are currently discussing the introduction of express trains that would bypass the less wealthy communities in which these crimes occurred. Though these changes are being debated, imagine that the national government decides to follow through on this proposal. The result would surely not only influence individual common experience, but also effect the actions of individuals throughout the area. Those who live in these suburbs are already marginalized economically, socially, and culturally and would only feel more so while those that ride the train to the airport would be less exposed to the problems experienced in this geographic area. Shared experiences between the two sub-groups are reduced but since government institutions continue to be shared between the two groups, interactions between the two groups would still be necessary. Two outcomes from this transit decision are possible, though neither is ideal. This choice, by French officials, could encourage a nation to become more divided or, worse, it could encourage citizens to feel that they are not even part of the French nation but instead belong to the nation of their home country or a new “immigrant nation” within France. The far-right *Front National* is a prime example of a group campaigning for the latter, promoting the exclusion of individuals in France that are not part of the perceived *French nation*.

How would this situation look if compulsory voting was implemented for legislative and presidential elections in France? If

it were implemented as well as in Australia, it would ensure such a high turnout rate that any study or examination of voting levels between different demographics would be “virtually irrelevant.”¹¹ Compulsory voting would ensure that elected politicians, who direct policy formation, are chosen by the entire population. Whether or not it would change the direction of policy is uncertain, but an evaluation of recent elections in France shows that there is a significant impact on *who* is elected to office. Consider the presidential election in May of 2007. The second round of voting was a run-off between Nicolas Sarkozy of the centre-right *Union pour un Mouvement Populaire* (UMP) and the *Parti Socialiste* (PS) Ségolène Royal. Sarkozy won by less than six percentage points.¹² The fact that most of those who did not vote were in the lower socio-economic demographic, along with the realities of the two round-system (where Sarkozy made efforts to attract the conservative anti-immigrant vote) may lead one to suggest that the marginalized sub-groups would have voted overwhelmingly for the more socialist party. If this had been the case, public reactions would have been significantly different. Media would have responded differently to the election, likely influencing citizens to vote differently in the legislative elections that followed only one month later. Public policy would have been different, and thus common experiences would have also been different. Though speculation about whether this would have had a positive impact in uniting France under one nation is not directly relevant, one thing remains certain: all demographics would have had a fair and equal opportunity to influence public policy, which in turn would have impacted the common experiences that would

¹¹ Louth and Hill, “Compulsory Voting in Australia: Turnout with and without it,” 27.

¹² Ministère de L’Intérieur, “Résultats de l’élection présidentielle 2007.” http://www.interieur.gouv.fr/Elections/Les-resultats/Presidentielles/elecresult__presidentielle_2007/%28path%29/presidentielle_2007/FE.html (accessed 14 November 2012)

have influenced nation-building and identity politics in the country. Compulsory voting would reduce not only the democratic deficit, but also the imbalance that is currently present in nation-building and identity formation within the state.

Though compulsory voting appears to be an attractive option given its ability to ensure better representation of the people in elected bodies, critics may direct one's attention to the fact that in 1970 the Dutch parliament voted with a large margin (91-15) to repeal its compulsory voting requirement.¹³ This raises questions as to the effectiveness of compulsory voting for the European Parliament or EU member-states. Further research into the Netherlands' subsequent elections, however, reveals that a "drop in turnout followed immediately."¹⁴ While voter turnout between 1946 and 1967 stood at nearly ninety percent, the Netherlands' four national elections between 1994 and 2003 revealed a turnout of seventy-eight percent.¹⁵ Such decreases in participation cannot be ignored when one considers that they were accompanied by increased variation between national subgroups. The introduction of nationalist parties onto the political scene, such as Geert Wilders' *Partij voor de Vrijheid* (Party for Freedom), has only served to further marginalize these subgroups via populist rhetoric calling for a Netherlands that is based on ethnic citizenship. Without the requirement to vote, this increase in a serious democratic deficit has likely resulted in large distortions between policymaking and the authentic will of the people, leading to the magnification of ethnic, religious, and economic divisions within Dutch society.

On the supranational level, one group that is marginalized across the entire EU is the Romani people. Without their own nation-state, the Roma constitute a minority in every country in which they reside. Unique cultural practices

and values have resulted in discrimination and exclusion for generations.¹⁶ Since they are spread across several states, the only unifying entity to which a majority of European Roma belong is the central institutions of the EU. In the most recent elections to the European Parliament, however, voter turnout was a shocking forty-three percent. With the European Parliament being the EU's only directly elected institution, such low voter turnout is alarming when one considers that one-hundred percent of Europe's population is subject to the choices made by these institutions. Such low levels of participation not only hinder the development of an overarching European *nation* (that requires mutual trust between its citizens), but they also severely undermine the one set of institutions that unite nations who stretch across member-state borders such as the Roma. Compulsory voting could greatly reduce the democratic deficit and enhance the legitimacy of the EU for different subgroups. Additionally, compulsory voting could also encourage individuals from different member-states to join together in exercising their democratic right to select parties that represent pan-European interests. Such participation could not only encourage mutual trust, but would also provide a mechanism of exclusion through which citizens of the EU can share in an activity that non-European citizens could not.

It is essential to recognize that if compulsory voting were implemented at both the national and EU levels, citizens may choose to vote *against* further European integration. Though this would certainly not be conducive to developing a European identity, nation-building and identity formation must nevertheless begin with the people and proceed through democratic pathways. If it is the will of the people not to form a European identity, compulsory voting

¹³ Louth and Hill, "Compulsory Voting in Australia: Turnout with and without it," 27.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ National Demographic Institute, "Roma Political Participation Initiative," *National Demographic Institute*, accessed 10 November, 2012, <http://www.ndi.org/roma-political-participation-initiative>.

would ensure that this desire is recognized. One may also argue that the ability to consult every citizen, including those of marginalized groups would enhance stability, whereas a European identity built on the will of the elite would be fundamentally unstable.

all members of a state have their voice heard in nation-building and identity formation efforts.

