Welcome • Bienvenue

Welcome to Federalism-E! This is an undergraduate peer-reviewed journal which showcases written works from political science students on the subject of federalism. The journal accepts submissions from undergraduates at any university in English and French and is edited by a team of students from across the country. The student peer reviewers are all volunteers, and their contributions to this issue are deeply appreciated.

This year’s articles cover a range of topics, from Indigenous issues, to federal fiscal power, to legal systems. They originate from as far west as the University of British Columbia, and as far east as Dalhousie University. Each essay was subjected to a double-blind peer review process, and their inclusion in the issue is a testament to the authors’ writing and research. The COVID-19 pandemic was a challenge to learning institutions everywhere, yet the hard work of the authors produced excellent articles, nonetheless. We hope you enjoy Volume 22 of Federalism-E!

Bienvenue au Fédéralisme-E! Cette revue contient des articles rédigés par des étudiants en sciences politiques au sujet du fédéralisme. Les soumissions, acceptées dans les deux langues officielles, sont revues volontairement par des étudiants à travers le Canada.

Les articles de cette année portent sur des sujets variés, tels que les enjeux autochtones, le pouvoir fiscal fédéral, et les systèmes judiciaires. Les soumissions ne se limitent pas aux frontières provinciales; on y trouve des articles bilingues de l’Ouest Canadien, à l’université de Colombie Britannique jusqu’à l’Est à l’université Dalhousie. Chaque article est soumis à une révision par les paires rigoureuse et valorise bien le travail et les recherches de l’auteur. La crise de la COVID-19 a posé des défis pour les institutions canadiennes, mais leurs auteurs on tout de même produit des articles excellents. Nous espérons que vous allez apprécier la 22ième édition de la revue Federalisme-E!
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Federal and Subnational Fiscal Power in Canada and the United States

Jeffery Li

University of Toronto

Federalism-E is founded by the Royal Military College of Canada and the Institute of Intergovernmental Relations at Queen’s University
Federalism-e is an electronic student journal about federalism, multi-level governance, and intergovernmental relations put forth in collaboration between Queen's University and the Royal Military College of Canada. This annual journal will publish papers by undergraduate students, which are reviewed by an editorial board composed of their peers, in both English and French languages. It is a bilingual, undergraduate electronic journal with a mandate to provide a forum to encourage research and scholarly debate with respect to a wide variety of issues concerning federalism both within Canada and abroad.

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Introduction

While both countries are classified as decentralized federations, Canada and the United States have very different fiscal arrangements between federal and sub-national governments. In their 2004 comparison of fiscal federalism in Canada and the US, Robin Boadway and Ronald L. Watts argued that Canadian provinces are more autonomous than American states due to the provinces receiving unconditional transfers from the federal government and having relatively high own-source revenues, while the states were restricted by a reliance on conditional federal transfers to meet their expenditures. While this account captures a broad insight that Canada is more fiscally decentralized than the US, it does not analyze how the overall “balance of power” in fiscal relations is affected by politics and the influence of sub-national forces on the behaviour of the federal government.

A closer examination of these factors reveals that while Canadian provinces are generally more autonomous than American states, the Canadian federal government is still more capable of exercising power on subnational governments than its American counterpart. This happens for two main reasons. Firstly, the Canadian federal government comparatively lacks institutional restraints on the exercise of its power. Secondly, American federal-state fiscal relations are interwoven and interdependent in a way such that many federal transfers are deeply influenced by the interests of particular states or regions.

The Canadian Federal Government’s Fiscal Free Hand

While Canada’s Westminster-styled “fusion of powers” combines the legislative and executive branches of government, the US’ “separation of powers” based Presidential model of government creates many centres of power in the federal government that are meant to be checks and balances against each other. Both the concentration of power in the executive in the Westminster system and the creation of veto points in the Presidential system are reasons why the Canadian federal government is comparatively free from restraints on the exercise of its power.

The federal spending power, or the ability of a federal government to spend money in areas that constitutionally fall under state/provincial jurisdiction, is one of the most important ways in which the federal government influences sub-national governments and has been held up broadly in both countries’ courts. While both federal governments have this power in theory, in practice Canada’s executive can make unilateral decisions regarding funding while the US’ split legislature and executive would be forced to negotiate or face gridlock if the branches are in

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opposition. The ability for the federal government to act decisively and without internal opposition shifts the balance of power away from the provinces, which is an experience borne out in the fiscal crisis of the 1990s. Reacting to strong public sentiment that government debt was too high, the 1995 federal budget unilaterally made large cuts in federal transfers while maintaining the requirements of the Canada Health Act (portability, accessibility, universality, comprehensiveness, and public administration) for the provinces to receive any healthcare funding at all. This situation resembled an unfunded mandate, where requirements were imposed on the provinces by the federal government through the Canada Health Act without the financial resources to fulfill those requirements.

This unilateral slashing of transfers while maintaining Canada Health Act requirements is not just a historical phenomenon. While the Martin government negotiated with the provinces to determine the growth of Canada Health Transfers from 2004-2014 (6% per year), the Harper government opted to unilaterally reduce the rate of growth for 2014-2024. Promising a more collaborative approach to intergovernmental affairs while on campaign, Justin Trudeau pledged to immediately negotiate the future of the Canada Health Transfers if the Liberals were to win the 2015 election, only to announce that there would be no changes in 2016. While these examples are not as drastic as the 1995 federal budget cuts, the provinces are still petitioning this issue to little avail. As recently as March 2020, an Ontario government delegation to Ottawa “once again urged the federal government to join Ontario as a partner at the table and fund their fair share”, specifically asking for “increasing the Canada Health Transfer by 5.2 percent annually” (lower than the increases in the Martin negotiated accord). With no formal powers or representation within the federal government, unless the Ontario government were willing to completely part with federal funding (unlikely, as the federal government still funds 25% of Ontario’s health care costs), they would have no ability to interfere with federal decision-making aside from informal bargains and lobbying.

A counterargument could be made at this point that even without representatives of the provinces to act as opposition within the federal government, there would still be sources of internal opposition in caucus, cabinet, or the party bureaucracy that would create strong pressure on the executive branch to avoid drastic or harmful actions against the provinces. The first reply

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6 Ibid 96.
to this counterargument is that internal opposition in the Canadian parliamentary system, characterized by its strong party discipline, is very weak compared to the opposition that can be mounted by an opposing party that has the power to interfere with the legislative agenda. The second reply is to consider that no significant internal opposition was apparent even in the outrage surrounding the 1995 budget, where Alberta and Quebec openly considered abandoning federal funding and the requirements of the Canada Health Act. While it is plausible that the Prime Minister’s Office could face pushback on the inside for arbitrary decisions, the bar for that seems to be set very high.

While on paper Canada’s Senate empowers the provinces by requiring the consent of a chamber that represents regional interests to pass legislation, the appointed Senate lacks the legitimacy to stand up to the democratically elected House. This contrasts with the American Senate, which enjoys the legitimacy of being elected and a strong resulting senatorial tradition of individualism that makes them relatively powerful in defending the interests of their states. The impact of these institutional differences can be seen in Daniel Béland and André Lecours’ analysis on why the US has no equalization payments, despite the prevalence of such a program in many other federations. For any legislation to pass, it must pass both the House and the Senate. Based on the numbers of Senators from states that would not or potentially would not receive any payments from equalization, it would be nearly impossible to have the program pass the Senate. In comparison, when equalization was introduced in Canada, no province had any means to veto it.

With all of this said, it would be inaccurate to say that there are no restraints on the Canadian federal government whatsoever. Since 1999, Canadian intergovernmental affairs have been bound to the Social Union Framework Agreement (SUFA), which sets out some principles and guidelines for intergovernmental relations. A close reading of this administrative agreement, however, shows that it is a very weak restraint on federal government fiscal power. While new joint social programs cannot be introduced without the consent of a majority of provinces, this is the only real limit to the power of the federal government. For existing programs, only a consultation is required before changes are made. In exchange for these modest guidelines, the federal spending power was effectively accepted and legitimized by the provinces (one of the

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14 Ibid, 322
15 Ibid, 320
reasons why Quebec refused to sign the agreement). Furthermore, even the value of this new limit to federal government power is questionable; prior to SUFA, the consent of the provinces generally was demanded by Premiers. The majority of provinces required under SUFA pays no regard to population, which significantly weakens the importance of the large provinces as their buy-in becomes as important as that of a small province like Prince Edward Island. Finally, an administrative agreement is not a durable restriction on federal power since the agreement can be dissolved should its terms become too stifling. Decisions from the judicial system may ultimately prove to be a stronger limitation on federal power. The ruling in favour of the permissibility of private medical insurance in Chaoulli v Quebec has been noted to contribute to growing federal government reluctance to enforce the Canada Health Act, giving the provinces more autonomy in how to use federal transfers. While there are still very few restraints on the exercise of federal spending power presently, the balance of power between federal and provincial governments might change in the future.

The Constraints of Intergovernmental Interdependence

The previous section outlined how thinking of the balance of power between two levels of government as simply the requirements and resources ascribed to each level is too simplistic, as the independence of the Canadian federal government executive allows it much fuller use of its powers. Accordingly, the level of interdependence between American states and the federal government further deconstructs that simple model of fiscal federalism.

We previously considered the independent influence exerted by states in the Senate and here we will extend that dynamic to the House. Politics in Congress are characterized by the pervasive practice of “pork-barreling”, or the use of federal funds for local projects ultimately intended to bring money to a representative’s district. Members of Congress face high election campaign costs that force them to pay close attention to their constituencies in order to fundraise effectively. This makes them highly motivated to be advocates for their states and districts, which is reflected in the finding that Members of Congress who practice pork-barreling have fewer primary challengers. While state governments occasionally lobby for their interests, the influence of sub-national levels of the country are a fundamental part of the structure of the

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20 Ibid
federal government. The ultimate result of this collection of interests, each seeking to “bring the pork back” to their constituencies, is a largely un-coordinated system of transfers, all with their own conditions.\textsuperscript{25}

With this in mind, we can evaluate the perception that the federal government in the United States imposes its will on state governments through the use of conditional transfers.\textsuperscript{26} The conventional argument goes that to the extent that the priorities attached to funding are not the priorities of the state, the autonomy of the state is undermined.\textsuperscript{27} The implication for our comparative case would be that the balance of power between the federal government and the states falls more heavily in the American federal government’s favour than in Canada. While I would not go so far as to completely reject the premise that conditional transfers limit state autonomy, I offer three replies to suggest that to the extent that this is true, it does not reflect increased American federal government power.

My first reply is the dynamic of the American federal government outlined above. Due to the heavy influence of state interests in the legislative process, it is hard to imagine that these conditions can become more intolerable to a state’s autonomy than potentially arbitrary funding decisions by the Canadian federal government, where the provinces have no direct influence whatsoever. Furthermore, it could be argued that the prevalence of conditional transfers in the American system is a response to mitigate the high level of decentralization in the US government. While Canadian provincial executive branches are directly responsible to the electorate through their legislatures, state executive branches are not (in between elections). As a result, they are instead held accountable by the federal government to spend the transfers responsibly.\textsuperscript{28}

The second reply is that all fiscal transfers from the federal government to subnational units, even unconditional ones, seem to have some political strings attached. Research by Marcelin Joanis in 2014 shows a statistically significant relationship between the provincial vote share that the federal party in power received in the last election and the transfer payments the provinces received; as the province voted less for the party in power, their transfers decreased.\textsuperscript{29}


Decomposed into equalization payments and other transfers, the formula-based equalization payments had a weaker relationship to vote share while other transfers had a stronger relationship.\textsuperscript{30} A similar trend is observed in American politics, where “members of Congress that belong to the President’s party are advantaged in the budgetary process”.\textsuperscript{31} Regardless of whether there are conditions or not, the decision of how much will be granted in a transfer or what transfers will be introduced is to varying degrees an arbitrary political decision by the federal government. This is a power that is maintained in the Canadian system.

My final response is that given the right political circumstances or intentions, the Canadian federal government reserves the ability to impose a high degree of conditional transfers. In 2008, the urgency of the recession made the provinces swallow their complaints and accept an economic recovery program that was conditional in nature.\textsuperscript{32} While the federal government might not generally want to pick fights with the provinces over applying conditions to transfers, this case study illustrates that it is nonetheless still an option should it be deemed important or if the federal government knows/perceives that public opinion would be on their side. This is not an unprecedented or new dynamic, either. The Canada Health Act in 1984 was opposed by all provinces, but its popularity nonetheless saw it pass unanimously through the House of Commons and the Senate, unilaterally applying conditions to healthcare transfers.\textsuperscript{33} Overall, the relative prevalence of conditional transfer payments makes the American federal government more powerful fiscally than state governments only if we hold the two levels of government strictly apart. In practice, the federal government is in large part a creature of many state interests, so its actual power in comparison to the states is much lower than it seems. The Canadian federal government exercises its power independently, whether or not conditional transfer payments are used.

\textbf{Conclusion}

While Canadian provinces are still likely more autonomous on account of their receiving more unconditional transfer payments and having a higher proportion of own-source revenues than American states, it is important not to overstate the degree to which this sets the fiscal balance of power against the federal government. Underlying this simple balance sheet are the confounding dynamics of politics. The American federal government was designed to decentralize power, and their fiscal arrangements will reflect that even if the form of conditional transfer payments concentrates it to a degree. By contrast, the executive-legislative fusion in Canada concentrates power in the executive branch of each government, allowing the federal government a wide and unobstructed use of its powers.

