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Welcome to Volume 10 of Federalism-E

On behalf of the writers and editors, welcome to the 2008-2009 edition of Federalism-e. For the past eight months we have collected, edited, and evaluated numerous articles concerning federalism written by a number of undergraduate students both within Canada and beyond. At Federalism-e our mandate is to produce an annual volume of undergraduate papers addressing various issues within the study of federalism such as political theory, multi-level governance, and intergovernmental relations. Both of us feel it is important to highlight the fact that this journal exists for undergraduate students. Federalism-e provides a forum encouraging research and scholarly debate amongst undergraduates which will hopefully germinate further interest in this field of study.

Bienvenue au volume 10 du Federalism-E

Au nom des auteurs et des éditeurs, bienvenue à l'édition 2008-2009 de Federalism-e. Au cours des derniers huit mois, nous avons rassemblé, annoté et évalué de nombreux articles qui traitent du fédéralisme, ceux-ci provenant de plusieurs étudiants du premier cycle au Canada et ailleurs dans le monde. Pour nous, le mandat est de produire un recueil annuel des textes du premier cycle, et qui traitent de différents sujets, comme la théorie politique, le partage des pouvoirs et les relations intergouvernementales. Nous voudrions réitérer que ce recueil est mis de l'avant pour les étudiants du premier cycle. Nous souhaitons que Federalism-e procure un forum promouvant la recherche et les débats académiques parmi la communauté du premier cycle, faisant grandir l'intérêt dans ce champ d'étude.

Intergovernmental Relations' Third Wheel: The Role of the Supreme Court in an Era of Collaborative Federalism

ALLISON O'BEIRNE

Introduction

The Supreme Court of Canada has an absolutely undeniable role in intergovernmental relations. As the country's only constitutionally entrenched body charged with the resolution of division-of-powers disputes, its decisions and rulings are always certain to influence the way in which governments interact with each other. Recently, however, the Supreme Court has come to be less highly regarded as a method of resolving the disputes that arise between governments. As Robinson and Simeon propose in their article "The Dynamics of Canadian Federalism," Canada is moving from an era of constitutional federalism, governed by the courts, to one of collaborative federalism (Robinson and Simeon, 2004: 106). As the role of the Supreme Court begins to diminish, it is important to critically analyze the alternative provided by less formal intergovernmental agreements. In this paper I will first examine the changing role of the Supreme Court, showing how it has fallen into lesser use in recent years, and proceed to look at the rising popularity of intergovernmental agreements made in a spirit of collaboration between

levels of government. I will then go on to expose some of the problems inherent in the increased use of such agreements, discussing both the issue of legal enforcement, which is so rarely present in the agreements, and the problems associated with the executive form of federalism through which the agreements take place. In the end, I will attempt to show that the Supreme Court is the only intergovernmental dispute-resolution method that combines non-partisan decision-making processes, strong legal reinforcements to its decisions, and continued responsiveness to ordinary Canadian citizens. The popularity of collaborative intergovernmental agreements is on the rise; and although the role of the judiciary may be changing, the Supreme Court must retain a significant role in dispute-resolution, as it influences the terms and enforceability of these agreements, and allows ordinary citizens to participate in the process of intergovernmental negotiations.

The Supreme Court: Longstanding History in Intergovernmental Relations

Ever since Canada was first established as a federation governed by a parliamentary system, the country's highest court has always had an extremely significant role to play in intergovernmental relations. In speaking about the role of Canada's courts, Ian Greene says "Courts are the state's officially sanctioned institutions of conflict resolution. Their primary purpose is the authoritative resolution of the disputes that elected legislatures have determined should come within their purview" (Greene, 2006: 16). The Supreme Court does have a very direct influence on intergovernmental relations. It is up to them to settle any disputes that may arise between governments, including those regarding the division of powers. The Court serves to clarify any ambiguities in Sections 91 and 92 of the Constitution, ensuring no government feels as though their jurisdiction is being unduly influenced by another.

The Supreme Court also has an impact on intergovernmental relations in other, less obvious ways. Their rulings on reference cases, setting out the standard for constitutional requirements of government policies, can have a huge effect on the way that governments interact with each other. For example, in the Secession Reference case brought forward in 1998, the federal government asked the Supreme Court to rule on the constitutionality of any move a province to separate unilaterally from Canada. In their decision, the Court said "The federalism principle... dictates that... the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire" (Reference re Secession of Quebec, 1998). This ruling served to put some (albeit ambiguous) conditions on the way in which the federal government ought to proceed in its relationship with an increasingly separatist Quebec. The Secession Reference decision also set a precedent in the realm of intergovernmental relations, outlining how the federal government ought to be prepared to deal with any provincial government which expresses a desire to secede. In a unanimous ruling, the Court stated that, "a substantial informal obligation exists in Canada's constitutional culture to address assertions of independence" (Baier, 2008: 27). This is very clearly an instance in which the Supreme Court, in answering a question on constitutionality of government policy, influenced the future of intergovernmental relations in Canada.

However, the Supreme Court does not only get involved in intergovernmental affairs at the behest of the government. On the contrary, it often finds itself at the very heart of intergovernmental conflicts because of the cases brought before it by Canadian citizens. In his article "The Courts, the Division of Powers, and Dispute Resolution", Gerald Baier talks about the Supreme Court decision on the case of Chaoulli v. Quebec. Dr. Jacques Chaoulli was a

Quebec physician who argued that a law preventing citizens from purchasing private health insurance and private medical services was unconstitutional. He said that long delays and poor care in public hospitals threatened a patient's right to life, liberty and security of the person as set out by section 7 of the Canadian Charter of Rights and Freedoms (Chaoulli v. Quebec, 2005). He claimed that the law was contravened of section 1 of the Quebec Constitution, which guarantees "a right to life, and to personal security, inviolability and freedom" (Chaoulli v. Quebec, 2005). The Court decided that the Quebec law preventing private health care violated both section 7 of the Canadian Charter, and section 1 of the Quebec Constitution. However, the rights violation was justified under section 1 of the Canadian Charter, meaning that only the province of Quebec would be required to allow for the provision of private health care. This ruling reinforced the idea of an asymmetrical view of federalism, allowing or requiring different provinces to provide different types of programs depending on their own cultural, social, and financial situation. As Baier explains, "Chaoulli did not challenge the constitutionality of provincial jurisdiction over health care; in that sense the case was not a typical division-of-powers controversy" (Baier, 2008: 27). However, since health care has become such a significant issue in the realm of intergovernmental relations, causing much conflict over which level of government ought to take responsibility for it, "the court's decision on the case was bound to have an impact on the tone of intergovernmental relations, at the very least" (Baier, 2008: 27). The Supreme Court has proven that it has an important role to play in intergovernmental relations, whether directly or indirectly. It is almost impossible to imagine how the Court could operate without having some impact on the way in which governments interact. Even so, there are many who criticize the Court's role in the relationships between governments, and who wish to see intergovernmental agreements move

out of the judicial realm and back into the hands of government administrators. Among these critics are some political parties, "such as the Reform Party, the Canadian Alliance, and most recently, the Conservative Party of Canada" (Kelly, 2008: 42). With Canada's current governing party numbering among those who criticize the role of the Supreme Court, it is essential to examine what sort of influence the Court has held in recent Canadian politics.

The Declining Role of the Supreme Court

Since it became Canada's highest court of appeal in 1949, the Supreme Court has been making landmark decisions influencing the workings of intergovernmental relations in Canada. However, in recent years it seems that there has been a decline in the reliance on the Court for such decisions in the political arena. Baier, himself a defender of the important role of the Supreme Court, says "One feature of the collaborative model is increased reliance on sector-specific accord and agreements, often directed by ministerial councils" (Baier, 2008: 23). As such agreements, driven by actors within the government, increase in popularity, the Supreme Court will find that it has a lesser role to play in the settlement of disputes between levels of governments. Katherine Swinton also pushes the Supreme Court into a secondary role, saying "The primary institution for dealing with the problems of interdependence and change in the Canadian federal system has been executive federalism" (Swinton, 1992: 137). As governments have come to realize that they will not be able to get the terms they want in the constitutional arena, they move towards agreements created through meetings between government executives. In fact, governments have become increasingly concerned about the limiting effects of relying on the judicial decisions instead of collaborative negotiation: "While governments can subsequently negotiate with one another to work around the result of judicial decisions, those very decisions can affect the

bargaining power that the participants have in such negotiations" (Baier, 2008: 35). This means that the Court is not looked to as often as it was in the years directly following the repatriation of the constitution. A review of the number of references cases brought before the court since 1982 shows that the majority occurred within 10 years of the patriation (Judgments, 2009). Rather than going to the courts to settle disputes, governments choose to work together to come up with agreements outside the realm of constitutional amendment, but still respecting the conditions of the constitution and the charter. As James Kelly explains, although the Supreme Court imagines itself to have an important role as the protector of Canadians' rights, "this is principally a political responsibility, as the main responsibility for protecting rights and freedoms lies not with the Supreme Court but with Parliament and the provincial legislatures at the stage when legislation is developed" (Kelly, 2008: 43). The Supreme Court is less often needed to resolve intergovernmental disputes, and the government executives creating new agreements work to ensure their constitutionality before they are ever put in place. This way, the Court will less often be asked to examine legislation in order to protect the rights of individual citizens, and there is less chance that the Court will alter government legislation. Government actors will, therefore, not be as limited in their negotiations by the irrevocable decisions of the judiciary.

Having already seen that the Court is experiencing a declining level of importance in the national political arena, the question remains: what is preventing it from regaining popularity and significance among citizens, who are so often shut out of intergovernmental negotiations? Perhaps the most obvious reason lies in recent governments' reluctance to work in cooperation with the Court. We can certainly see in the arguments made above that "intergovernmental negotiations have replaced the courts as the primary venue of change in the federation" (Baier, 2008: 23). Governments are moving towards

intergovernmental negotiations as a means for institutional change, and away from the jurisdictional arena. However, governments are certainly not the only ones who impact the Court's role by bringing cases before it. As we saw in the case of Chaoulli v Quebec, Canadian citizens are often the ones who impact intergovernmental relations by bringing their own challenges before the Court. On the other hand, some recent changes have decreased the Court's potential responsiveness to Canadian citizens. In 2006, the current Conservative government announced that it was cancelling the Court Challenges Program, which was established "to financially assist Canadians launching Charter-based litigation against the government in two clearly specified areas: equality and minority-language rights." (Asper, 2008). This means that it has become increasingly difficult for ordinary citizens to bring a case before the Supreme Court, since government funding which was previously available for this very reason has now been cut. One other factor which may contribute to decreased citizen reliance on the Supreme Court is increased governmental interest in intergovernmental negotiations as a means of national decision-making. If decisions on intergovernmental relations are being moved out of the realm of the judiciary, citizens may choose to interact more directly with government executives than through the Court. This recent rise in the popularity and profusion of intergovernmental negotiations and agreements, which could in part contribute to the declining role of the Supreme Court, is explored in the next section.

Intergovernmental Agreements: The New Frontier

On the surface, a new emphasis on collaborative intergovernmental agreements seems like a positive step in Canadian politics. Rather than relying on a third-party arbitrator like the Supreme Court, governments are moving to a friendlier relationship, working together to create agreements that satisfy all parties from the

moment of their implementation. Speaking about the transition into the most recent, collaborative era of Canadian federalism, Robinson and Simeon mention such agreements as the Social Union Framework Agreement (SUFA), the North American Free Trade Agreement (NAFTA), and the Agreement on Internal Trade (AIT) (Robinson and Simeon, 2004, 117-121). These agreements come as a result of intergovernmental discussions and negotiations, and they are designed to suit the needs and expectations of different levels of government. Some of these agreements even set out dispute-resolution policies, in the event that any government becomes unhappy with the terms of the agreement at a later date. These policies can sometimes be quite ambiguous, like the SUFA, which "outlines no specific mechanism or approach [but] promotes a 'spirit' of dispute resolution marked by intense collaboration and avoidance of formal processes and third parties" (Baier, 2008: 34). On the other hand, the AIT "includes provisions for dispute settlement in the event that either a government or a person complains that government policies are in conflict with the commitments of the Agreement. These mechanisms are contained in Chapter 17 of the AIT" (Baier, 2008: 31). The governments that are creating these agreements manage to reach a consensus without bringing cases before the Supreme Court, and then outline methods they can use to avoid judicial intervention in resolving any forthcoming disagreements. The dispute-resolution methods set out by these agreements show that governments are eager to move out of the jurisdiction of the Supreme Court and back into the executive realm. The collaborative era as defined by Robinson and Simeon certainly seems to be in full swing.

Problems: Legal Enforcement

Increased government collaboration, and a move towards collaborative dispute-resolution methods do seem to be positive steps for Canadian federalism. However, some problems have arisen since the

new popularization of intergovernmental agreements. The agreements are created in a spirit of collaboration and open discussion, but the terms set out within them amount to little more than friendly guidelines. Simeon and Nugent explain that, "Despite their format of clauses, sections, subsections, appendices, indemnity provisions, and signature blocks, these intergovernmental agreements exist in a legal limbo. They are not legally enforceable contracts. Nor are they equivalent to statutes" (Simeon and Nugent, 2008: 96). This seems like an obvious principle; agreements made in the political arena will remain there, allowing them to be untouchable by the judiciary, and amendable only by further collaborative decision-making. The problem is that, in an era of asymmetrical federalism, when federal governments are known to use their spending power to exert huge influence over the provinces, the lack of legal status for these agreements can be quite troubling. As Katherine Swinton explains, "To the extent that these instruments are relatively easy to change or are unenforceable, they may be unsatisfactory to a province like Quebec which is seeking a lasting rearrangement of jurisdiction" (Swinton, 1992: 140). Provinces seeking permanent institutions to ensure full government cooperation, even in times of political stress or government turn-over, cannot rely on these unenforceable agreements.

Furthermore, provinces that would seek reliable and permanent financial cooperation from the federal government cannot rely on intergovernmental agreements made outside the legal realm. One does not need to look back too far to find an example of a federal government that refused to honour a supposedly fixed financial agreement. In the 1990 federal budget, huge cuts to the Canada Assistance Plan (CAP) were announced, leaving provinces scrambling to find adequate revenue for provincial programs without the government aid they expected. Though the provinces tried to hold the government to the longstanding terms of the CAP, the Supreme Court denied that the government had any

obligation to maintain its previous level of funding (Reference re CAP, 1991). In fact, the provinces could not even claim that the government had any obligation to maintain the CAP funding based on the expectations set out by provincial budgets across the country. "The Court also rejected the application of the doctrine of legitimate expectations in these circumstances. At most, the doctrine gives the provinces the right to make representations and be consulted; it does not confer a substantive right to consent to changes" (Swinton, 1992: 143). For provinces like Quebec seeking permanent resolution to their political conflicts over governmental jurisdiction, these agreements are unhelpful. For other provinces, struggling to pay for the social programs they must supply to their citizens, intergovernmental agreements can prove downright treacherous. Without any means of holding the government accountable to the terms set out by these agreements, poor provinces are left in a state of uncertainty. At a time when governments' financial arrangements are consistently reliant on intergovernmental agreements, no province can ever guarantee that any particular revenues will continue to exist from one year to the next. The agreements, created to bring stability to intergovernmental relations, provide almost no guarantee of legal enforceability.

More Problems: Executive Federalism

Of course there is a degree of uncertainty inherent in the move away from the Court and towards collaborative agreements. More worrisome, however, is the way in which the shift towards collaborative intergovernmental agreements can negatively impact the participation of non-governmental actors in the decision-making process. There are two potential ways in which non-governmental actors can be represented in governmental processes; either indirectly through the representation provided for them by their elected officials, or directly, through personal participation in government negotiations. Both of

these methods for citizen participation are cut short when government decisions are made almost exclusively by high-ranking executives.

In the first, indirect form of citizen participation, it is expected that the wishes of citizens will be carried out by the MPs and Senators representing them in parliament, and the Members representing them in legislatures across the country. However, as Jennifer Smith explains, "Since there is little opportunity for public debate during the process, the only possibility is at the conclusion, [but] political leaders do not need to bring the agreement back to their respective legislatures to vote on it" (Smith, 2004: 105). Those who would hope that the provincial or federal legislatures could represent their interests in the process of creating intergovernmental agreements are sure to be disappointed. These agreements rarely if ever require any kind of legislative approval.

The second form of participation would see citizens and interests groups directly involved in the creation of the agreements that will impact them. This kind of participation is certainly not unheard of in Canadian history. Certainly one of the most famous recent examples of a non-governmental citizen organization participating in the political process is the representation of Aboriginal peoples at the negotiations on the Charlottetown Accord in 1991 (Robinson and Simeon, 2004: 117). Since so many agreements on government funding and policy are being made in the framework of executive federalism, it is possible that citizens feel that they should be trying to make their opinions heard in the political and executive realms, rather than by way of the judiciary.

However, the inclusion of citizens' groups in intergovernmental negotiations poses some very serious problems for the efficacy of those discussions. Simmons notes that one of the most heated issues revolves around the selection of potential participants:

> The question of who represents Canadians is even more complex when non-

> governmental actors, representing themselves or a particular identity or interest… are part of the process. Should only those with something at 'stake' be involved in policy process? If so, who determines whether an individual is a 'stakeholder'? (Simmons, 2008: 359).

Governments will often avoid the inclusion of any non-governmental actors in their negotiations because the mere selection of people or groups who would represent Canadians is nearly impossible. Intergovernmental negotiations are so often left to government executives in an effort to reduce debate and controversy, and to speed up the process of reaching consensus on the terms of the agreements. Thus, both the elected legislatures of Canada, and the interest groups that represent citizens from all walks of life, are excluded from the process of creating intergovernmental agreements. As Meekison, Telford and Lazar say in their discussion of the institutions of executive federalism, "the traditional institutions of the federation, aside from possibly the Supreme Court, appear to have become even less effective in managing intergovernmental agreements" (Meekison et al., 2003: 10)

Conclusion: A Return to the Court

If, as Meekison and his associates seem to suggest, the mechanisms of collaborative intergovernmental agreements and executive federalism are so unfit to represent Canadians and to manage intergovernmental relationships, then surely it is time to return to a system of federalism which places high value on the Supreme Court and its role. Baier certainly seems to think so. He concludes by extolling the virtues of a strong Supreme Court:

> [J]udicial review still offers procedural advantages over its replacements. Unlike the new mechanisms of intergovernmental dispute resolution, it gives actors other

> than governments an opportunity to influence the politics of intergovernmental relations. It also reinforces the constitutional character of the federal order, reminding governments that the Constitution is meant to be supreme. (Baier, 2008: 35-6)

Baier advocates a strong role for the Supreme Court as the reigning authority on intergovernmental dispute-resolution. In fact, such a move has already been predicted by recent intergovernmental agreements which include dispute-resolution methods, such as those outlined in the AIT, which are based on the existing structure of the Supreme Court. (Baier, 2008: 37). The problem, of course, is that these dispute-resolution methods which model themselves on the Court are redundant. A non-partisan dispute-resolution institution very much like the one set out in the AIT already exists in the Supreme Court, and for the government to try to re-create it outside the realm of the judiciary is both wasteful and downright dangerous. These dispute-resolution bodies become copies of the Court, but without the same legal authority, precedent-setting powers, or required expertise. This similarity to the structure of the Supreme Court could lead to a false sense of security, where governments assume that intergovernmental agreements have some kind of objective or legal enforceability. As Swinton reminds us, "parliamentary sovereignty reigns and… Parliament or a legislature has the ability to change its agreements without warning or in an unfair manner with the sanction being a political one, rather than a legal one" (Swinton, 1992: 143). In reality, governments can make alterations to their agreements without any advance warning, and will face no real legal consequences.

In the end, though governments may try to create dispute-resolution bodies that are modeled on the Supreme Court, they all fail to maintain some of the essential advantages that judicial review can provide. The Court has repeatedly shown itself to be much more

responsive to Canadian citizens than intergovernmental agreements at the executive level. Intergovernmental agreements, even those which contain dispute-resolution formulas, have little or no legal status, making them nearly impossible to enforce; and politically-created dispute-resolution bodies do not carry the same legal or precedent-setting powers that are available in the judiciary. In an era of collaborative federalism it may seem that the Supreme Court has a declining role in intergovernmental relations. On the contrary, the Court must maintain a strong role in order to ensure the continued representation of Canadian citizens in the realm of executive federalism, and a strong legal foundation for the terms of intergovernmental relations.

Works Cited

Asper, David. "The Problem with the Court Challenges Program". National Post. 12 September 2008

Baier, Gerald. "The Courts, the Division of Powers, and Dispute Resolution". Canadian Federalism: Performance, Effectiveness, and Legitimacy: Second Edition. Eds. Herman Bavkis and Grace Skogstad. Ontario: Oxford University Press, 2008. 23-40

Greene, Ian. The Courts. Vancouver, BC: UBC Press, 2006

Kelly, James B. "The Courts, the Charter, and Federalism". Canadian Federalism: Performance, Effectiveness, and Legitimacy: Second Edition. Eds. Herman Bavkis and Grace Skogstad. Ontario: Oxford University Press, 2008. 41-62

Meekison, J. Peter, Hamish Telford and Harvey Lazar. "The Institutions of Executive Federalism: Myths and Realities". Canada: The State of the Federation: Reconsidering the Institutions of Canadian Federalism. Montreal and Kingston: McGill-Queen's, 2003

Robinson, Ian and Richard Simeon. "The dynamics of Canadian federalism". Canadian Politics (4th Edition). Eds. James Bickerton and Alain-G Gagnon. Peterborough, Ontario: Broadview Press, 2004

Simeon, Richard and Amy Nugent. “Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions”. Canadian Federalism: Performance, Effectiveness, and Legitimacy: Second Edition. Eds. Herman Bavkis and Grace Skogstad. Ontario: Oxford University Press, 2008. 89-111

Simmons, Julie. “Democratizing Executive Federalism: The Role of Non-Governmental Actors in Intergovernmental Agreements”. Canadian Federalism: Performance, Effectiveness, and Legitimacy: Second Edition. Eds. Herman Bavkis and Grace Skogstad. Ontario: Oxford University Press, 2008. 355-379

Smith, Jennifer. Federalism. Vancouver, BC: UBC Press, 2004

Swinton, Katherine. “Federalism Under Fire: The Role of the Supreme Court of Canada”. Law and Contemporary Problems. 55.1 (1992): 121-145

Chaoulli v. Quebec. Supreme Court of Canada. 9 June, 2005. Judgments of the Supreme Court of Canada. [csc.lexum.umontreal.ca]

Reference Re. Secession of Quebec. Supreme Court of Canada. 20 August, 1998. Judgments of the Supreme Court of Canada. [csc.lexum.umontreal.ca]

Reference re Canada Assistance Plan. Supreme Court of Canada. 20 August, 1998. Judgments of the Supreme Court of Canada. [csc.lexum.umontreal.ca]

Judgments of the Supreme Court of Canada. January 8, 2009. LexUM Research Laboratory. Accessed January 12, 2009. [csc.lexum.umontreal.ca]

Constitutional Accords and National Discord: The Impact of Constitutional Reform on Canadian Unity

ERIC SNOW

Two particularly significant efforts have been made to amend the constitution since it was patriated in 1982: the Meech Lake Accord and the Charlottetown Accord. During each process, Canadian leaders acted boldly and decisively to renew Canadian federalism, satisfy the disenfranchised and keep all Canadians happy at once. However, while constitutions are intended to draw people together under a common purpose, this bold action succeeded in nothing but driving Canadians apart. The country was politically fractured into a collection of divided constituencies, and at its culmination the country was almost torn apart forever. Starting with the aftermath of the Constitution Act, 1982, this paper will consider several proposals from the Meech Lake and Charlottetown Accords respectively. The reasons why each accord failed will be considered in turn, as well as the consequences of that failure. Finally, there will be a

consideration of approaches to renewing Canadian federalism that have occurred since the failure of the Accords. This will demonstrate that major constitutional reform has wrought only negative consequences on national unity; non-constitutional approaches, despite their limitations, serve as a more feasible and practical method of renewing Canadian federalism.