Coined by Ignatieff in 1994, scholars tend to differentiate between ethnic and civic nationalism. While ethnic nationalism focuses on a common history, culture, language, and religion; civic nationalism focuses on a common set of values, institutions, and rights. One significant element of both definitions, however, is the word *common*. This paper has argued that nations are formed due to common experience, whether that be gained through a common governmental institution that develops policy, or a common educational curriculum explaining history. Since nations are imagined communities, the most powerful force in uniting people are government institutions and their public policy initiatives. In industrialized liberal democracies such as those of the European Union, these institutions are elected by the general population. Unfortunately, without compulsory voting, turnout amongst certain socio-economic and ethno-cultural groups is significantly lower than others. This results in elected institutions and public policy initiatives that are not representative of the whole of the population. Since these policies and institutions play such a large role in nation-building and identity formation, certain groups are excluded from the process and, by definition, the outcome. In France, this has resulted in further marginalization of already marginalized groups, which assists in legitimizing divisive policies propagated by the far-right *Front National*. With regards to the European Parliament, poor electoral turnout has resulted in a disconnect with the overarching union and has undermined the only set of institutions that unites trans-border nations such as the Romani people. Though compulsory voting is not the only means of reducing the deficits in justice and democracy, it could be a major step forward in ensuring that

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So Near Yet So Far: The Extent of Aboriginal Inclusion in Canada

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1. Introduction

The Truth and Reconciliation Commission of Canada (TRC) visited Halifax October 2011 to recount the atrocities which occurred in residential schools in Canada. For over one hundred years Aboriginal children attended these government-funded schools aimed at extinguishing the culture, spirituality, and knowledge of Aboriginal Peoples.¹ Although extreme, the example of residential schooling demonstrates that Aboriginals were considered outsiders in Canada. While the schools themselves no longer exist, the debate about Aboriginals and the extent to which they are outsiders in the Canadian federal system persists. Political scientist Jennifer Smith (2004) contributes to this debate by describing who is 'in' and 'out' in terms of Canadian federalism.

Historical examples demonstrate that Aboriginals have succeeded in gaining more autonomy and self-determination over time. However, certain elements of Canadian federalism act as deterrents to full inclusiveness. While this question of inclusion raises countless issues surrounding the Aboriginal experience in Canada, this essay will focus on the following three key points relating to the inclusiveness of Canadian federalism. First, history shows that Aboriginals are *on their way* 'in'. This argument is supported by examples of Aboriginal title and Aboriginal self-determination being reclaimed over time. Second, the structure of Canadian federalism, if remained unchanged, will not allow for Aboriginals to be *completely* 'in'. In particular two key deterrents of Aboriginal inclusion will be discussed: territoriality and executive federalism. And finally, potential ways forward for Aboriginals will be considered, looking specifically at the merits of different self-government models.

2. On the Way 'In': The Evolution of Aboriginal Inclusion in Canada

2.1 Aboriginal Title

¹ Truth and Reconciliation Commission of Canada, *Residential Schools*, 2011. Retrieved from <http://www.trc.ca/websites/trcinstitution/index.php?p=12>

'Netukulimk' is a Mi'kmaq term meaning 'stewardship of the land.'² Originating from the Mi'kmaq concept of Natural Law, wherein land and its resources are gifts from the Great Spirit, netukulimk signifies that land is communally owned and must be protected for the next generation's use.³ The land has always been an integral part of Aboriginal culture and spirituality, and so it is not surprising that land claims have become a central theme in the dialogue between the governments of Canada and Aboriginal Peoples. In terms of inclusiveness, the history of land claims in Canada shows us how far Aboriginals have come in regaining netukulimk, or 'stewardship' of their lands.

Only a little more than a century ago, the 1867 Indian Act gave the federal government exclusive authority to legislate in relation to "Indians and Lands Reserved for Indians". In 1911, Frank Oliver, then serving as Superintendent-General of Indian Affairs, amended the Indian Act to allow municipal governments to expropriate reserve lands for public works, and allow for a judge to move a reserve away from a municipality.⁴ While these examples show the inequalities faced by Aboriginals at this time, they also show how rapidly this imbalance has shifted over a single century. This shift was largely due to land claims. The 1997 case of *Delgamuukw* versus British Columbia exemplifies the use of land claims to further Aboriginal inclusion. This case, involving the Wet'suwet'en nation claiming aboriginal title over 58 000 square kilometres of land in BC, went all the way to the Supreme Court. The Court found that under Section 35(1) of the Constitution Act rights to aboriginal title are protected by law, issuing the following statement: "Aboriginal title is a collective right by an Aboriginal group to the exclusive use and occupation of land for a variety of purposes,

which need not be activities that the group has traditionally carried out on the land."⁵ This was a ground-breaking ruling because not only did the court officially recognize aboriginal title under the Constitution, but stated that it can be used for modern purposes and not simply traditional activities. Of course there are many other modern examples of land claims. The Yukon Territory for example finalized The Umbrella Final Agreement (UFA) in 1990 to return some 16 000 square miles of surface land to the fourteen nations in the Yukon Territory.

While the Oliver amendments demonstrate the lack of Aboriginal autonomy over lands only one hundred years ago, modern examples like the Yukon UFA and the *Degamaukw* case show how land claims have been a way 'in' for Aboriginals in Canada, and continue to be today. Aboriginals have always thought of the land as an extension of their culture, and therefore have always considered themselves as stewards of it in some respect. As Jennifer Smith says, "the notion of sovereignty past, present and future is [the Aboriginal's] political anchor, and a particularly weighty one when combined with land."⁶ But when it comes to federalism, the legal and political realms of Canada must also observe the rights to Aboriginal title if meaningful change is to occur.