\textsuperscript{30} Ibid, 666-667
This comparison yields some useful insights into the nature and potential future of fiscal federalism in Canada. While Canada’s fiscal arrangements are very decentralized, the independence of the federal government nevertheless occasionally enables it to be a powerful and forceful actor on provincial governments. The balance of power shifts in response to the political incentives that motivate or limit each level of government and is relatively unmoderated by the interdependence observed in American fiscal federalism. Thus, the sensitivity of this framework to political currents means that debates on the role of the federal government and the effect of its interventions through conditions have a profound impact on how fiscal arrangements are made. Future developments in the fiscal balance of power are not predetermined by the fact that Canada is now generally decentralized, and surprising outcomes are possible depending on which way the winds blow.
Bibliography


Reforming the NCR system: Tying the Knot on Federal Integration

Blair Maddock-Ferrie

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The bureaucratic problems in treating those deemed Not Criminally Responsible (NCR) can be addressed by creating a federal hospital for NCR patients. Implementing a federal NCR hospital would allow for further national preventative efforts to reduce the need for NCR patient care. However, a clear concept of the current system must be attempted before establishing an understanding of what an NCR patient is or how their situation can be improved. During the preliminary research it became clear that an understanding of how the NCR system functioned was lacking at both an operational and administrative level. After calling five hospitals that treat NCR patients in Ontario and British Columbia, it was found that none were aware whether the funding came directly from the province or federal government. Beyond the billing of patient care to the province, all further information was unknown. The BC Forensic Psychiatric Hospital was unclear if the chain of custody was under Provincial or Federal authority, as both remanded patients to the facility without differentiation. To reflect the limited level of sources available, Ontario will be the focus of this paper. The Ontario legislation also reflects the duality of authority between the provincial and federal levels. The result is a system that neither serves the patients nor the society which entrusts the system to treat these individuals which the community perceives as dangerous.

The modern concept of Not Criminally Responsible was confirmed following an appeal to the Supreme Court in 1991 in the case of R v. Ratti. A person found NCR had to have either been found guilty of committing a crime in a criminal court or deemed to be a public nuisance requiring incarceration. For a defendant to request NCR status, the act must fall within an offence that each province has deemed allowable for an NCR request. The 1991 appeal further established that the person restrained under NCR must be deemed by a provincial review board as no longer posing a risk to public safety before release. Both the province and the federal government could establish more severe conditions of release as deemed necessary. The authority of the person was placed under provincial jurisdiction, at the pleasure of the federal government. The limit of federal power over NCR patients has yet to be addressed and has remained a constitutional question. The roots of this constitutional confusion dates back to the inception of treating those deemed NCR or at the time ‘criminally insane’.

The history of treating the ‘criminally insane’ in Ontario illustrates the overall confusion under which care of NCR patients are conducted in several provinces. The treatment of NCR patients in Ontario dates back to 1838 under the colonial parliament of Upper Canada when an asylum was authorized under colonial governance, with heavy regional autonomy. The first

asylum was established in an abandoned prison in 1841, under what would evolve into the Center For Addictions and Mental Health (CAMH). Other facilities were progressively built from that point onwards until they were consolidated under the Ontario Mental Health Act of 1990 that placed mental health under the jurisdiction of the province. The consolidation of these hospitals into a unified system on the provincial level is ongoing, as each hospital must attempt to provide basic mental health care regardless of specialization or resources. The development of the system has resulted in NCR patient care that is individual and largely dependent on the location of sentencing, not patient need.

A major problem with the lack of clear jurisdiction in NCR cases is in the treatment of prisoners with mental illness. The NCR system and Correctional Services Canada are not linked in a way that would allow a prisoner to receive care reserved for NCR patients; as a court must determine them NCR. The federal government, due to it’s the overlap between the criminal justice system and mental health acts, has left a discrepancy in the prison system, having limited assets to treat patients. The mentally ill are over represented in prison system with 65% of federal inmates requiring mental health treatment which often goes untreated at the standard considered as basic care. These prisoners having committed a crime serious enough to where community treatment was not accepted but mental illness was not considered a factor large enough to be classed as NCR. Prisons are left providing care that meets the standard of harm reduction where possible but not considered treatment.

Furthermore, the lack of a unified national mental health act has only exacerbated the issue of overlapping authority. Criminals have distinctly less access to mental health services while conversely the criminal code is often used as a means to provide patient care. This leaves

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12 Ibid.
13 Ibid.
14 Ibid.
mental health heavily under-addressed in the prisons, which is correlated to increased recidivism.\textsuperscript{16}

The complex clinical environment of CAMH, which treats NCR patients, involves multiple social services including the police.\textsuperscript{17} There is no data on NCR interactions with police prior to being found NCR. However, the data can be extrapolated from those who are admitted to a psychiatric institution overall and by the interactions by disorder which are most common in those found NCR. Over 75\% of all involuntarily admitted patients had previous interactions with police or social services.\textsuperscript{18} Of those patients with mood disorders, which make up 70\% of NCR cases, 83\% had prior interactions with police.\textsuperscript{19} Therefore, given this data it can be stated that a majority of NCR patients had prior interactions with police. The number of patients convicted of a crime prior to the NCR status was at 36\%, indicating that mental health care was also not completed to the need level during their prison term.\textsuperscript{20} The evidence of prior police interactions reinforces the active involvement of police and social services in NCR prevention programs as found at CAMH.

Beyond the release of the patient, social services are often involved to ensure that the individual is not breaking their terms of release or causing a nuisance to their community.\textsuperscript{21} The use of private institutions, which provide funding for integration services, is also essential in integrating NCR patients into society after release.\textsuperscript{22} A multitude of groups exists within the NCR system, the programs that are used by CAMH to address recidivism, further compounds the issues of jurisdictional ambiguity. The coordination of these groups is largely left at the hospital’s discretion and limited to the local area, further illustrating the problem of legal confusion that this paper’s reforms attempt to address.\textsuperscript{23}

The first stage of the reform would be to establish a separation of authority from the health care system for NCR funding, housing, staffing, and support. This system already exists in a limited capacity as the province of Ontario creates a strong distinction between those remanded by the court and those remanded for public safety.\textsuperscript{24} Distinction between those remanded for

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\textsuperscript{16} Pegah Memarpour, Rose Ricciardelli, and Pauline Maasarjian, “Government Reports versus Offenders”.

\textsuperscript{17} CAMH, “Mental Health and Criminal Justice Policy Framework,” CAMH Report, October 2013.


\textsuperscript{19} Ibid.


\textsuperscript{21} CAMH, “Center for Addictions and Mental Health,” n.d.

\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid.

\textsuperscript{24} Richard D. Schneider, “The Mentally Ill: How They Became Enmeshed in the Criminal Justice System and How We Might Get Them Out,” Department of Justice Canada, March 2015.
\end{footnotesize}
public safety and NCR are made at every stage of the care process. During the course of determining NCR status, the factor of criminality directly changes the level of access and what options the courts has choices for patient care. If they are found guilty of a misdemeanor criminal offence where mental illness was a contributing factor but is not NCR, the access to care is distinctly different. Depending on the severity of the case, those where mental illness was a factor but not NCR might be put on probation and be admitted to a psychiatric institution under involuntary admission or receive care in the community. These patients are not placed under the Ontario Review Board, which draws a clear line between NCR patients and those who are not.

The distinction between NCR patients and involuntary patients is further made during hospitalization. NCR patients are separated into different wards with higher security then those who are involuntarily admitted. The level of training to work on the secured wards is higher, with CAMH requiring additional courses and or training before a staff member is allowed to work on the ward. The level of security also translates into an increased ratio of security personnel. The method of release is distinctly different, with the Ontario Review Board being responsible for the release of the NCR patient. This is in contrast to those who are admitted involuntarily, whose release is determined by the patient’s care team. The exact numbers in the allocation of funds between those found NCR and remanded is unclear, however, it is significant enough to be noted by the Department of Justice. The lack of availability of such documents is possibly because of patient confidentiality, which is due to the hospital billing the province individually by patient need. The informal system has provided care that meets the regulations to the minimum standard and leaves the hospitals to rely on private funding for any additional support. This system exists in its current state due to the provinces’ attempts to keep costs low, thereby treating the NCR as patients rather than prisoners and fostering an attitude that views them as burdens. The distinction in a legislative capacity would allow the provinces to separate the NCR from the health care umbrella and allow for greater evaluation of NCR treatment needs. The separation would also allow for a distinction in public perception between those deemed NCR and remanded for public safety, which on a treatment level is already a strong

25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
30 Ibid.
31 Ibid.
34 CAMH, “Center for Addictions and Mental Health,” n.d.
35 Ibid.
36 Ibid.
Most importantly, the distinction allows for a change in the jurisdiction from the health care system to the criminal justice system.

Under the federal act that governs NCR patients, the powers of the provinces are defined as a minimum standard of care. However, another act could remove the powers entirely. An act of the federal parliament that placed the care of the NCR under the existing legislation of criminal justice could logically follow existing federal-provincial distinctions of responsibility.

Any NCR patients who committed any act that could have, if tried under the criminal justice system, resulted in a sentence greater than two years, would be remanded to federal care, in line with existing provincial-federal distinctions. The precedence for such an act already exists as the federal government has set stricter regulations for NCR patients to the provinces. Under the existing criminal justice legislation, the NCR patients would be remanded to the custody of Correctional Services Canada. The biggest opposition to this proposal would be to the possible change of perception of the NCR from patients to the prisoner.

This problem could be addressed in the next step with the establishment of a federal mental health hospital.

The creation of a federal mental health hospital would allow for the control of the treatment of NCR patients with equality of care. The inclusion of Health Canada in the form of, at minimum, an oversight capacity would ensure that the care would remain therapeutic rather than punitive. The use of existing infrastructure under federal direction until the hospital was operational would be the ideal solution for maintaining consistent care. The Canadian Mental Health Commission (CMHC) that serves in an existing advisory capacity for all mental health may also prove valuable in the federalized treatment of NCR patients. The majority of statistics on the topic of NCR patients and those involuntarily admitted are generated by CMHC working in conjunction with government entities. The third-party nature of CMHC, which seeks to advocate for patient care would also serve as a safe guard against abuse. The establishment of such a hospital would address three fundamental problems with the mental health system: cost, consistency of care, and recidivism. The movement of all NCR patients who would have received a federal prison sentence to one location would eliminate the need for multiple hospitals in every province, allowing the reallocation of funding. The care consistency would be addressed by being able to provide a universal set of treatments for each group of mental disorders with the appropriate resources.

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43 Ibid.
44 Ibid.
specialized treatment for certain rare disorders that might be deemed too costly in the provincial setting. The possibility of providing research for more effective treatments also exists due to the large potential research pool. The reduction of recidivism is a mix of the previous solutions due to the complex nature of the NCR system.

A federal mental health hospital could address the issue of recidivism by addressing the problem at the source. The largest contributor to addressing the NCR cost is to prevent the possibility that they might re-offend by providing resources to those who show signs of possible psychosis. Those who receive treatment early may be prevented from offending entirely and remain productive members of society. The cost of treating someone who can remain in the community is significantly lower than someone who is institutionalized; further, the volume of patients that can be treated is larger than can be achieved in a hospital. The cost to society when a crime is prevented is further offset when considering the rates of prisoners who are not at the threshold for NCR but have mental illness as a significant factor in their criminality. Unfortunately, the lack of a Canadian mental health database that distinguishes for NCR patients forces the use of American data gathered by Harvard Medical Mental Health letters; however, based on the large sample size, similar conclusions can be made. Those with personality disorders, including bipolar, narcissistic personality disorder and others, are disproportionately represented in the Criminal Justice System. When coupled with Substance Abuse, it accounts for 6.3 times the rate of violent crimes compared to the general population. Those with Schizophrenia and Substance Abuse make up 5.4 times their population ratio. These individuals would not necessarily fall under NCR statutes; however, their mental illness was a factor in the violent crime. Therefore, a prevention program that can identify these individuals successfully may prevent the commission of violent crimes that deprive the life of those who benefit society.

This concept is already being addressed by CAMH, partly through private donations and cooperation of the Toronto Police Services. CAMH attempts to identify those with a risk of psychosis and provide them with assistance to prevent a possible crime, with this program lowering both the number of criminal acts and NCR patients. The current lack of a national

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46 Ibid.
47 Anne G Crocker and Tonia L Nicholls, “The National Trajectory Project of Individuals Found Not Criminally Responsible”.
48 Ibid.
49 Ibid.
50 Anne G Crocker and Tonia L Nicholls, “The National Trajectory Project of Individuals Found Not Criminally Responsible”.
53 Ibid.
54 Ibid.
55 Ibid.
56 CAMH, “Center for Addictions and Mental Health,” n.d.
57 Ibid.
NCR database, however, makes these programs difficult.\textsuperscript{58} The work of CMHC in attempting to create national mental health trends and policy serve as a useful first step to the creation of such a database, should the government wish to peruse this.\textsuperscript{59} Further, the police have neither the training nor the guidance and require additional training before they can fill the role. Training and guidance which the OPP and Toronto Police have directly requested from the province of Ontario on numerous occasions.\textsuperscript{60} A similar program that is implemented across Canada, with the assistance of RCMP, could prevent criminal acts and save further costs. The jurisdiction of the RCMP, which is directly subordinate to the Federal government, also necessitates federal involvement for the implementation of regional programs for most of the nation.\textsuperscript{61} The dual diagnosis of addiction that permeates these cases is further best tackled through a nationalized effort.\textsuperscript{62} The direct correlation between addiction and criminality that has been established by the Federal government makes the expansion to mental health screening in jails a logical next step.\textsuperscript{63} The next problem with those who are NCR is integration. Once released, medical assistance often ends, with the majority of supervision consisting of drug monitoring in a similar manner to a parole board.