The Liberal government under Pierre Trudeau was successful in patriating the constitution through Constitutional Act, 1982. However, while the Act gained the support of nine of the ten provinces, Quebec remained a solitary holdout. Though the consent of Quebec was unnecessary for approval, as there was no amending formula at the time, in 1981 the Quebec National Assembly passed a decree rejecting the Act. A number of nationalists who had campaigned on the "Yes" side in the 1980 referendum on sovereignty joined Brian Mulroney's Progressive Conservative Party, seeking to formally bringing Quebec into the constitution. Mulroney came to power in 1984, while the Quebec Liberal Party under Robert Bourassa was elected in 1985 over the sovereigntist Parti Québécois who had opposed the 1982 patriation. With these leaders in place, there was an interest on both sides in resolving the issue in a cooperative fashion. Presented with an opportunity to go beyond the successes Trudeau had achieved, Mulroney brought forward a new round of constitutional discussions. Whether or not the re-opening of the constitution was necessary remains unclear, particularly with the urgency with which it was done. Many of Quebec's concerns could be resolved without a constitutional approach, as was done more recently. Furthermore, Quebec's sovereigntist former government may well have rejected any proposal the federal government could have put forward in 1980, providing an understandable reason for Quebec's opposition. Even if Mulroney were successful, Quebec's support would be more symbolic than institutional. ———In spite of this, the negotiations began in 1986 when Bourassa released a list of five

demands that would have to be satisfied to bring Quebec into the constitution. The demands consisted of recognition of Quebec as a distinct society, greater power in immigration, a role in the selection of Supreme Court justices, a veto on future constitutional change and limitations on federal spending power in provincial jurisdictions.[1] These five demands were pivotal in the re-opening of the constitution during the Meech Lake Accord, and they remained central points of discussion even after the constitutional efforts broke down.

The notion of recognizing of Quebec as a distinct society is at least as old as Canada itself. Section 94 of the constitution recognizes a distinction in laws relating to Property and Civil Rights based on the civil law tradition in Quebec.[2] Nevertheless, of the five demands, the distinct society clause has been the greatest cause of controversy. Legally, this clause did not seem to have a clear or direct effect. Nevertheless there were some, including Pierre Trudeau, who argued that writing it in an interpretive clause instead of the preamble indicates an allocation of power to the government of the distinct society.[3] Opposition to the distinct society clause grew more prominent after the Supreme Court struck down a Quebec law requiring French only signs as it was a violation of the Charter of Rights and Freedoms. In response, Bourassa reaffirmed the law using the notwithstanding clause, with only a minor alteration from the previous law that would allow the use of signs indoors.[4] Though there was no direct link between the law and the Accord's distinct society clause, Bourassa's actions called into question the rights of individuals under the distinct society clause in the minds of English Canadians.

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[1] Georges Matthews, Quiet Resolution: Quebec's Challenge to Canada, (Toronto: Summerhill Press Ltd, 1990), p. 84

[2] Brian O'Neal, "Distinct Society: Origins, Interpretations, Implications", Social and Political Affairs Division, Parliamentary Research Branch, (December 1995), p. 4

[3] Donald Johnson (Ed), With a Bang, Not a Whimper: Pierre Trudeau Speaks Out, (Toronto: Stoddart Publishing Co., 1988), p. 75

[4] Russell, Constitutional Odyssey, p. 145

The distinct society clause was not the only barrier to the approval of Meech Lake. Over the course of the negotiations, it became apparent that Quebec was not the only group of Canadians who felt neglected by the constitutional process. The aboriginal community felt they had been unfairly excluded from the negotiating process. Elijah Harper, an Amerindian member of the Manitoba legislature, significantly raised the profile of aboriginal constitutional concerns when he single-handedly blocked the Accord from coming to a vote until the deadline for approval had passed. When it became evident that the Accord would fail as a result, Premier Clyde Wells of Newfoundland, the only other holdout province, decided not to bring the matter to a vote.[5] In the end, the Meech Lake Accord not only failed in its goal of placating Quebec, but opened further wounds with other Canadian constituencies.

While the Accord had failed, it had only failed narrowly and largely as a result of running out of time. There was certainly support for its initiatives, though it had become apparent that Quebec would not be the only group to accommodate in any future constitutional reform. Furthermore, the bi-partisan Bélanger-Campeau Commission had called for a new referendum on sovereignty no later than 1992.[6] As a result, the almost immediate re-opening of the constitution may well have been inevitable. Mulroney responded to the report of the Commission by calling a national referendum for that year, and so the negotiations of the Charlottetown Accord began.

The Charlottetown Accord included much of what had been present in the Meech Lake Accord, and expanded on a number of points. The distinct society of Quebec was preserved within a broader "Canada clause", which also touched on Canadian values such as democracy and the rule of law as well as

[5] Matthews, Quiet Resolution, p. 101

[6] Thomas Courchene, "The Changing Nature of Quebec-Canada Relations: From the 1980 Referendum to the Summit of the Canadas", IRPP Working Paper Series, no. 2004-08, (September 2004), p. 5

aboriginal rights.[7] However, while the Meech Lake Accord had not touched on the matter of Senate reform beyond provincial consultation in the appointment of Senators, the Charlottetown provided for a comprehensive overhaul. This included reducing the number of Senators to 62, consisting of six for each province and one for each of the territories. While Quebec was hesitant about this vision of the Senate, which would significantly reduce Quebec's representation in the upper house, they accepted it based on compromises. One of these compromises was that Quebec would be guaranteed at least 25% of the seats in the House of Commons. Given that Quebec currently holds less than 25% of the population, this clause would guarantee overrepresentation for what is already Canada's second largest province, independent of any future population shifts.[8] The importance of Quebec's support allowed Quebec to expand its demands for special treatment on a clause designed to promote equality among provinces. As a result, the positive implications of one area of the constitution were compromised by demands from an individual constituency.

The Charlottetown Accord was weighed down by its attempts to please all constituencies. In a single debate, the Accord was criticized for giving Ottawa too much power and also for decentralizing the country, for giving Quebec both too much and too little, and for both giving too much power to Indian chiefs while doing too little for aboriginals.[9] The attempts to please everyone within the framework of the Charlottetown Accord caused people to see it only for its flaws, which were significant enough to call for its rejection. The concessions for Quebec were a particularly divisive

[7] Russell, Constitutional Odyssey, p. 281

[8] The population of Quebec is 7.2 million, not far behind Ontario (11.4 million) and almost double British Columbia (3.9 million), the next largest province. Based on the 2006 census, <http://www.statcan.gc.ca/>

[9] Jeffrey Simpson, "The Referendum and its Aftermath", in The Charlottetown Accord, the Referendum, and the Future of Canada, ed. Kenneth McRoberts & Patrick Monahan, (Toronto: University of Toronto Press, 1993), p. 195

issue; while Quebec felt they were not getting enough, English Canada felt Quebec was getting too much.[10] As a result, individuals on both sides of issues came together to rejected the Accord, with the notion that a better deal would be possible once this one had been rejected. Despite the support of all of the federal, provincial and territorial first ministers, three of the federal parties, all but two provincial opposition parties and countless other organizations and constituencies, it was nevertheless rejected.[11] Of the 75% of Canadians who came out to vote, 54% rejected the Accord and it failed in six of the ten provinces.[12]

The damage that the Charlottetown Accord wrought on national unity became evident shortly thereafter, and the political landscape changed dramatically. The 1993 federal election included the most crushing defeat of a political party in Canadian history, with the governing Progressive Conservatives being reduced from a majority government to a mere two seats. While the Liberals were able to form a majority government, for only the second time in Canadian history no single party held a majority of opposition seats. The fractured opposition included two regional parties, neither of which had before won seats in a general election. The Reform Party, with origins as a party of western protest with the slogan "The West Wants In", managed to secure 52 seats despite having previously been considered a fringe group. While the Reform Party did run candidates across Canada, with the exception of Quebec, it claimed seats almost exclusively in western Canada.[13] Additionally, the newly formed separatist Bloc Québécois secured a majority of seats (54 out of 75) in Quebec in the first federal election in its existence. Frustrations in Quebec were expressed further when the Parti Québécois under

[10] Brooke Jeffrey, Strange Bedfellows, Trying Times: October 1992 and the Defeat of the Powerbrokers, (Toronto: Key Porter Books, 1993), p. 9
[11] Jeffrey Simpson, "The Referendum and its Aftermath", p. 194
[12] Brooke Jeffrey, Strange Bedfellows, Trying Times, p. 1-2
[13] Courchene, "The Changing Nature of Quebec-Canada Relations", p. 6

Jacques Parizeau formed a new government in 1994. Parizeau ran with the promise of immediately bringing forward a second Quebec referendum on sovereignty. Though the "No" side eventually emerged victorious, it was by a far narrower margin, 50.6% to 49.4%, than it had been during the referendum of 1980.[14]

The crises of the Charlottetown Accord and the Quebec referendum on sovereignty referendum had come to a close. However, the underlying problems that had brought about the constitutional talks in the first place were still no closer to being resolved. The constitution remained largely unchanged since the Constitution Act, 1982. Quebec had reaffirmed its place as a province within Canada ~~in~~ through the referendum, despite the strong showing in favour of sovereignty~~.~~, ~~and~~ Furthermore, the Clarity Act enacted in 2004 outlined more clear and strict conditions any future referenda would have to follow.[15] Though the country was experiencing widespread constitutional fatigue~~, the referendum had reaffirmed Quebec's place as a province within Canada, and~~ the need to unite the country was as great as ever. A new approach would be necessary for any further efforts to renew the federation and bring Quebec into its framework.

Almost immediately after the failure of the 1995 referendum, the Liberal government under Jean Chrétien introduced a motion to recognize Quebec as a distinct society without the use of a constitutional amendment. Despite the uneasiness in English Canada surrounding the distinct society matter, Chrétien's motion makes it clear that the House of Commons should be "guided by this reality" and "guided in [its] conduct accordingly". However, the wording was chosen carefully, the motion emphasized that Quebec is a distinct society "within Canada" and identifies its "French-speaking majority, unique culture and civil law tradition" as justification for this recognition.[16]

[14] Courchene, "The Changing Nature of Quebec-Canada Relations", p. 7
[15] Russell, Constitutional Odyssey, p. 246
[16] O'Neal, "Distinct Society", p. 21

While the motion was decried by sovereigntists as too little, too late,[17] the motion presented a formal recognition and pushed the matter out of the public mind for the moment.

Another motion the Liberals quickly brought forward touched upon the veto Quebec had sought regarding constitutional change. While following loosely in the footsteps of Accord negotiations, the Liberal legislation neither gave Quebec a sole veto nor required unanimity across Canada. Instead, the legislation added greater stipulations to the rule of seven provinces with 50% of the population. The approval of Quebec, Ontario, British Columbia and Alberta[18] became necessary, as well as one of the other two Prairie Provinces and two Atlantic provinces constituting 50% of the population in both regions.[19] Though this formula was not quite as demanding as unanimity, it diminished the authority of the smaller provinces, most notably rendering the support or dissent of Prince Edward Island irrelevant in the amendment process.[20] Furthermore, after the Charlottetown Accord, there is precedent that any major constitutional changes must be put to referendum, or else they will be democratically illegitimate. As a result, a majority of the vote in provinces comprising at least with 92% of the population will be necessary for future constitutional amendments.[21] If constitutional fatigue and the fear of the fate of the Progressive Conservative Party had not been sufficient deterrents, the stringency of the new rules may well have taken major constitutional

[17] Russell, Constitutional Odyssey, p. 236
[18] While Alberta does not have an explicit veto, their current population so large that their support is necessary to secure 50% of the population in the Prairie Provinces, thereby giving Alberta a *de facto* veto. Based on the 2006 census, <http://www.statcan.gc.ca/>
[19] Russell, Constitutional Odyssey, p. 237
[20] The current population of Prince Edward Island is so small (about 6% of Atlantic Canada) that any other two Atlantic provinces can achieve 50% of the regional population without them. Additionally, there is no combination of four provinces where at least one does not hold a veto. This renders PEI's support unnecessary and their dissent meaningless. Based on the 2006 census, <http://www.statcan.gc.ca/>
[21] Russell, Constitutional Odyssey, p. 238

reform off the table as a method of renewing the federation.

More recently, the Conservative government under Stephen Harper has also committed to initiatives relating to federal spending power in provincial jurisdictions, including in the party's 2008 platform. Many of these initiatives are similar to those that were proposed under the Meech Lake and Charlottetown Accords. This includes requiring the consent of a majority of provinces for cost-shared programs and giving provinces the right to opt out provided they "offer a similar program with similar accountability structures".[22] Interestingly, the language in Harper's approach is weaker than that of the Accords, which suggested programs would have to comply with "the national objectives,"[23] which in turn had received criticism at the time for its weakness. This greater level of flexibility on the part of the federal government occurred without a negotiating process with the provincial governments.

Despite the efforts of successive governments, some constitution-related reforms have been no more successful through non-constitutional approaches than they were through constitutional ones. Senate reform, a key plank of the modern Conservative platform, continues to be largely unsuccessful as it has been for the past thirty to forty years. There have been at least twenty different proposals and attempts at Senate reform, yet all of them have failed.[24] Much of what Senate reform hoped to accomplish, including changes to its composition or powers, is impossible without a direct constitutional amendment. However, other areas can be dealt with, as the Harper Conservative government has attempted to do. Keeping Senators out of cabinet can be tackled by

[22] Conservative Party of Canada, The True North Strong and Free: Stephen Harper's Plan for Canadians, (October 7, 2008), <http://www.conservative.ca/media/20081007-Platform-e.pdf>, p. 26

[23] Russell, Constitutional Odyssey, p. 287

[24] Serge Joyal, Introduction of Protecting Canadian Democracy: The Senate You Never Knew, (McGill-Queen's University Press, 2003), <http://www.sen.parl.gc.ca/sjoyal/Joyal%27s%20book%20docs/Introduction%20(Eng).htm>

convention. Consultation with the provinces regarding their selection can easily be done; technically, this is how the process still works in regard to the Prime Minister and the Governor-General. This process could even provide for the election of Senators by either or the provincial legislatures, or by popular vote as the Conservatives have proposed. The Harper government also included the introduction of fixed terms of no longer than eight years and new ethics rules in their 2008 platform.[25]

There are downsides to dealing to using non-constitutional approaches such as legislation or convention as a manner of renewing federalism. Any such legislation or convention is not constitutionally entrenched. As a result, the continuation of that process would depend on convention that could be ignored and legislation that can be overturned by future parliaments. While such policies would thereby lack permanence, this also serves as one of the benefits of a non-constitutional approach. Unlike constitutional amendments, which have gone from difficult to almost impossible to achieve, these approaches can be improved upon or reconsidered if they no longer serve the national will. Furthermore, this process is made accountable through the democratic process. While such approaches could be achieved without consulting provincial governments, there would be a resulting backlash. The political ramifications also make the removal of previous legislation or convention unlikely, unless it is contrary to the democratic will.

Canada's self-imposed limitations on many types of constitutional amendments have increased since the constitution was patriated. The formula now requires virtual unanimity amongst the provinces and informally includes the expectation of a national referendum. For better or worse, a major constitutional overhaul in the spirit of the Meech Lake and Charlottetown Accords may now be impossible. The energy and enthusiasm surrounding changes to the constitution are far greater than that of any mere

[25] Conservative Party of Canada, The True North Strong and Free, p. 24

legislation, and this energy was at first harnessed to consider the possibilities for improvements and renewal. However, that same energy can be turned against the process once individuals perceive the amendments to be taking away their own rights, or favouring those of someone else. During the Meech Lake and Charlottetown Accords, this mentality caused a fight over Canadian differences, rather then the commonalities for which a constitution is formed and intended to reflect. In the words of Machiavelli, "there is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through than initiating change to a State's constitution". Efforts to renew the federation are meaningless if they come at the cost of the federation itself.

Works Cited

Conservative Party of Canada. The True North Strong and Free: Stephen Harper's Plan for Canadians. October 7, 2008. <http://www.conservative.ca/media/20081007-Platform-e.pdf>

Courchene, Thomas. "The Changing Nature of Quebec-Canada Relations: From the 1980 Referendum to the Summit of the Canadas". IRPP Working Paper Series, no. 2004-08. September 2004.

Jeffrey, Brooke. Strange Bedfellows, Trying Times: October 1992 and the Defeat of the Powerbrokers. Toronto: Key Porter Books, 1993.

Johnson, Donald (ed.). With a Bang, Not a Whimper: Pierre Trudeau Speaks Out. Toronto: Stoddart Publishing Co., 1988.

Joyal, Serge. Introduction of Protecting Canadian Democracy: The Senate You Never Knew. McGill-Queen's University Press, 2003.

Matthews, Georges. Quiet Resolution: Quebec's Challenge to Canada. Toronto: Summerhill Press Ltd, 1990.

McRoberts, Kenneth and Patrick Monahan, ed. The Charlottetown Accord, the Referendum, and the Future of Canada. Toronto: University of Toronto Press, 1993.

O'Neal, Brian. "Distinct Society: Origins, Interpretations, Implications". Social and Political Affairs Division, Parliamentary Research Branch. December 1995.

Russell, Peter. Constitutional Odyssey: Can Canadians Become a Sovereign People?. Toronto: University of Toronto Press, 2004.

Striving to Maintainon a Holistic Nation: Preventing Quebec Sovereignty

KIMBERLEY GOSSE

Introduction

"Federalism is essentially a system of voluntary self-rule and shared rule […] a binding partnership among equals in which the parties to the covenant retain their individual identity while creating a new entity."[1] Canadian federalism illustrates how a political sub-unit such as a province, can maintain personal autonomy while contributing and recognizing its importance to the holistic entity. The federal and provincial governments' relationship is constitutional, as their division of powers is entrenched in our written Canadian constitution. However, ambiguity in legislature and a provinces belief of having a weak political identity can create tension among these levels of government. Historically, this has been an issue seen through the province of Quebec and the political turmoil experienced on each respective level of government. The Quebec referendums on sovereignty almost led to the destruction of a nation. The failure of the Meech Lake and Charlottetown Accords represented English

[1] Kincaid in Good 2008, 3.

Canadians and aboriginals disinterest in granting Quebec the luxury of being a "distinct society." This paper will discuss the failures of Meech Lake and Charlottetown Accords and why Canada is in a better position today because the constitutional amendments presented through these Accords were not ratified. Moreover, the paper will consider non-constitutional measures taken since the demise of Quebec sovereignty to address the issues. First, political history prior to the Meech Lake Accord will be discussed. Secondly, the failure of Meech Lake will be considered. Thirdly, the issues surrounding the Charlottetown Accord will be investigated. Fourthly, the paper will present reasons why Canada is in a better political position because these accords were not ratified. Fifthly, non-constitutional measures will be demonstrated that have been created to address Quebec's legislative concerns.

Events leading up to Meech Lake

The Quebec independence movement was at the forefront of Quebec politics throughout the 1970s and early 1980s. René Lévesque, leader of the Parti Quebecois, led the independence movement in 1968. He wanted to repatriate Quebec sovereignty. The Liberals in Quebec returned to power led by Robert Bourassa in 1970. The social climate in Quebec in the late 1960s and early 1970s had been highly explosive. It came to a head with the October Crisis in the 1970s when the Front de liberation du Quebec wanted Quebec sovereignty, which was vocalized through drastic measures. Through the Victoria Act in 1971, Prime Minister Pierre Trudeau attempted to patriate the constitution and to declare English and French as Canada's official languages. Although all 10 provinces and the federal government signed the agreement, Robert Bourassa premiere of Quebec, revoked the agreement after a few days because he felt Quebec's interests were not protected. Although

originally unsuccessful, these changes were made legitimate through the Canada Act in 1982. The Parti Quebecois won power again in 1976 under René Lévesque. His success showed that the Quebec people supported his platform. This was the first time in political history had a province elected a party who was committed to secession. One of the first legislative movements by Lévesque and his government was enacting Bill 101, forcing non-Anglophone immigrants to enroll their children in French schools and called for French only commercial signs.[2]

The Quebec referendum of 1980 proposed this question to the citizens of Quebec: "Do you agree to give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?"[3] Thus, if implemented the Quebec government would have control of issues surrounding sovereignty such as the administration of taxes and laws while still reaping the economical benefits from Canada and maintaining their currency.

Prior to the Constitution Act of 1982, any amendments to Canada's constitution had to go through the British parliament. At that time, Canada had been a country governed by the British North American Act until Prime Minister Pierre Trudeau convinced nine premiers to support constitutional reform, which included a Canadian amending formula. The Act approved two legislative changes: it patriated Canada's constitution, thus granting "Canada's parliament the power over future constitutional amendments", and rescinded British parliament's involvement in Canadian politics.[4] Quebec did not sign the new constitutional agreement because they felt it did not give them the provincial autonomy they wanted. However, "legally and constitutionally, Quebec

[2] Michael S. Whitington and Glen Williams, Canadian Politics in the 1990's (Scarborough, Ontario: Nelson Canada, 1995), 93.

[3] Robert Young, Confederation in Crisis(Toronto: James Lormier & Co., 1991), 13.