2.2 Aboriginal Rights

In the 1969 White Paper on Indian Policy Pierre Trudeau argued that Aboriginals should not be afforded group-specific rights that separated them from the rest of Canada.⁷ The Paper is a clear representation of Trudeau's vision for a Pan-Canadian nationalism which would supersede all ethnic distinction. Indeed, one could argue that section 15(1) of the

² Suzanne Berneshawi, "Resource Management and the Mi'kmaq Nation," *The Canadian Journal of Native Studies* XVII, no. 1 (1997): 119.

³ *Ibid.*, 120.

⁴ *Indian Act*, 1911.

⁵ S.C.R. 1997, 1010.

⁶ Jennifer Smith, *Federalism*, (Vancouver: UBC Press, 2004), 67.

⁷ Robert Murray, "Liberalism, Culture, Aboriginal Rights: In Defence of Kymlicka," *Canadian Journal of Philosophy* 29 (1999): 109.

Constitution Act (1982) contradicts any kind of asymmetrical federalism by saying that every individual “has the right to the equal protection and equal benefit of the law without discrimination.” However political philosopher Will Kymlicka argues that without group-specific rights Aboriginals would not be equal under the law. He argues that unlike the majority, they need special laws to preserve their culture.⁸ This debate between Pan-Canadian symmetry and multinational asymmetry raises the obvious question of how Aboriginal rights have evolved over time. And when considering the ways in which Aboriginals are on their way ‘in’ in terms of self-determination, this question is paramount.

Aboriginal rights, just like aboriginal title, have evolved drastically over a relatively short period of time. After all, it was not until 1985 that Bill C-31 “An Act to Amend the Indian Act” allowed for bands to determine membership based on their own rules instead of those dictated by the Indian Act. The Constitution Act of 1982 is perhaps the climax of Aboriginal inclusion in Canada— at least on paper. Section 25 of the Charter of Rights and Freedoms (1982) and section 35 of the Constitution (1982) show how Aboriginal rights have been entrenched in Canada’s federal framework. For example, the Charter states that it will not derogate from “any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada,”⁹ while the Constitution notes that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”¹⁰ In this way Kymlicka’s assertion that in order to be included Aboriginals must receive special recognition is cemented in the Canadian Constitution, suggesting that in a formal legal sense Aboriginals are on their way ‘in’. However, as Jennifer Smith explains, while Aboriginals are recognized constitutionally through the Charter

and legally through Supreme Court rulings, the practical application of these rights is not as clear-cut. Indeed, there are many roadblocks to inclusiveness in the Canadian federal system which act as deterrents to Aboriginals being completely ‘in’.

3. Roadblocks to Inclusiveness: Deterrents in the Federal Framework

3.1 Territoriality

Political scholar Donald Smiley describes the federal condition of Canada as a system where “major axes of social and political differentiation follow territorial lines.”¹¹ Simply put, Canada is essentially a territorial federation. Indeed, most federations follow this construction, and this is not by accident. In the realist perspective federations evolved to allow countries to expand their territory beyond the feasible control of a single central government. The previous section discussed the ways in which Aboriginals have become more included in the federal framework over time. While the progress made in terms of Aboriginal inclusion is clear, this process has been largely territorial in nature. That is, the majority of the concessions won have predominantly benefited territorially-based Aboriginals. The territoriality of the Canadian federal system deters the inclusion of non-territorially-based Aboriginals, thereby thwarting their capacity to be fully included in the Canadian federal structure.

An example of a non-territorial group is Aboriginal women. Joyce Green suggests that Aboriginal women are actually canaries in the mines of Canadian citizenship: indicators for the condition of citizenship itself. In reference to Bill C-31, which gave band membership determination over to the bands themselves, Green argues that “where prior to 1985 the federal government implemented sexist, racist legislation”, and after the Bill the bands themselves had adopted equally “sexist

⁸ Will Kymlicka, *Liberalism, Community and Culture*, (Oxford: Oxford University Press, 1989), 191.

⁹ Canadian Constitution Act, Section 25, 1982.

¹⁰ Canadian Constitution Act, Section 35, 1982.

¹¹ Donald Smiley, “Federal-Provincial Conflict in Canada,” *Publius* 4 (1974): 7.

membership codes.”¹² For example, in 1995 the Canadian Human Rights Commission had to step in and order the Montagnais Nation Council to pay damages to four women who had been discriminated against under Bill C-31.¹³ The Quebec band had placed a moratorium on giving Aboriginal women status under the Bill because they had not yet constructed their own formula for awarding band membership.¹⁴ The Native Women’s Association of Canada’s (NWAC) report on the Bill found that “although blatant discrimination against Indian women had been removed from the Act, the effects of that discrimination persisted, as new areas of inequality arose.”¹⁵

Cheryl Maloney, President of the Nova Scotia branch of the NWAC, says that as an Aboriginal woman in Canada she feels that inclusiveness is impossible in the current federal environment.¹⁶ When asked whether Aboriginals in general are on their way ‘in’ Maloney says the band system involving the Indian Act and reserve lands is a backwards system that holds back change. According to her, reservations are but arbitrary boundaries drawn by the government that in no way define the Aboriginals around which they are drawn. The Aboriginal identity lies in ‘nationhood’, says Maloney, and has since time immemorial. Will Kymlicka describes this point of view perfectly, stating “if decisions about boundaries and powers are not made with the intention of empowering national minorities, then federalism may well worsen the position of national minorities.”¹⁷ Nationhood goes beyond borders, and beyond generations. To divide this

by territories based on an outdated reserve system ultimately excludes many Aboriginals.