A proper transition environment is also often lacking due to the costs. CAMH has one such facility that provides a transition environment. However, this was done entirely through private donations and the assistance of patient advocate groups. CAMH, despite being the largest mental health hospital in Canada, is not funded entirely by the taxpayer, with 23.3\% of operational costs covered by private or other sources of revenue.\textsuperscript{64} Although NCR is not specified in the report, as the care is directly under the hospital, it can be assumed that the funding is under the same category.\textsuperscript{65} As such, the province barely provides enough money for the hospital’s functionality, let alone services that reduce recidivism. The medical benefits of providing additional integration services are many, but critically it prevents recidivism.\textsuperscript{66} The number one indicator of an NCR reoffending is stopping their treatment, whether by stopping their medication or by associating with groups known to stop treatment, known as triggers.\textsuperscript{67} The


\textsuperscript{65} Ibid.

\textsuperscript{66} Anne G Crocker and Tonia L Nicholls, “The National Trajectory Project of Individuals Found Not Criminally Responsible”.

\textsuperscript{67} Ibid.
lack of integration creates a possibility that the person may fail to integrate into society and become homeless.\(^68\) If the former patient becomes homeless, then the likelihood that the individual will comply with treatment becomes all but non-existent.\(^69\) The Province, however, bears no responsibility for this outcome as the duty of care ends the moment the patient is released.\(^70\) Therefore, by attempting to cut costs in the interim creates a system that creates greater long-term cost to society due to recidivism. There is one final problem in the reform of the NCR system, political expediency.

The burden of the NCR being left on the province allows for a level of distance that limits negative exposure when incidents occur. The public perception of those known often referred to as “criminally insane” is not positive. The repeated examples of individuals escaping from hospitals, terrorists being found NCR, unlawful incarceration, or other controversies have created a decidedly negative perception of the NCR system.\(^71\) The jurisdiction of the NCR patients being left to the province and delegated to the hospitals can help to make these incidents appear isolated. The lack of a national NCR database, lack of interhospital or provincial cooperation, can be perceived as intentional rather than mismanagement. The separation of the NCR system from the Criminal Justice system also allows for a distinction from each other beyond treatment, as the controversies appear isolated. The support for reform exists within the government, with advocacy groups pushing for greater federal integration, but the risk of these controversies is high.\(^72\) The negative perception of people with mental illness, which has declined but remains high and may not be justified within a party agenda.

The trend towards gradually increased acceptance of mental illness has, in part, diminished this potential political pragmatism. The current Liberal government has repeatedly made pledges to address mental health; however, they avoid the subject of NCR patients.\(^73\) The Conservative party also seems unlikely to address the issue, as the Mental Health Reform Act

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\(^{68}\) Ibid.

\(^{69}\) Ibid.

\(^{70}\) Ibid.


moved the focus of the NCR system into a more punitive direction.\textsuperscript{74} The potential for NCR reform may exist as the trend toward accepting mental illness continues due to ongoing efforts to destigmatize mental health.\textsuperscript{75} Still, it is unclear if or when that point will occur.

Canada’s mental health system suffers from a chronic lack of bureaucratic consolidation that has seen unequal treatment, overrun hospitals and a lack of understanding. The removal of the Not Criminally Responsible from the provincial jurisdiction will ultimately save costs and allow for greater care of the mentally ill population as a whole. This reform is feasible under the federalist system’s current legal powers that do not require constitutional reform. The elimination of NCR patients would most likely not be objected to by the provinces that appear to view their responsibility over NCR patients as a burden that they wish to eliminate. The move to federal authority might improve the lives of the patients and society by ensuring all NCR patients are treated equally.


University of Alberta. “Individuals Found Not Criminally Responsible (NCR) by the Justice System Show Very Low Rates of Recidivism, New Study Shows.” University of Alberta.
A Patchwork of Climate Policies that Reflect Subnational Jurisdiction: Assessing Canada and the U.S. Response to Climate Change Following the Paris Agreement

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Federalism-e is an electronic student journal about federalism, multi-level governance, and intergovernmental relations put forth in collaboration between Queen's University and the Royal Military College of Canada. This annual journal will publish papers by undergraduate students, which are reviewed by an editorial board composed of their peers, in both English and French languages. It is a bilingual, undergraduate electronic journal with a mandate to provide a forum to encourage research and scholarly debate with respect to a wide variety of issues concerning federalism both within Canada and abroad.

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Introduction

Fossil fuels allowed countries to industrialize, develop manufacturing sectors and experience prolonged economic growth. Despite improving many peoples’ standard of living, widespread dependence on fossil fuels increased the level of greenhouse gas emissions globally and resulted in anthropogenic climate change. Anthropogenic climate change, hereafter climate change, is defined as an increase in global average temperature due to sustained greenhouse gas emissions. Climate change currently alters weather patterns and results in droughts, floods and freshwater shortages. This phenomenon constitutes a multidimensional challenge that affects both industrialized and non-industrialized countries.

Through multilateral forums, the United Nations (UN) aims to mitigate climate change impacts. In 2015, the UN instituted the Paris Agreement to reduce global greenhouse gas emissions. Signatories to the Agreement are responsible for amending domestic climate policies and implementing binding emission targets. Federal states face specific challenges when adopting climate policies since jurisdiction is shared between national and subnational governments based on a constitutional division of authority. ¹ This division of authority often restricts a national government from implementing comprehensive climate policies. For instance, subnational governments with jurisdiction over natural resources may limit environmental protection when fiscally dependent on resource extraction and exports. Moreover, ideological polarization results in provisional climate policies characterized by short-term emission targets and lowest common denominator solutions.

The complexity of federal governance structures account for differences in climate policy implementation in Canada and the United States (US). ² Both countries possess carbon-intensive industrial sectors and high per capita emissions. ³ Nonetheless, neither federation has implemented a comprehensive climate policy that significantly reduces net greenhouse gas emissions over a sustained timeframe. In this paper, I explore how Canadian and American federal governance structures impact these countries’ ability to adopt binding emission targets following the Paris Agreement. Why do these governance structures constrain Canada and the US from decreasing their net greenhouse gas emissions? This paper argues that climate policies in Canada and the US are enacted in a patchwork fashion, despite both countries having ratified the Paris Agreement.

² Ibid., 72.
Thus, the paper begins by exploring climate change, the Paris Agreement and the challenges federal states face when implementing climate policies. The paper then examines the Canadian and American federations separately to identify the primary factors restricting Canada and the US from reducing their net greenhouse gas emissions. The paper concludes by comparing the Canadian and American federal governance structures to determine why these countries have a patchwork of climate policies that reflect subnational jurisdiction rather than a coordinated national strategy.

The United Nations’ Response to Climate Change

Today, most countries are dependent on fossil fuels to power industrial projects, sustain agricultural production and facilitate transportation. Despite the benefits of fossil fuels, the use of such products increases the amount of greenhouse gas emissions. In 2015, for example, the global average concentration of atmospheric carbon dioxide exceeded 400 parts per million, a level seen only prior to human evolution.4 As such, scholars often describe climate change as a ‘wicked problem’ due to its scale and complexity.5 Some governments do not adopt binding emission targets because of the uncertainty that remains in predicting climate change impacts.6 Moreover, politicians may not view climate change as an immediate threat because their outlook is short-term and predicated on election cycles. Some governments also maintain a vested interest in prolonging dependence on fossil fuels since carbon-intensive sectors generate economic growth. No matter these challenges, the UN coordinates multilateral forums to curb global emissions and transition to renewable energy.

In 1997, the UN introduced the Kyoto Protocol, an international climate treaty based on the consensus that human-generated emissions cause climate change. The Kyoto Protocol required industrialized countries to reduce net emissions by an average rate of 5% as per their 1990 levels.7 The Protocol reflected a common but differentiated approach to mitigating climate change impacts by encouraging industrialized countries to decarbonize before non-industrialized countries. Industrialized countries therefore retained greater responsibility to decrease emissions due to their historic responsibility for accelerating emissions. Likewise, some argue that non-industrialized countries should be allowed to industrialize and undergo prolonged economic growth since industrialized countries have already done so. Non-industrialized countries may also lack the financial resources required to mitigate climate change impacts.

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6 Ibid.
7 Ibid., 1110.
Following the Kyoto Protocol’s adoption, several industrialized countries including Canada, the US and Japan withdrew support. A common but differentiated approach to limiting global emissions is ineffective if the world’s greatest emitters withdraw support. The UN later introduced the Paris Agreement to increase multilateral support for reducing global emissions. Unlike the Kyoto Protocol, the Paris Agreement does not enact legally binding emission targets. This Agreement instead encourages signatories to strengthen their domestic climate policies and adopt legislation to reduce emissions.8

Signatories negotiated the Paris Agreement at the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change.9 The Agreement aims to limit the increase in global average temperature to below 2°C above pre-industrial levels.10 To achieve this goal, the UN incorporated Nationally Determined Contributions (NDCs) that recognize signatories’ common but differentiated abilities to curb emissions.11 NDCs outline a country’s long-term low emission development strategy and encourage signatories to limit emissions through a process of ‘ratcheting up’.12 Every five years, signatories must submit a new NDC that includes increasingly stringent climate policies.13 Overall, the Paris Agreement institutionalizes an aspirational goal to reduce global emissions, mitigate climate change impacts and legitimize sustained climate action.14

Challenges Federations Confront when Amending Domestic Climate Policies

Signatories to the Paris Agreement are responsible for amending domestic climate policies and adopting binding emission targets. These policy changes are particularly difficult to enact in federal states since jurisdiction is shared between two or more orders of government.15 For example, subnational governments with jurisdiction over natural resources may oppose the national government’s plan to enact climate policies that threaten the resource sector when financially dependent on revenue from resource extraction.16 Moreover, entrenched ideological polarization at the federal level results in short-term climate policies that reflect the political agenda of the party in power.17 Subnational governments often implement climate policies and

8 Ibid., 1107
10 Ibid., 776.
11 Ibid., 779.
form coalitions to strengthen environmental protection. Divided sovereignty between orders of government reflects an advantage inherent to federalism because it allows subnational governments to advance climate action no matter the federal government’s conviction.

In 2015, Canada and the US affirmed their support for the Paris Agreement and developed climate policies to reduce net emissions. Despite signaling their support for the Agreement, neither country has implemented policies that considerably reduce greenhouse gas emissions over a sustained time period. These countries’ federal governance structures have constrained the national government’s ability to adopt binding emission targets. As a result, policy development is realized at a subnational level. Canadian provinces and American states demonstrate success in implementing long-term climate policies. The following section explores Canadian federalism and identifies the principal factors that restrict the Government of Canada from maintaining its commitment to the Paris Agreement.

Canada’s Response to the Paris Agreement

In October 2016, the Government of Canada submitted its first Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change. As outlined in its NDC, the Government of Canada established the Pan-Canadian Framework on Clean Growth and Climate Change to decrease net emissions. The Government of Canada aims to reduce national emissions by 30% below 2005 levels by 2030. Canada plans to curb emissions across all economic sectors, increase the use of renewable energy and develop resilience to climate change impacts. However, Canada’s constitutional configuration and decentralized environmental framework challenge the Government of Canada’s ability to enact climate policies that significantly reduce emissions over a sustained timeframe.

Canada’s Constitutional Configuration and Decentralized Environmental Framework

The British North America (BNA) Act, 1867 established the governance structure that affects contemporary climate policy. Sections 91 and 92 of the BNA Act outline the jurisdictions allocated to national and subnational governments. Through this division of power, provincial governments obtained jurisdiction over areas of regional concern such as hospitals, schools,

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18 Bakvis and Brown, “Policy Coordination in Federal Systems.”
21 Ibid.
22 Ibid.
23 Ibid.
24 Huque and Watton, “Federalism and the Implementation of Environmental Policy,” 73.
municipalities and property. Provinces likewise acquired jurisdiction over lands, minerals and royalties. The federal government acquired authority over banking and currency, national defense, criminal law, commerce and interprovincial transportation. The BNA Act assigned the federal government the authority necessary to maintain Peace, Order and Good Government.

The BNA Act’s division of authority indicates that Canada has a decentralized federal framework since provinces possess constitutionally protected jurisdiction. Specifically, provinces control the carbon-intensive sectors that contribute most to Canada’s net emissions. This decentralized structure limits the federal government from regulating industrial sectors that emit significant greenhouse gases. The constitutional configuration also challenges the Government of Canada’s ability to set binding emission targets.