[4] Marjorie Bowker, Canada's Constitutional Crisis (Edmonton: Lone Pine Publishing, 1991), 19.

is nevertheless part of the constitution."[5]

The Meech Lake Accord

On April 30, 1987, federal and provincial leaders met at a retreat on Meech Lake in Quebec's Gatineau Hills to amend the Canadian constitution. This accord attempted to gain Quebec's acceptance of the Constitution act of 1982. Since the act, Canadian politics had changed immensely in the following years, at both the federal and provincial level. Under the leadership of Brian Mulroney, the conservatives had defeated the Liberals in 1984. In the following year, the federalist Quebec Liberal Party under the leadership of Bourassa, came to power. Bourassa formulated five constitutional demands that would have to be met in order for Quebec to sign the Constitution Act of 1982. These demands were: constitutional recognition of Quebec as a "distinct society"; restoration of Quebec's veto on constitutional change; greater control over immigration; a role in selecting Supreme Court Justices and Senators from the province; and restriction of federal government's spending power in areas belonging to provincial jurisdiction.[6]

The Meech Lake Accord addressed five changes to the Canadian constitution. First, the "distinct society" clause recognized Quebec as a distinctive society in terms of both culture and language. It went so far as to recognize Canada's bilingual, bicultural heritage within and outside of Quebec and gave provincial governments the right to preserve these characteristics. For changes to be made to the constitution, it required the unanimous consent from parliament and all ten provincial legislatures. Second, the Accord also addressed issues dealing with immigration. Immigration now became a shared responsibility between the federal and provincial governments. It also guaranteed that Quebec would receive

[5] *Ibid.,* 18.

[6] Good, Kristin. 2008. Quebec-Canada Relations Unit, September 22, 2008, 17.

an annual number of immigrants based on its share of the population. Third, the Accord suggested an alternate format to select Supreme Court of Canada judges. When a vacancy came open, the premieres could submit names and the prime minister would have to make his choice from the given list. Before the Accord, the prime minister was under no obligation to take a premieres choice into consideration. Fourth, all provinces were given a role in selecting Supreme Court justices and senators and entrenched Quebec rights to three Supreme Court Justices. In the case of Quebec, since it had the right to three of the nine Supreme Court justices appointed from that province, only the Quebec premiere could submit names whenever a Quebec vacancy came open. Finally, provinces were also given the right to opt out of new national programs with compensation as long as they established similar programs that were in keeping with national plans.[7] "In order to become law, the Accord had to be ratified by Parliament and the legislatures of all the provinces in accordance with Section 41 of the Constitution Act."[8]

These legislative demands on behalf of Quebec were overwhelming for English Canadians. They were opposed to the idea of defining Quebec as a "distinct society." "Not only was the process by which the accord had been arrived at illegitimate, the substance of the accord itself was at odds with the conception of the federation that had achieved dominance in English Canada with the patriation of the constitution."[9] The distinct society clause attacked "the essence of the constitutional principles that Canadians held dear – their equality as citizens with constitutional rights under the charter and the equality of the provinces."[10] The clause would have created asymmetrical federalism. Manitoba and Newfoundland were keys in the

[7] *Ibid.*, 18.

[8] *Ibid.*, 19.

[9] Raymond B. Blake, Transforming the Nation: Canada and Brian Mulroney (Montreal: McGill-Queen's University Press, 2007), 86.

[10] *Ibid.*

demise of Meech Lake. Aboriginal MLA Elijah Harper of Manitoba, refused to support the Accord based on the fact that there was no First Nation representation within its five major conditions. Along with Harper's refusal, Clyde Wells Premier of Newfoundland, first supported the agreement but learning of Harper's refusal, he withdrew his support and adjourned the Newfoundland legislature before a free vote could be held.[11] Also the new Liberal Leader Frank McKenna in New Brunswick did not support the Accord and Quebec Liberal Premier Bourassa's use of the notwithstanding clause to "protect its signs legislation against the Charter." This elicited disapproval from English Canada. It has been stated that section 38 (1) of the 1982 Act which created the new amending formula, played a role in McKenna's decision. "Section 38 (1) allowed for parliamentary debate and legislative committee hearings, public forums, and other forums of ratifications."[12] It allowed McKenna to hold public forums on the accord which ultimately slowed the ratification process and gave opponents the chance to find support against it.[13]

The public had numerous concerns over the Accord. In the midst of attending to constitutional amendments, the public began to view the process as "11 white men meeting in the middle of the night in secret to rewrite Canada's constitution"[14], making decisions without consulting the Canadian people. They saw themselves as having no part in the process. Canadian's expressed the emphasis on having a "citizen's constitution,"[15] feeling that too much information was being withheld. This catalyzed a "decline of deference"[16] as the public resented their lack of involvement in political issues.

[11] Peter H. Russell, Constitutional Odyssey (Toronto: University of Toronto Press Inc, 1993), 151.

[12] Michael S. Whittington and Glen Williams, Canadian Politics in the 1990s (Scarborough, Ontario: Nelson Company, 1995), 325.
[13] *Ibid.*
[14] *Ibid.* 326.
[15] Good, Kristin. 2008. Quebec-Canada Relations Unit, September 22, 2008, 27.
[16] *Ibid.*

Moreover, women's organizations believed the "distinct society" clause would compromise their Charter rights. There was growing concern and emphasis by minority groups for non-territorial representation in the fear that they would be lost in their demographics. In addition, Former Prime Minister Pierre Trudeau came out of retirement and condemned the Accord by stating, if ratified; it would "render the Canadian state totally impotent."[17] Despite vocal opposition, the Meech Lake Accord was almost ratified. The Canadian amending formula declared that once constitutional amendments are presented and passed on behalf of one province, there is a three year deadline for the federal government and all provinces to ratify the amendments for a legitimate legislative change to occur. Thus the deadline for ratification was June 23, 1990 after the first province, Quebec, formally supported the changes three years prior. Within a year, parliament and eight provinces had approved the ratification. However, the Meech Lake Accord was terminated as Manitoba and Newfoundland failed to produce legislature on June 23, 1990.

According to Roger Gibbins, the general public mood of Canadian's leading up to the Charlottetown Accord was one of "sourness or nastiness."[18] He felt that Canada had lost faith in politicians and the existing political institutions. There was a resistance to renewed constitutional negotiations. Based on a CBC/Globe and Mail poll, Canadian people were asked what they thought the likelihood would be of Quebec eventually separating from Canada.[19] The results of the poll showed that Canadians did not feel that Quebec would separate from Canada. Especially in the West the percentage was very low: 6 percent on the Prairies, 10 percent in British

[17] Rhonda Parkinson, Road to Meech Lake: Quebec and the Constitution, 14 September 2007, <www.mapleleafweb.com/features/meech-lake-accord-history-overview>,(4 November 2008), 5.

[18] Robert Young, Confederation in Crisis (Toronto: James Lormier & Company, 1991), 22-23.

[19] Ibid.

Columbia and 10 percent in Ontario.[20] The results showed that Canadian's were willing to call Quebec's bluff.

The Charlottetown Accord

The Charlottetown Accord was the end result of five years of numerous meetings on constitutional reform involving the federal, provincial and territorial government and representatives of Aboriginal peoples. After the failure of Meech Lake, Quebec was angry and felt rejected which intensified their wishes for separation. The issues involved in the Charlottetown Accord were similar to Quebec's demands seen in Meech Lake, however with slight modifications. The "distinct society" issue was again on the table. This idea was reinforced through the Canada Clause "which incorporated a distinct society clause as well as another clause authorizing the legislature and government of Quebec to preserve and promote the distinct society of Quebec."[21] Another issue addressed in the Charlottetown accord was Quebec's potential veto on 'reform on national institutions'. Moreover if the accord was ratified, Quebec would be given 25 percent of representation in the House of Commons. This was upsetting to the other provinces as a "25 percent guarantee for Quebec was not in line with demographic trends."[22] In particular, Alberta and British Columbia would be less represented in the senate.[23] This was seen as a necessity on behalf of the Quebec government as Bourassa was uneasy with the Triple E senate proposal, which strived for better regional representation for western Canada. The aboriginal people were appalled that the federal government was willing to grant Quebec the status of being a "distinct society" going beyond

[20] ibid.

[21] Raymond B. Blake, Transforming the Nation: Canada and Brian Mulroney (Montreal: McGill-Queen's University Press, 2007), 282.

[22] Good, Kristin. 2008. Quebec-Canada Relations Unit, September 22, 41.

[23] Richard Johnson, Neil Nevitte and Elizabeth Gidengil, The Challenge of Direct Democracy: The 1992 Canadian Referendum, (Montreal: McGill-Queen's University Press.

the definition in the Meech Lake Accord. Although the accord also called for two aboriginal representatives in the House of Commons and the recognition of aboriginal rights as a "third level of government", this was deemed not enough by the aboriginal people. The Constitution Act of 1982 recognized that further "identification and definitions of the rights" of aboriginal peoples was a piece of unfinished constitutional business which must be addressed.[24] Aboriginal groups wanted self-government. Aboriginal leaders regarded the right of their peoples to govern themselves as a moral right that they had long before Europeans arrived, and one they had never relinquished.[25] They also strongly believed it must be recognized in the constitution as coming from their inherent right to self-government, not from the good well of Canadians and the government.

Quebec Sovereignty: Why Canada would have been worse off

Sir John A. MacDonald once said, "We are a great country, and shall become one of the greatest in the universe if we preserve it; we shall sink into insignificance and adversity if we suffer it to be broken."[26] As the quote implies, a separation of a province from Canada would reduce its power on the global scene. This in turn could leave Canada vulnerable to the United States in a number of ways. Previous contracts regarding national security and free trade, or even civil unrest could give the United States the chance to become a major player in Canada's national issues. Hypothetically, if there was great tension between Canada and Quebec leading to civil unrest, the United States could potentially send troops to intervene, under the pretense of protecting its own borders. If the federal government paid out substantial amounts of money to appease the remaining provinces, how then would Ottawa be able to pay for

[24] Peter H. Russell, Constitutional Odyssey (Toronto: University of Toronto Press Inc, 1993),130.
[25] *Ibid.* 131.

[26] J.L.Granatstein and Kenneth McNaught, English Canada Speaks Out (Toronto: Doubleday Canada Limited, 1991),105.

its defense bill? Would Canada's air space be absorbed by the United States? Many of these issues would lead one to believe that Canada could become part of the United States. Potentially having another country within Canada would compromise the defense of our nation, creating problems around the border of Canada and Quebec if civil unrest was to transpire. In addition, Canadian allies may now question the contribution Canada and Quebec would make to the North Atlantic Treaty Organization.[27]

If Quebec had successfully separated from Canada, numerous economic repercussions would have followed. According to the December 1996 report of the Committee on the Evolution of Canadian Federalism, compared to other provinces Quebec's economy is the most dependent on interprovincial trading.[28] It exports to other provinces more than it imports. If relations were tense between Canada and Quebec, then Canadian provinces would have to look for alternate markets for their products. In addition, the stock market could decline sharply, our dollar could reach record lows, and our interest rates could rise. Obviously this could concern foreign investors and would dwindle their confidence in the Canadian economy.[29] Americans in particular have billons of dollars invested in Canada and millions of dollars depended on trade with this country[30] and this in itself may put pressure on Canada to resolve political tension.

Historically the Atlantic Provinces have depended on federal payouts (equalization payments or unemployment assurance benefits) to mitigate "regional economical disparities"[31] according to Granatstein and McNaught. Because of this, they have always advocated for a strong central government in order to keep

[27] Robert A. Young, The Struggle for Quebec (Montreal: McGill-Queen's University Press, 1999), 139.
[28] Committee on the evolution of Canadian Federalism, Quebec's Identity and Canadian Federalism (Ottawa: Liberal Party of Canada, 1996),63.
[29] *Ibid.* 62.
[30] *Ibid.*139-40.
[31] J.L. Granatstein and Kenneth McNaught, English Canada Speaks Out (Toronto: Doubleday Canada Limited, 1991), 116.

the money coming in. Because of the reallocation of federal resources following Quebec's secession, these provinces would be potentially vulnerable to economic crisis without adequate support from the federal government. It is also important to note that the Atlantic provinces would be physically separated from the rest of Canada which could lead them to question their political identity.

A sovereign Quebec would result in a re-evaluation of political legislature. According to Marjorie Bowker, the rest of Canada could be left with no constitutional structure.[32] There would be a need to evaluate the constitution -technicalities in our written constitution would have to be amended upon the dismissal of a sub-unit from its central government. This would result in many tedious, but important constitutional changes.

Non-constitutional Measures implemented regarding the Accord's Issues

After the referendum of 1995 there was great pressure placed on Ottawa to resolve the sovereignty issue. The Federal government tried to do this in numerous ways. Ottawa tried to fulfill the commitments they had made to Quebec at the end of the referendum campaign. Two non-constitutional measures put forth by Parliament were Plan A and Plan B.

The basic objective of Plan A was to "entrench a distinct society clause."[33] The approach taken was to reconfirm the importance of Quebec's role in the federation. Quebec accounts for a high percentage of the diversity present in Canada, and without their contribution, Canada would be less developed in terms of culture and language. Under this plan Canada would declare and celebrate Quebec as a distinct society within our country. Some of the Premieres believed Plan A was granting special status to Quebec and disapproved of asymmetrical federalism as they believed Canada

[32]Marjorie Bowker, Canada's Constitutional Crisis (Edmonton: Lone Pine Publishing, 1991),112.

[33] Robert A. Young, The Struggle for Quebec (Montreal: McGill-Queen's University Press, 1999), 94.

should continue to practice equality among provinces. Since Ottawa could not get the consensus among Premiers of Alberta, BC, and Ontario the federal government went alone and introduced into parliament a resolution to recognize Quebec as a distinct society. Another element of Plan A was to decentralize some of the federal power and for Ottawa to restrict its spending power. Other initiatives included the federal government opting out of job training and greater intergovernmental communication. The government had taken out full page adds in Quebec and sent pamphlets to each Quebec household notifying individuals how they had met their referendum commitments.

Another piece of legislation addressing Quebec secession was Plan B, which called for a series of initiatives to clarify the process of secession and some of its implications. This tactic stressed the ambiguous process of secession itself. Other groups for example, aboriginals, municipalities or regional municipalities in Quebec could also separate from Quebec. In the words of Stéphane Dion, "if Canada is divisible, Quebec is divisible too. If I give myself a right, I can not stop others from exercising the same right."[34] Three questions stemmed from the possibility of secession: Under the constitution, can […] the government of Quebec effect the secession of Quebec from Canada unilaterally? Is there a right under international law […] to effect the secession of Quebec from Canada unilaterally? In event of conflict, between domestic and international law […], which would take precedence in Canada?[35] In the end, it was left to the political process i.e. Supreme Court of Canada to address the issue. The courts decided Quebec would be acting against the accordance of the law (constitutionally and internationally) if they were to unilaterally secede. However, it was also concluded that "there is a constitutional obligation for the rest of

[34] Robert A. Young, The Struggle for Quebec (Montreal: McGill-Queen's University Press, 1999),102.
[35] Robert A. Young, The Struggle for Quebec (Montreal: McGill-Queen's University Press, 1999), 108.

Canada to negotiate with Quebec, should a 'clear majority' on a clear question' express the will to secede."[36]

Collaborative federalism began to be exercised after the descent of the Meech Lake and Charlottetown Accords in an attempt to narrow the legislative conflict between the federal parliament and provincial autonomies. The Agreement on Internal Trade in 1994 was the beginning of governmental collaboration through non-constitutional means. This stated that when applicable, national standards would be created through intergovernmental collaboration.[37] National standards were important to central Canada as well as in adhering to the specific needs of each province. Other initiatives taken were Ottawa's pledge to restrict its spending power. An example of this would be the "Framework to Improve the Social Union for Canadians" which was established in 1999 with emphasis on a social union between the two levels of government. "Social union" refers to "the complex set of intergovernmental agreements through which the major elements of social policy: health, post-secondary education, and welfare"[38] were formulated. Provincial governments would be notified in advance of new programs being implicated. More importantly, the federal and provincial governments would team up to distinguish items of national precedence with the federal government acknowledging they would not implement a new program without the majority of the provinces consent.

In order for collaborative federalism to exist, all parties involved must show reciprocated respect for one another with the well being of all Canadians to be considered. Thus the "emphasis is on equal partnership, not federal leadership."[39]

Additional measures taken non-constitutionally by the federal government to address the issues tackled in the Meech Lake and

[36] Good, Kristin. 2008. Quebec-Canada Relations Unit, September 22, 2008, 58.
[37] Ian Robinson and Richard Simeon, The Dynamics of Canadian Federalism (Peterborough, Ontario: Broadview Press), 120.

[38] *Ibid.*
[39] *Ibid.* 121

Charlottetown Accords was Stephen Harper's introduction of open federalism in which he strived to have a more balanced federal system. He sought to support provincial autonomy while attending to matters of national importance.

Conclusion

Quebec separatism has been a key issue in Canadian politics since the 1970s. The issue has been addressed through numerous legislative initiatives primarily the Meech Lake and Charlottetown accords. Although these propositions failed, the federal government has made continuous attempts to accommodate different political identities within Canada such as the French majority in and outside of Quebec, Aboriginal people, and English Canadians. Other legislative strategies put forth by parliament would include Plan A, Plan B, and SUFA. Furthermore, our political system has emphasized different approaches to executing federalism. For example, collaborative, open and asymmetrical federalism have tried to integrate the needs of the provinces (especially Quebec), with the aspirations of non-territorial groups. Yet, as seen historically throughout Canadian politics, it is unlikely that Quebec, the west or Aboriginal people will give up their own political agendas to look at the bigger picture of the welfare of all Canadians.

Works Cited

Blake, Raymond B. Transforming the Nation: Canada and Brian Mulroney. Montreal: McGill-Queen's University Press, 2007.

Bowker, Marjorie. Canada's Constitutional Crisis: Making Sense of It All. Alberta: Lone Pine Publishing, 1991.

Committee on the Evolution of Canadian Federalism. Quebec's Identity and Canadian Federalism: Recognition and Interdependence. Ottawa: Liberal Party of Canada.

Granatstein, J.L., and Kenneth McNaught. English Canada Speaks Out.Toronto: Doubleday Canada, 1991.

Johnson, Richard, Neil Nevitte and Elizabeth Gidengil. The Challenge of Direct Democracy: The 1992 Canadian Referendum. Montreal: McGill-Queen's University Press, 1996.

Kincaid, John. Handbook of Federal Countries: 2002. Introduction, Montreal and Kingston: McGill-Queen's University Press, 2002.

Parkinson, Rhonda. Road to Meech Lake: Quebec and the Constitution. 14 September 2007. <www.mapleleafweb.com/features/meech-lake-accord-history-overview>, (4 November 2008).

Robinson, Ian and Richard Simeon. "The Dynamics of Canadian Federalism." "In" Canadian Politics (4th edition). Eds. J. Bickerton and A. Gagnon. Peterborough, Ontario: Broadview Press, 2004.

Russell, Peter H. Constitutional Odyssey Toronto: University of Toronto Press Inc, 1993.

Whitington, Micheal S. and Glen Williams. Canadian Politics in the 1990's Scarborough, Ontario: Nelson Canada, 1995.

Young, Robert. Confederation in Crisis. Toronto: James Lormier & Company, 1991.

Young, Robert A. The Struggle for Quebec: from Referendum to referendum? Canada: McGill-Queen's University Press, 1999.

The Issue of Sovereignty: The *Clarity Act* as an Effective and Legitimate Response to Canada-Quebec Relations

MEGAN SETO

Introduction

Quebec sovereignty in the Canadian federation has elicited strong emotion across the spectrum of politics and national interest. The forwarding of the Clarity Act by Jean Chretien's Liberals was an attempt by the federal government to seek a resolution to the question of Quebec unilateral secession in a legal and clearly defined manner. The Act of 2000 was not of abstract materialization. Rather, it highlighted the complexity of Canada's multinational identity and the historical quandaries of her founding races. The Act was a response to the 1995 Quebec referendum, yet despite it being an attempt to provide clarity to concerns arising from the referendum, the Act has generated further debate and new anxieties regarding Canada-Quebec relations.

In the scope of this examination, the prelude to the Clarity Act involved two decades of discussions aimed at addressing "Quebec's place in Canada." The historical tensions between Canada-Quebec relations since 1980 – will be firstly examined; with emphasis on events defined as times of crisis or high intergovernmental relations. The second purpose of this study will regard an assessment of the derived

origins of the Secession Reference and the Clarity Act. Finally, the central theme of this paper will be devoted to the divergent opinions of the Act – both of its effectiveness and of its legitimacy. Thus, the third section of this study will place emphasis on the ramifications of the legislative Act. To prove this, the paper will define the meaning of "effective" and "legitimate" and apply this to the Clarity Act to determine its ability or inability to meet the desired meaning. As implied, the study of effectiveness will be centered on the federal government's goal orientation and debated success. The definition of legitimacy will be applied to the Clarity Act, where perception and legality will influence its ability to meet the defined standard. It will be demonstrated that the procured legislation of the Clarity Act did not sufficiently fulfill the gaps or intended goals of the federal government – in essence deeming it ineffective. The ineffectiveness of the Act is synonymously coupled with raised concerns of its legal authority, thus – weakening its lawmaking might, applicability and legitimacy.

Tensions within the Federation: Canada-Quebec Relations Since 1980

In 1980, Pierre Elliott Trudeau helmed the reins of political balance. His approach to Quebec had been of an aggressive battle to keep her within the fold of the federation. This nationalizing ethos was "aimed against the centrifugal forces of regionalism, province-building, and Quebec nationalism."[1] This was potently displayed in the 1980 Quebec referendum. While a majority of Quebecers voted 60%-40% against the mandate to "negotiate sovereignty association" with Canada, the referendum served as a platform and catalyst for the repatriation of the Canadian constitution.[2] The subsequent failure to include Quebec in the 1982 constitutional settlement

[1]Francois Rocher and Miriam Smith, "The four dimensions of Canadian federalism." in New trends in Canada federalism (second edition), (Peterborough : Broadview Press, 2003), 36.

[2] Robert Young, The Struggle for Quebec: From Referendum to Referendum? (Montreal & Kingston: McGill-Queen's University Press, 1999), 8

would generate two decades of constitutional debate. Trudeau defended the actions of his government. He argued, "a 'separatist' government of Quebec would never have signed the Constitution Act."[3] What is more telling of the government though is the defense that the Liberal federalist government was more than willing to serve the interest of the Quebec people.[4] This displays both a patronizing viewpoint of the central governments perspective of the province, but symbolically highlights the alienation of Quebec from the rest of Canada (ROC). It aided in the creation of the "us" versus "them" mentality within the federation, but the Trudeau defense also belittled and illegitimatized the sovereigntist leaders as incapable spokespersons of recognizing Quebec interests.

The Progressive Conservatives under Brian Mulroney faired similar benign success in bringing Quebec back into the constitutional agreement. The "honorable" Mulroney overtures towards Quebec were perceived by the ROC as Quebec interests being "jammed down English Canada's throat."[5] This is evident in the failed agreements of the Meech Lake Accord and the latter attempt with the Charlottetown Accord. The demand for a "distinct society" clause by the Quebec premier, Robert Bourassa, was a pivotal factor in Meech Lake's failure. It perpetuated the fear of a hierarchy in rights. Though the Charlottetown constitutional package was reconfigured to include these concerns, the perception of asymmetry in Canada-Quebec relations created skepticisms amongst the ROC. During the inter-constitutional period, Quebec began to contemplate its legal authority to remove itself from the federation, as evident in the Belanger-Campeau Commission and the Allaire Report.[6] To defer a 1992 referendum,

[3] Rocher, Dimensions, 36.
[4] Ibid.