Of course Aboriginal women are not the only group being excluded on the basis of territoriality. Urban-dwelling Aboriginals who have no ties to reserves are also excluded. According to the 2001 census approximately “seven out of 10 Aboriginal people live off a reserve while another third of those live in large cities.”¹⁸ While it is true that their rights and freedoms are protected under the Charter, the fact remains that their only other mode of inclusion would seem to be participation in one of the two levels of government. And as Jennifer Smith explains, “since Confederation less than a dozen Aboriginals have been elected to the House of Commons” and even fewer to the Senate.¹⁹ As we can see, the examples of both Aboriginal women and non-status Aboriginals demonstrate how the territoriality of Canada as a federation acts as a deterrent to complete Aboriginal inclusion in the system.

3.2 Executive Federalism

According to Donald Smiley executive federalism is “the relations between elected and appointed officials of the two levels of government.”²⁰ While executive federalism does allow for greater federal-provincial and inter-provincial cooperation, the fact remains that it has resulted in a clear democratic deficit in Canada and, consequently, a clear deterrent to Aboriginal inclusion. It is true that Aboriginals have gained more autonomy over the past century, but they are still excluded by the intergovernmental summitry occurring through the use of executive federalism. Consider the

¹² Joyce Green, “Canaries in the Mines of Citizenship: Indian Women in Canada,” *Canadian Journal of Political Science* 34, no. 4 (2001): 717.

¹³ Margot Young, *Poverty: Rights, Social Citizenship, and Legal Activism*, (Vancouver: UBC Press, 2007), 115.

¹⁴ Ibid.

¹⁵ Native Women’s Association of Canada, *Bill C-31 Amendment Literature Review*, (2001), 7.

¹⁶ Cheryl Maloney, “Interview on the Topic of Aboriginal Women’s Inclusion in Canadian Federalism,” Personal Communication, 13 Nov 2011.

¹⁷ Kymlicka, *Liberalism, Community and Culture*, 138.

¹⁸ Statistics Canada, “Aboriginal Peoples of Canada, Highlight Tables, 2001 Census,” Cat. No. 97F0024XIE2001007, 2001. Retrieved from <http://www12.statcan.ca/english/census01/Products/standard/themes/DataProducts.cfm?S=1&T=45&ALEVEL=2&FREE=0>.

¹⁹ Jennifer Smith, *Federalism*, 85.

²⁰ Ibid., 98.

Meech Lake negotiations of 1987 which were criticized for failing to include Aboriginal voices, or the creation of the Social Union Framework Agreement (SUFA), where Aboriginal positions were largely ignored.²¹ But one of the clearest examples of the exclusion of Aboriginals is the creation of a Council of the Federation in 2003. Composed of the 13 premiers of the provinces and territories, the council was developed as “a new institution for a new era in collaborative intergovernmental relations” that would “foster meaningful relationships between governments.”²² While the Council aims to show initiative on issues that are important to ‘all Canadians’, there is no mention of Aboriginal governments specifically. Abele and Prince discuss this failing, stating that the Council uses federalism to make Aboriginals seem like mock-municipalities instead of fostering a nation-to-nation relationship.²³

However arguments have been made that existing structures can be modified to include Aboriginals in executive federalism. For example Abele and Prince suggest that the Council of the Federation should meet with peak Aboriginal Organizations of Canada, including groups like the NWAC and the Assembly of First Nations (AFN) to voice Aboriginal concerns. Cheryl Maloney however cautions against this. While these organizations allow Aboriginal voices to be heard, Maloney says there is a danger in treating representatives from these peak organizations as the elected representatives of Aboriginal Peoples instead of the elected officials of the nations, who are the rightful representatives of Aboriginals in Canada.²⁴ As we can see there are as many ways forward as there are drawbacks to Aboriginal inclusion. This next

section will look at the merits, and cautions, of self-government as a way forward.

4. The Way Forward: Devolution and the Merits of Self-Government

4.1 The Nisga’a Model

In 2000, the Final Agreement of the Nisga’a People of the Nass Valley, BC went into effect. The Agreement allows the Nisga’a to become a self-governing nation, and was ground-breaking in terms of Aboriginal history because its laws have supremacy over federal and provincial law in specific areas. While the Nisga’a government’s lawmaking powers still remain “concurrent with federal or provincial authority” they hold supremacy over eight zones of governance, including major areas such as lands and resources, health care, and social services.²⁵ Nisga’a demonstrates how devolution, and self-government specifically, can bring Aboriginals within the fold of federalism. However this model gives a specific group of Canadians superiority over others, and thus could be interpreted as unconstitutional or asymmetrical according to the Canadian Charter of Rights and Freedoms and the equality it defends.

4.2 The Public Government Model

The territory of Nunavut was created in 1999 to settle self-government claims by the Innu people of the North. This model involves the creation of a territory in which the public can participate and elect representatives, including a premier, who will act as the voice of Nunavut in the Council of Federations and other such organizations. While the model of public government does allow for a more formal engagement with the federal system than the Nisga’a model, there are some concerns that because it is territorially-based it ignores the need for non-territorial Aboriginal groups, including women’s groups and urban-dwelling

²¹ F Abele and M Prince, “Constructive and Co-operative Federalism,” *IJGR*, (Queen’s University 11, 2003), 5.

²² *Ibid.*

²³ *Ibid.*

²⁴ Maloney, “Interview on the Topic of Aboriginal Women’s Inclusion in Canadian Federalism.”

²⁵ *NLG*, 2.

Aboriginals, to be represented. To address this concern some countries have devolved power to an entire third level of government devoted to cultural affairs. Belgium, which has three distinct identity groups, uses this sort of governance scheme. However, this model may not be transferable to Canada given that there are hundreds of communities of Aboriginal People. There are also models of urban self-government being researched to address the under-representation of urban-dwelling Aboriginal groups. For example, Dunn suggests treating urban Aboriginals as a community of interest whose territory would be cultural rather than geographical, and whose jurisdiction would be defined accordingly.²⁶

Whichever model you look at, it is important to note that self-government strategies do provide a useful way forward in terms of the inclusion of Aboriginals in the federal system. However they must come from the people themselves, or else run the risk of being yet another form of colonization.