For instance, the federal government approved the Greenhouse Gas Pollution Pricing Act in June 2018. This national carbon pricing system allows the Government of Canada to impose a price on carbon on provinces and territories that did not adopt an adequate carbon tax or emissions trading scheme by 2018. Several provinces including Alberta and Ontario oppose the federal government’s national carbon pricing system and argue that the Government of Canada encroached on provincial jurisdiction. By assigning jurisdiction over industrial sectors to provincial governments, the BNA Act has allowed regional economic interests to undermine the federal government’s national climate policies. This example suggests that Canada’s decentralized federal framework limits the federal government’s ability to introduce binding emission targets and potentially prevents the country from maintaining its commitment to the Paris Agreement.

Due to Canada’s decentralized constitutional configuration, the federal government must implement emission targets in collaboration with provincial governments. Establishing climate policies that significantly decrease net emissions requires the federal and provincial governments to cooperate, especially as there are few areas of concurrent jurisdiction. Canada has developed

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26 Huque and Watton, “Federalism and the Implementation of Environmental Policy,” 73.
27 Bakvis and Brown, “Policy Coordination in Federal Systems,” 490-1.
28 Ibid., 491.
29 Ibid.
31 Ibid.
33 Huque and Watton, “Federalism and the Implementation of Environmental Policy,” 78.
formal and informal institutions to promote coordination between orders of government. Such intergovernmental relations reduce the constraints posed by the BNA Act’s division of authority.

Executive federalism largely characterizes Canada’s intergovernmental relations. Government executives facilitate relations between federal and provincial governments. Canada’s parliamentary structure supports executive federalism by fusing the executive and legislative branches and thereby promoting executive dominance of the legislature. The British Westminster parliamentary model likewise supports executive federalism through party discipline and cabinet solidarity. Executive federalism allows the federal government to work in partnership with subnational governments when adopting legislation in an area of provincial jurisdiction.

Despite possessing institutions that support intergovernmental relations, Canada’s division of authority generally results in jurisdictional overlap and interdependence between orders of government. A decentralized environmental framework and constitutionally protected provincial jurisdiction limit the federal government’s ability to enact climate policies that significantly reduce net emissions. As a result, climate policies are largely enacted in a patchwork fashion even though the Government of Canada ratified the Paris Agreement.

Subnational Response to Climate Change

Canada’s subnational governments perform a critical role in establishing policies that reduce greenhouse gas emissions. For example, British Columbia, Manitoba, Ontario and Quebec have implemented jurisdiction-wide emission targets, joined the Western Climate Initiative and participated in the UN Framework Convention on Climate Change process. Regional economic factors and political circumstances such as party politics and public support explain why some provinces implement stringent climate policies whereas others do not.

The Government of British Columbia (BC) introduced a carbon tax in 2008. Under Premier Gordon Campbell, the Government of BC committed to reduce provincial emissions to 44% below 2007 levels by 2020. BC is now regarded as a leader in climate policy since it

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35 Bakvis and Brown, “Policy Coordination in Federal Systems,” 491.
36 Ibid.
37 Ibid.
40 Ibid., 547.
introduced a carbon pricing system before most other jurisdictions in North America.\textsuperscript{43} Quebec is likewise considered a leader in climate policy because the province linked its cap-and-trade system with California’s in 2014.\textsuperscript{44} Seeing as Quebec produces hydroelectricity, the province would benefit financially from increased demand for low-emitting energy sources in North America.\textsuperscript{45} Quebec was therefore well-positioned to enact a climate strategy.

In comparison, resource-rich provinces contribute significantly to Canada’s net emissions and generally do not adopt binding emission targets.\textsuperscript{46} ‘Petro-provinces,’ in particular, have a vested interest in delaying the transition to a low-carbon economy. Resource-rich provinces such as Alberta do not prioritize the environmental impacts caused by resource extraction because they are fiscally dependent on carbon-intensive industrial activities.\textsuperscript{47} Moreover, environmental degradation may occur downstream from the immediate vicinity of an industrial project.

Resource-rich provinces often have strong economies that are dependent on resource extraction and exports. For instance, Alberta’s oil and gas sector constituted 42% of the province’s revenue between 2003 and 2015.\textsuperscript{48} This economic activity has allowed Alberta to invest in social programs and contribute to Canada’s equalization payments. In turn, the federal government uses equalization payments to support relatively poorer provinces.\textsuperscript{49} Equalization payments allow the Government of Canada to balance fiscal capacity and ensure a comparable level of service between subnational jurisdictions.\textsuperscript{50} Despite committing to reduce net emissions, the federal government does support resource-rich provinces to an extent. The federal government may constrain its climate agenda when trying to address conflicting regional interests.

As discussed above, Canada’s constitutional configuration strengthens a province’s ability to enact policies that reflect its regional interests. Several provinces have established robust industrial sectors because subnational governments have jurisdiction over natural resources. Provinces that are dependent on resource extraction now encounter structural barriers to achieving economic diversification. Extractive corporations, for example, advocate prolonging resource development projects to increase profit potential and returns on capital investment.\textsuperscript{51} Many politicians support export-led development since exports finance a substantial portion of

\begin{flushright}
\textsuperscript{43} Ibid., 555.
\textsuperscript{44} Ibid., 556.
\textsuperscript{45} Ibid.
\textsuperscript{46} Huque and Watton, “Federalism and the Implementation of Environmental Policy,” 79.
\textsuperscript{47} Carter, “Policy pathways to carbon entrenchment,” 165.
\textsuperscript{48} Ibid., 154.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid., 152.
\end{flushright}
provincial budgets. Fiscal dependence on resource extraction and exports increases Canada’s net emissions and reduce a province’s willingness to transition to renewable energy.\textsuperscript{52}

In sum, Canada’s decentralized federal framework restrains the federal government from establishing a coordinated national response to climate change. Despite the Government of Canada having ratified the Paris Agreement, climate action occurs primarily at the subnational level. As a result, the country’s climate policies resemble a patchwork that varies based on subnational jurisdiction. The following section examines American federalism and explores the critical role states play in decreasing emissions.

The United States’ Response to the Paris Agreement

In 2016, the US submitted its first Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change.\textsuperscript{53} As outlined in the NDC, the US aimed to reduce greenhouse gas emissions by 26% below its 2005 levels by 2025.\textsuperscript{54} Likewise, the US intended to linearly reduce its emissions until 2020 and attain an 80% reduction in economy-wide emissions by 2050.\textsuperscript{55} The federal government planned to attain these goals by amending the Clean Air Act, implementing fuel economy standards on heavy-duty vehicles and enacting regulations to reduce carbon emissions from power plants.\textsuperscript{56} Although the US established emission targets, the country’s constitutional configuration and ideological polarization challenge the federal government’s ability to enact climate policies that significantly reduce emissions over the long-term.

The United States’ Constitutional Configuration and Ideological Polarization

The 1789 American Constitution outlines the powers assigned to federal and state governments. The Constitution assigned broad authority over domestic policy to the federal government.\textsuperscript{57} States obtained jurisdiction from the Tenth Amendment, which indicates that powers not delegated to the federal government may be assigned to subnational governments.\textsuperscript{58} Unlike Canadian provinces, the powers assigned to states are residual in nature.

The US’ constitutional configuration allows the federal government to determine national environmental standards.\textsuperscript{59} The Environmental Protection Agency (EPA) is a federal institution

\textsuperscript{52} Ibid., 151.
\textsuperscript{53} USA First NDC, “The USA’s Nationally Determined Contribution,” last modified September 2, 2016, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Huque and Watton, “Federalism and the Implementation of Environmental Policy,” 73-4.
\textsuperscript{58} Ibid.
\textsuperscript{59} Bakvis and Brown, “Policy Coordination in Federal Systems.”
that establishes environmental standards and delegates implementation to state governments. Bakvis and Brown describe this process as ‘administrative federalism’ whereby the federal government coordinates the adoption of national legislation involving two or more orders of government. Administrative federalism allows states to adapt the EPA’s environmental standards to reflect their particular circumstances. The federal government assumes responsibility for implementing environmental protection in states that do not attain the national standard.

While the US’ constitutional configuration allows the federal government to establish national environmental standards, ideological polarization at the federal level results in provisional climate policies. Ideological polarization critically impacts domestic climate policies since the political party in power has the authority to strengthen or repeal national legislation. As such, presidential administrations develop environmental standards based increasingly on ideology rather than considering the long-term consequences of these decisions. Republican administrations often weaken environmental laws whereas Democratic administrations reinforce them.

The US’ response to the Paris Agreement exemplifies the effect of ideological polarization. In June 2014, the Obama Administration introduced the Clean Power Plan (CPP). The CPP aimed to decrease greenhouse gas emissions from power plants by 32% below 2005 levels by 2030. The CPP also set state-specific reduction targets that encouraged subnational governments to curb emissions generated by power plants. The US’ dependence on coal to generate electricity suggests that power plants contribute significantly to the country’s net emissions. Therefore, reducing emissions from power plants was critical for the US to maintain its commitment to the Paris Agreement.

The election of Donald Trump marked a significant change in the federal government’s response to climate change. In June 2017, President Trump announced his intention to withdraw the US from the Paris Agreement. The Trump Administration issued Executive Order 13738 to terminate the former administration’s Clean Power Plan. President Trump argued that the Obama

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60 Ibid., 487.
61 Ibid.
62 Ibid.
63 Konisky and Woods, “Environmental Federalism and the Trump Presidency.”
64 Ibid., 356.
65 Ibid., 357.
66 Ibid.
Administration’s climate policies financially constrained the US. Moreover, regulations that require implementing clean coal technology restricted the country’s economic growth. The transition between the Obama and Trump Administrations demonstrate that ideological polarization limits the US from reducing net emissions over a prolonged time period.

In addition, ideological polarization results in institutional gridlock. Presidential administrations increasingly rely on the tools available to the executive branch to enact legislation and realize their political agendas. Administrations rely on these tools because the legislative branch often blocks legislation that originates from the executive branch dependent on political ideology. By separating the executive and legislative branches at the federal and state levels, the US’ federal governance structure enables institutional gridlock. The Senate is the institution primarily responsible for facilitating intergovernmental relations and thereby reducing institutional gridlock. Through the Senate, state interests are represented at the federal level. The Senate, however, is not a legitimate forum to resolve institutional gridlock as it is often bypassed and is used as a tool of the administration.

In sum, ideological polarization results in institutional gridlock at the federal level and causes presidential administrations to rely on executive orders to enact legislation. The Trump Administration’s decision to dismantle the former administration’s Clean Power Plan reflects the magnitude of ideological polarization present in contemporary America. Ideological polarization limits the US from significantly reducing net emissions over the long-term. Likewise, intergovernmental relations remain rather ineffective at resolving the effects of ideological polarization. Subnational governments perform a critical role in advancing climate action.

Subnational Governments and a Patchwork of Climate Policies

The American Constitution grants states the authority to enact or repeal binding emission targets. Despite a favorable constitutional configuration, ideological polarization at the subnational level explains the variation in states’ climate policies. For instance, states’ reactions differed in response to the Obama Administration’s decision to adopt the Clean Power Plan (CPP) and thereby increase the federal government’s role in regulating emissions. Liberal-leaning states such as California and New York supported this Administration’s decision to strengthen environmental regulation. Conservative-leaning states such as Texas and Oklahoma objected to the CPP and the federal government’s increased control over emissions.

71 Bakvis and Brown, “Policy Coordination in Federal Systems,” 485.
73 Ibid.
During the Trump Presidency, conservative-leaning governors celebrated this Administration’s decision to repeal the CPP.\textsuperscript{74} The governors of California, New York and Washington, however, established the US Climate Alliance when President Trump announced his intent to withdraw from the Paris Agreement.\textsuperscript{75} The Alliance includes sixteen states, representing roughly 40% of the US population and nearly 50% of the US’ national GDP.\textsuperscript{76} The Alliance aims to uphold the US’ commitment to the Paris Agreement regardless of the Trump Administration’s retrenchment of environmental legislation.

Overall, America’s climate policies reflect a patchwork that vary between states. Liberal-leaning states have established coalitions to decrease carbon emissions, promote renewable energy and increase regulations on oil production.\textsuperscript{77} Liberal-leaning states may uphold the US’ commitment to the Paris Agreement despite the federal government’s relatively provisional climate policies.\textsuperscript{78} Comparable to Canada, American federalism provides an opportunity for improved climate action because subnational governments can implement binding emission targets in the event the federal government withdraws support. The following section assesses Canada and the US’ patchwork response to climate change and identifies strategies to further climate action on a subnational basis.

**A Patchwork of Climate Policies that Reflect Subnational Jurisdiction**

Canada and the US are constrained from upholding their commitments to the Paris Agreement due to the countries’ constitutional configurations. In Canada, the BNA Act assigned authority over most carbon-intensive sectors to provincial governments. Canada’s constitutional configuration limits the federal government from adopting national climate policies without encroaching on provincial jurisdiction. Unlike Canada, the American Constitution assigned broad power over domestic policy to the federal government and residual authority to states. Nonetheless, ideological polarization resulted in provisional climate policies at the federal level that reflect the political agenda of the party in power.