[5] Alan C. Cairns, "Looking into the Abyss," in The referendum papers: essays on secession and national unity., ed. David R. Cameron (Toronto: University of Toronto Press, 1999), 201.
[6] Peter Russel and Bruce Ryder, "Ratifying a postreferendum Agreement," in The referendum papers: essays on secession and national unity., ed. David R. Cameron

the federal government reconfigured the initial "five demands" of Quebec in the new package.[7] However, like its predecessor – Charlottetown failed. Quebecers felt shut out. They argued that they were given a raw and reduced deal in comparison to Meech Lake, which Quebecers had supported.[8] As evidence, they point to the removed Quebec distinct society clause, thus, furthering the gulf between Quebec and the federal government. Yet the rejection of the Charlottetown Accord by the ROC was perceived in Quebec as a rejection of even minimal demands for Quebec interests, leading to greater disenchantment. The bitter memories of these failed accords served as catalysts for the 1995 referendum.

The deferment lasted until 1995, where a new referendum asked for a "new economic and political partnership" between Quebec and Canada.[9] The result was a hair thin victory for the "no" side of 51.6% to 49.4%.[10] Despite the endorsed agreement of the referendum question by the three Quebec powers; the Parti Quebecois, Bloc Quebecois and the ADQ, the referendum question faced similar concerns as those expressed against the 1980 referendum: the question asked was not clear.[11] There was a failure to state clearly that the voting was for non-reversal negotiations for Quebec independence. Confusion can be attributed to the vagueness of terms such as "association," and "sovereign;"

(Toronto: University of Toronto Press, 1999), 325.

[7] The five conditions forwarded by Robert Bourassa were non-negotiable demands presented by the Quebec National Assembly to initiate constitutional negations with the federal government. They were: (1) Constitutional recognition of Quebec as a "distinct society" (2) Restoration of Quebec's veto on constitutional change. (3) Greater control over immigration (4) A role in selecting Supreme Court Justices and Senators from the province (5) Restrictions on the federal government's spending power in areas of provincial jurisdiction. Good, Kristen, 2008, Canada- Relations, 141

[8] Cairns, Abyss, 235.

[9] Thomas Courchene, "The changing nature of Quebec-Canada relations: From the 1980 referendum to the summit of the Canadas," IRPP Working Paper Series, 08 (2004): 524-26.

[10] Ibid., 5.

[11] Patrick Monahan, "Doing the rules: An assessment of the federal Clarity Act in light of the Quebec Secession Reference," C.D. Howe Institute (2000):14.

providing ambiguous words that were not defined and contextually confusing for the voter. The close sovereigntist victory has also been attributed to Chretien's initial hands-off approach to the referendum. For scholars such as Patrick J. Monahan, the "yes" vote in 1980 and 1995 highlighted key constitutional gaps not addressed by the federal lobbyists, "a key element of the federalist strategy in the referendum campaigns of 1980 and 1995 was to emphasize the uncertainties associated with voting 'yes.'"[12] Ottawa's constitutional duty after a successful sovereignty campaign was uncertain, as there was no contingency plan. As David R. Cameron acknowledges, "the narrowness of the federalists' win in the 1995 Quebec referendum demonstrated that we [ROC] can no longer afford to take an ostrich-like approach to the possibility of Quebec sovereignty."[13] Canadians began to think forwardly and placed sovereignty in a scope that dealt with it as valid possibility. Thus, the 1995 referendum legitimized the movement – the Supreme Court of Canada, legally would do the same.

The Succession Reference and the Clarity Act: the Constitutional Roadmap

Under Allan Rock, the Liberal Justice Minister announced the intentions of the federal government to refer to the Supreme Court of Canada (SCC), three questions regarding Quebec's ability to unilaterally secede from Canada. As part of the Plan B initiative, the answer was intended to harden the government's position against Quebec by discrediting or weakening the sovereignty movement's legal authority.[14] Known as the Succession Reference, the three questions asked were:

[12] *Ibid*., 12.
[13] Russell and Ryder, Postreferendum, 326.

[14] Andree Lajoie, "The Clarity Act in its Context," in Quebec: State and Society (third edition), ed. Alain- G. Gagnon (Peterborough: Broadway Press, 2004), 35.

(1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

(3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[15]

The SCC ruled in 1998 that in regards to the first question, Quebec could not unilaterally secede. On the second question, it ruled that the Quebec peoples could not be regarded as oppressed. It noted that the application for the international legal right to declare self-determination was not valid as it applied to colonial contexts. There was no conflict in law; therefore, the third question was not answered.[16] According to Andre Lajoie:

> The [Secession Reference], therefore, aimed not only to declare the unconstitutionality under Canadian law, but the invalidity, under international law, of any Quebec law that would propose a referendum...the Court chose to give Ottawa its "negative support," by indicating to the federal government how far both of them could go together."[17]

[15] Reference re. Secession of Quebec, [1998] 2 S.C.R. 217.

[16] Alain G. Gagonon, "Quebec's Consitutional Odyssey," in Canadian Politics., ed. James Bickerton and Alain-G. Gagnon (Peterborough: Broadview Press, 1999), 296.

[17] Lajoie, Context, 153.

The fundamental aspect that would lay the foundation for the Clarity Act and qualify Lajoie's argument is with the SCC's ruling on a "clear question," a "clear majority," and the negotiations that were to take place if defined thresholds were met. The significance of the ruling is the SCC's decision to not define what constituted a clear majority and question. Instead they left the political question to politicians to quantify and define. The significance regarding negotiations was that the SCC ruled that if there was a sovereigntist mandate, which had been handed by the Quebec people based on a clear question and majority, the federal government had a constitutional obligation to negotiate with Quebec. They could not ignore it as Chretien had tried.

The applicability of the Secession Reference is fundamental to the Clarity Act, because the Reference served as a legal roadmap and intent for the legislative Act. The 1995 Act, led by Stephane Dion, was aimed to reconcile the recommendations of the SCC. The Act defined a clear question as one that includes a statement of Quebec's intentions to form an independent state, void of ambiguity. The duty to negotiate could only be triggered if this requirement was met.[18] Under the Act, the 1980 and 1995 referendum questions were deemed unclear.19 The second recommendation that the Clarity Act accepted was the attempt to define what constituted a clear majority. The Act defined this as "a clear expression of a will by a clear majority of the Canadian population of that province cease to be part of Canada."[20] It considers factors such as the size of the eligible and majority voters. It does recognize that the standard of 50% of valid voters +1 did not meet the standard that the Reference forwarded as a "substantial consensus."[21] The figure was not analogous with the decision making implications of provincial secession. Though both sides declared victory after the Secession Reference, the

[18] Monahan, Rules, 14.
[19]Claude Ryan, "Doing the Consequences of the Quebec Secession Reference: The Clarity Bill and beyond," C.D. Howe Institute (2000): 9.
[20] Ibid., 31.
[21] Monahan, Rules, 13.

application of its recommendations instead generated greater debate amongst politicians and scholars, where a divergence of opinion has been voiced. To study the implications of the Act, arguments relating to the Act's effectiveness and legitimacy will be forwarded in this paper.

The Effectiveness Of The Clarity Act: The Federalist Goals And The Sovereigntist's Response

To apply the term "effective," it will be defined as "producing a decided, decisive or desired effect."[22] This piece of legislation failed to meet this definition of effectiveness. Its flaw is attributed to contradictions, failed objectives, and convolution – while achieving in areas such as minority rights and border issues. Does partial achievement sufficiently justify effectiveness? To conclude, we must examine the areas of dispute that the federal government attempts to clarify and challenge.

On the issue of a clear question, the intention was to provide clarity in the question making and voting process. Was the government effective in defining and conveying this intention? According to Monahan the ease of the question making process invoked in the Act involved a greater role of federal government intervention. Though the federal government cannot limit the question asked in a referendum, Monahan argues that the Act legitimizes the appropriateness of intervention by "submit[ting] the issue of the clarity of any referendum question to the House of Commons, permit[s] all parties to debate and formulate a collective view on the nature."[23] The myriad of confusion resulting from past word choices seemed enough to justify this standard. For Quebec sovereignist and federalists alike, the address to a clear question was not desired. Firstly, the unilateral position allowing the federal government to dismiss its obligation to negotiate sovereignty in cases of ambiguity was not supported

[22] Definition of Effective < http://www.merriam-webster.com/dictionary/effective>, November 19, 2008

[23] Monahan, Rules, 23.

by Quebecer's.[24] Secondly, Claude Ryan argues that the "collective view" approach is an example of federal intrusion in provincial matters. He argues of a contradiction within the Act:

The federal government recognizes… "the government in any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question." But it contradicts this recognition by a provision in the clarity bill that confers on the federal parliament direct power of intervention…by its own admission, this process lies within the jurisdiction of the Quebec National Assembly.[25]

Superficially, the federal government appeared to have formulated a clear question definition that was equitable. But the contradiction renders its effective value as flawed in regards to the autonomy of the National Assembly. It raises the legal argument of ultra vires from the targeted province. Ryan directly challenges Monahan's embraced approval of the "collective view" position in a referendum question.

Referendums are a political statement. It seems counterintuitive for the National Assembly to seek approval for a political declaration from the very body it intends to divide itself from. The effective value of the clear question aspect only aids in Quebec's argument of paternalism by the federal government, as it acts as a negatively connotative proof-reader for the National Assembly. This concern by Quebecer's is –unfortunately – effectively legitimatized by the Act. Analogous with Trudeau's defense during the constitution partition, it reinforces the view that sovereigntist governments cannot act on the best interests of Quebecers. The blanket assumption that only the federal government can offer fair representation and equity is problematic. It challenges democracy and undermines the elected officials of the National Assembly, rendering official representatives as moot. This

[24]Ryan, Consequences, 22.
[25] *Ibid.*

assumption is dangerous. Thus, elements of the Clarity Act are problematic. This cannot be the desired effect of the federal government if it intends to be equitable. If it does not create legal oppression, as the SCC rejects, it perpetuates a theoretical one.

The problematic parts of the clear question argument pales in comparison to the decisive matter of defining what constitutes a clear majority. A distinctive ineffective element of the Clarity Act resides with its failure to quantify what is a clear majority. This part of the Act can be outright considered ineffective because not only does it not clarify, but it convolutes the issue. Evidence of this ill-defined area of the Act is demonstrated within political literature. Theorists can only speculate what could consitutute as a majority based on polling opinions of the voting majority and other socioenviromental factors.[26] Speculation amongst the echelon should not dominate if there is a decisive, definitive, and predictable manner of determining a majority. This is of utmost important if the sole reasoning for a piece of legislation is to be decisive! Its definitional nature is vague, and only addresses what quantitative value is not acceptable, which is 50% +1, yet there is a failure to supplement it. For Monahan who supports the Act, even he states that there is societal uncertainty, whereby questions of transparency and accountability can occur. There can be confusion and disorder if a majority figure is not established and a very close race was to ensue.[27] This is a serious flaw to the Clarity Act as a whole document because of the importance of the clear majority issue. It acts as one half of the necessary component needed for sovereignty negotiations to take place.

In areas where the federal government did achieve success was in regards to Aboriginals and the issues of border. The Act attempts to be more inclusive as evident in what is considered the multilateral

[26] Monahan, Rules, 26.

[27] *Ibid.*, 32.

negotiation model, whereby Aboriginals are included in the negotiation processes of sovereignty.[28] For Aboriginals their tries are closer to the federal government though they, like the Quebecer's, have also experienced the patronizing extensions of the government. As Peter Russell and Bruce Ryder highlight, "it must also be recognized that there are a number of Aboriginal peoples within the province of Quebec whose right to self-determination – in both moral and legal terms – is as strong, if not stronger, as any that the Québécois can claim."[29] The inclusiveness of Aboriginals is important for this group after being marginalized during the 1980 and 1995 referendums. A concern for the Quebec government is the overwhelming support against sovereignty –showing 96% opposition.[30] The inclusion gives the federal government greater negotiating power, as First Nations are within the jurisdictional responsibility of the federal government. The Act is effective in the sense it includes former marginalized groups.

The extension of Aboriginal's inclusiveness also overlaps with issues of land and boundaries. The second positive aspect of the Clarity Act is its address to the border issues within Quebec, and the possibility of renegotiating land divisions. The federal government's position on this issue reflects the inclusiveness and consideration of Quebec regions who overwhelmingly may decide to vote "no" in a referendum campaign. This legal effect weakens the standing claim by sovereignty leaders who argue that border negotiations would not be subjected. This follows the hardening position of the Plan B initiative. Scholars have noted, "a refusal to negotiate and adjust borders would mean that the Quebec government was not conducting itself in accordance with the mandated

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[28] *Ibid.*, 14.
[29] Russell and Ryder, Postreferendum, 327.
[30] Aboriginal Peoples and the 1995 Quebec Referendum: A Survey of the Issues, Parliamentary Research Branch (PRB) of the Library of Parliament, February 1996.

negotiation framework."[31] Though two issues stand as the more positive elements of the Act, they are not able to sufficiently overshadow the flaws of the two necessary principles needed to trigger the debates of Aboriginal rights and border issues.

Legitimacy of the Clarity Act- Legality and Recognition

For Quebecers, there is a strong sense of the rule of law. Despite not signing the Canadian Constitution, its people have abided and contributed as supporters of the rights based vision of federalism. The conceptions of democracy and the rule of law are necessary in the evaluations of the extent of legitimacy in the Secession Reference and Clarity Act. To define the application of "legitimacy," Claude Ryan argues that it is supported on a foundation of the rule of law. He states, "legitimacy and legality must go hand in hand in democratic society." He qualifies this by quoting the Secession Reference, "[D]emocracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign" will is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation."[32] The examination of legitimacy will emphasize legal legitimacy and also the legitimate value of the Clarity Act as recognized by the Quebec government.

In regards to legal legitimacy of the Clarity Act, to what extent is the Secession Reference democratic and abiding by the rules of law? Firstly, proceeding in a nonconsensual manner to the SCC is problematic. The Act can be deemed as not legitimate because Quebec, did not participate, nor support the Reference. The importance of a consensual piece of legislation contributes to the degree of legitimacy, as argued by Russell and Ryder, "we hold the view that, if there is to be a radical change in Quebec's constitutional status – including its becoming an independent state –such as change should be effected through a process that is consensual and retains

[31] Monahan, Rules, 20.

[32] Ryan, Consequences, 22.

legal continuity."[33] Forcefully bringing a province into the fold of constitutional matters challenges the notion of equality of power in the federalism model.

Secondly, legally interpreting sovereignty as exclusive to political influences is problematic. Quebec felt that the role of the SCC was strictly legal in nature and not political, as the issues of sovereignty was categorized as. Moving the issue to the legal sphere undermines the initial position of the federal government; hence questioning its authoritative role. The orthodox view of the federal government supports this as they "chose not to intervene in a matter that was 'political' rather than legal" in reference to the 1995 referendum.[34] The decision to refer the question of secession is a contradiction of the government in times of panic. Quebec can argue that the political nature gives the SCC no authority to be decisive on the matter. Furthermore, this dramatic shift compromises the validly of the Reference, because of the difficulty in separating "law" and "politics" in an issue that is historically and socially convoluted, yet integral to understanding the present issue of sovereignty. It is a political beast that the SCC ambitiously determined as able to "clearly be interpreted as directed to legal issues."[35] It can not be directed in a pure legal sense without trading off vital contextual factors in the issue itself.

The third problematic element of the legitimate value of the Act is the methodology used. The legal philosophy of the SCC in answering the Reference question departs from the application of case law; which judgments are to be based on. This problem is raised by Claude Ryan who argues that:

Its answers pertain to the legal and juridical aspects of those questions, that would mainly discuss unilateral secession, and it intends to leave…the genuinely political aspects of secession...Such a exclusively

[33] Russell and Ryder, Postreferendum, 324.
[34] Young, The Struggle, 68.
[35] Ryan, Consequences, 1-2.

juridical approach, however has inherent limitations. By restricting its analysis to the legal aspects of the questions put to it, the Supreme Court necessarily has to interpret reality based on legal concepts.

The case law regarding sovereignty is restricted, or as Monahan argues as riddled with "gaps."[36] It is based on judgment that is intuitive where standards cannot be measurable and compared. It is a slippery slope of interpreting sensitive constitutional matters. Furthermore, there is a built in legal bias, as the pressure to be equitable is more significant because it deals with the monumental issue of nationhood itself. No judge wants to be the judge that creates precedence in breaking up the country. Hence, the language used can often be vague and even shallow; a dominant criticism of the Clarity Act. This is an immense burden for a panel of nine judges. The legitimate value of a piece of legislation is not strong if the foundation that it is built on is weak, and the walls of interpretation as compacted by intuitive standards.

The strongest means of proving a legitimate piece of legislation is through its application and decisive power. The response of Bill 99 by the Quebec government is a formal dismissal of the Act by the National Assembly. It neuters the legitimate authority of the Act. For the federal governments, its goal was to assert its position and define its obligations in cases of sovereignty negotiation. In the opinion of the Quebec government, this vision and exertion of power is not viewed as democratic in accordance with the definition of legitimate that we use to measure. The counter-legislation of Bill 99 acts as a statement of the Clarity Act's application as law, one that is not recognized. Though the validity of Bill 99 is challenged by federalist Quebecers, it is more a symbolic message of self-determination.[37] It is a defiant statement of the right to self-determination. It garners historical feelings that are more in line with the

[36] Monahan, Rules, 9.

[37] *Ibid.*, 25.

Quiet Revolution years, in the belief that Quebec and only Quebec are masters of their house.

Conclusion

The growing fracture of the two founding races culminated in the trending away from the collective ignorance regarding the issue of Quebec self determination. Struck after the 1995 referendum, the Clarity Act has continued to raise new constitutional issues regarding Quebec. In this examination we have challenged the degree the Act has been in terms of the defined standards of effectiveness and legitimacy. We have argued that the Clarity Act has not met the definition of both. It has been demonstrated that the Clarity Act did not sufficiently fulfill the gaps or intended goals of the federal government. Within the legislation there were contradictions regarding the issue of a clear question and furthermore, it convoluted the definition of what constituted a clear majority. The failure to support the two necessary pillars needed for sovereignty negotiation to take place deemed it as ineffective despite making gains in the areas of Aboriginal rights and border claims. The ineffectiveness of the Act is synonymously coupled with raised concerns of its legal authority. Three fundamental problems occurred: Quebec was excluded from the Secession Reference process, the restrictive nature of answering a legal question regarding sovereignty was problematic, and the departure from case law was a slippery slope towards interpretation. Sovereignty is a product of social and political experiences that are not mutually exclusive with the rule of law. Quebec's position against the Clarity Act is emphasized in its counter-legislation with Bill 99. These foundational problems weakened its lawmaking authority, applicability and importantly its legitimate and effective value.

Works Cited

Aboriginal Peoples and the 1995 Quebec Referendum: A Survey of the Issues. Parliamentary Research Branch (PRB) of the Library of Parliament. February 1996.

Cairns, Alan C. "Looking into the Abyss." in The referendum papers: essays on secession and national unity., ed. David R. Cameron, Toronto: University of Toronto Press, 1999, 199-243.

Courchene, Thomas. "The changing nature of Quebec-Canada relations: From the 1980 referendum to the summit of the Canadas." IRPP Working Paper Series, 08 (2004): 1-20.

Gagnon, Alain G. "Quebec's Constitutional Odyssey." in Canadian Politics, ed. James Bickerton and Alain-G. Gagnon (Peterborough: Broadview Press, 1999), 296.

Lajoie, Andree. "The Clarity Act in its Context." in Quebec: State and Society (third edition), ed. Alain- G. Gagnon, Peterborough: Broadway Press, 2004, 151-163.

Monahan, Patrick. "Doing the rules: An assessment of the federal Clarity Act in light of the Quebec Secession Reference." C.D. Howe Institute (2000):1-39.

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

Rocher Francois and Miriam Smith. "The four dimensions of Canadian federalism." in New trends in Canada federalism (second edition). Peterborough: Broadview Press, 2003, 21-41.

Russell, Peter and Bruce Ryder. "Ratifying a post-referendum Agreement." in The referendum papers: essays on secession and national unity., ed. David R. Cameron, Toronto: University of Toronto Press, 1999, 323-362.

Ryan, Claude. "Doing the Consequences of the Quebec Secession Reference: The Clarity Bill and beyond." C.D. Howe Institute (2000): 1-32.

Young, Robert. The Struggle for Quebec: From Referendum to Referendum?. Montreal & Kingston: McGill-Queen's University Press, 1999.

James Madison et *Le Fédéraliste* : optimisme, réalisme et modernité

FRANÇOIS LE MOINE

A nation without a national government is an awful spectacle.
- *Federalist*, LXXXV.

Un combat politique

Après la victoire sur les troupes de Cornwallis et la reconnaissance de l'indépendance par le traité de Paris en 1783, une certaine désorganisation règne dans les colonies américaines. La guerre avait été un outil puissant de cohésion. La Déclaration d'Indépendance (1776) avait donné un sens à la lutte et les treize Articles de Confédération et d'union perpétuelle (1777) avaient créé une assemblée fédérale qui devait décider de la politique étrangère et régler d'éventuels contentieux entre les colonies. Mais une fois la victoire acquise, ce mécanisme ne suffit plus : « La Confédération était en effet constituée uniquement par un Congrès continental hypertrophié, face auquel il n'existait ni pouvoir judiciaire ni

Président. Ce congrès fonctionnait à travers un ensemble de commissions et était composé de délégués des différents États ».[1] Les États créent leur propre monnaie et l'autorité centrale peine à s'imposer. Il est désormais nécessaire d'assurer l'union et la prospérité en temps de paix. Pour remédier à ces difficultés, une première conférence est organisée à Annapolis, mais elle est ajournée en raison du manque de participants. Les États conviennent de se réunir l'année suivante, en 1787, à Philadelphie. Comme deux ans plus tard à Versailles, ce congrès a d'abord pour mandat de régler les problèmes de taxation et de finances publiques, et comme à Versailles, les délégués vont accomplir une œuvre bien plus vaste que celle pour laquelle ils avaient été convoqués.[2]

Après de longs débats, la nouvelle constitution est finalement signée le 17 septembre 1787. L'essentiel des dispositions provient du Plan de Virginie de James Madison. Les délégués sont épuisés et l'approuvent en partie pour éviter le pire, c'est-à-dire une anarchie intérieure croissante ainsi que des rivalités entre les États. Le célèbre discours de Benjamin Franklin avant la signature résume bien l'état d'esprit de cette dernière journée :

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. […] Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The

[1] Vergniolle de Chantal, F., « La convention de Philadelphie : les fondements du modèle américain », *Critique Internationale*, 2003/4, n° 21, p.122.