5. Conclusion

“...there will be a day where Native people will get recognition, wherever they go, in all walks of life...because we will be educated enough and knowledgeable enough to know better.”²⁷ Marie Knockwood was one of the many Aboriginals who gave speeches at the Truth and Reconciliation Commission in Halifax. Her words suggest that there is hope for Aboriginals to be included, but that it will come from the ground up, beginning with education. Cheryl Maloney suggested something similar,

saying that Aboriginals will always have an idea that they are sovereign peoples, and that there is “an invisible line that connects a nation through time...through oral histories recounted by older generations...”²⁸ This essay discusses how Aboriginals are on their way in, but also considers clear deterrents in the federal framework that stop certain groups from being included. Finally ways forward were discussed, focusing on certain models for self-government. Of course due to the limited scope of this essay, more research exists on other ways forward that could not be included. Overall, Jennifer Smith is correct in saying that Aboriginals are on their way in. This is clear when we look the historical record of Aboriginal rights in Canada. But we are nowhere near close to achieving total inclusiveness for Aboriginals, especially for those who are not territorially-based. Nevertheless, both Maloney and Knockwood remain hopeful that there will come a day when Aboriginals will be fully included in Canada. What remains to be seen however is how Canadian federalism will need to adapt in order for Aboriginal inclusiveness to be fully realized.

²⁶ M Dunn, “Access to Survival: A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada,” *NCC Constitutional Secretariat*, Position Paper, *Institute of Intergovernmental Relations* (Kingston: Queen's University, 1986).

²⁷ Marie Knockwood, Live Stream Speech, *Truth and Reconciliation Commission*, (Halifax, 2011).

²⁸ Maloney, “Interview on the Topic of Aboriginal Women’s Inclusion in Canadian Federalism.”

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A Gay Federation: The Effects of Federalism on the Lesbian and Gay Movement in Canada

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Alan Cairns argues that “federalism is not enough” to deal with non-territorial minorities.¹ This certainly seems to have been the case with the Canadian LGBT (lesbian, gay, bisexual, and transgender)² movement. In some ways,

¹ Alan Cairns, “Constitutional Government and the Two Faces of Ethnicity: Federalism is Not Enough” in *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*. ed. Karen Knop (Vancouver: UBC Press, 1995) p. 27 Note that Cairns is specifically discussing ethnicity, but the lessons can be applied to the lesbian and gay movement as well.

² This essay will focus on lesbian and gay rights. An entire book could be written about the exclusion of bisexual and transgender issues from the 'LGBT' movement, and particularly from questions of same-sex marriage and discrimination. The question of whether bisexuals are covered by lesbian and gay rights is a complicated and politically charged one, and transgendered individuals are an entire separate political

federalism (the specific system of sovereignty-sharing wherein both levels of government are co-equal and each is sovereign in areas under its jurisdiction) has directly inhibited attempts to stop discrimination, provide benefits to common-law same-sex partners, and legalize same-sex marriage. First, prior to the introduction of the Charter of Rights and Freedoms in 1982, human rights cases were usually decided on the basis of jurisdiction, thus severely limiting the ability of activists to challenge discriminatory laws. Second, activists who wish to limit the allocation of rights to gays and lesbians have used arguments regarding

question. Currently, it is likely that transgender rights are covered by Human Rights Acts in all provinces under 'sex,' but only the Northwest Territories specifically addresses this question. A bill to incorporate Transgender into the Charter has been debated by the federal Parliament many times, but has yet to pass. As such, while these issues are both fascinating and pertinent, this essay will overall disregard the questions of bisexual and transgender rights.

provincial rights to frame the debate as a question of constitutionality rather than of strictly human rights. Third, issues under provincial jurisdiction are susceptible to the use, under Section 33 of the Charter, of the Notwithstanding Clause by provincial governments, which is a concern when provincial elites are opposed to lesbian and gay rights. Other authors argue that the specific arrangement of Canadian federalism has actually been beneficial for minorities, including the lesbian and gay community, especially when compared to that of the United States.³ First, federalism provides “laboratories”⁴ where provinces can serve as sources of innovation for new laws and activities that will later be replicated federally. Second, the centralization of Canadian federalism has sped up the adoption of progressive legislation in areas such as the decriminalization of sodomy. Third, the existence of Quebec and the challenges to national unity posed by federalism were partially responsible for Prime Minister Pierre Trudeau's construction of rights discourse and the Charter. As such, the existence of Quebec and the tensions created by federal-provincial relations are responsible for the ability of the lesbian and gay community to use Charter provisions in order to gain equality. We will see, however, that although there is some truth to these claims, the cumulative effect of the federal structure of Canadian governance has been to impede the lesbian and gay movement.

To begin with, prior to the Charter, human rights cases were usually decided on the basis of jurisdiction, thus severely limiting the ability of activists to challenge discriminatory

laws.⁵ Unlike in the United States, where the Bill of Rights has been a part of the constitution since the 1800s,⁶ Canadian courts had no way to challenge government legislation except as a question of the correct division of powers. The existence of provincial or federal Bills of Rights was of no help in this situation, as said bills were only applicable to areas solely under that level of government's jurisdiction. These existing acts, such as Prime Minister Diefenbaker's Bill of Rights,⁷ were not constitutionally entrenched – and thus could be overturned by any new government legislation. This problem can be seen in the many court cases on discrimination which took place throughout the 1970s, where the general attitude toward gay and lesbian rights was, as reflected in *University of Saskatchewan v. Saskatchewan Human Rights Commission*, that “decriminalization does not mean protection of human rights.”⁸ It took a new constitutional device, the Charter of Rights and Freedoms, to force governments to more seriously address human rights issues, including those of the lesbian and gay community. Not only did this new Charter create a constitutional imperative to protect marginalized groups, it was also necessary to shift public discourse from a focus on regionalized divisions, and to help Canada move towards developing a new national identity that focused instead upon the rights of the individual.⁹ Once the Charter was in place, a series of court decisions, including *Egan v. Canada* 1995, “read” sexual orientation into S. 15.¹⁰ In 1996, the federal government officially amended the federal Human Rights Act to include sexual orientation and, by 2004, all

³ Miriam Smith, *Political Institutions and Lesbian and Gay Rights in the United States and Canada*. (New York: Routledge, 2008.)