While a federation’s constitutional configuration establishes a relatively rigid governance structure, its intergovernmental relations afford some degree of flexibility. Intergovernmental relations generally facilitate cooperation between orders of government and reduce constraints posed by a country’s constitutional division of authority. Intergovernmental relations in Canada and the US, however, appear rather ineffective at resolving division between orders of government and supporting comprehensive climate action. Neither Canada nor the US have

\textsuperscript{74} Ibid., 365.
\textsuperscript{75} Ibid., 359.
\textsuperscript{76} Ibid.
\textsuperscript{78} Ibid.
implemented climate policies that significantly reduce net emissions over the long-term. Domestic climate policies instead reflect the economic and political interests of Canadian provinces and American states.

Canada’s fused executive and legislative branches foster consensus, which allows the federal government to enact legislation relatively efficiently. Nevertheless, provinces’ constitutionally protected jurisdiction over most carbon-intensive sectors restricts the federal government from adopting national emission targets. Fiscal dependence on resource extraction and exports causes many resource-rich provinces to prolong industrial activities that emit high levels of greenhouse gases. As a result, several provinces do not adopt climate policies that curb net emissions. The limits of Canadian federalism reflect the country’s varied regional and economic interests.

Extensive ideological polarization in the US causes institutional gridlock at the federal level. Presidential administrations strengthen or repeal environmental legislation dependent on ideology through the use of executive orders. Climate policies enacted through an executive order, though, are relatively provisional. As a result, liberal-leaning states have established coalitions to strengthen environmental regulations. Like Canada, American climate policies reflect a patchwork that differ based on the economic and political interests of individual states.

Establishing Better Climate Outcomes at the Subnational Level

In Canada and the US, developments in climate policy are realized at the subnational level. Assessing climate action at the subnational level is therefore critical to understand how provinces and states can better facilitate policy transfer and limit inconsistent responses to climate change. Generally, the mobility of goods and people create competitive pressure between jurisdictions, especially in the absence of strong federal leadership. Competitive pressures may cause jurisdictions to reduce environmental standards to attract investment from the private sector. Oftentimes, stringent climate policies cause companies to transfer jurisdictions, resulting in a loss of investment and employment in the original jurisdiction. In such scenarios, overall emissions do not decrease because carbon-intensive activities occur in another region.

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79 Bakvis and Brown, “Policy Coordination in Federal Systems,” 500.
83 Ibid., 548.
84 Ibid., 549.
85 Ibid.
86 Ibid.
Policy transfer and collaboration among subnational jurisdictions is critical to reduce net emissions. Such cooperation allows subnational jurisdictions to compensate for a lack of federal leadership as well as enact climate policies of greater magnitude. The California-led Western Climate Initiative, for instance, established a price on carbon across a regional trading market by instituting a cap-and-trade system in individual jurisdictions. This cap-and-trade system established a limit on greenhouse gas emissions and provided tradable permits to participating jurisdictions. British Columbia and Quebec worked with California to advance policy transfer and establish improved climate policies. Ultimately, relations between subnational jurisdictions in North America facilitate policy transfer and remain instrumental to reducing overall emissions.

Conclusion

In sum, Canadian and American climate policies reflect a patchwork that varies dependent on subnational jurisdiction. Despite both countries ratifying the Paris Agreement and committing to decrease net emissions, considerable environmental protection is enacted on the basis of subnational jurisdiction. In Canada, resource-rich provinces have a vested interest in prolonging industrial activities that emit high levels of greenhouse gases because they are fiscally dependent on resource extraction and exports. Canada’s constitutional configuration further constrains the federal government from enacting national emission targets since the BNA Act assigns jurisdiction over most carbon-intensive sectors to provincial governments. In the US, presidential administrations often enact or repeal climate policies through executive orders. Ideological polarization and the ‘administrative presidency’ decrease the timeframe in which national climate policies are implemented. Coalitions among predominantly liberal-leaning states allow for more sustained climate action.

Canada and the US possess advanced industrial sectors that emit significant greenhouse gases and high per capita emissions. While both countries ratified the Paris Agreement, neither federation has adopted a coordinated long-term climate change strategy that significantly reduces net emissions. Since the Paris Agreement, subnational governments have experienced greater success in adopting climate policies. Future research should therefore assess how the United Nations can better support subnational governments in implementing climate policies. This research should also consider how federations can establish improved relations between national and subnational governments to foster partnerships in areas of overlapping jurisdiction.

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87 Ibid., 552.
88 Ibid.
89 Ibid.
90 Bakvis and Brown, “Policy Coordination in Federal Systems,” 496.
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The Rejection of Bill 618: How Canada’s Colonial Policies Serve as Precursors to the Suicide Crisis in Indigenous Canada

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Federalism-E is founded by the Royal Military College of Canada and the Institute of Intergovernmental Relations at Queen’s University
Federalism-e is an electronic student journal about federalism, multi-level governance, and intergovernmental relations put forth in collaboration between Queen’s University and the Royal Military College of Canada. This annual journal will publish papers by undergraduate students, which are reviewed by an editorial board composed of their peers, in both English and French languages. It is a bilingual, undergraduate electronic journal with a mandate to provide a forum to encourage research and scholarly debate with respect to a wide variety of issues concerning federalism both within Canada and abroad.

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Introduction

Suicide as a public health issue has become a contentious issue within Saskatchewan, and Canada’s current political sphere. There is plenty of evidence to suggest that the First Nations reserves and communities in the Northern part of Saskatchewan are particularly vulnerable. These hotspots have reached the level of a mental health emergency, and many citizens are demanding governmental action and intervention. A New Democratic Party MLA named Doyle Vermette created Bill 618 as a solution, which was unanimously rejected by the entirety of the Saskatchewan Party’s caucus. This veto left many in the province angered; Vermette responded by stating he is “at a loss”. The current suicide rates are shocking; the youth living in Northern communities are at an exceptionally high risk. Research supports that Canada’s legacy of colonial policies is to blame for the relentless poor social and mental health conditions experienced by Indigenous peoples. Activist Tristen Durocher has worked to bring more attention to this issue through his protest called “Walking With Our Angels”; which was in direct response to the vetoed bill. Durocher’s protest highlighted the root of the problem: Canada needs to end its legacy of systemic oppression against its Indigenous peoples. This paper will argue that the veto of Bill 618 sparked controversy due to the continual victimization of Canada’s Indigenous population at the hands of the state.

Bill 618

The conception of a suicide prevention bill has been at the heart of Doyle Vermette’s political endeavours for the past two years. This Northern Affairs Critic for the Saskatchewan NDP proposed Bill 618 in November, to have it struck down in June 2020 by every single Sask. Party MLA. Vermette himself represents the Cumberland constituency, a Northern community which is all too aware of the suicide tragedy in Indigenous Canada. The suicide rates for First Nations youth are five to seven times greater than their non-Indigenous counterparts; the Inuit youth have one of the highest rates in the world, with a staggering eleven times greater risk. These statistics are shocking, and grounds for demanding urgent reform. In response to the veto of his bill, Vermette responded, “How am I to explain to those families this government’s unwillingness to do what is so badly needed right now?” The provincial government’s current

10 Bramadat-Willcock, “Sask. legislature votes down suicide prevention bill.”
plan is titled the “Pillars for Life Plan” and has been heavily criticized by both Vermette and provincial NDP leader Ryan Meili. The main concern over this plan is that it offers no additional funding; without funding those in desperate need of resources will not be able to receive them. Vermette’s proposed bill created a strategy which was both legally binding, and a multi-faceted approach.\(^\text{11}\)

Bill 618 recognized and described suicide as a “complex problem” which encompasses many problems in areas such as psychological, social, and spiritual wellbeing. The document asserted that suicide is an issue all Canadians should be responsible for eradicating; it is unjust to place the burden onto only the communities which are the most vulnerable and at risk. The purpose of the strategy was to not only prevent further deaths but work to educate and provide access to resources to Canadians who are living with the trauma of being affected. Vermette’s vision for aiding in this public health issue was through the “collaborative action” of many actors. Various governments, organizations, and individuals were to all be part of this cooperative effort; the Saskatchewan Health Authority was to play a critical role in disseminating this strategy. This actor’s role includes educating the public on information relevant to suicide and its prevention, as well as communicating what the best practices are for prevention. The bill puts an emphasis on “evidence-based practices” which is key; this mental health crisis must be addressed with the same seriousness as any other public health problem. The fact that it is not currently addressed as such speaks to the stigma surrounding mental health. Vermette’s bill includes that two years following the implementation of the Act, the Saskatchewan Health Authority is responsible for a progress update. This is a vital part of the Bill, as it legally binds the provincial government to keep track of the success of the strategy, and critically analyze what else should be done. The current rates of suicide the Indigenous peoples of Canada currently face warrant this type of intervention; anything less is a blatant disregard for public safety.\(^\text{12}\)

**Contemporary Conditions Within Canada**

The overrepresentation of Indigenous peoples in suicide statistics is not limited to Saskatchewan residents, but represents an overarching problem affecting populations all throughout Canada.\(^\text{13}\) Suicide is the leading cause of death for First Nations peoples in Canada from youth until age forty-four. States of emergency being granted in response to escalating suicide rates has become an increasing occurrence in Indigenous communities throughout the country. A state of emergency means relief is provided for the community similarly to the way funds are provided for natural disaster victims; the suicide epidemic in Indigenous Canada warranting the same funding as natural disasters solidifies the urgency of the situation. Nunavut experienced forty-five suicides in 2013, which was the highest annual report to date. The tragic statistic led to the premier implementing a state of emergency, and communities in Northern Ontario followed suit in 2016 when emergency relief was requested. Communities in Northern Ontario declared emergency following a peak in youth rates, including a ten-year-old girl. Emergency relief was requested at the Neskantaga First Nation, Onigaming First Nation, as well

\(^{11}\) Ibid.

\(^{12}\) An Act respecting a Provincial Strategy for Suicide Prevention, Bill 618, First Reading November 5, 2019, (Saskatchewan, 28 Leg., Fourth Sess.) https://www.legassembly.sk.ca/media/1594/progress-of-bills.pdf.

\(^{13}\) McQuaid, et al., “Suicide Ideation and attempts among First Nations Peoples,” 423.
as the Pikangikum First Nation. The climbing occurrences of suicide led to a formal report by the House of Commons “Standing Committee on Indigenous and Northern Affairs” being conducted in 2016 and read in the House the following year.\(^{14}\)

### 2017 House of Commons Report

The June 2017 parliamentary session include the presentation of the Standing Committee on Indigenous and Northern Affair (The Committee)’s report called “Breaking Point: The Suicide Crisis in Indigenous Communities”. The findings of the report were accumulated over a year and utilized both qualitative and quantitative methods to gather information. The Committee gathered their data from twenty public hearings, one hundred witnesses, and over fifty youth testimonies. The witnesses included community leaders, Indigenous academics, healthcare professionals, as well as front-line caregivers such as social workers. Evidence was gathered from coast to coast; roundtable discussions occurred in Kuujjuaq, Nunavik; Sioux Lookout, Ontario; Vancouver, British Columbia, as well as Iqaluit, Nunavut. Electronic surveys were offered in addition, to allow more testimonies to be made for this who did not have access to the hearings. The consensus concluded was that successful prevention requires the accumulative effort of all levels of government, along with Indigenous organizations; the report relayed that there are many policy considerations the federal government must remedy. The issues of housing, education, and the preservation of Indigenous cultures in the public sphere, are all policy considerations that are critical to remedy this public health problem. The ongoing epidemic of Indigenous communities being overrepresented in suicide rates is a public health problem, and therefore it is beneficial to review how Canada’s federal system disseminates Indigenous health services.\(^{15}\)

### Indigenous Peoples and Racial Injustice in the Canadian Healthcare System

A decentralized government such as Canada, has specific operational challenges, due to the overlapping responsibilities of jurisdictions.\(^{16}\) There is not universal intergovernmental consensus regarding which level of government has financial responsibility for healthcare services.\(^{17}\) This results in a state with unclear boundaries for which level of government oversees what task, leading to certain sectors being overlooked. Indigenous and Northern Affairs is a federal responsibility, but healthcare is provincial; this intersection is a prime example of Canada’s federal system leading to unclear consensus on who is ultimately responsible for the widening mental health disparity in Indigenous Canada\(^{18}\). Indigenous health is affected by the manifestation of racial injustice within Canadian society, including the healthcare system. Race, culture, and religion are all critical determinants of health inequalities; this is seen through the

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\(^{17}\) Flood, Lahey, and Thomas, “Federalism and Health Care in Canada: A Troubled Romance?,” 450.

\(^{18}\) Ibid, 451.
existing health gap between Indigenous people and other Canadians. The federal government was made responsible for the welfare of Indigenous people through the signing of treaties, as well as the Indian Act. Health and education, which are technically provincial jurisdiction, are included in these binding legal documents. However, due to the decentralized organization of healthcare in the country, available services differ depending on the province or territory. Jurisdictional gaps continue to exclude First Nations communities from accessing services; expensive medications, types of therapies, and other services may not be covered by the provincial governments. The federal government alleges that it remedies this for First Nations communities through the Indigenous Services Canada’s First Nations Inuit Health Branch, but the health gap is widening at an accelerated rate nonetheless. Jurisdictional discrepancies leading to service gaps leave First Nations children living on reserves, with special health needs, especially vulnerable; Jordan’s Principle was created to offset these inequalities.