[2] Les constituants, toujours soucieux de rester dans la légalité, sont conscients d'avoir excédé leur mandat. Madison répond aux objections dans *Le Fédéraliste*, XV, affirmant qu'il est préférable d'évaluer la constitution afin de savoir si elle est bonne ou mauvaise et non pas si l'on en avait ou non fait la demande.

> opinions I have had of its errors, I sacrifice to the public good. […] I hope therefore that for our own sakes as a part of the people, and for the sake of posterity, we shall act heartily and unanimously in recommending this Constitution (if approved by Congress & confirmed by the Conventions) wherever our influence may extend, and turn our future thoughts & endeavors to the means of having it well administered.[3]

L'acte fondateur est posé. Mais, il reste à ratifier cette constitution dans les treize nouveaux États. Une large campagne s'organise dans l'opinion ; d'un côté, les anti-fédéralistes, partisans d'une confédération décentralisée et de l'autre les fédéralistes, optant pour un pouvoir central plus fort. Alexander Hamilton, John Madison et John Jay vont s'associer pour publier, sous le pseudonyme de Publius,[4] une série d'articles dans les journaux new-yorkais pour défendre le projet. Dès 1788, les articles seront réunis en un seul ouvrage et publiés, avec le sous-titre : « Recueil d'articles écrits en faveur de la nouvelle constitution telle qu'elle a été adoptée par la Convention Fédérale le 17 septembre 1787 ». Le Fédéraliste connaîtra un énorme succès aux États-Unis et sera même traduit en français dès 1792, en pleine Révolution, si bien que « Talleyrand en recommandait instamment la lecture et Guizot affirmait qu'au point de vue

[3] Franklin, B., « Disapproving and accepting the Constitution », 17 septembre 1787. Cité sur http://www.usconstitution.net/franklin.html.

[4] Le pseudonyme Publius est une référence à Publius Valerius Publicola, premier co-consul romain avec Brutus, élu après l'expulsion de Tarquin de Rome. Brutus décédé, Publicola devint consul unique, mais renonça à augmenter son pouvoir personnel (Tite-Live, *Histoire Romaine*, Livre I, VII-VIII). Il renforça le sénat, donna plus de pouvoir au peuple et devint, selon Plutarque « un législateur soucieux du peuple et mesuré » (Plutarque, *Vies Parallèles*, Publicola, XII, 1). Les fédéralistes ne sont pas les seuls à utiliser des pseudonymes romains pour leurs articles ; deux anti-fédéralistes célèbres – Georges Clinton et Robert Yeast – publient respectivement sous les pseudonymes de Cato et de Brutus. L'opposition est évidente entre d'une part la naissance glorieuse de la République et de l'autre les résistances des derniers grands républicains contre César. Cette référence à Rome n'est pas seulement une marque d'érudition, mais elle est aussi une nécessité. Les colonies ne peuvent trouver dans leur passé un guide pour la situation exceptionnelle qu'elles traversent et la fondation romaine est le parallèle historique le plus évident et le plus glorieux d'une fondation républicaine qui remplace une monarchie oppressive.

de l'application élémentaire des principes du gouvernement, il ne connaissait pas de meilleur ouvrage ».[5] Hamilton, Madison et Jay font ainsi partie de ceux qui appuient la Constitution non par défaut comme Franklin, mais parce qu'ils sont convaincus que le texte représente un document de première importance dans l'histoire humaine :

> Il semblait réservé au peuple de ce pays de décider, par sa conduite et son exemple, cette importante question, si les sociétés humaines sont capables de se donner un bon gouvernement par réflexion et par choix, ou si elles sont condamnées à jamais à recevoir leurs Constitutions politiques du hasard et de la force. Si cette observation est juste, la crise que nous traversons peut être regardée comme l'époque à laquelle ce problème sera résolu ; un mauvais choix, dans les mesures que nous avons à prendre, deviendrait un malheur général pour l'humanité.[6]

Considéré comme le premier commentaire de la constitution américaine, la Cour Suprême – dont Jay a été le premier juge en chef – cite encore très souvent ce recueil pour motiver ses décisions.

Cette étude va se concentrer sur les deux articles les plus célèbres du Fédéraliste : le X et le LI.[7] Tous deux rédigés par Madison, ces textes montrent comment le système mis en place par la Constitution doit permettre, par sa structure même, d'éviter de sombrer dans les défauts

[5] Sumner Maine, H., *Essais sur le gouvernement populaire*, Paris, 1884, p. 284 cité in *Le Fédéraliste*, Paris, V. Giard et E. Brière, 1902, préface de A. Esmein, p. XXI et XXII.

[6] Hamilton, A., *Le Fédéraliste*, I - On remarque d'ailleurs qu'un embryon du messianisme étasunien est déjà présent avant même que la constitution n'ait été ratifiée. Les traductions du *Fédéraliste* sont tirées de Hamilton, A., Jay, J., Madison, J., *Le Fédéraliste*, traduction de Tunc, A., Paris, Economica, 1988.

[7] Dans un sondage réalisé par les Archives fédérales auprès du public américain, ces deux articles X et LI du *Fédéraliste*, arrivent en 20e position des textes les plus importants de l'histoire américaine, après le « Voting Right Act » de 1965 et avant la Charte des Nations Unies (http://www.ourdocuments.gov/content.php?flash=true&page=vote). Même si ce type de sondage recense l'inclassable, il montre la révérence que ces deux petits articles de journaux peuvent toujours inspirer, plus de deux siècles après leur rédaction.

des républiques qui ont jusqu'alors existé. Nous verrons à quel point Madison a basé son système sur une vision moderne de l'Homme, issue des Lumières et de la philosophie politique moderne. Nous aborderons aussi la question des droits de l'Homme qui brillent par leur absence dans le recueil.

Le Fédéraliste, X : contre les factions

Les cités antiques et modernes ont été des centres de culture et de savoir de premier plan ; les querelles entre optimates et populares, ou entre Guelfes et Gibelins, sont des sujets historiques passionnants. Mais, les troubles internes que ces républiques ont connus n'incitent pas pour autant une population soucieuse d'établir la justice et de faire régner la paix intérieure, comme le veut le préambule de la constitution, à s'engager dans la même voie : « On ne peut lire l'histoire des petites Républiques de la Grèce et de l'Italie, sans se sentir saisi d'horreur et rempli de dégoût par le spectacle des troubles dont elles étaient continuellement agitées, et de cette succession rapide de révolutions qui les tenaient dans un état d'oscillation perpétuelle, entre les excès du despotisme et de l'anarchie. Si le calme y reparaît par hasard, ce n'est que pour former un contraste éphémère avec les terribles tempêtes qui lui succèdent. »[8] Est-il possible de penser la république[9] autrement ?

Après que Hamilton, dans l'article IX, eut rappelé les problèmes historiques auxquels les républiques ont jusqu'alors été confrontées, Madison tente dans l'article X de démontrer comment la république américaine peut éviter ces écueils. Madison explique d'abord ce qu'il entend par faction : « j'entends un certain nombre de citoyens formant la majorité ou la minorité, unis et dirigés

[8] Hamilton, A., *Le Fédéraliste*, IX. Il serait possible d'objecter que la philosophie, la tragédie, la sculpture et l'architecture d'Athènes ont plus fasciné les esprits depuis deux millénaires que les Guerres du Péloponnèse. Et avant les désordres de Florence, on pense plus volontiers à son humanisme : Dante, Botticelli et Michel-Ange avant Savonarole. Ce commentaire montre bien la sensibilité des Pères Fondateurs.

[9] Dans *Le Fédéraliste*, alors que le terme de « république » revêt un caractère positif, celui de « démocratie » est péjoratif. Associé aux désordres d'Athènes, les fédéralistes se gardent bien de vouloir créer un régime démocratique. Principalement issus de la classe marchande, ils cherchent avant tout à créer un régime stable.

par un sentiment commun de passion ou d'intérêt, contraire aux droits des autres citoyens ou aux intérêts permanents et généraux de la communauté ».[10] Une faction n'agit pas dans l'intérêt collectif mais dans son intérêt propre.

Pour Madison, les causes des guerres de factions sont multiples : des sectes religieuses ou des groupes politiques voulant imposer leurs vues ou des chefs en quête de prestige, ont souvent été la cause de conflits internes. Cependant, et comme plus tard Marx, Madison conclut à l'importance primordiale de la richesse et de la propriété dans les luttes sociales et politiques : « la source de factions la plus commune et la plus durable, a toujours été l'inégale distribution de la richesse. Ceux qui possèdent et ceux qui ne possèdent pas ont toujours eu des intérêts différents ». [11]

Pour l'auteur, ces factions et ces antagonismes ne sont pas un accident ponctuel, mais ils sont inhérents à une société libre. L'homme se forme naturellement différentes opinions. Une société où chacun est libre d'exposer ses vues sera donc irrémédiablement source de factions et de conflits sur le bien et le juste. Comment alors assurer la liberté sans mettre en danger la paix civile ?

Pour Madison, il y a deux manières de vaincre les factions, soit en éliminant les causes qui permettent aux factions d'exister, soit en contrôlant les effets produits par les factions. Soustraire les causes des factions veut dire en clair, soit imposer l'uniformité entre les citoyens pour qu'ils pensent tous de la même manière – la solution Brave New World –, soit détruire la liberté qui permet aux citoyens d'exprimer des opinions divergentes – la solution Léviathan –. Puisque ces deux solutions contredisent le projet libéral des Pères Fondateurs, Madison conclut qu'il faut agir non en amont, mais en aval des factions. Ces factions devront forcément exister si l'on veut préserver la liberté, mais il faut minimiser leur effet destructeur. Agir en aval d'une faction, c'est empêcher qu'une faction impose sa loi. Si Hobbes

[10] Madison, J., *Le Fédéraliste*, X.
[11] *Ibid.*

conclut que les désordres civils doivent être contenus grâce à un pouvoir fort, Madison croit pour sa part que le système politique peut, en trouvant la bonne formule, empêcher les factions de nuire au bien-être de tous.

De deux choses l'une. Ou bien la faction est minoritaire ; alors le principe démocratique l'emporte et la majorité peut s'unir pour la rejeter. Ou bien la faction est majoritaire et veut imposer sa loi. C'est alors qu'il faut prendre en compte une nouvelle donnée : celle de la taille de la république.

Un problème de taille

Que ce soit en Grèce ou en Italie, les exemples historiques connus de fondations républicaines ou démocratiques ont été sur un territoire réduit, celui de la Cité. Étant donné ces antécédents, est-il possible de fonder pour la première fois une république sur un vaste territoire, mais aussi et surtout de la maintenir sans qu'elle ne sombre dans le despotisme ? Montesquieu, dont L'esprit des Lois est aussi bien le livre de chevet des fédéralistes que des anti-fédéralistes, répond à cette interrogation par la négative :

> Il est de la nature d'une république qu'elle n'ait qu'un petit territoire : sans cela, elle ne peut guère subsister. (…) Dans une grande république, le bien commun est sacrifié à mille considérations ; il est subordonné à des exceptions ; il dépend des accidents. Dans une petite, le bien public est mieux senti, mieux connu, plus près de chaque citoyen ; les abus y sont moins étendus, et par conséquent moins protégés. (…) Ce fut l'esprit des républiques grecques de se contenter de leurs terres, comme de leurs lois.[12]

Et George Clinton, alias Cato – qui sera vice-président sous Jefferson et

[12] Montesquieu, *De l'esprit des Lois* (VIII, XVI), Paris, Gallimard, 1995, pp. 276-277. Montesquieu est qualifié de « the great Montesquieu » par Georges Clinton et de « celebrated Montesquieu » par Hamilton (Clinton, G., « Cato n° 3 » *in* Storing, Herbert J., *The Complete Anti-Federalist* (7 vols.), Chicago, University of Chicago Press, 1981 et Hamilton, A., *Federalist*, LXXVIII).

Madison – reprend cette critique dans le débat sur la constitution :

> Whoever seriously considers the immense extent of territory comprehended within the limits of the United States, together with the variety of its climates, productions, and commerce, the difference of extent, and number of inhabitants in all; the dissimilitude of interest, morals, and policies, in almost every one, will receive it as an intuitive truth, that a consolidated republican form of government therein, can never *form a perfect union, establish justice, insure domestic tranquillity, promote the general welfare, and secure the blessings of liberty to you and your posterity,* for to these objects it must be directed: this unkindred legislature therefore, composed of interests opposite and dissimilar in their nature, will in its exercise, emphatically be, like a house divided against itself. […] The republic of Sparta, was owing to its having continued with the same extent of territory after all its wars; and that the ambition of Athens and Lacedemon to command and direct the union, lost them their liberties, and gave them a monarchy.[13]

Cette objection, est parfaitement compréhensible. Il ne faut pas sous-estimer à quel point une grande union pouvait constituer un pari sur un territoire où les moyens de communication demeuraient élémentaires. Alors qu'Athènes comptait quelque 40,000 citoyens, que l'on pouvait réunir en un espace unique, les États-Unis comptent une population cent fois plus importante au moment de leur fondation. Par ailleurs, les institutions républicaines de Rome n'avaient pas résisté à l'extension du territoire et aux demandes que les nouvelles provinces et que les généraux victorieux faisaient peser sur un système conçu pour gérer une ville, non un empire.

[13] « Cato n° 3 », *op. cit.* Les italiques sont d'origine et font référence au texte de la Constitution

Ces exemples ne découragent pas l'optimisme de Publius : « Étendez sa sphère [de la république], elle comprendra une plus grande variété de partis et d'intérêts, vous aurez moins à craindre de voir à une majorité un motif commun pour violer les droits des autres citoyens ». [14] Le grand défi que lance Madison à la tradition politique occidentale est de prouver qu'il est non seulement possible de construire une vaste république où la liberté et la paix iront de pair, mais aussi qu'elle est précisément la réponse au problème de la faction potentiellement majoritaire évoquée plus haut. Ainsi, si une secte religieuse ou un chef politique peut causer des désordres dans un État, la variété de l'Union et son étendue vont permettre soit de neutraliser les effets négatifs ou de trouver une majorité pour vaincre les désordres. C'est là toute l'originalité de la démarche : elle combine deux éléments de désordre potentiel – la taille du territoire et les factions – en un élément de stabilité. À un problème républicain, Madison propose un remède républicain.

Le Fédéraliste, LI : la clé de voûte

Tout aussi importante que la question des factions et de la paix civile, cet article porte sur la question de la séparation des pouvoirs. Ce texte est le dernier d'une séquence (XXXVII à LI) qui passe en revue les principes de répartition des pouvoirs à l'intérieur de la constitution. À partir de l'article LII et jusqu'à l'article LXXXIII, Publius explique minutieusement le fonctionnement du pouvoir législatif, puis de l'exécutif et finalement du judiciaire. Si l'article LI est si important, c'est qu'il articule l'ensemble du propos et qu'il détaille le principe si difficilement traduisible des "checks and balances", des contrepoids.

Madison débute avec des observations générales. Il reprend de Locke et de Montesquieu la nécessité de séparer le pouvoir en différentes branches : « Pour qu'on ne puisse abuser du pouvoir, il faut que par la disposition des choses, le pouvoir

[14] Madison, J., *Le Fédéraliste*, X.

arrête le pouvoir ».[15] Madison précise que chaque branche doit jouir d'une indépendance quant aux nominations, à l'organisation et aux salaires attachés à chaque fonction.

L'auteur reconnaît qu'il faille admettre quelques dérogations au principe de la séparation des pouvoirs. Pour le pouvoir judiciaire,[16] on doit par exemple prendre en considération le système de nomination et les compétences requises pour l'exercice de la fonction. De plus, les nominations étant généralement permanentes, il faut s'assurer que le juge prenne rapidement ses distances de l'instance qui l'a nommé.

Madison reconnaît également que les trois pouvoirs ne doivent pas avoir le même poids. Conformément à la philosophie du XVIII[e] siècle, le pouvoir dominant pour Madison est celui du législateur.[17] Il est conséquemment nécessaire de diviser cette autorité en deux chambres, le Sénat et la Chambre des Représentants, qui sont rendus étrangères, l'une à l'autre, par des modes d'élection et de fonctionnement différenciés.

Ces deux premiers éléments, la séparation des pouvoirs et l'indépendance des élus, sont les prérequis à la construction de ce que l'on pourrait appeler la « machine » fédérale. Un troisième élément doit s'ajouter à l'équation pour que cette « machine », encore inactive, fonctionne correctement dans la durée. Pierre Manent résume le problème auquel Madison apportera une solution radicalement moderne :

> En Angleterre, le pouvoir exécutif, résidant dans le roi, et le pouvoir législatif, résidant dans la Chambre des Communes, ont une source ou une légitimité différente : cela garantit la vigilance de chacun des pouvoirs face aux

[15] Montesquieu, *L'Esprit des Lois*, XI, 4.

[16] Pour plus de détails sur le judiciaire, voir principalement le célèbre article LXXVIII.

[17] Cette conception est aussi bien présente en Angleterre qui reconnaît la suprématie du parlement, que chez Rousseau, l'une des grandes influences de la Révolution française, qui fait du législateur l'instrument de libération populaire et de transformation de la société (*Le Contrat Social*, II, 7). Le pouvoir de revue des actes législatifs par le judiciaire établi par l'arrêt *Marbury* v. *Madison* (1803) et la montée du pouvoir exécutif au XX[e] siècle sont venus remettre en cause la hiérarchie imaginée par Madison.

> empiètements éventuels de l'autre. Mais dans la constitution américaine, les trois pouvoirs, quoique pour l'essentiel séparés, ont même origine : la volonté du peuple. Où chaque pouvoir trouvera-t-il les ressources morales pour s'opposer aux empiètements d'un autre pouvoir qui pourra toujours se réclamer de cette volonté ?[18]

Des anges et des hommes

Madison a déjà montré qu'il avait tiré les leçons de Locke et de Montesquieu sur la séparation des pouvoirs. Mais l'extrait suivant démontre qu'un autre élément, soit une vision moderne de l'Homme, dans laquelle on retrouve des échos de Machiavel et de Hobbes, est mise au service de la fédération. Madison ne se fait aucune illusion sur la nature humaine. Mais, pour lui, comme pour Adam Smith, la nature égoïste de l'homme n'empêche pas de mettre l'intérêt personnel au service de l'intérêt général. Madison mérite, ici encore plus qu'ailleurs, d'être longuement cité :

> Mais la garantie sérieuse contre une concentration progressive des différents pouvoirs dans le même département, c'est de donner à ceux qui administrent chaque département les moyens constitutionnels nécessaires et un intérêt personnel pour résister aux empiètements des autres. Les moyens de défense doivent être, dans ce cas, comme dans tous les autres, proportionnés aux dangers d'attaque. Il faut opposer l'ambition à l'ambition, et l'intérêt de l'homme doit être lié aux droits constitutionnels de la place. C'est peut-être une critique de la nature humaine, que ces moyens soient nécessaires pour contrôler les élus du gouvernement. Mais qu'est le gouvernement lui-même sinon le plus grand critique de la nature humaine ?

[18] P. Manent. *Les Libéraux*, Paris, Gallimard, 2001, p. 307.

> Si les hommes étaient des anges, il ne serait pas besoin de gouvernement ; si les hommes étaient gouvernés par des anges, il ne faudrait aucun contrôle extérieur ou intérieur sur le gouvernement. Lorsqu'on fait un gouvernement qui doit être exercé par des hommes sur des hommes, la grande difficulté est la suivante : il faut d'abord mettre le gouvernement en état de contrôler les gouvernés, il faut ensuite l'obliger à se contrôler lui-même. La dépendance vis-à-vis du peuple est, sans doute, le premier contrôle sur le gouvernement ; mais l'expérience a montré la nécessité de précautions complémentaires.[19]

Madison rend ici un grand hommage à la pensée politique moderne. La République de Platon est un texte admirable, mais celui qui cherche un manuel pour gouverner une Cité est mieux avisé de se référer au Prince. Machiavel avait en effet basé sa philosophie politique sur un constat réaliste de la nature humaine qui permettait de gouverner efficacement : l'histoire montre que l'égoïsme de l'homme est une donnée plus constante que son courage ou que sa vertu. Leo Strauss résume bien la situation : les Modernes construisent sur un sol peu élevé, mais qui a l'avantage d'être solide. Les Anciens avaient, de leur côté, tendance à construire dans les airs, sans ancrage dans le réel.[20]

Les Modernes pensent ainsi qu'il est possible de combiner un constat anthropologique plutôt pessimiste à une finalité politique positive. L'homme n'a pas besoin d'être parfait, ni même d'être particulièrement vertueux, pour que l'on puisse construire une société

[19] Madison, J., *Le Fédéraliste*, LI. On note que Hamilton partage la conception de Madison sur l'Homme : « tous les hommes sont des vauriens n'ayant d'autre but que leur propre intérêt. Par cet intérêt nous devons les gouverner, et par ce moyen, les faire coopérer pour le bien de tous, en dépit de leur insatiable avarice et ambition. » (Hamilton, A., *The Papers of Alexander Hamilton* (1 : 126), cité in Ruiz, J.-M., « *Publius* et la Nature Humaine » in *Revue française d'étude américaine*, n°87 – janvier 2001, p. 9).

[20] Strauss, L., « Niccolo Machiavelli », *Studies in Platonic Political Philosophy*, Chicago, University of Chicago Press, 1986, pp. 210-228.

harmonieuse et stable. On saisit maintenant mieux l'affirmation de Madison : « Il est aussi ridicule de rechercher des modèles dans la simplicité de la Grèce ou de la Rome ancienne que chez les Hottentots ou les Lapons ».[21]

Pour Madison, les Américains vont défendre leurs institutions pour des raisons très simples. Non qu'ils soient plus que d'autres peuples, attachés à la vertu humaine, ni à cause d'une sagesse supérieure, ni en raison d'un ordre venu d'en haut. Les Américains vont défendre leurs institutions simplement parce que c'est dans leur intérêt. Le système de contrepoids conçu par Madison va empêcher un groupe ou un individu de tirer avantage du non-respect de la Constitution. Les citoyens de la république américaine et les membres des différentes branches du gouvernement vont défendre la Constitution et vont se comporter de la même manière que le célèbre boulanger de Adam Smith, qui se lève tous les matins pour cuire du pain, non par générosité et pour nourrir l'humanité, mais simplement parce que c'est dans son intérêt propre.

Les droits de l'Homme

Avant de conclure, il apparaît utile d'aborder un sujet moins commenté, mais révélateur de l'état d'esprit de l'époque. Alors que les droits de l'Homme sont primordiaux dans le discours démocratique contemporain, allant jusqu'à être pour plusieurs l'attribut indissociable de la démocratie, ils brillent par leur absence dans Le Fédéraliste.