⁴ Howard, A. E. Dick. “Does Federalism Secure or Undermine Rights?” in *Federalism and Rights*, eds. Ellis Katz and George Alan Tarr, (Maryland: Rowman & Littlefield Publishers, Inc., 1996) p. 17

⁵ Smith, *Political Institutions* p. 42

⁶ Smith, *Political Institutions* p. 21

⁷ Miriam Smith. *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995*. (Toronto: University of Toronto Press, 1999) p. 42

⁸ Paul Mazur, “Gay and Lesbian rights in Canada: A Comparative Study” *International Journal of Public Administration* 25 (2002) p. 52

⁹ Smith, *Political Institutions* p. 53

¹⁰ Smith, *Political Institutions* p. 96

jurisdictions in Canada had done the same.¹¹ As such, the changes initiated by the Charter suggest that the Canadian obsession with federalism and the rights of provincial minorities seriously limited the ability of Canadian lesbian and gay activists to challenge their exclusion from public discourse and the courts.

In a related way, because of the division of powers and the decentralized authority of the provinces, the use of the Charter in areas of provincial jurisdiction has occasioned debate around the legitimacy of national rights and values overriding elected provincial legislatures and their explicit intentions.¹² Furthermore, some authors argue that the privileging of courts under the Charter hides a federal bias.¹³ The Supreme Court is appointed by the Prime Minister, and thus, argue these analysts, tends to demonstrate favouritism towards federal initiatives and values rather than provincial interests.¹⁴ These two arguments are useful tools for activists who wish to oppose lesbian and gay rights without becoming implicated in human rights discourse, allowing them to frame the question, instead, as one of constitutionality and “community rights”. The primary example of this in the lesbian and gay movement was the *Vriend v. Alberta* (1998) case, where an openly gay man was fired from his job at a Catholic school.¹⁵ The original case, in the Alberta Court of Appeal, focused not on human rights grounds, but rather on the constitutionality of a federally created charter and un-elected court overriding the

elected provincial legislature. According to one author, the exclusion of sexual orientation from the Alberta Human Rights Act was a conscious choice by the legislature, with the decision reiterated in no less than 6 succeeding debates.¹⁶ The Charter, on the other hand, was a ‘federal document’, which ought not to overrule provincial decisions in areas of provincial jurisdiction, as this “undermined the constitutional division of powers”.¹⁷ Thus, in the original decision, the court ruled that the Charter violated provincial rights, and *Vriend* lost his case.¹⁸ When the case went to the Supreme Court, the ruling was overturned as a violation of Section 15 of the Charter.¹⁹ This example demonstrates how lesbian and gay rights can be obstructed by presenting them as a federal threat to provincial sovereignty.

Finally, the fact that many areas of concern for the movement, such as employment and tenancy security, fall under provincial jurisdiction is a major problem for the lesbian and gay movement, as provinces can use the notwithstanding clause to protect their legislation from Charter challenges. Section 33 of the Charter allows a province to disregard Charter mandates for a period of five years on issues that fall under provincial jurisdiction.²⁰ The primary example of this is the Alberta Marriage Act. In 2000, Alberta made a clear statement in the Marriage Act that it was not going to recognize same-sex marriage and invoked the notwithstanding clause to pre-emptively justify this potential Charter violation.²¹ Of course, marriage is not an area of provincial jurisdiction, and thus had this legislation been tested it likely would have been found unconstitutional.²² Nonetheless, this demonstrates how the division

¹¹ Smith, *Political Institutions* p. 2

¹² Anthony Peacock, “Judicial Rationalism and the Therapeutic Constitution: The Supreme Court’s Reconstruction of Equality and Democratic Process under the Charter of Rights and Freedoms” in *The Myth of the Sacred: the Charter, the Courts and the Politics of the Constitution in Canada*, eds. Patrick James, Donald Abelson and Michael Lusztig, (McGill-Queen’s University Press 2002) p. 18

¹³ Smith, *Lesbian and Gay Rights* p. 75

¹⁴ Smith, *Lesbian and Gay Rights* p. 75

¹⁵ Smith, *Political Institutions* p. 99-100

¹⁶ William Black, “Vriend, rights and democracy,” *Constitutional Forum* 7 (1996) p. 128

¹⁷ Peacock, “Judicial Rationalism” p. 31

¹⁸ Black, “Vriend, Rights and Democracy” p. 125

¹⁹ Smith, *Political Institutions* p. 99

²⁰ Mazur, *Gay and Lesbian Rights* p. 48

²¹ Smith, *Political Institutions* p. 143

²² Smith, *Political Institutions* p. 143

of powers and the notwithstanding clause can be used to deny lesbian and gay rights in areas that really are under provincial jurisdiction. Thus, in the case of *Vriend*, the Alberta legislature could have used the notwithstanding clause to continue to exclude sexual orientation from the provincial Human Rights Act.²³

Section 33 also poses a risk to gay and lesbian common-law marriage. In the Canadian welfare state, common-law marriage is central to the distribution of benefits,²⁴ and in the 1970's, Canadian courts consistently ruled against gays and lesbians in custody battles, as well as denying claims to pensions and other job-related benefits.²⁵ It was not until 1999 that the Supreme Court, in *M v. H*, ruled that same-sex couples were governed by the same rules as heterosexual common-law couples under S. 15 of the Charter.²⁶ This ruling led to the federal Modernization of Benefits and Obligations Act (2000), which explicitly recognized the rights of same-sex couples in all areas of federal jurisdiction, except marriage.²⁷ However, following *M v. H*, the legislature of Alberta or any other province could have chosen not to recognize unmarried partners by invoking the notwithstanding clause. Despite the fact that this did not happen, the power of the notwithstanding clause poses a constant threat to the lesbian and gay movement.