**Jordan’s Principle**

The disputes between levels of government regarding funding for First Nations healthcare, has had deadly consequences; in 2005 Jordan Rivers Anderson passed away following unresolved intergovernmental conflict over who was to pay for his services. Jordan had a neurological disorder called Carey Fineman Ziter Syndrome and needed to be hospitalized for the first two years of his life. Jordan was Cree from Norway House Cree Nation, 500 km North of Winnipeg, and was released from the hospital on the condition that his home be renovated to fit his medical needs. The federal government declined funding to renovate Jordan’s house, and engaged in lengthy financial disputes with the Manitoba government over who was to pay for the other expenses. The disheartening reality is that these expenses include a $30 showerhead, special food, and transportation for medical appointments; these were not amenities Jordan could live without. Following the continual fighting over the medical bills, Jordan died at age five in a Winnipeg hospital, before any resolution was reached. This tragic event reiterates the historical legacy of Canada’s governments disregarding the needs of its First Nations peoples and led to the creation of “Jordan’s Principle”. This principle was adopted federally in 2007 and declares that Indigenous children’s health services is to be handled in a way which puts the child first. Whichever government is the first-contact one, is to pay up front for the services, and jurisdictional disputes are to be handled after the child receiving their care. This principle shows progress but had not been ratified in any province or territory by 2017, a decade after its adoption.

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creation. A critical examination into Canada’s colonial policies offers explanation into the circumstances which led to the current health gap.

Canada’s History of Colonial Policy

The Indian Act

The Indian Act, which came into effect in 1876, is the product of two separate pieces of colonial legislature being merged into one. The two acts which were combined were the General Civilization Act, and the General Enfranchisement Act; it is clear from the titles of the legislature that the goal of both was assimilation. The Indian Act is a key component of First Nations-government relations to this day because it is largely still in effect. During the nineteenth century, this act was used as a tool of colonization; the federal government created the oppressive reserve system and began stripping away an abundance of rights. The Indian Act worked to create a cultural genocide within Canada, through outlawing and criminalizing various cultural and traditional elements of Indigenous cultures. Religious ceremonies, language, names, traditional governance were largely banned and punishable under this legislature; this led to the identity of an entire group of peoples being stolen. This cultural genocide’s effects are still felt today in Canada, and are exhibited through the high rates of addiction, mental and physical health problems, and of course suicide by Indigenous populations. Furthermore, the concept of patriarchy was introduced through the Indian Act’s gender discrimination regarding status. Prior to colonization, many nations held women in high regard, and celebrated their power through representing them within the political sphere. Following the implementation of this act, Canada’s Indigenous peoples were now exposed to the harmful effects of both a cultural genocide, and of patriarchal values. These effects have manifested into the social problems prevalent today; residential schools are another grave policy error made by the federal government.

Residential School System

The Residential School System was a product of 1884 amendments to the Indian Act; the schools were created to further the goals of assimilation which were foundational to the Act itself. This goal was clear to the public when in 1920 the Deputy Minister of Indian Affairs stated, “I want to get rid of the Indian problem.”. The schools operated until 1996, when the last one, located in Saskatchewan, was closed. The federal government financed these institutions, and they were facilitated by various churches within the country. These schools furthered the agenda of cultural genocide, outlawing any cultural elements or traditions; the punishments children received for breaking these rules were at times inhumane, and a collective failure of both the government and the church. There is evidence that children were burned, beaten naked

23 Ibid, 102.  
24 Canada, Parliament, House of Commons, Standing Committee on Indigenous and Northern Affairs, Minutes of Proceedings and Evidence.  
27 First Nations Study Program, “The Indian Act”.  

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in front of their peers, and starved for disobeying. Some residents reported needles being inserted into their tongues for speaking their native language, or even in severe cases of abuse, being force-fed their own vomit. There is also evidence of forced abortions occurring at the schools because of the occurrence of sexual abuse. Some survivors reported being locked in basements, closets, and even cages as punishment. The severe trauma suffered at these schools has created entire generations of families within Canada that have not yet recovered, and who are stuck in cycles of abuse and addiction to cope. These horrid events occurred only in the last century, and thus the effects are clearly shown through the mental health problems which have recently come to attention through Bill 618. All these examples of trauma and unacceptable living conditions represent how badly the Canadian government has failed, specifically through its failure to promises laid out in treaties.

Rights of Indigenous Peoples in the Canadian Legal System

Treaty Promises

The right of First Nations communities to equitable healthcare is entrenched in treaty agreements made with the federal government; the treaties assert that it is the responsibility of the federal government to oversee the dissemination of health services. Treaty Six asserts healthcare as a right owed to First Nations peoples by the Crown, but treaties represent promises made by the federal government not provincial. Therefore, a new collaborative effort between all levels of government is necessary to rectify treaties rights. As Vermette’s bill explained, more addiction and mental health resources are needed in northern communities. The onus belongs to both the provincial and federal levels of government to fulfill the treaty right to healthcare and provide increased supports to the residents in Northern Saskatchewan. The Truth and Reconciliation Commissions Report stated that the subpar health resources for Indigenous peoples on and off reserves are a direct result of colonial policy, and it is up to all levels of government to remedy the existing health disparities. Alika Lafontaine, the former president of the Indigenous Physicians Associations articulates this problem, “…the division between provinces and the federal government is an imaginary one…[there exists] only a disagreement on who pays for services. Governments can’t deny basic health care services to Indigenous peoples as a matter of law.” The current state of emergency in our province represents the violation of constitutional rights at the hands of the federal and provincial governments.

30 Ibid.
31 An Act respecting a Provincial Strategy for Suicide Prevention, Bill 618.
The Constitution Act, 1982

Part I of the Constitution Act, 1982, includes the Charter of Rights and Freedoms, which is guaranteed to all Canadians equally. Section 7 of the Charter asserts the right to life, liberty, and security for all Canadians; a section that is currently being violated in our province. When there is one distinct group of peoples who are living in such unhealthy and unbearable conditions that their suicide rate is four times that of the rest of the province, their right to life is clearly not being fulfilled. When there are children as young as ten years old taking their own life at an elevated rate, and of only one race, there is not liberty. The suicide rates of First Nations children living in northern areas is not a coincidence; it is the direct consequence of a country that used the exploitative systems of colonialism to build a settler nation. Section 15 states that all Canadians deserve equal protection under the law; but where is the protection when they are denied health services by their government? The law does not protect First Nations citizens living on reserves who are denied their treaty rights to healthcare, as well as denied the government action that is legally owed to them by the federal government. This rejection of Bill 618 has created unrest throughout the province, many Indigenous peoples are fed up with their voices being silenced. Tristen Durocher, a young Métis man, has brought attention to the issue of suicide prevention through his protest called “Walking with Our Angels”.

“Walking With Our Angels”

Tristen Durocher, a twenty-four-year-old Métis man from Northern Saskatchewan, embarked on a political protest in response to the government’s rejection of Bill 618. Along with his friend Harmony King, Durocher led a 635 kilometer walk which lasted twenty-eight days. In addition to the walk, which began at Air Ronge Cemetery, Durocher fasted for forty-four days; this protest was entitled “Walking With Our Angels”. The protest was to bring national attentional to the public health crisis facing Indigenous communities throughout every region in Canada. The final stage of this grieving ceremony resulted in Durocher and King cutting off their braids on the steps of the legislative building in Regina. The pair tied their braids into the shape of a noose, and then proceeded to burn it back at Durocher’s tipi in a ceremonial fashion.

Durocher’s tipi was situated at Wascana Park in Regina, and the provincial government attempted to have it removed, claiming it posed a “safety risk”. The lawyers for the government cited that Durocher’s tipi violated park bylaws prohibiting overnight camping.

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36 Ibid.
38 Campbell, “‘Doesn’t mean it’s the end’”.
39 Ibid.
41 Campbell, “‘Doesn’t mean it’s the end’”.
42 Ibid.
43 Taylor, “Saskatchewan court allows teepee protest camp to stay on legislature lawn”.

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Court of Queen’s Bench Justice Graeme Mitchell ruled in Durocher’s favour, and dismissed the application for a court order to remove the tipi. The judge stated that the park’s website acknowledges that it is situated on Treaty 4 territory, and thus Durocher’s use of traditional land must be allowed for his spirituality. Judge Mitchell also stated that Durocher’s right to expression was violated, and that a public space, such as Wascana Park, is where citizens go to “express public dissent”. Judge Mitchell has also given the park six months to rewrite their bylaws, to provide exemptions for political expression, as protected under the Constitution.

Saskatchewan Premier Scott Moe refused to come meet with Durocher, and the only contact his administration made was when they took Durocher to court. This reflects how deeply entrenched colonial power is in Canada’s governing structures, at all levels. Despite the House of Commons report, which specifically outlined the necessity for all sectors of government to work together, the Saskatchewan Government chose to ignore the harrowing conditions of its Indigenous population. Moe’s administration’s actions make it clear that neocolonialism, and racial injustice is so deeply embedded within all sectors of Canadian governance. Moe’s decision to charge Durocher for his spiritual expression, are reminiscent of the Indian Act’s laws criminalizing Indigenous culture, and make it abundantly clear that as a country, Canada has much work left to do.

**Conclusion**

The Saskatchewan Party’s rejection of Vermette’s bill coincides with the Canadian government’s pattern of ignoring the needs of its Indigenous peoples. The provincial government had an opportunity to put real action behind an urgent public health emergency and failed. The rejection of Bill 618 was a political decision tainted with colonialism. It is an insult to democracy for a unanimous decision be made to reject a prevention strategy that so many in our province are desperate for. The provincial governments plan offers no additional funding; there will be no increased access to resources for the victims up North if the funding status remains the same. Since the Indian Act, Canada’s message of assimilation and colonialism has been clearly represented through their policies regarding Indigenous peoples. If the government claims that they would like to apologize for these horrors, such as residential schools, it appears to be more performative than genuine when mental health crises caused by colonialism are ignored. The health and wellbeing of one group of people in Canada should not be in jeopardy due to jurisdictional disputes regarding money between levels of government. Canadian lives are more important than funding disputes, and it is shameful that these funding disputes are still to this day creating more victims. Furthermore, when Indigenous youth activist Tristen Durocher began protests to bring attention to Bill 618 and its importance, Saskatchewan Party leader Scott Moe’s response clearly showed his party’s ignorance for Indigenous issues. These are not decisions a
government dedicated to reconciliation would make. Canada is looked at as an example of freedom and multiculturalism by the rest of the world; but this is an inaccurate depiction when its own citizens live in conditions which violate their rights to life and equality. Canada cannot be a free country when your access to healthcare is contingent on if you are Indigenous or not. That is blatant discrimination, and it has lethal consequences for those who are born Indigenous into a country which is rooted in colonial policy.
Bibliography


Counteracting Settler Legal Systems: Oral Histories, The *Indian Act*, and Reconciling Indigenous Law in Canada

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The incontrovertible differences between Canadian federal law and Indigenous legal systems can perhaps be best observed in comparing common law doctrines such as the *Indian Act* with that of Indigenous oral histories. The former is a pernicious document that exists in principle to suppress traditional Indigenous practices, only shifting or diversifying its stipulations in order to maintain cultural erasure. On the other hand, Indigenous oral histories are a dynamic body of experiences which continue to develop and whose roots run deeper than recorded colonial history. The emergence of contention between Indigenous peoples and Canadian settler law surrounding land claims has solidified Indigenous demand for equal consideration in public policy. As a result, Canada’s provincial and federal governments have begun to engage in processes of acknowledgement and reconciliation with Indigenous governance and authority. Emerging discourses have forced a reevaluation of colonial legislation such as the *Indian Act* as well as prompted scholars and policy makers to contemplate how Indigenous-federal relations will shift in the near future. Among the most important intersections of these legal systems is found in the procedures and outcomes of Supreme Court cases as they pertain to Indigenous oral histories. By analyzing particular Supreme Court cases, the ensuing academic commentary, and their implications for future legal precedents, one can better understand how to transition to a legal paradigm that includes Indigenous law, one defined by equity and justice while simultaneously respecting superseding authority over Indigenous lands and waters. By looking forward, governments can institute a desire-based framework that generates top-down and bottom-up strategies of addressing Indigenous and Canadian relations, affirms the goal of Indigenous sovereignty, and recognizes the diversity needed in Canadian judicial systems.

Indigenous oral histories have had a long and complicated relationship with Canadian courts, as colonial government structures have historically continued to undermine Indigenous authority. A primary example of this power imbalance is the *Indian Act*, a piece of legislation enacted in 1876 which sought to completely restructure Indigenous cultural, societal, and economic practices with the ultimate goal of cultural assimilation of Indigenous peoples. Many aspects of this legislation exist solely to prevent the exchange of cultural knowledge. Consider the potlatch, a social ceremony practiced by First Nations of the Pacific Northwest Coast such as the Coast Salish, Kwakwaka'wakw, Nuu-chah-nulth, and the Dene of the interior western subarctic. The ceremony is instrumental in legal processes like conferring names, statuses, and granting sacred rights, though it was banned in an 1884 amendment to the *Indian Act* in an attempt to extinguish these practices.\(^1\) Subsequent policies within the *Act* have been equally restrictive, such as Section 141, which barred status Indians from seeking legal counsel.\(^2\) However, the resilience of Indigenous communities has ensured that these assimilation tactics have failed, while ongoing grassroots movements and protests have led to a stronger sense of Indigenous self-determination. This contentious past must be taken into account when assessing goals for settler and Indigenous legal relations, as it is imperative to recognize these laws as the groundwork from which Supreme Court policy towards Indigenous culture draws from.