À la fin de l'article LI, Madison affirme que : « La justice est la fin du gouvernement, c'est la fin de toute société civile. Elle a toujours été et sera toujours le but poursuivi jusqu'à ce que but soit atteint, ou que la liberté soit perdue à sa poursuite ».[22] Madison justifie la Constitution sur une base institutionnelle et bien qu'il reconnaisse l'importance de la justice, il défend plutôt faiblement les droits individuels. À la lecture de la citation : « vous aurez moins à craindre de voir à

[21] Hamilton, A., *The Papers of Alexander Hamilton* (3 : 103), cité in Ruiz, J.-M., *op. cit.*

[22] Madison, J., *Le Fédéraliste*, LI.

une majorité un motif commun pour violer les droits des autres citoyens »,[23] Madison rend moins probable, mais non pas impossible comme on pourrait l'attendre, une attaque contre les droits individuels.

Madison recherche la paix sociale et la stabilité du régime. Mais, qu'advient-il quand une conception, injuste pour certains, est largement partagée par les différents membres de la fédération, dans différents espaces ? Quel frein existe-t-il aux abus de pouvoir de la fédération ? Quel argument trouverait-t-on, par exemple, contre une restriction des libertés de la presse si elle faisait consensus ?

Cette absence de droits clairement identifiés n'est pas un oubli. Même si l'Angleterre offre depuis un siècle un exemple de protection de la sphère individuelle avec l'Habeas Corpus et le Bill of Rights, Hamilton se prononce contre un quelconque Bill of Rights américain dans Le Fédéraliste, LXXXIV. La Constitution fait déjà référence à la garantie d'Habeas Corpus[24] et l'on ne voit pas l'intérêt de pousser plus loin l'exercice, considérant que les garanties existantes étaient suffisantes et qu'énumérer certains droits signifiait en exclure d'autres.[25]

Pourtant, quelques mois plus tard, en 1789, James Madison propose un projet d'amendements – le United States Bill of Rights – qui garantit justement ce que Publius voulait laisser de côté un an plus tôt : la liberté de religion, de presse, d'assemblée, la protection contre les fouilles ou contre tout abus physique, le droit à la propriété et à un procès équitable, pour ne nommer que les principaux.

Que s'était-il passé ? Plusieurs personnalités – tel Thomas Jefferson – étaient favorables à ces amendements. Les critiques des anti-fédéralistes sur cette question – dont Patrick Henry – ont mis en danger la ratification de la Constitution dans plusieurs États. Madison a finalement dû proposer ces amendements, de peur de voir l'ensemble de l'édifice s'écrouler.

[23] Madison, J., *Le Fédéraliste*, X.

[24] Article Premier, Section 9 de la Constitution.

[25] Hamilton, A., *Le Fédéraliste*, LXXXIV.

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Dans La République de Cicéron, Scipion expose une idée de Caton selon laquelle deux types de fondation de cité sont possibles : l'exemple du législateur unique – Solon ou Lycurgue – et l'exception romaine. Scipion explique :

> Notre État [Rome], n'a pas été constitué par l'intelligence d'un seul homme, mais par celle d'un grand nombre ; et non au cours d'une seule vie d'homme, mais par des générations, pendant plusieurs siècles. Il n'a jamais existé, disait-il [Caton], un génie assez grand pour ne rien laisser lui échapper de tous les faits, et tous les génies réunis pour n'en faire qu'un seraient incapables, à un moment donné, de prendre de sages mesures, en embrassant toute la réalité, s'ils manquaient de l'expérience que donne une longue durée.[26]

À la lecture de ce passage, on ne peut s'empêcher de faire un parallèle avec Le Fédéraliste. Qu'auraient pensé les républicains romains de la fondation américaine ? Certes, si l'on n'a pas donné raison à un seul individu jusqu'au bout – comme le montre l'exemple du Bill of Rights – les Pères Fondateurs ne seraient-ils pas l'exemple historique le plus proche de ce législateur idéal auquel l'Antiquité a rêvé ?

On peut objecter que la constitution américaine a été de nombreuses fois amendée et que certains problèmes, à commencer par l'esclavage, ont d'abord été évités. Si, comme le croit Madison, l'inégale répartition de la richesse est historiquement la principale source de conflits, alors l'esclavage est certainement en tête des problèmes dont il faudrait se préoccuper. De plus, si le système républicain permet de restreindre assez efficacement le développement de factions, il ne permet pas de régler un conflit fondamental de valeurs entre deux modes d'organisation différents qui

[26] Cicéron, *La République* (livre II), Paris, Gallimard, 1994, p. 58.

divisent le pays géographiquement. Le système de Madison ne peut fonctionner que s'il existe un consensus assez large sur les principes fondamentaux qui doivent régir l'organisation sociale.

Par ailleurs, si le débat a pu atteindre un haut degré de raffinement, il ne faut pas pour autant penser que les articles de Publius ont réfuté toutes les objections et que le débat s'est partout déroulé de façon exemplaire. Au Connecticut, on a couvert un délégué anti-fédéraliste de goudron et de plumes alors qu'au New Hampshire, on a fait voter la ratification en secret, pendant que les délégués anti-fédéralistes étaient en train de manger… Même à New York, où les articles de Publius ont été publiés, la ratification a été obtenue in extremis. Sans doute que si la Constitution avait été soumise au vote populaire, elle n'aurait été acceptée dans aucun État.

Malgré tout, il est difficile de penser à un exemple historique de fondation politique qui se soit autant rapproché de l'idéal de Caton. Aucune autre nation n'a eu la chance d'avoir d'aussi grands hommes, à la fois penseurs et hommes d'État, pour présider à la fondation de ses institutions politiques. Il faut rendre à Madison et aux Pères Fondateurs ce qui leur revient : l'édifice constitutionnel a traversé deux siècles mouvementés, au cours desquels plusieurs grandes nations ont succombé à la tentation tyrannique. Défauts et qualités bien pesés et soupesés, on ne peut que s'incliner devant leur œuvre.

Le moment de rédaction d'une constitution est un événement politique où l'urgence de la situation laisse peu de temps à la réflexion approfondie. Les textes du Fédéraliste réussissent cependant à faire ce que peu de texte politique partisan accomplit : transcender le lieu et le moment et être d'une portée universelle. Publius envisage un certain nombre de questions qui ont fait réfléchir les penseurs politiques depuis l'Antiquité et trouve des solutions originales, basées sur une vision moderne et réaliste de l'homme et sur un optimisme quant aux possibilités d'avenir. Toute personne

intéressée par les institutions politiques peut trouver dans ces courts articles une source de renseignement et de sagesse. Si le libéralisme et la démocratie semblent aujourd'hui aller de soi, s'ils semblent être naturels à l'homme, alors une lecture sommaire du Fédéraliste montre à quel point nos systèmes politiques sont le produit de réflexions approfondies et de longs combats politiques.

Textes de référence

-Cicéron, *La République*, Paris, Gallimard, 1994.

-Hamilton, A., Jay, J., Madison, J., *Le Fédéraliste*, Paris, V. Giard et E. Brière, 1902.

-Hamilton, A., Jay, J., Madison, J., *Le Fédéraliste*, Paris, Economica, 1988, traduction de Tunc, A., (texte de référence).

-Hamilton, A., Jay, J., Madison, J., *The Federalist Papers*, Oxford, Oxford University Press, 2008.

-Montesquieu, *De l'esprit des Lois*, Paris, Gallimard, 1995.

-Storing, Herbert J. (éd.), *The Complete Anti-Federalist* (7 vols.), Chicago, University of Chicago Press, 1981.

-Tite-Live, *Histoire Romaine*, Paris, Les Belles Lettres, 1986.

-Plutarque, *Vies Parallèles*, Paris, Gallimard, 2001.

Commentateurs

-Manent, P., *Les Libéraux*, Paris, Gallimard, 2001.

-Ruiz, J.-M., « *Publius* et la Nature Humaine » in *Revue française d'étude américaine*, n°87 – janvier 2001.

-Strauss, L., « Niccolo Machiavelli », *Studies in Platonic Political Philosophy*, Chicago, University of Chicago Press, 1986, pp. 210-228.

-Vergniolle de Chantal, F., « La convention de Philadelphie : les fondements du modèle américain », *Critique Internationale*, 2003/4, n° 21.

The Canadian Federation and Fiscal Imbalance

KATHERINE GOSSELIN

Canada, like all other federations, must function despite the complex nature of fiscal relations between the country's multiple levels of government. The Conservative government, under Prime Minister Stephen Harper, has acknowledged that a fiscal imbalance exists in the Canadian federation. Through a number of recent measures, the government has strived to reconcile the country by trying to achieve a state of fiscal equilibrium. This paper will explain how Canada came to be in a state of imbalance, what that means, and how it relates to Alain Noël's three conditions for fiscal balance. In particular, this paper will focus on the perceived imbalances or disadvantageous financial situations in large Canadian cities like Toronto and in the provinces of Ontario and Saskatchewan. Though many opposition members refused to believe that a fiscal imbalance was applicable to the Canadian situation, Harper vowed to fix these imbalances as part of his 2006 election platform of open

federalism. Lastly, this paper will consider how the 2007 federal budget attempts to return the federation to a state of fiscal equilibrium and whether or not these measures have been successful in allowing the federation to meet the conditions for fiscal balance.

To better understand the complexity of fiscal relations in Canada, it is necessary to define various concepts relating to fiscal imbalance and the programs created to address these issues. Fiscal imbalance was most recently made a public issue with the creation of the Canada Health and Social Transfers (CHST) in 1995 (Brown 2007, 74). The CHST maintained many of the imbalanced policies of its forerunners, Established Programs Financing (EPF) and the Canada Assistance Plan (CAP). The establishment of this lump sum transfer explains why fiscal inequality has become such a prominent issue. Instead of measures based on equality, the legacy of these two programs meant that the distribution of the CHST was based largely on outdated formulas and convention, instigating much controversy because each province received a different share of the transfers per capita. The government at that time, however, refused to believe that this situation constituted fiscal imbalance. Instead, it was up to the recently elected Conservative government to address the issues of imbalance parlayed by voters (Ibid., 75). Stéphane Dion, in his previous role as Federal Minister of Intergovernmental Affairs, was quoted as saying that "there can be no imbalance to the detriment of one order of government when it has access to all revenue sources and even has a monopoly on such major sources as lotteries and natural resource royalties" (Laurent 2002, 2). Obviously, Harper disagreed.

If the current government continues to make fiscal balance a priority, what will it look like? Alain Noël identifies three conditions for fiscal balance, stating that, ideally

1. "...own-source revenues are sufficient to allow each order of government to be autonomous and

accountable in its fields of jurisdiction;"

2. "own-source revenues plus transfers are adequate and enable governments to cover necessary expenditures; and"

3. "transfers are unconditional, unless there is a valid agreement to that effect" (Noël 2005, 129-130).

In other words, a fiscal imbalance exists when any of these three indicators are found to be lacking.

Complexities arise as well because there are two types of imbalance to be considered — vertical and horizontal. A vertical fiscal imbalance, the type of imbalance which has garnered recent attention, occurs when one level of government raises more revenue than is necessary for implementation of public programs and the other level of government raises less than is necessary, after transfers (Advisory Panel 2006, 12). According to the Advisory Panel on Fiscal Imbalance, this type of imbalance developed in the 1990s as a result of large-scale cuts to provincial funding from the federal government. The Panel also notes that the fiscal imbalance is perceivable in the lives of all Canadians, given the federal government's increasing presence in areas of provincial jurisdiction. This situation is difficult for the different levels of government to resolve because it would be widely unpopular for provinces to increase taxes significantly or decrease the amount of social programs in an attempt to remedy the imbalance (Ibid., 67).

The horizontal fiscal imbalance addresses the disparities in wealth between different provinces and "the difference in the ability of individual provinces and territories to raise revenues" (Ibid., 13-14). Oil-rich provinces like Alberta have far more resources to spend on public programs than provinces which are "economically disadvantaged ... [and] less able to raise the necessary revenues" (Ibid., 77). The situation is equally disadvantageous for the territories, who perceive an even greater imbalance in their ability to raise revenues. In Ontario or Quebec,

increasing income tax rates by 3% would achieve a 1% increase in total revenues. In Nunavut, on the other hand, a 30% increase in income tax rates would be required in order to achieve the same 1% increase in revenues (Ibid., 49). This inequality in fiscal capacity is the reason why the government needed to create "some form of program designed to help the less prosperous provinces provide adequate public services to their residents" (Ibid., 77).

The program created to address the issue of unequal fiscal capacity is called Equalization or, in the case of the territories, Territorial Formula Financing. These programs are intended to uphold the ideal that all Canadians should have access to equivalent levels of service no matter where they live. In order to accomplish this goal, the government distributes tax revenues to less well-off provinces (Ibid.). By averaging the fiscal capacity or "ability to raise revenue" of all 10 provinces, the government discerns which provinces have below average fiscal capacity and grants these 'have-not' provinces Equalization payments (Department of Finance, "Equalization Program" 2008). Because of the horizontal and vertical fiscal imbalances which exist in the Canadian federation, Stephen Harper has made it the objective of his government to resolve these issues.

In the past decade or so, there has been evidence of a fiscal imbalance in nearly every interaction between the separate levels of government. Cities, Ontario, and Saskatchewan, have complained of imbalance or unfair treatment, and they will be the focus of the remainder of this paper.

In large municipalities, there exists a valid contention that they do not receive an adequate share of government revenue and are therefore unable to cover the considerable expenses associated with providing services to their citizens (Slack 2004, 4). Cities require an exceptional amount of resources if they are to provide "police and fire protection, roads and transit, water and sewers, garbage collection and disposal, recreation and culture, public health, housing, planning and development,

and in some municipalities, social services" for over a million people (Ibid.). However, because Canada's cities are only allowed access to "property taxes, user fees, and intergovernmental transfers," large municipalities such as Toronto, Montreal, and Vancouver, find themselves unable to keep up with the increasing levels of demand for public services (Ibid., 19). Enid Slack addresses this often overlooked issue of the imbalance faced by municipal levels of government and outlines ways in which revenue sharing between provincial or federal governments and large cities might be improved. One possibility is that a portion of the revenues from other levels of government could be transferred to municipalities according to a set formula (Ibid., 8). There is also the possibility that this uniform portion of the provincial or federal tax rate could be returned either partially or entirely to the municipalities of origin. Slack's other options for revenue sharing suggest a focus on greater municipal autonomy. With more autonomy, cities would be permitted to set their own tax rate from government revenues or could even go so far as to create a municipal tax (Ibid., 9). All of these are valid options which must be considered by the Conservative government if they are to resolve the fiscal imbalance between higher levels of government and large municipal governments.

The province of Ontario must not only deal with the city of Toronto's inability to meet demands for public services, they must also address provincial fiscal issues. In the past few decades, citizens of Ontario claim to have suffered from cuts in federal funding and the creation of disadvantageous federal programs. For example, "the 5% growth limit to Canada Assistance Program for the three have provinces" likely cost Ontario $7 billion between 1990 and 1994 (Courchene 2005, 5). Ontario also contends that the province should be compensated more generously by the federal government because they receive such a large portion of Canada's immigrants. More resources to fund the settlement of immigrants and Labour Market Development

Agreements have been demanded from the federal government, but to no avail (Ibid.). The government of Ontario complains that the lack of Labour Market Development Agreements cost the province "$900 million in the three years ending 1993-94" (Ibid.). Until very recent changes in Ontario's fiscal capacity, most other provinces felt that these contentions made by Ontario were unsubstantiated and unmerited.

As one of the richer provinces in the federation for a long period of time, Ontario has often been looked upon with jealousy and resentment by other provinces who felt, "just as high-income people may complain that they pay more in taxes than they get in services, so do high-income provinces" (Lee 2006, 19). Ontario was often viewed as a rich province complaining that they were forced to contribute more to the federal government in taxes than they received in federal transfers and that poorer provinces were the recipients of Ontario's tax revenues (Ibid.). As of November 2008, this situation has undergone a significant change as Ontario, for the first time ever, will receive an Equalization payment worth $347,000,000 (Maurino & Leslie 2008, A1). Still, it is important to consider how, prior to this change in economic status, Ontario's complaints were often viewed as inappropriate and unconstitutional. Section 36 of the Canadian Constitution commits both provincial and federal levels of government "to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians" (Department of Justice 1982). Furthermore, the Constitution commits the federal government to making equalization transfers so that all provinces can have relative equality in public services at similar levels of taxation. This legislation significantly weakens the arguments of rich provinces such as Ontario, that have often felt as though they were receiving unequal treatment by contributing a large portion of their tax revenues to programs in other provinces (Ibid.).

In stark contrast to the situation of Ontario, Saskatchewan is now considered a 'have' province after a lifetime of receiving Equalization payments. However, contentions of fiscal inequality persist. In particular, the federal government's confiscation of Saskatchewan's oil revenues is cause for unrest in the province, as the people of Saskatchewan are relatively poor without non-renewable resources and feel that they are being mishandled by the federal government. In the "fiscal year 2000-01 Saskatchewan's energy revenues totalled $1.04 billion...[but] these energy revenues triggered even larger decreases in Saskatchewan's equalization entitlements, over $1.13 billion" (Courchene 2004, 4). In fact, the province's "non-energy equalization entitlements are rising" far more quickly than any other province (Ibid., 9). Despite its status as a wealthy province, Saskatchewan is actually one of the least well-off provinces in the federation, finding itself at "the bottom rank in terms of per capita disposable income" (Ibid.). Regardless of massive energy revenues, the majority of wealth is not accrued by the provincial government; citizens are penalized for the wealth derived from energy revenues and prevented from receiving additional and much needed federal transfers. Employment Insurance transfers are another matter for concern in Saskatchewan as the province receives a mere $36 per person. This is in contrast to provinces such as Newfoundland and Prince Edward Island, who receive in excess of $1000 per person in Employment Insurance (Ibid.). These discrepancies in government transfers ignore the fact that Saskatchewan, despite its vast energy resources, is incapable of providing for its own citizens without assistance from the federal government. This case, as well as those of the province of Ontario and large municipalities, provides some insight into the issues raised across the country in relation to fiscal imbalance.

When Stephen Harper was elected Prime Minister in 2006, it was partially due to his criticisms of the fiscal imbalance and his vow to return

Canada to a state of fiscal equilibrium. The Prime Minister's official website outlines his plans for open federalism as of 21 April, 2006. At that time, he vowed to Canadians that he would "tackle the fiscal imbalance as part of his open approach to federalism" (Office of the Prime Minister 2006). This concept of open federalism provides provinces with more autonomy and responsibility and, at the same time, constrains the spending of the federal government in areas of provincial jurisdiction (Ibid.). By improving the relationship between federal and provincial levels of government, he believes that fiscal imbalance can be resolved. The Prime Minister also states that the fiscal imbalance is no longer just a financial issue because, "while a lot of money is involved, the functioning and the very spirit of the Canadian federation are at stake" (Advisory Panel, 98). Given such bold statements regarding the issue of fiscal imbalance, it is necessary to consider how he has chosen to act upon these assertions.

Is Canada, thanks to the government of Stephen Harper, now in a state of fiscal equilibrium? The 2006 and 2007 budgets drafted by the Conservative government claim to restore balance, but do they reconcile the disparities in the aforementioned cases of large municipalities, Ontario, and Saskatchewan? Does the current state of the federation meet Alain Noël's three criteria for fiscal balance? The 2007 federal budget focuses significantly on resolving fiscal imbalance and makes the lofty claim that the Conservative government "follows through on every commitment of the [2006 budget] plan and goes further" (Department of Finance 2007, 3). Budget 2007 allegedly "restores fiscal balance with provinces and territories" and "takes another step towards restoring fiscal balance with Canadian taxpayers" (Ibid.). This restoration process will be implemented over the next seven years and will equate to $39 billion in additional transfers. These transfers are intended to improve Equalization and Territorial Formula Financing programs and support provincial and territorial "healthcare, post-secondary education, child-care spaces, labour

market training and infrastructure" (Ibid., 45). The 2007 budget plan also aims to create a more fiscally transparent federation and to clarify fiscal responsibilities for each level of government (Ibid., 46).

Some of the concerns expressed earlier by municipalities are addressed in part by the 2007 budget. The budget grants municipalities a part in the Gas Tax Fund and an increase in their GST rebate from 57.1 percent to 100 percent (Ibid., 34-35). To the benefit of Ontario, as well as Alberta and the Northwest Territories, the budget claims that the cash support for these provinces and this territory will be increased to the same level as all other provinces and territories (Ibid., 22). For Saskatchewan, the benefits are less certain since the budget hardly mentions the province except to say that it is not receiving Equalization payments due "to strong growth" and that Saskatchewan will receive $15 million in "new labour market training funding" (Ibid. 71). The improvements promised to Saskatchewan, Ontario, and major cities, appear to be quite minimal overall and it is questionable whether these measures will be enough to resolve the fiscal imbalance.

As outlined earlier, the three conditions for fiscal balance according Alain Noël are that:

1. "...own-source revenues are sufficient to allow each order of government to be autonomous and accountable in its fields of jurisdiction;"

2. "own-source revenues plus transfers are adequate and enable governments to cover necessary expenditures; and"

3. "transfers are unconditional, unless there is a valid agreement to that effect" (Noël 2005, 129-130).

To deal with his first criteria, are the revenues of each level of government sufficient in allowing autonomy and responsibility in areas of jurisdiction (Ibid., 129)? Though this condition is met in a number of provinces, several provinces ran deficits in 2007, which suffices to say that they were unable to provide for the needs of their

citizens with provincial revenues. Newfoundland and Labrador, the Northwest Territories, Nova Scotia, and Quebec ran deficits, while every other provincial government and the federal government ran a surplus or had a balanced budget in this same period (Statistics Canada 2007). In the case of Ontario, prospects of fiscal balance have been hopeful, as the provincial government ran a surplus of $300,000,000 for the fiscal year 2005-2006, a significant improvement over the deficit of $5,500,000,000 that the province incurred in the fiscal year 2003-2004 (Ministry of Finance 2007, 5). In Saskatchewan, the province is forecasting another surplus for the year 2008-2009 at $250,000,000 (Gantefoer 2008, 72).

These two examples, as well as the other nine provinces and territories who avoided deficits, provide some hope of strides being made towards a state of fiscal balance and reliance on own-source revenues. However, municipalities have little hope of seeing the same type of progress any time soon and Toronto's 2007 budget concedes this point, admitting that the city's "challenge of matching its spending needs to its ability to raise revenues...is a permanent or 'structural' mismatch'" (City of Toronto 2007, 35). In terms of the federal government, other issues of imbalance may arise as there is increasing speculation that the federal government will find itself in deficit in 2008 or 2009. A deficit in the federal level of government would complicate the issue of imbalance further, as it would cause several orders of government at once to be unable to provide necessary services through own-source revenues (Martin 2008).

In response to Noël's second criteria, are own-source revenues and transfers sufficient for the governments to be able to cover their expenses (2005, 129)? Because federal transfers have been adequate in covering the costs incurred by every province and territory, this second criteria has been fulfilled in certain respects. In the four cases of provinces or territories with deficits, federal transfers in the form of Equalization payments have overly compensated for their lack of funding

(Department of Finance, "Federal Support" 2008). However, in the case of a municipal government like that of Toronto, and the potential federal deficit in the coming year, transfers are insufficient to resolve the imbalance. Cities, as mentioned earlier, do not receive Equalization payments. Furthermore, it is unlikely that the federal government would compensate for a possible federal deficit with revenues from lower levels of government. So, though own-source revenues and transfers may be sufficient in covering the costs of the provinces and territories, they are as of yet insufficient in addressing the situation at the municipal and federal levels of government.