Furthermore, the fact that a tool such as the Charter was necessary to override provincial decisions suggests that federalism as a whole had a negative impact on human rights. This is particularly concerning if we accept Howard's argument that smaller units of government, such as the state or province, are much more susceptible to domination by a small group of

elites.²⁸ This is sometimes the case in the United States, where the need to legalize same-sex marriage on a state-by-state basis has resulted in a slow and difficult process.²⁹ Although marriage is not an area of provincial jurisdiction, the provinces do have authority over several other areas of great interest to the lesbian and gay movement. Thus, without the Charter, federalism as a whole can be seen as obstructive to non-territorial minorities, such as the lesbian and gay community.

Some authors argue that Canadian federalism has had a positive effect on the lesbian and gay movement, using the differences between Canadian and American gay and lesbian rights as evidence.³⁰ The next section of this essay will assess the validity and nature of this claim.

First, as Howard says, states can act as "laboratories", where ideas are spawned that later lead to federal action.³¹ Further, having a large number of governments "increases the number of access points to the political system, enabling a wider range of issues to come onto the agenda."³² These American statements are equally applicable to the Canadian federation, where much of the innovation around gay and lesbian rights happened in the provinces themselves. In the 1970's, much of the lesbian and gay rights movement was focused on changing public opinion.³³ Therefore, the focus was on challenging provinces in court in order to

²³ Smith, *Political Institutions* p. 100

²⁴ Smith, *Political Institutions* p. 113

²⁵ Mazur, *Gay and Lesbian Rights* p. 56

²⁶ Smith, *Political Institutions* p. 127

²⁷ Smith, *Political Institutions* p. 143

²⁸ Howard, "Does Federalism" p. 22

²⁹ Christy Glass and Nancy Kubasek. "The Evolution of Same-Sex Marriage in Canada: Lessons the US Can Learn from their Northern Neighbor Regarding Same-Sex Marriage Rights". *Michigan Journal of Gender & Law* 143 (2008-2009) p. 146

³⁰ See Miriam Smith, *Political Institutions*, and Glass and Kubasek, "The Evolution of Same-Sex Marriage"

³¹ Howard, "Does Federalism" p. 17

³² Alan Trench. "Federalism." *British Journal of Canadian Studies* 20 (Sept. 2007) p. 312-313

³³ Smith, *Lesbian and Gay Rights* p. 41

attempt to force sexual orientation into the provincial Bills of Rights. The first Human Rights Act to prohibit discrimination on the grounds of orientation was the Charte des droits of Quebec, in 1977,³⁴ and Quebec was an early adopter of laws to protect same-sex parents,³⁵ showing how one province can lead the way. Similarly, when it came to the legalization of same-sex marriage, the provinces were at the forefront, with BC, Alberta, New Brunswick, Nova Scotia, and Newfoundland all taking steps towards supporting same-sex marriage.³⁶ These provincial actions helped to put the question of same-sex marriage on the political agenda in Canada, and the legalization of marriage in eight provinces was a major factor in the federal government's decision to send a reference case to the Supreme Court in 2004.³⁷ These two examples show that Canadian federalism has had a positive effect on lesbian and gay rights in creating space for innovation at the provincial level and in providing venues for activists to place issues onto the political agenda.

However, this also seems like an oversimplification of a complicated process. To return to the American example, the states could also serve as venues for innovation, but this process of policy diffusion does not seem to have occurred in that nation.³⁸ There is not necessarily a connection between early action on the part of provinces and decision-making by the federal government. In fact, the early adoption of a progressive Human Rights Act in Quebec may have removed a potential lobbying point for the lesbian and gay community in that province that might have helped them to confront federal laws later.³⁹ Although the precedents set by provincial

courts certainly affected the decision-making of the Supreme Court regarding marriage, it is questionable whether a direct causal claim can be made that general innovation at the provincial level seriously alters the process of incorporating lesbian and gay rights into federal legislation

Second, Smith demonstrates how the centralization of the Canadian federation on specific issues has sped up the institutionalization of lesbian and gay rights in a way that that of the United States, to use a common example, has not. This has happened in two ways: first, the division of power grants certain major areas of jurisdiction to the federal government, including criminal and family law. Second, the Westminster-style Canadian Senate, in its current arrangement, is primarily a partisan rather than regionally representative institution.⁴⁰ When contrasted to America, the Canadian Senate is less inclined to represent smaller, rural provinces in blocking progressive legislation. For these reasons, lesbian and gay activists did not need to win over every region in order to pass favourable federal legislation. One major issue for the lesbian and gay community was the decriminalization of sodomy.⁴¹ The federal government of Canada decriminalized sodomy in 1969 as part of a sweeping series of reforms to Canada's Criminal Code and in response to some highly publicized cases of arrest, such as that of Everett Klippert.⁴² Although the law is still discriminatory, in that the age of consent is different for sodomy than for other kinds of sexual activity,⁴³ this decriminalization made later fights much easier, as the debate was no longer around "criminal behaviour" and being gay was no longer illegal.⁴⁴ Smith compares this Canadian decriminalization of sodomy by the federal government, which