More recently, the 1982 *Constitution Act* affirmed the protection of Indigenous rights within the settler state, delegating responsibilities to the Supreme Court to resolve any further

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1 An Act further to amend “The Indian Act.” S.C. 1884, c 27.
2 *Indian Act.* R. S.C. 1927, s. 141.
constitutional issues. This means that claims of Aboriginal title are no longer in the hands of unqualified parliamentarians elected by a majority of non-Indigenous peoples who lack qualifications to moderate Indigenous issues. Rather, these claims are dealt with through unelected constitutional judges in a lethargic and widely interpretive court system instead. With this transition came the era of Comprehensive Land Claim Agreements, where Indigenous communities have begun to assert their title over ancestral lands. This assertion is required in the eyes of the Canadian courts only, as much of the land was unceded and thereby never truly belonged to the settler state to begin with. Oral histories would play a large role in this assertion, as they are key to understanding connections to these territories within an Indigenous context. However, the court’s attitude and treatment of these customs has been troubling at best.

The 1997 Supreme Court case *Delgamuukw v. British Columbia* was groundbreaking in its recognition of oral histories as evidence of Aboriginal title. Brought forth by the Wet’suwet’en and Gitxsan nations, the trial would decide the title to territory in northern British Columbia, a jurisdiction which notably had never signed any treaties with the Canadian government. The Supreme Court overturned an earlier judgement from lower B.C. courts that had claimed Aboriginal title did not exist in law, allowing an appeal and leading to a retrial. The Supreme Court’s ruling not only defined the scope of Aboriginal title, but ensured it was a constitutionally protected right that cannot be extinguished by the provinces, although it could be “infringed upon.” Additionally, it set the precedent for all future cases in that it established that Indigenous oral history must be granted the same importance as written Canadian history within settler courts. The complex nature of the case represented years of work that had been done by Wet’suwet’en and Gitxsan peoples to record their economic structures, governance systems, and spiritual connections to the land. Of course, the verdict only served to prove what these communities had known all along; oral histories matter. Although it was not a concrete solution, it nevertheless was a step forward for the recognition of Indigenous sovereignty. Wet’suwet’en and Gitxsan reactions to the ruling were cautiously optimistic. It seemed that this new ruling would make up for the ignorance and pain caused by B.C. Chief Justice Allan McEachern, who had displayed blatant racism in his remarks towards Indigenous peoples in the lower court’s previous judicial decision. Members of the two nations saw this as a victory for Indigenous resilience, stating, “The power of the blanket’ is still very alive, and we’re going to carry it forward,” in reference to songs and stories shared during feast hall ceremonies. Wet’suwet’en Chiefs hailed it as an example of both regional and cultural harmony. Most promisingly, they were optimistic that the decision would lay the groundwork to further advance Indigenous interests in settler court systems.

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5 Ibid.
However, there were still pertinent issues with regard to how the courts treated oral evidence. Central to the ways in which both peoples proved territorial connection was Gitxsan adaawk, a collection of sacred oral traditions relating to ancestral histories, Wet’suwet’en kungax, a spiritual song or dance, and the feast hall where both communities share their oral stories.\(^9\) Adaawk is a main principle of Gitxsan law, a dynamic documentation of both past and present rules in Gitxsan society.\(^10\) Due to its centrality, it played a prominent role in court proceedings, which called into question its limits within the common law system. The courts struggled to comprehend how adaawk could be both a recollection of the past as well as a record of recent events. The main problem, as illustrated by Indigenous legal scholar Val Napoleon, was that adaawk was being treated the same way as Western social sciences like history and anthropology. She argues that adaawk must be seen as a distinct entity, one that cannot be invalidated or dissected by common law courts as it exists as an eternal truth of Gitxsan law.\(^11\) She concludes that adaawk must be offered as a complete system that in and of itself proves territorial occupation, otherwise any subsequent trials would simply be, “. . . one legal system (Western) judging another (Git[x]san).”\(^12\) Although the Delgamuukw case was revolutionary in setting a precedent for common law, it failed to contextualize Indigenous legal structures as authorities in their own right.

It would not be until 2014 that the courts would officially establish Aboriginal title outside of reserve lands. In Tsilhqot’in Nation v. British Columbia, the Supreme Court unanimously declared that the Tsilhqot’in Nation had claim to territory in central British Columbia after Canadian forestry company Carrier Lumber was issued a license to exploit their land and resources. It was another landmark decision, but one that further complicated the approach to oral evidence. Based on previous judgements, the Supreme Court separated oral history from what it referred to as “oral traditions,” otherwise known as Dechen Ts’edilhtan or Tsilhqot’in law.\(^13\) This separation allowed the courts to give virtually no legal weight to crucial aspects of Dechen Ts’edilhtan. Concepts such as gwenIg, which refers to stories that articulate knowledge and spiritual connections to the land, were cast aside as “myths” and “legends” instead of being recognized as underlying proof of Tsilhqot’in cultural presence.\(^14\) By doing this, the Canadian state undermined its declaration of title by continuously refusing to legally recognize integral parts of Indigenous culture. It also set in place a precedent that refused to acknowledge the intricacies of each Indigenous nation’s history, practices, and perspectives by categorizing them in strictly homogeneous Western notions.

Since this case, there have been some promising developments in the Canadian court’s approach. In 2019, the Secwepemc nation celebrated a court motion that allowed a group of

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11 Ibid, 153.
12 Ibid, 155.
14 Ibid, 184.
Elders to testify together in their ongoing title case.\textsuperscript{15} Canadian courts usually require depositions to be given individually, however by recognizing a panel-like method, the court is aligning itself with the Secwepemc traditions of reciting oral history as a collective. These kinds of accommodations help to integrate Indigenous legal practices into common law systems, but they are still problematic in their assertion of common law as the default authority. To rectify this power imbalance, certain fundamental perspectives within the settler court system must be addressed in order for the Canadian government to truly reconcile with Indigenous nations.

First, oral histories should not be treated as relics. Settler courts have struggled to interpret oral histories within the narrow framework of Eurocentric historical record keeping. These traditions must not be approached as cultural artifacts that are stuck in the past, but instead as relevant and versatile documents. The Tsilhqot'in Nation's gwenIg, for example, not only included stories from previous generations, but continued to expand up to and including the 2014 land claim case. Throughout the legal proceedings, Elders shared guidance that both related to the past and reflected current feelings felt by their community, thereby adding to gwenIg.\textsuperscript{16} If Canadian courts acknowledge this principle, it will enable a broader appreciation for the diversity of Indigenous legal systems, and Canadian courts can hopefully move away from stereotypical perspectives that cast Indigenous governing practices as unmodern and archaic.

Second, oral traditions cannot be treated as a monolith. In their procedure of deciphering and granting Aboriginal title, judges have interpreted different oral traditions across cases using troublingly similar methods. To ensure that respect and care is given to each title case, it is imperative that Indigenous cultures are not conflated as one monolithic entity. Both Gitxsan adaawk and Tsilhqot'in gwenIg should not merely be identified as culturally distinct in comparison to Canadian legal systems, but should be treated as two separate legal systems themselves. Differentiating Gitxsan, Tsilhqot'in, and all other Indigenous legal practices affirms that the commanding authority of that nation's legal structure exists solely within the nation itself. This would provide equal footing for meaningful nation-to-nation relations with the Canadian state, removing the need for settler courts to authenticate Indigenous legal paradigms.

Finally, the Canadian government must be prevented from infringing upon Indigenous sovereignty. This has historically been the most difficult position for Canada to reconcile, as our nation's past governments have repeatedly violated treaty agreements. The federal government is still making up for these violations, just recently paying the Bigstone Cree Nation $231 million for failing to grant an appropriate amount of land as was promised to them when they originally signed Treaty 8 back in 1899.\textsuperscript{17} It is pivotal to ensure this pattern is not repeated with modern treaties and agreements. As dictated in the Delgamuukw decision, Aboriginal title may be infringed upon by the Crown for such purposes as “economic development,” provided that there is adequate consultation as well as fair compensation.\textsuperscript{18} This precedent completely erodes the

\textsuperscript{15} Andrea Palframan. “Secwepemc win motion for elders to give oral history evidence as a group.” Raven, June 10, 2019.
\textsuperscript{17} “When the government fails to honour its commitments.” CBC News, May 30, 2011.
\textsuperscript{18} Stan Persky. Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title. (Vancouver: Douglas and McIntyre, 1998), 20.
model of relationship between Indigenous nations and the Crown that was laid out in the Royal Proclamation of 1763, which explicitly forbade governments from “molest[ing] or disturb[ing]” Indigenous nations. In order to protect Indigenous land from capitalist interests and pressure, valid consent must take precedence over consultation. The government must update Section 35 of the 1982 Constitution Act to not only affirm Aboriginal title, but also specify that it cannot be infringed upon under any circumstance in order to truly enshrine Indigenous political and legal sovereignty.

In addition to these top-down requirements, Indigenous scholars and legal experts have been making tangible advancements in bottom-up domains like education to spark meaningful reform within the Canadian legal system. One such example is the creation and development of the University of Victoria’s joint Canadian common law and Indigenous legal orders degree program. The program, founded in part by the aforementioned Val Napoleon and Indigenous legal academic John Borrows, acts on a call by the Truth and Reconciliation Commission to help develop Indigenous legal institutions in order to better understand, interact with, and use Indigenous law effectively. This initiative provides a framework for a new generation of young lawyers, lawmakers, and academics to work within and learn from, demonstrating that a harmonious relationship between the two legal orders is possible.

In discussing Canada’s legal landscape, Napoleon remarks that; “Canada is multi-juridical,” and that Indigenous representation, ““. . . would bring another legal perspective and another set of tools and way of understanding human problems to the table.” By authenticating and respecting Indigenous law and traditions, Canadian courts will gain powerful allies in that of Elders and Indigenous scholars from all different nations. Resilience to the assimilatory tactics of the Indian Act has proven to these courts that they can no longer ignore the authority of Indigenous legal systems, but instead must work alongside and recognize them as their own entity. Indigenous nations and their practices have immense amounts of wisdom to offer, and their oral stories must be understood by the settler courts as crucial to respecting Indigenous tradition and sovereignty. Using John Borrow’s idea of the “seventh generation,” it is up to today's scholars and legal experts to continue opposing colonial devices and implement the foundations of nation-to-nation relationship building. Only through these changes may the courts realize that Canada has always been, long before the creation and implementation of the Indian Act, a multi-juridical land.

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Bibliography


From Wearing Toques to Taking Tokes: An Overview of Cannabis Law and Legalization in Canada

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In the summer of 2018, Canada officially became the second country in the world to legalize recreational marijuana at the federal level, behind only Uruguay who did so in 2015.\(^1\) The Cannabis Act, “sets nationally applicable regulatory provision on cannabis production, distribution, retail, possession, and consumption, including a national tracking system to which license holders and the provinces and territories must report to monitor the cannabis supply chain.”\(^2\) Because of the historic nature of this decision, and thus the lack of modern case studies and examples from which to base their legalization model and approach, cannabis has quickly become one of the largest topics of public policy debate and discussion in Canadian political science. Canada’s legalisation scheme is regarded as one of the most intensive policy making exercises since the creation of the welfare state, with hundreds of laws, regulations, bylaws, and other policies created and revised within a three year timeframe.\(^3\)

As was previously mentioned, being one of only two countries to actually legalize marijuana at the national level, Canada’s cannabis legalization scheme has been subjected to a great deal of scrutiny. Because of this, a plethora of issues with it have become widely apparent, along with potential recommended solutions from public policy experts. This paper will argue that Canada’s legalization model ultimately should be more centralized under the government and unified nationally under a public health framework and approach.

Ironically, on top of being one of the first nations to fully legalize recreational cannabis consumption today, Canada was also one of the first nations to criminalize it back in 1923,\(^4\) on the advice of Emily Murphy, famous Canadian suffragette, member of the Famous Five, and the first female judge in the British Empire. MacLean’s Magazine published a collection of xenophobic articles written by Murphy regarding opium and cannabis use in 1916 that riled up public and political support for its ban.\(^5\) This ultimately marked the beginning of the common trope that marijuana users are criminal or deviant.\(^6\) It wasn’t until the 1960s that the average Canadian began to encounter marijuana.\(^7\) Because of this increase in popular interest, political parties began promising cannabis legalisation starting in the 1970s,\(^8\) following the national Le Dain Commission of Inquiry in 1972. The commission report recommended the removal of criminal penalties for simple possession.\(^9\) While the government of the day rejected their

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\(^7\) Hathaway, “Legal History,” 1.
\(^8\) Wesley, “Beyond prohibition,” 535.
recommendation to decriminalize and adopt various other reforms,\textsuperscript{10} the commission report marked the beginning of the mainstream political and public policy march towards full legalization that we saw fully realized in 2018.