Lastly, it must be considered whether intergovernmental transfers are unconditional, or if there is an agreement in place on conditional transfers (Noël, 130). This stipulation, it would appear, has been fulfilled since Equalization payments and Territorial Formula Financing are, indeed, unconditional transfers. The other major federal transfer, the Canadian Health and Social Transfer, is not unconditional, but its conditions have been agreed upon by both levels of government. As the title of this latter transfer might imply, the provinces receive these transfers under the condition that they must be spent on healthcare and social services (Brown, 68). Therefore, this third stipulation of fiscal balance would seem to be the only one adequately fulfilled, as provincial deficits and problems in large municipalities and potentially in the federal government do not allow the Canadian federation to meet the conditions for fiscal balance.

Alas, it would appear that any previous discrepancies in the vertical fiscal imbalance have been resolved in terms of most of the provincial levels of government, but imbalance persists in other areas of the federation. Even in the provinces and territories that meet the requirements for fiscal balance, dissatisfaction with public services and complaints of disadvantageous federal programs still exist. As well, municipalities and the federal government continue to feel the effects of an imbalance.

Therefore, it must be concluded that Canada is not yet in a state of fiscal balance, despite Prime Minister Stephen Harper's best efforts. Though some would argue that the issue of fiscal imbalance never applied to the Canadian situation, it is nonetheless an issue which the current government has chosen to address and therefore requires critical examination. Though cases of fiscal imbalance persist in the Canadian context, the current Conservative government has made significant progress towards the goal of fiscal equilibrium.

Works Cited

Advisory Panel on Fiscal Imbalance. "Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance." *The Council of the Federation* (2006), http://www.councilofthefederation.ca/pdfs/Report_Fiscalim_Mar3106.pdf

Brown, Douglas. "Fiscal Federalism: Searching for Balance." In *Canadian Federalism: Performance, Effectiveness, and Legitimacy.* 2nd edition, edited by Herman Bakvis and Grace Skogstad, 63-88. Toronto: Oxford University Press, 2007.

City of Toronto. *2007 Budget Summary*, <http://www.toronto.ca/budget2007/pdf/2007BS.pdf#financial>

Courchene, Thomas J. "Confiscatory Equalization: The Intriguing Case of Saskatchewan's Vanishing Energy Revenues." *Choices* 10, no. 2 (March 2004), <http://www.irpp.org/choices/archive/vol10no2.pdf>

---. "Vertical and Horizontal Fiscal Imbalances: An Ontario Perspective." Background Notes for a Presentation to the Standing Committee on Finance (2005), http://www.irpp.org/miscpubs/archive/tjc_050504.pdf

Department of Finance. "Equalization Program." Federal Transfers to Provinces and Territories (2008), http://www.fin.gc.ca/FEDPROV/eqpe.html (accessed November 1, 2008).

---. "Federal Support to Provinces and Territories." Federal Transfers to Provinces and Territories (2008), http://www.fin.gc.ca/FEDPROV/mtpe.html (accessed November 21, 2008).

---. *Aspire to a Stronger, Safer, Better Canada: Budget 2007*, http://www.budget.gc.ca/2007/pdf/bkfbsfe.pdf

Department of Justice. "Constitution Acts 1867 to 1982." http://laws.justice.gc.ca/en/const/index.html (accessed November 21, 2008).

Gantefoer, Rod. *Saskatchewan Provincial Budget 08-09: Ready for Growth* (2008), http://www.finance.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=3230,3204,2000,1974,1973,204,Documents&MediaID=2387&Filename=2008-09BudgetSummary.pdf

Laurent, Stephen. "Canada's Fiscal (Im)balance: Both Sides of the Argument." *Parliamentary Research Branch*, November 27, 2002, http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/EB-e/prb0236-e.pdf

Lee, Marc. "Tax Cuts and the 'Fiscal Imbalance'." Canadian Centre for Policy Alternatives (2006), http://www.policyalternatives.ca/documents/National_Office_Pubs/2006/Fiscal_Imbalance.pdf

Martin, Don. "Flaherty Poised to be 'Deficit Jim'." *National Post,* October 28, 2008.

Maurino, Romina and Keith Leslie. "Ontario joins the have-nots." *The Chronicle Herald*, November 4, 2008.

Ministry of Finance. "Chapter II: Ontario's Economic Outlook and Fiscal Plan." *Ontario Budget 2007*, http://www.fin.gov.on.ca/english/budget/ontariobudgets/2007/pdf/chpt2.pdf

Noël, Alain. "'A Report That Almost No One Has Discussed' Early Responses to Quebec's Commission on Fiscal Imbalance." In *Canadian Fiscal Arrangements: What Works, What Might Work Better,* edited by Harvey Lazar, 127-147. Montreal & Kingston: McGill-Queen's University Press, 2005.

Office of the Prime Minister. "Prime Minister Promotes Open Federalism," http://pm.gc.ca/eng/media.asp?id=1123 (accessed October 31, 2008).

Slack, Enid. "Revenue Sharing Options for Canada's Hub Cities" (2004), http://www.canadascities.ca/pdf/revenuesharingoptions.pdf

Statistics Canada. "The Daily: June 14, 2007," http://www.statcan.ca/Daily/English/070614/d070614a.htm (accessed November 21, 2008).

Aboriginal Self-Government: Finding A Path

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Aboriginal self-government is a reoccurring issue in Canadian politics. The basis for this issue can be found in the history of colonization of the Aboriginal peoples by the Canadian nation-state. The legitimacy of the claims to Aboriginal self-government are derived from the fact that the Aboriginals were the first peoples of pre-colonization Canada and were alienated from the formation of the state and its *Constitution*. Since the institutional recognition of an Aboriginal inherent right to self-government by the 1982 *Constitution Act*, the Chrétien government in 1995, and the 1996 Royal Commission on Aboriginal Peoples, the discourse on what model of Aboriginal self-government to adopt has developed into a highly contested topic with several proposals and objections (Abele and Prince 576-577). I will explore the possible models of self-government, the applicability of these models, as well as their legitimacy. It will be argued that the only legitimate and just, yet fundamentally inapplicable, form of Aboriginal self-government is obtained through a model of "treaty federalism" where the Aboriginal peoples' relationship to Canada is one of nation-to-nation (Turner 8).

One of the possible models of Aboriginal self-government involves the recognition of Aboriginal bands and tribes as municipalities. This municipal model of Aboriginal self-government has been adopted in some Aboriginal communities in British Colombia and in Métis settlements in Alberta (Rossiter and Wood 360; Abele and Prince 573). These Aboriginal communities have gained greater autonomy in their domestic affairs as the power and policy making is no longer be dictated by the *Indian Act*. Aboriginal municipalities, "provide a range of services to relatively small populations, use a representative electoral system, possess a modest power of taxation, and own source revenues" (Abele and Prince 572).

However, this model of Aboriginal self-government is not a legitimate end point because it fails to recognize any distinct status of the first peoples. A municipal model does not change the structure that has been detrimental to the Aboriginal peoples since colonization. In this scenario, the federal and provincial governments would continue to delegate all powers to the municipality. Therefore, the municipality still exists within the institutions that perpetuate the assimilation focused "White Paper Liberalism" (Turner 12). The introduction of Aboriginal municipalities would also change the power dynamics of Canadian constitutionalism. Aboriginal municipalities will likely face a similar struggle to the one that emerged in the federal-provincial relationship, where the provinces sought to be more than municipalities themselves.

Where this "solution" has been attempted, implementation was illegitimate as was the case with Aboriginal municipalities in British Columbia. The implementation of this model was the result of a referendum on provincial treaty negotiations, yet many Aboriginal groups refused to recognize the legitimacy of the referendum and organized a boycott. The result of the boycott was the participation of only one-third of the eligible voters who were predominantly non-Aboriginal and an overwhelming vote for the municipal

model (Abele and Prince 573; Rossiter and Wood 359-360). The referendum process ignored the Aboriginal voice and their inherent right to self-government. The only voice that did count was the voice of the predominant middle class, white, Canadian citizen.

The concept of Aboriginal municipalities is not a legitimate end point for self-government; however, it could be a possible starting point for the Aboriginal peoples. Aboriginal municipalities would allow bands and tribes to gain experience and knowledge in areas of taxation and resource management that will be instrumental for the future governing of their people. A temporary municipal model would also provide time for Aboriginal communities to "empower their people so they could negotiate from a position of greater strength" (Boldt 137). Nonetheless, this model of Aboriginal self-government in its non-temporary state moves towards an illegitimate end because it fails to address and remove itself from the colonial practices of the past. This model also denies any distinct status of the Aboriginal peoples by governing them under Canadian policies as solely Canadian citizens. This allows the federal government to move away from the rather controversial policies of the Indian Act.

Another possible model of Aboriginal self-government that has been pursued is one primarily based on territory and resources. This model led to the creation of Nunavut and a smaller Northwest Territories in 1999 (Abele and Prince 574). The applicability and viability of this model is limited in the sense that few Aboriginal communities have the land base and population to constitute a new territory. This model of Aboriginal government may be pursued by groups such as the Inuit in Nunavik, the Inuvialuit in the Northwest Territories, and some of the larger Métis settlements (Abele and Prince 575). It is interesting to note that all residents of such territories, regardless of race or ethnicity, share the same rights and responsibilities. In Nunavut, the Inuit population constitutes 85 percent of the

territories population (Abele and Prince 574-575).

This possible model of self-government is becoming increasingly relevant to provinces like Saskatchewan and British Columbia that have a vast, growing Aboriginal population and is introducing a new dimension to treaty politics. The example of Nunavut and its 85 percent Inuit population prompts the questioning of this model as its requirements remain unclear. To what extent must the Aboriginal peoples constitute the majority of a province in order for territory negotiations to take place between the province and the federal government? Can a large portion of a province be expropriated to an Aboriginal majority of that area? These are the types of questions that the Canadian federal government may be faced with in the distant future concerning territory in Quebec, the Northwest Territories, British Columbia and Saskatchewan.

The idea of all Aboriginal nations in Canada banding together to become a single province has also been introduced. This would create a province unlike any other where there is not one land base but multiple and scattered territories. This model would be significantly difficult to achieve and to govern. It would also limit the several distinct and varied Aboriginal nations, and their differing concerns, to one voice within Canadian politics. This model of Aboriginal self-government thus fails in applicability; nor would it be able to represent the different voices of the various Aboriginal nations. The fractured model of Aboriginal self-government is illegitimate for the same reason as the municipal model: it still exists within the structures and institutions that allow federal power over the Aboriginal peoples of Canada.

The federal government does have its own vision of Aboriginal self-government within Canada. This model of self-government involves the creation of "a third Aboriginal order of government gradually taking its place alongside the provincial and federal orders in the Canadian system" (Abele and Prince 576). It would be based around creating new institutions and modifying existing ones within

Canadian federalism. This third order model would give the Aboriginal order of government jurisdiction over issues that concern the Aboriginal peoples as well as give them the opportunity to be more self determined than in previous models of Aboriginal self-government. This idea of Aboriginal government existing alongside the provincial and federal governments was primarily introduced by a special committees report known as the Penner Report (Boldt 88). The 1980 Penner Report highlighted "that First Nation governments may have implicit legislative powers that are now unrecognized and an inherent right to self-government expressed in the Royal Proclamation, 1763, and guaranteed in the *Constitution Act*, 1982" (Abele and Prince 576). These suggested legislative powers under this model of self-government would allow the Aboriginal governments to have jurisdiction transferred to them from provincial and federal levels upon negotiations. This Aboriginal jurisdiction would allow their governments to "have full legislative and policy-making powers in such areas as social and cultural development, revenue raising, economic and commercial development, justice and law enforcement… and that they should have full control over their territory and resources" (Boldt 88). The Penner Report represented a strong move away from the "White Paper Liberalism" and colonial practices of the past, as seen in the Penner Report's recommendation of the reordering of Canadian federalism and it's suggestion that Aboriginal peoples "by themselves should, by free choice, determine the form and structure of government they desire" (Turner 12; Boldt 90). The recognitions by the federal committee and the Penner Report created the base on which third order government was founded. Aspects of the Penner Report were included in the Charlottetown Accord that was ultimately voted down by Canadian citizens in the 1992 national referendum (Abele and Prince 577). The reasons for this vote are disputed but it mainly was the result of few people knowing what this model of government meant for Canada and

what it would evolve into.

The Chrétien government took notice of this model of Aboriginal government proposed by the Penner Report and formed its own modified version. However, the modified version excluded the most fundamental aspects of the Penner Report. The proposed model by the Chrétien government would allow the Aboriginal peoples to "govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages, and institutions, and with respect to their land and their resources" (Canada 1995 3-4). However, the Chrétien government ignored the recommendation from the Penner Report that the Aboriginal peoples "by themselves should, by free choice, determine the form and structure of government they desire" (Boldt 90). Chretien's modified version of the Penner Report stipulated that Aboriginals would not have full jurisdiction on law making and that they would be subject to the Canadian *Constitution*, the *Canadian Charter of Rights and Freedoms*, and strict standards of accountability imposed by the federal government (Abele and Prince 577-578; Pointing and Henderson 64). The Chretien model for Aboriginal government reverts back to previous policy that is "consistent with historical attempts to colonize indigenous peoples" (Pointing and Henderson 64). The Chretien model seems to express "that the Aboriginal right to self-government is contingent, rather than inherent… the Aboriginal right to self-government must be negotiated, rather than unilaterally exercised by Aboriginal nations as part of their inherent sovereignty" (Pointing and Henderson 65). This view of a delegated right to self-government is nothing short of neo-colonialism, represents a different form of federal control over the Aboriginal peoples, and is ultimately illegitimate.

Furthermore, the proposed model of the Chretien government is contradictory to the provisions concerning the jurisdiction of Aboriginal governments in matters internal to their people. The

Aboriginal people have a unique communal culture (which even the Chrétien government recognized) that defines values, justice, law, power, and rights differently than the discourse of the Canadian state that is dominated by liberal individualist view. Beneath the surface of this model, there is the presence of a neo-colonial agenda that that seeks to eliminate any Aboriginal status. The goals of this agenda are identical to the goals of the 1969 White Paper, which had been introduced by Chrétien when he was the Indian Affairs Minister under the Trudeau government (Turner 16). Aboriginal scholar Meno Boldt asserts that the, "ultimate goal is the elimination of all institutional arrangements that set Indians apart from Canadians… to 'civilize' Indians" (Boldt 79). The purpose of such elimination is to end the Indian problem and rid Canada of the white man's burden by removing any distinct legal status of Aboriginal peoples. The increasing vulnerability of the federal government, in regards to implementing Aboriginal policy, has made the eventual dismantling of the *Indian Act* a pressing necessity. The adoption of Chretien's model would integrate Aboriginal peoples into the existing form of Canadian federalism. This integration into the Canadian federation leads to Aboriginal peoples being governed by Canadian policy and no longer the controversial policies of the *Indian Act*. The stipulation of Aboriginal peoples being subject to the *Canadian Charter of Rights and Freedoms* under this model speaks to the federal government's intentions of dismantling the *Indian Act*. Currently, Aboriginal peoples who are governed by the *Indian Act* are not covered under the *Canadian Charter of Rights and Freedoms*. If the Aboriginal peoples were currently subject to the *Canadian Charter of Rights and Freedoms*, the federal government would be in direct violation of the UN Charter. The reserve system in Canada would be defined as apartheid (Jacobs 11). The proposed Liberal model of an Aboriginal order of government turned its back on the recommendations of the Penner Report which was a

constructive effort to giving Aboriginal peoples a voice in Canada. The Chretien model of an Aboriginal order of government, as it has been proposed, is illegitimate because it is not compatible with Aboriginal culture and because it is a reiteration of Canada's colonial past.

The aforementioned models or paths to Aboriginal self-government, excluding the recommendations of the Penner Report, are illegitimate. This illegitimacy stems from "the concept that the existence of the Canadian state is not a given in the legal and political relationship" and that "Canadian citizenship is something that was eventually given to Aboriginal peoples, not something they asked for, wanted, or even accepted" (Turner 37; Abele and Prince 581). This concept of citizenship is what defines the relationship between the Aboriginal peoples and the Canadian state in the "treaty federalism" model (Turner 8). In treaty federalism model the relationship is one of nation-to-nation where the Aboriginal people do not join federalism but exist as a separate and sovereign nation. The relationship between the two nations would be defined by negotiated treaties (Abele and Prince 579). The treaty federalism model would extend complete control to Aboriginal peoples to determine both their form of traditional government and their relationship to the Canadian state. This model is often symbolized by the Kaswentah's traditional Two Row Wampum where the two rows of shells represent the two separate entities with separate values travelling down separate but parallel paths. These two rows are connected by three beads that represent peace, friendship and respect (Turner 45-48).

The 1996 Royal Commission on Aboriginal Peoples strengthened the legitimacy of treaty federalism by implying that the political relationship between Canada and the Aboriginal peoples should be one of nation-to-nation (Turner 8). It is the only legitimate model of Aboriginal self-government because it is the only way Aboriginal peoples can regain or recover their traditional powers and righteousness. Mohawk scholar

Taiaiake Alfred expresses that all other models of Aboriginal self-government "will simply replicate non-indigenous systems… intensifying the oppression (because it is self-inflicted and localized) and perpetuating the value dichotomy at the root of our problems" (Alfred 3). In order for the Aboriginal peoples to recover as a whole, they must attempt to regain their traditional culture for the basis of their politics and government and this traditional culture and government is inseparable from the land of Aboriginals (Alfred 48).

The probability and applicability of this model is what undermines it as a legitimate form of Aboriginal government. It is important to understand that these undermining factors are products of colonization. It is unclear if the majority of Canadian citizens will accept the questioning of Canadian sovereignty as the situation of Quebec has shown. It is also unclear whether the majority of Canadian citizens understand that "Indigenous peoples do not seek to destroy the state, but to make it more just and to improve their relations with the mainstream society" (Alfred 53). This ambiguity was present in the 1996 Royal Commission where the relationship of nation-to-nation was defended. However, in the terms of the commission report the relationship became understood as a relationship of government-to-government (Abele and Prince 588).

The building of infrastructure and institution would be a daunting task for Aboriginal peoples under this model. Taxation amongst distinct self-determined models of Aboriginal government and off-reserve Aboriginals would be among the most difficult initiatives to achieve. If the implementation of the infrastructure and institutions was successful, the Aboriginal peoples would still remain oppressed by colonialism. The band style governments that have institutionalized Aboriginals has created an environment of corruption and unaccountability amongst Aboriginal elites who are benefactors of the colonial mindset and perpetuators of the various social ills currently facing Aboriginal communities across Canada.

Therefore, Aboriginal peoples would be faced with the task of regaining their traditional culture in the gaze of modernity while being subject to the impossibility of decolonization. Though this model is the only legitimate and just form of Aboriginal self-government, it cannot be implemented and maintained in a legitimate and just manner.

The models of Aboriginal self-government examined here pose different challenges and criticisms that the Aboriginal peoples and the Canadian government face when searching for a solution to right previous wrongs that have put Aboriginal peoples in a position of isolation and degradation. Aboriginal self-government implemented as municipalities, territories, and as the Chretien third order of government are illegitimate because they do not empower Aboriginal peoples and they do not exist outside of the colonial structures and institutions that have created the current situation for Aboriginals. The recommendations of the Penner Report represent a model that promises legitimacy and also stands in stark contrast to the three models of Aboriginal self-government opposing the nation-to-nation relationship. The Penner Report is also more legitimate than Alan Cairns' Citizen Plus model where Aboriginals are benefactors of Canadian citizenship as well as extra Aboriginal rights. The Penner Report, unlike Cairns' Citizen Plus model, if implemented would allow Aboriginals to be exempt from aspects of Canadian citizenship (i.e. *Canadian Charter of Rights and Freedoms*, *Canadian Criminal Code*) that do not complement their unique traditions and culture (Boldt 89). The nation-to-nation model is the only legitimate and just form of Aboriginal self-government, but the improbability of Canada straying from its attachment to national interest and individualism keep this model from becoming a reality. The difficulties on the path to Aboriginal self-government will not be overcome easily and will likely exist when the future generations of Aboriginals are struggling to find meaning and attachment to a culture lost in time.

Works Cited

Abele, Frances, and Michael J. Prince. "Four Pathways to Aboriginal Self-Government in Canada." American Review of Canadian Studies 36.4 (2006): 568-595.

Alfred, Taiaiake. Peace, Power, Righteousness: An Indigenous Manifesto.Toronto: Oxford University Press, 1999.

Boldt, Menno. Surviving As Indians: The Challenge of Self-Government. Toronto: University of Toronto Press, 1993.

Canada, 1995. "Aboriginal Self Government, Federal Policy Guide: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation Of Aboriginal Self-Government." Ottawa: Public Works and Government Services Canada.

Henderson, Linda J., and Rick Pointing. "Contested Visions of First Nation Governance: Secondary Analysis of Federal Government research on the Opinions of On-Reserve Residents." Canadian Ethnic Studies 37.1 (2005): 63-86.

Jacobs, Mindelle. "Natives Still Not First-Class Citizens." The Edmonton Sun. 25 May. 2005: 11.

Rossiter, Dave, and Patricia K. Wood. "Fantastic Topographies: Neo-Liberal Responses to Aboriginal Land Claims in British Columbia." The Canadian Geographer 49.4 (2005): 352-366.

Turner, Dale. This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy. Toronto: University of Toronto Press, 2006.

Strengthening Federalism Through Charter Decisions

BRENT RANDALL

The Constitution Act, 1982, containing the Charter of Rights and Freedoms, is seen by many to be a major victory for individual liberty. The Charter is seen as a ground-breaking provision, but it is also at the mercy of interpretation. Like the Constitution containing it, there are many ambiguous terms which inevitably demand application when settling disputes between two parties. This requirement of interpretation can turn the Charter from celebrated to controversial depending on the interests involved. In Canada, provincial and federal legislatures are most often in charge of interpreting the Constitution favourably by creating laws that capture the spirit of the document. If for some reason there is concern with how the Constitution, and Charter, is interpreted through this legislation, the Supreme Court of Canada is the final decision-maker on its validity. This judicial review is the source of much debate, for a couple reasons. First, some take exception to the Supreme Court having the final say on rights issues. Second, when it is applied in such a way, the Charter seems to centralize power and create a

pan-Canadian rights regime orchestrated by the Court. These two points of interest are what I will be focusing on.