³⁴ Smith, *Political Institutions* p. 49

³⁵ Smith, *Lesbian and Gay Rights* p. 57

³⁶ Glass and Kubasek, "The Evolution of Same-Sex Marriage" p. 169

³⁷ Smith, *Political Institutions* p. 155

³⁸ Glass and Kubasek, "The Evolution of Same-Sex Marriage"

³⁹ Smith, *Lesbian and Gay Rights* p. 57

⁴⁰ Smith, *Political Institutions*, p. 14

⁴¹ Glass and Kubasek, "The Evolution of Same-sex Marriage" p. 149

⁴² Smith, *Political Institutions* p. 36

⁴³ Smith, *Political Institutions* p. 39

⁴⁴ Smith, *Political Institutions* p. 39

happened all at once and with minimal debate, to the American case, where the decriminalization of the act had to be debated in each state legislature because the states have jurisdiction over criminal law.⁴⁵ Similarly, when it came to the official legalization of same-sex marriage, the issue again fell under federal jurisdiction in Canada. Again, unlike in United States, activists only had to lobby one government in order to change nation-wide laws.⁴⁶ Although several provinces had, due to court decisions, legalized same-sex marriage prior to the federal legislation in 2005,⁴⁷ once the federal government changed the official law the battle was won nation-wide, unlike in America. As such, the lack of regional representation on these issues had a positive effect on lesbian and gay rights.

However, these examples and the comparison to the United States also demonstrate how the Westminster parliamentary system has allowed a lot of power to be concentrated in the hands of the political executive.⁴⁸ When the political executive has been supportive of lesbian and gay rights, this has been a good thing, permitting swift and unilateral action and restricting the possibility of reversal of legislation.⁴⁹ It also means that individual politicians are less susceptible to lobbying and manipulation, due to the strict party discipline and dominance of the executive.⁵⁰ Thus, while the lack of regional representation in the areas of criminal and family law has been beneficial for the lesbian and gay movement, these benefits may be more due to the Westminster Parliamentary system rather than to the nature of Canadian federalism. Furthermore, this argument suggests that a

unitary state would have been even better for the lesbian and gay movement.

Finally, we have already seen how the Charter has played a central role in forcing change in three out of our four issues. It is apparent that federalism, without the Charter, negatively impacted the lesbian and gay movement, but it can equally be argued that the Charter of Rights and Freedoms originated in the federal system of Canada. Trudeau constructed the rights discourse surrounding the Charter as a direct attempt to respond to the threat of Quebecois nationalism to national unity.⁵¹ This discourse built until pan-Canadian nationalism became inextricably linked with human rights and other “Canadian” values, thus creating space for gay rights to be inserted into Canadian law.⁵² Thus, the lesbian and gay movement confronted a political discourse of rights, wherein their claims were not, as in the United States, a special interest,⁵³ nor, as in pre-Charter Canada, irrelevant to a constitution-obsessed nation,⁵⁴ but rather a part of the Canadian national identity.⁵⁵ Thus, the shift in political discourse and jurisdiction initiated by Charter politics but indirectly originating in the conflict over Quebecois nationalism and thus in the federal

⁴⁵ Smith, *Political Institutions* p. 55

⁴⁶ Glass and Kubasek “The Evolution of Same-Sex Marriage” p. 151

⁴⁷ Glass and Kubasek, “The Evolution of Same-Sex Marriage” p. 146

⁴⁸ Smith, *Political Institutions* p. 13

⁴⁹ Smith, *Political Institutions* p. 132

⁵⁰ Smith, *Political Institutions* p. 182

⁵¹ Guy LaForest, *Trudeau and the end of a Canadian Dream*, translated by Paul Brown and Michelle Winroth. (Montreal: McGill-Queen's University Press, 1995) p. 129

⁵² Jane Jenson. “Citizenship Claims: Routes to Representation in a Federal System” in *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*. ed. Karen Knop (Vancouver: UBC Press, 1995) p. 101

⁵³ Glass and Kubasek, “The Evolution of Same-Sex Marriage” p. 159

⁵⁴ Jenson, “Citizenship Claims” p. 110

⁵⁵ Richard Simeon and Katherine Swinton. “Introduction: Rethinking Federalism in a Changing World.” in *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*. ed. Karen Knop (Vancouver: UBC Press, 1995), p. 252

nature of Canadian identity has helped the lesbian and gay movement in Canada. Nonetheless, while this argument is persuasive, it is important to remember that without federalism, Canada might have already had a Charter (or equivalent), and certainly Canada would not have been as obsessed with federal questions to begin with. As such, rights discourse could have originated out of some other issue, and thus this argument does not necessarily conclusively prove that federalism has helped the lesbian and gay movement.

From this examination, it is apparent that Canadian federalism has overall been a stumbling block to the lesbian and gay movement. The focus on jurisdiction rather than on human rights that was characteristic of pre-Charter political discourse and court decisions meant that gays and lesbians had to wait for the advent of the Charter of Rights and Freedoms in order to have a serious chance at gaining equality. This focus on jurisdiction continues, even under the Charter, as opponents continue to frame the debate in terms of provincial rights. Furthermore, if provinces so decide, they can use the notwithstanding clause to block future action on lesbian and gay issues. Although provinces can serve as areas of innovation in which to get new issues onto the political agenda, it is unclear that this was necessarily any motivation for any of the federal actions, except perhaps the legalization of same-sex marriage. As well, although the centralized nature of Canadian federalism may have been an improvement over the decentralized American one, this argument also suggests that federalism in general is detrimental to lesbian and gay rights, and a unitary state may be preferential. Finally, although it is true that the Charter emerged out of Trudeau's attempt to protect national unity from regional conflicts exacerbated by federalism, this does not mean that a Charter could not have emerged for some other reason had Canada been a unitary state. Therefore, it seems as though Alan Cairns had it right when he argued that federalism, while ideal for dealing

with territorially concentrated minorities, actually aggravates the issue around non-territorial minorities such as the lesbian and gay community.

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