In this paper I will start by briefly looking at the current nature of Canada's Charter of Rights and Freedoms. I will then look at the relationship between the Supreme Court and the federal and provincial legislatures in the case of dealing with Charter disputes and what it implies for the current state of rights in Canada. This will be followed by a look at section 33 of the Charter, the Notwithstanding Clause. I will talk about its importance, and what the stigma of enacting it means for the balance of power on Charter conflicts. I will then offer how I think this balance of power can be restored and maintained. Along the way I hope to defend my statements from counter-arguments that may arise. My aim is to show that the current method of applying the Charter is incompatible with the goal of maintaining a strong Canadian federation.

The Charter of Rights and Freedoms is a provision in the Canadian Constitution very similar to the Bill of Rights enacted in 1960. The main difference is that unlike the Bill of Rights, the Charter has been entrenched in the Constitution, giving it much more legitimacy when settling disputes. Janet Hiebert notes that the Bill of Rights was intended to make Parliament the ultimate decision-maker on rights disputes. Critics argue that when the Charter was created it shifted this reliance away from Parliament, but Hiebert disagrees, stating that she believes Parliament still has a key role in interpreting the Charter (Hiebert 2002: 4). Hiebert's sentiment aligns perfectly with standard political belief – that Parliament, or even more specifically, federal and provincial governments, should be one of the major players in deciding how to best apply the Charter. The problem arises in the fact that these legislatures must share the power of interpretation with the Supreme Court of Canada if rights disputes are pushed far enough. This sharing of power is not easily managed. Hiebert states that a reason this has become more of a

power struggle is because of the changing attitude of the Supreme Court. The Court used to believe that if they were to rule on differences of values of society, it would be misplaced and that such decisions should be made by legislatures. Now, however, they collectively see themselves as "guardian of the Constitution" (Hiebert 2002: 21).

It is important to note that the Supreme Court is not simply power-hungry, snatching away the balance of power away from the legislatures. Rather, it seems that the nature of our system has fed into this shift. As F.L. Morton argues, it is often a better move politically for governments to defer difficult rights questions to the Court. In remaining as neutral as possible, they avoid developing rifts within their party, as well as their constituencies (Morton 1999: 26). Since the Court has been given the final decision anyway, legislatures are able to save face while still getting some kind of results for their region. Legislatures seem to have accepted that instead of a dialogue with the Court, there is instead a monologue or a chain of command with the judiciary at the top giving orders (Morton 1999).

The Canadian system was certainly not intended to have this top-down approach. Sir John A. MacDonald thought that the division of power in this country would be clearly laid out so that judicial review of federal-provincial disputes would be unnecessary (Manfredi 2001: 12). The Notwithstanding Clause, which will be discussed later, was also supposed to even the playing field so that the legislatures would have a shield against the decisions of the Supreme Court. With plenty of power struggles between federal and provincial governments, and a nearly non-existent Notwithstanding Clause, it is clear that the current Canadian legal landscape did not work out how MacDonald or the framers of the Constitution had anticipated. There are a few reasons why the relationship between the Court and legislatures evolved this way.

As Jennifer Smith points out, the provinces were mostly cold to the idea of the Charter because it was seen as a limit on their autonomy.

The main source of this negativity stems from the fact that Supreme Court Justices are appointed by the federal government. Opponents to this view argue that judicial decisions apply to the federal level as much as the provincial, and that the judiciary is its own independent body, and therefore free from potentially biasing influences (Smith 2004: 61). While it is easy to understand the counterpoint to the provincial concerns, it is hard to buy into its real world implications. This is not to say that it is certain the Supreme Court would be biased toward the federal government, since that is how they are appointed. However, it is only natural, in our democratic country, to be sceptical about any appointed officials even if they are appointed to the highest Court in the land. It would be nice to think that the Supreme Court is an independent body, free from any sort of political influence, and it certainly is possible. The trouble is that there are also going to be questions raised about the legitimacy of an appointed body, and those questions are being raised here by the provincial legislatures.

Not only is there concern of bias toward the federal government, but the Charter is also seen by some as a way of centralizing public policy. By concentrating so much power into the Supreme Court, it appears as though the Charter becomes pan-Canadian. Since one centralized body is responsible for dealing with Charter disputes across the country, there is bound to be a certain amount of conformity to specific values that the Court applies in their cases. This is not really a fault of the Court. With the same people presiding over all cases it is only natural for their personal moral standards to be an influence in their decisions. This is also precisely the reason why the power dynamic for Charter conflicts needs to be adjusted. Allowing the Supreme Court the ability to deliberate and issue a verdict is useful, but they may not be as aware of specific intricacies and differences between cultures and regions of Canada that are important to getting the case right. If these details are

missed, then there is the danger of not having the Charter work equally for everyone, and thus unbalanced treatment for all parts of the federation. This is where the legislatures need to be able to step in as a similarly powerful entity and engage in a dialogue with the Court to make the best judgment.

F.L. Morton, in his biting critique of the current system of deciding rights disputes, encapsulates the way decisions are actually made in Canada by looking at the fallout of the 1988 *Morgentaler* ruling. He writes about how Justice Lamer, who struck down the abortion provisions in the Criminal Code based on procedural concerns, later went on record in 1998 saying he struck it down because (he thought) a majority of Canadians were against making it a criminal offence. The Mulroney government was then forced to enact a new abortion policy in light of the Morgentaler ruling thinking that the Court's real problem was in the procedure for getting an abortion (Morton 1999: 24-25).

Morton's account presents two important points of interest. One, it shows the nature of the relationship between the Court and the government on creating rights legislation. This is the new decision-making process that has emerged – a piece of legislation is questioned, brought to the Court, the Court decides, and the legislature must cater to their demands if necessary. It is not hard to see why Morton claims there is little dialogue between the two. This lack of dialogue can prove damaging for the dynamics of federalism. Canadian federalism, whether it is actually realized in the day-to-day workings of the country, is intended to be a system based on shared rule between equal interests in the federation. If one interest, in this case the Supreme Court, is far from equal then the system is compromised. The aim of federalism in Canada is to balance interests and powers, but the Supreme Court dictating to legislatures, as often is the case, does not fulfill this aim.

The *Morgentaler* fallout also shows us that the Supreme Court is not infallible or perfectly moral actors as we sometimes might naively

assume based on their high ranking. As previously outlined by Morton, Lamer officially opposed abortion provisions in the Criminal Code because he thought some of the language surrounding its legality was too ambiguous. He later stated he really opposed the provision because he believed most Canadians were opposed to making it a criminal offence, even though that was incorrect. It is hard to avoid thinking that Lamer's decision was made dubiously. In his official decision, Lamer was opposed to the provision based on descriptive grounds – he believed that there needed to be clarification. In actuality, Lamer's opposition came from his (misplaced) normative beliefs – that abortion should not be a criminal offence because most Canadians felt that way. This naturally leads to a question of how we want the Supreme Court to operate. Do we want strict application of the Charter to the letter, or do we want to make sure that human moral judgment and reason, which can be fallible, come into play as well? It would seem that we want a balance of both, but finding this equilibrium can be tough or nearly impossible and feeds into the troubled relationship.

An additional tension that has been only mentioned, and runs alongside the others is the fact that the judiciary decisions contain finality. This power has major implications for how we view the Court as well as constitutional law in general. Christopher P. Manfredi goes so far as to say that it creates a paradox for liberal constitutionalism. By enforcing the constitution as being the most powerful, Manfredi argues that it is the judiciary which is actually the most powerful by way of its responsibility for such enforcement (Manfredi 2001: 22). This implies that it is the Supreme Court who must ultimately be pleased, rather than the provisions of the Charter. Furthermore, this ultimate power perpetuates the belief that the Supreme Court justices are the ultimate moral actors. Both of these consequences are unfavourable in a federal system under a constitution.

James Kelly challenges this idea, what he calls the "myth of

judicial supremacy." He argues that judicial activism does not necessarily lead to judicial supremacy (Kelly 2002: 98). This is a valid argument from Kelly. Judicial activism does indeed *not necessarily* lead to judicial supremacy, but it is hard to deny that the Canadian system gives the judiciary considerable power over legislatures as previously outlined. There is no problem with the judiciary being able to review legislation, but rather the way the system allows the Court to have the ultimate decision as if they are the final moral truth of the matter. This is where the major trouble lies, and I will propose a solution for it later in this paper.

To properly assess the balance of power, it is useful to look at the "secret weapon" of sorts that the legislatures have at their disposal in section 33, the Notwithstanding Clause. There is no question that the clause was added to the Charter to appease the provinces. Inherent in its inclusion is the recognition that the Court possesses great power in the review process, so a provision was called for to give the legislatures similar power. It is when we identify that the Notwithstanding Clause was included to even the odds that Supreme Court superiority is more evident. This is because the Notwithstanding Clause has been stigmatized, a political taboo that has barely ever been enacted and thus leaves the legislatures at a distinct disadvantage.

The baggage that comes with the Notwithstanding Clause is no fault of the Supreme Court. The Clause can still be enacted, but seems to be dead in the eyes of most politicians. If we give any weight to the belief that the Court holds power over the legislatures, it seems that an attempt at bringing the Notwithstanding Clause back into the good graces of the public should be strongly considered.

The main question that needs to be answered is why did the Notwithstanding Clause fall into disfavour? We would be best served by looking at the most famous instance of when it was enacted. Since it is enacted so rarely, and has been the centre of major controversy,

it seems that past experience is a main reason to steer clear of the clause.

In the 1988 case *Ford v. Quebec,* the Quebec government famously enacted the clause to override the provision of freedom of expression and equality rights in the Charter, by restricting the posting of any commercial signs in a language other than French. The Notwithstanding Clause was removed when the law was rewritten after the designated five year period (Ford v. Quebec). It seems that a major consequence of this application is that some may now view section 33 as the way that Quebec managed to deny someone's Charter rights. This was a bad way to illustrate the power that the clause is capable of giving legislatures, and even the Quebec government realized this eventually. Not only does it show people that their Charter rights can be taken away by a government majority, it also shows that governments can be mistaken when enacting it.

Manfredi explains that the stigmatization of the legislative override offered by section 33 may also stem from three misconceptions. First, people tend to misunderstand that the Supreme Court does not have the exclusive right to constitutional interpretation, and that the legislatures are supposed to be equally involved. Second, there is the general distrust people have in politicians – particularly that they will adopt policies which are not in the best interest of their constituents. Third, there is the misunderstanding that appealing to the Supreme Court is the best way to settle fundamental moral questions (Manfredi 2001: 195). Howard Leeson also considers another reason similar to the argument from Morton that legislatures would prefer to play it safe, not "rock the boat" so to speak, and defer potentially divisive issues to the Court. He states that this is unlikely, but it may give us some insight into the growing trend of avoidance in legislatures (Leeson 2000: 18). Both Leeson and Manfredi offer good reasons why the evasion of section 33 has continued. If we take their ideas, and combine them with past experiences, there is plenty of

motivation behind rejecting the Notwithstanding Clause as a viable political option.

With the Notwithstanding Clause seemingly damaged beyond repair, legislatures are at a distinct disadvantage when it comes to rights disputes. Leeson suggests that the Notwithstanding Clause needs to be evoked more often (Leeson 2000: 2). This seems like the best way to get the Clause back into the good graces of the public. The more it is avoided the more it becomes stigmatized and deteriorates as a practical solution to rights disputes. Furthermore, the longer it is dormant the longer legislatures put themselves at the mercy of the decisions of the judiciary. Legislatures get caught up in a vicious cycle of feeding the conception of something which continues to hold them down the chain of command. Bringing the Clause into a positive light will be extremely challenging particularly because it hinges on the trust of the general public in their governments to make good decisions. This means that a key component of legislatures regaining their power may lie in regaining the confidence of voters, which does not seem to be happening currently.

The difficult task of rebuilding the Notwithstanding Clause is just a part of the complications that need to be sorted out to regain the balance of power. There also needs to be some reforms on the side of the judiciary. There has to be something to add legitimacy to the selection of Supreme Court justices. People are going to balk at the idea of appointed officials no matter what position they hold. There will always be the question of the certain "connections" they possess to get where they are. Perhaps a vote is in order, either by the legislatures or by the constituents themselves, which could entail a restructuring of the amount and traits of the justices who are selected. It is tricky to point at one way to work on this downfall, and admittedly these are only broad ideas. The point is that the legitimacy of the Supreme Court needs to be seriously examined, or else questions will continue to linger.

Another thing that needs to be addressed is the finality that Supreme

Court decisions entail. This is troubling because it assumes that the Supreme Court is the final word on Charter interpretation, and that they cannot be swayed by certain biases or partiality. This finality can be hard to swallow given that the judges are appointed rather than elected by those whom they are ruling over. Furthermore, as Leeson states, since judges are going to be of a certain type – well-educated, elite in some sense (at least academically), it may be argued that they do not properly represent the general population (Leeson 2000: 3). These troubles Leeson mentions seem a little far-fetched but still important. There is certainly a disconnect that is apparent when perceived elites are ruling over everyday citizens. It is not clear, however, what can be done about such a disconnect. To be a Supreme Court justice automatically puts one into a rather elite class, no matter their background. This account also does not leave us with much of an alternative. Would we rather that our judges are only moderately educated? This answer is obvious. We want intelligent people dealing with such serious matters.

Leeson's concerns of elitism and the perceived lack of representation are important issues to consider nonetheless when discussing the finality of Supreme Court decisions. We need to find a way to apply an effective check and balance to the Court. Some may argue that this would be inefficient, that there must be a certain point where some entity makes the final judgment. Indeed a final decision-maker would be the best choice if it was always in our best interest, but we know that judges can make mistakes just like anyone else. These mistakes can undoubtedly cause an uproar which can then impact the legislatures, cutting into their efficiency. On top of the public outcry, there is also the lack of efficiency that comes with legislatures re-tooling and altering legislation to the demands of the Court. It would seem at first glance that giving the Court the final word is most efficient, but when taking overall productivity into account it is not entirely clear that this is the case.

Therefore, it would seem that looking at alternative routes for shifting power could prove to be worthwhile.

There are a few ways that an even playing field between the Supreme Court and the legislatures could be achieved. To begin, as touched on earlier, there needs to be a way of selecting Supreme Court Justices that can be seen as more legitimate and fair than the current practice of appointment. Perhaps a Canada-wide vote is too much to ask for, but maybe co-operation between federal and provincial legislatures in the appointment would be seen as a practical solution.

There also needs to be a way for Supreme Court decisions to be disputed by legislatures. This may be through the Notwithstanding Clause becoming a respectable option, by developing more of a dialogue between the two parties, or something else. Neither the legislatures nor the Supreme Court are going to get things right every time. The difference is that when the legislatures go wrong they are corrected by the Court but when the Court goes wrong, either one's position needs to be changed or a repeal needs to be made to the same Supreme Court with a hope of changing their minds. The key is getting away from creating the false impression that one group of people always has the best answer.

The most important thing that is needed is willing co-operation. The Supreme Court needs to recognize that the balance of power needs to be altered, and be open to making such a change. This may be extremely hard to achieve because a kind of inertia is to be expected with power structures. Those who are perceived to have an unfair advantage often refuse to recognize the discrepancy, are ignorant of it, or have no incentive to change it. To get the Supreme Court to acknowledge that the power structure is unbalanced would be hard enough; to get the Court on board with fixing the situation seems even harder. There somehow needs to be the recognition that this would be what is best for Canada as a federation.

It is important for any federation to be based on ensuring

that responsibilities are shared fairly. For one party to hold considerable power over another is to violate the idea of federalism. No longer is there collaboration toward a greater good, instead there are commands handed down considered most important by the most powerful. The structure of power in Canada when it comes to disputes looks very much like this, and therefore puts the very tenets of federalism at risk. If we are committed to maintaining a strong federalism, we need to ensure that the shared responsibilities are in fact shared. Whether this is done through a change in the Supreme Court selection process, a strengthening of the Notwithstanding Clause, or building a dialogue between the Court and the legislatures, we need to decide if we really want federalism or if we prefer to delude ourselves into thinking we do but only when convenient.

Works Cited

Ford v. Quebec. 1988. 22 Nov. 2008 <http://csc.lexum.umontreal.ca/en/1988/1988rcs2-712/1988rcs2-712.html>.

Hiebert, Janet. Charter Conflicts. Quebec: McGill-Queen's University Press, 2002.

Kelly, James B. "The Supreme Court of Canada and the Complexity of Judicial Activism." The Myth of the Sacred. Quebec: McGill-Queen's University Press, 2002. 97-122.

Leeson, Howard. " Section 33, The Notwithstanding Clause: A Paper Tiger?" IRPP Vol. 6: 4 (June 2000): 1-24.

Manfredi, Christopher P. Judicial Power and the Charter. Don Mills: Oxford University Press, 2001

Morton, F.L. "Dialogue or Monlogue?" Policy Options (Apr. 1999): 23-26.

Smith, Jennifer. Federalism. Vancouver: UBC Press, 2004.

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FRANÇOIS LE MOINE

François est étudiant en droit à l'Université McGill. Il a complété une licence en histoire à l'Université de Paris I - Panthéon-Sorbonne, une année au centre d'études japonaises de l'Université Keio et une maîtrise en philosophie politique à l'École des Hautes Études en Sciences Sociales.

KIMBERLEY GOSSE

Kimberly will be graduating in October from Dalhousie University with a Bachelor of Science in Psychology. She has aspirations to attend law school in the near future.

BRENT RANDALL

Brent has just completed his BA in Philosophy at Dalhousie University. In September 2009 he will be pursuing a law degree at the University of Ottawa.

ERIC SNOW

Eric is a fourth year student in Political Science at Dalhousie University. Born and raised in Nova Scotia, he is an avid follower of Canadian politics. He will be graduating with a Bachelor of Arts in May 2009, and will begin pursuing his Master of Public Administration at Dalhousie University in September 2009.

KRISTOPHER STATNYK

Kris is a 4th year political science student at the University of Alberta, Augustana faculty. He is of Aboriginal heritage and a member of the Vuntut Gwitchin First Nation. He was raised in the rural community of Mayerthorpe, Alberta. His father was a member of the RCMP for 21 years which has contributed to his intentions of pursuing law school.

MEGAN SETO

Megan Seto is currently a third year student at Dalhousie University. Born and raised in Halifax, she is pursuing a Bachalor of Arts Degree with a Major in History and a Minor in Law and Society. She is an avid particpant in student activites, that range from the Dalhousie Undergraduate History Society to the Dalhousie Arts and Social Science Society - both of which she currently sits as president. Based on her experiences at the university, Megan plans to pursue a career in criminal law.

KATHERINE GOSSELIN

Katherine is currently a second year student at Dalhousie University in Halifax. Orginally from Yorkton, Sasketchewan, she is majoring in Internaitonal Development Studies and Political Science. She hopes to one day work in a field related to development and human rights.

Referees / Analystes

VICTORIA KAYSER

Victoria Kayser est présentement Présidente du Centre de recherche et de développement de matériel didactique pour enfants autistes, et débute également un doctorat en psychoéducation en 2009 à Montréal. Son projet de recherche portera sur la réhabilitation des enfants victimes de la guerre, grâce à l'approche sensorielle du Docteur Maria Montessori. Madame Kayser a une maîtrise en sciences politiques, un certificat en droit international humanitaire et droit lors des conflits armés obtenu auprès du Centre de recherche et de formation de l'ONU, suivi quelques cours indépendants pour civils au Nato Defense School par le biais d'Ilias, et possède également un diplôme d'enseignement Montessori. Madame Kayser est également co-responsable de la coordination militaire, sécurité et forces policières au sein d'Amnistie internationale et travaille présentement sur un nouveau traité de l'ONU sur le commerce des armes légères. Ses projets futurs concerneront la coordination des droits des personnes handicapées toujours pour d'Amnistie internationale, où son attention sera portée sur le droit des enfants autistes et le droit des militaires handicapés suite à leurs fonctions sur le terrain.

ALEXANDRE BRASSARD

Alexandre Brassard est directeur à la recherche du Collège Glendon (Université York) à Toronto. Il y enseigne aussi au Department de science politique et au Département d'études internationales à titre de professeur contractuel. Ses intérêts touchent la méthodologie de la recherche, la politique canadienne et les politiques publiques de la culture et de la science. Il est membre du Comité éditorial des éditions Antares et collabore avec le Centre d'études et de recherche sur l'administration publique fédérale (CÉRAPF) de l'École nationale d'administration publique (ÉNAP). Les récents travaux d'Alexandre offrent une analyse quantitative des attitudes nationalistes chez les artistes québécois.

JULIANA TRICHILO CINA

Juliana Trichilo Cina, Hon.B.A., M.A., began her undergraduate degree at the University of Toronto, St. George Campus in 1999. Graduating With Distinction in 2003, Juliana was henceforward committed to principles of life-long learning and ongoing personal growth. She accepted an Ontario Policy Intern role in 2003 with the Post-Secondary Education Quality Assessment Board, Ministry of Training, Colleges and Universities. Following this internship, Juliana attended Queen's University where she completed her Masters in Political Studies. Her academic focus was Canadian and Constitutional Politics.

Since 2004, Juliana has enjoyed a number of contract, freelance, and entrepreneurial endeavours through which she has nurtured her communications skills, academic insticts, and business acumen. Today, Juliana works with Starshot Ventures Inc. serving the business community as a Communications Specialist. She continues to offer communications coaching and consulting services to individuals on a freelance basis. You will find information on Juliana's Communications Consulting services by visiting her site (jtcina.com) or blog (jtcina.blogspot.com).

VICTORIA EDWARDS

E3161 Victoria Edwards (RMC 2003) is an Operational Requirements Manager (ORM) on the Material Acquisition and Support Information System (MASIS) project within Director General Material Systems and Supply Chain in Ottawa. She holds a Bachelor of Military Arts and Sciences from the Royal Military College of Canada, a Masters Certificate in Project Management from George Washington University and a Masters in Public Administration from Dalhousie. She has published and presented extensively on conflict resolution and social economic public policy. She has been a civilian employee in the public service for sixteen years. She was a member of the career assignment program (CAP), a civilian management development program. Her home department was DND, where she had been the information management section head at the Canadian Forces Crypto Support Unit. Through the CAP program, she had staff assignments in materiel acquisition, personnel, and information management/project management at National Defence Headquarters. She also held staff assignments as senior analyst in the Aboriginal Affairs Secretariat at the Privy Council Office, as a clerk to the Senate Committee on Defence and Veteran's Affairs, and as a manager of regional benefits in Industry Canada. She is married and has three dogs.

Editors/Éditeurs

DONOVAN HUPPÉ

Donovan est présentement étudiant en Politique au Collège militaire royal du Canada à Kingston d'où il graduera en mai 2009 en tant qu'officier de l'arme blindé. Il a l'intention de poursuivre des études supérieures à la même institution au sein du Département des études sur la conduite de la guerre. Ses intérêts portent sur la politique et sa philosophie, le droit international, le droit des conflits armés, ainsi que le fédéralisme de façon générale.

NICK DESHPANDE

Nick is an undergraduate student in his last year of studies in political science (honours) at the Royal Military College of Canada.