As recently as 1997, the federal government was committed to the criminalization of possession, as they failed to address the issue in the new Controlled Drugs and Substances Act passed that year.\textsuperscript{11} However, only two years later, under the same Liberal government of Prime Minister Jean Chretien, the government created a medicinal marijuana program through Health Canada that individuals could apply to for an exemption from marijuana possession laws.\textsuperscript{12} However, it was struck down in an Ontario court the following year, as it was deemed unconstitutional once it became known that the program was not oversee by any regulation, but that all applications were simply considered at the discretion of the Health Minister’s office.\textsuperscript{13} Following the ruling, they created the Marihuana Medical Access Division (MMAD) to oversee the implementation of the Medical Marihuana Access Regulations (MMAR).\textsuperscript{14} However, there were countless issues with this system. Few medical exemptions were ever granted, as physicians were unwilling to sign off on applications due to the limited research on its efficacy, the lack of specialists in smaller rural communities, the excessive length of the application package at 29 pages, and the length of time it took for applications to be processed.\textsuperscript{15}

In 2002, Special Committees in both the House of Commons and the Senate released reports, recommending different reforms to cannabis possessions and supplying laws. The House of Commons report recommended decriminalization while the Senate report recommended full legalization.\textsuperscript{16} In 2003 an Ontario court once again found the federal medicinal cannabis program to be insufficient, creating an ‘illusion of access’ to safe, legal cannabis for patients.\textsuperscript{17}

Beyond the lack of political will to move toward cannabis legalization at anything other than a glacial pace, there were two primary international pressures that held back progress on cannabis legalization. The first was a number of international treaties which Canada signed on to that not only restricted actions they could take towards legalization, but also limited movement from other states, creating an international consensus of maintaining the status quo on marijuana policy. Some of the major treaties include the Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971) and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).\textsuperscript{18} Secondly, there was also a fear that the United States would retaliate via the enactment of barriers to trade. However, the

\textsuperscript{10} Erickson and Oscapella, “Puzzling policy,” 313.
\textsuperscript{11} Erickson and Oscapella, “Puzzling policy,” 313.
\textsuperscript{12} Erickson and Oscapella, “Puzzling policy,” 315.
\textsuperscript{13} Lucas, “Regulating compassion,” 2.
\textsuperscript{14} Lucas, “Regulating compassion,” 2.
\textsuperscript{15} Lucas, “Regulating compassion,” 2-6.
\textsuperscript{16} Hathaway, “Legal History,” 2.
\textsuperscript{17} Lucas, “Regulating compassion,” 2.
\textsuperscript{18} Lucas, “Regulating compassion,” 3.
Obama presidency, and the state level decisions to legalize marijuana for recreational purposes, created, "a window of opportunity for policy reform in Canada."¹⁹

Because of this, in 2015 the Liberal Party was the first in Canadian history to promise to legalize recreational marijuana during an election campaign, which would become a key pillar of their platform²⁰ that built their winning electoral coalition that year. Following their large victory in 2015, the Liberal’s maintained their commitment to legalization before the next election in 2019, so as to avoid major blowback for their failure to deliver on that promise.²¹ While there were numerous calls from Members of Parliament, the Official Opposition, Senators, and provincial figures to slow the timeline, the Liberals charged forward, developing a policy framework on legalization in a year, and setting the date for legalization to be July 2018, which was later delayed until late summer 2018.²² Likely due to the time crunch, the provinces based their legalization schemes on the federal government’s principles outlined in their framework developed the year prior.²³ They also borrowed heavily from one another in order to meet the deadline.²⁴ Despite a last minute attempt by the provinces at a First Minister’s meeting to outline their desired timeline for legalization in order to properly address new concerns regarding road safety, traffic enforcement, taxation, revenue sharing, public education campaigns, as well as the supply and retail of cannabis,²⁵ the federal government maintained their timeline and recreational cannabis was legalized on October 17th, 2018, with edible cannabis being legalized the following year.

In regards to the legalization of cannabis, the stated primary goals of the federal government were public health and public safety. More specifically, this includes, “implementing a government monopoly on cannabis retail, setting a minimum age for purchase and sale, placing limits on cannabis availability, curbing excessive demand through pricing and taxation, setting marketing restrictions and establishing a comprehensive framework for drug impaired driving.”²⁶ To this end, they hope to increase public health and educational awareness to curb marijuana use as opposed to criminal prosecution.²⁷ Some of the state goals of legalization include minimizing the illicit market, restricting youth access to cannabis, and reducing the burden on the criminal justice system.²⁸

Given that 43% of Canadians claim to have used marijuana at one point in their life,²⁹ its high demand in Canada has allowed for the emergence of a large black market,³⁰ one that is

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¹⁹ Wesley, “Beyond prohibition,” 536.
²⁰ Wesley, “Beyond prohibition,” 536.
²¹ Wesley, “Beyond prohibition,” 536.
²² Wesley, “Beyond prohibition,” 537.
²³ Wesley, “Beyond prohibition,” 537.
²⁴ Wesley, “Beyond prohibition,” 537.
²⁵ Wesley, “Beyond prohibition,” 537.
²⁶ Bonato, Hyshka, Rueda, and Watson, “Early-Stage,” 1692-1693.
²⁷ Cox, “Cannabis Act,” 205.
²⁸ Cox, “Cannabis Act,” 207.
unregulated and deeply interconnected with further criminal activity. The hope is that legal- 
zation can in part address the issue of the illicit market, by separating the criminal dis- 

tinction between casual, law-abiding users and those who deal and distribute as part of larger 
criminal enterprises. As has been proven, criminalization of all those associated with marijuana 
has failed in reducing cannabis use.

The desire to reduce cannabis use is based in the growing mountain of evidence 
concerning health risks associated with cannabis use, particularly in young people, which is 
high in Canada. Specifically, Canadian youth use marijuana at the highest rate among developed 
countries, at nearly 25% of those aged 14 to 24 reporting having used cannabis in the last year. 
The hope is that legalization will lower the direct contact that children in Canada have with 
marijuana through the black market, thus reducing the rate of use in young people.

In regards to criminal justice, it is said that 4% to 12% of vehicle fatalities and injuries in 
Canada involve cannabis, a sizable portion that is likely to be reduced with improved impaired 
driving interventions and social education. It also cannot be ignored how current criminal 
justice policies regulating tobacco, alcohol and cannabis in Canada do not properly correspond to 
their health risks. While tobacco and alcohol are considerably more dangerous than marijuana, 
they are and have been commercial products for decades. Additionally, cannabis enforcement 
has been incredibly expensive, has not served as a deterrent to using the drug, and is known to 
pose a greater risk than use itself. Note that this risk is not evenly distributed throughout the 
population, but this will be discussed in greater detail later.

While not perhaps a stated priority of the government, the economic implications of 
marijuana legalization simply cannot be ignored. The marijuana industry in Canada is set to 
become a $10 billion a year industry, which could potentially amount to $5 billion in tax revenue 
for the government, depending on the amount they tax its sale. It would greatly increase the 
number of legal jobs in Canada, though in terms of net jobs, it will likely amount to a loss when 
considered the work in the illicit economy. This too would increase tax revenue by increasing 
the size of the labour force. On top of the increased revenues for the government, it will also 
greatly decrease government spending, specifically that which is spent on marijuana law 
enforcement. To be specific, there were 73,000 marijuana related offenses in 2013 alone, costing 
the government anywhere from $500 million to $1 billion each year.

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32 Michael Chaiton, Brian Emerson, Elaine Hyshka, Rebecca Jessee, Maritt Kirst, Kat Kolar, Philippe Lucas, 
Robert Schwartz, Robert Solomon, Gerald Thomas, “A common public health-oriented policy framework for 
33 Bonato, Hyshka, Rueda and Watson, “Early-Stage,” 1692.
The underlying theoretical approach of the government’s legalization policy is Harm Reduction. Harm Reduction is a “public health framework that involves a pragmatic orientation which explicitly focuses on harms from drug use rather than use itself, and prioritizes reductions in health risk and social harms over other goals, such as punishment or drug abstinence.” This is truly marked by the seismic shift in policy focus and approach to the issue of cannabis use from strict prohibition to operating a strictly regulated legal market. This is in contrast to models used in countries like Portugal and Netherlands who have opted for decriminalization, which leaves the market still illegal and thus, unregulated. Similarly, Canada has also attempted to avoid the light market regulation and commercialization approach implemented in the United States, wherein the cannabis sales are entirely privatized and generally it is handled as another commercial product.

While the situation is still evolving as cannabis has only been legalized for under two years and academic research is still scarce on the topic, that which is available seems to suggest that there are many large shortcomings with the approach taken by the government so far, which has hindered the efficacy of its stated harm reductionist, public health approach. For starters, despite receiving praise for undertaking cannabis legalization from a public health theoretical perspective, there is little within the Cannabis Act and the whole of the government’s response that seems to further this end goal.

The Cannabis Act largely leaves the system intact that disproportionately criminalized communities of colour and Indigenous communities in Canada. For example, from 2015 to 2017, Indigenous people in Regina, Saskatchewan were nine times more likely to be arrested for cannabis possession than white people despite both groups using at a similar rate, meaning that policing is largely biased. This disproportionate impact, combined with the fact that while cannabis has been legalized, the government introduced 45 new offenses related to cannabis to the criminal code, including harsher penalties for illegal cannabis possession, means that the situation for those most negatively impacted by prohibition are unlikely to improve under their legalization scheme.

The federal government’s decision to take a hands off approach to legalization through requiring the provinces to handle the brunt of policy creation has allowed many inconsistencies to pop up across the country in regards to cannabis regulation. This is despite research showcasing that, “federal-provincial-territorial coordination, if not collaboration, will be crucial

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44 Cox, “Cannabis Act,” 207.
45 Cox, “Cannabis Act,” 207.
46 Jared, “Beyond prohibition,” 543.
51 Cox, “Cannabis Act,” 207.

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in achieving the public health and public safety outcomes governments have set for themselves individually and collectively.”

Given the tight timelines and the federal government's decision to largely stay out of the regulation of legal cannabis, provinces have adopted a policy framework incredibly similar to that of alcohol and tobacco, and states with legal cannabis in America. While the provincial governments would hopefully learn lessons from the alcohol and tobacco regulatory frameworks, in order to address their harm reductionist and public health goals with cannabis they should have developed a unique policy framework. The decision to lean on commercialized frameworks for cannabis regulation likely will not bode well for their public health goals.

Lastly, while having separate medical and commercial programs for cannabis has been recommended by experts and other important stakeholders due to the different needs and concerns for the safety of medical patients, the medical system has largely remained unchanged despite being largely hated across the board. In a 2012 survey, 72% of respondents reported being either somewhat or totally unsatisfied with the medical cannabis program in Canada. The problems with the medical system ought to be addressed under legalization in order to further their aims at increasing public health and reducing harm.

In order to address these issues, there are some clear, evidence-based solutions proposed in the academic community that would be in the government’s interest to follow if they were to meet their goals for legalization. To adequately address racial discrimination in cannabis prohibition in a restorative and social justice-based way, the government ought to consider reparations, including but not limited to the expungement of cannabis-related offenses from all criminal records, and increasing support and investment in communities of colour and Indigenous communities to help them to participate in and benefit from legal cannabis. The government should also consider including Indigenous communities and municipalities of colour in national discussions regarding revenue sharing, criminal justice, and commerce in regards to the cannabis industry.

In regards to national consistency and unity in the legalization framework, the federal government should consider insisting that all provinces maintain a state-controlled monopoly on the cannabis market, in an effort to maintain the focus of legalization on public health and harm reduction as opposed to commercialization and profit.

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52 Wesley, “Beyond prohibition,” 545.
53 Wesley, “Beyond prohibition,” 542.
59 Wesley, “Beyond prohibition,” 545.
Lastly, the government ought to overhaul the medical cannabis program. Major areas of focus should be to remove the vast bureaucratic obstacles to prescription and patient access, as well as covering the full cost of medical marijuana prescriptions, in order to reduce stigma associated with the medicinal use of cannabis and to support public health in the face of recreational legalization.\(^6\)

In conclusion, while the stated goals of harm reduction and public health in legalizing cannabis are solid and are backed by evidence and research, the Government of Canada’s legalization framework and public policy approach to legalization does not set them up to achieve this in the long run. While the situation is new and evolving, meaning that academic information and data regarding legalization is scarce, analyses of the legalization framework show that there are large holes in the scheme as it currently exists, ones that could easily be addressed. More specifically, the government ought to include greater restorative, social justice measures to address the harm and inequality caused by cannabis prohibition. They should also take greater leadership in crafting the specific policies of legalization to ensure government control and to avoid too much provincial variance. Lastly, they ought to maintain and reform the medical cannabis program for the safety of patients. Regardless of its flaws, Canada’s cannabis legalization approach will likely be the topic of a great deal of transdisciplinary research going forward. This research should hopefully improve not only our response to harm reduction and illicit drug use, but the response throughout the world.

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Bibliography


La Françafrique est-elle chose du passé? La joute française au Sahel : implications et désillusions

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La présence armée de Paris au Sahel dans le cadre de l’opération Serval, puis Barkhane, vise à la stabilisation de la zone et au rétablissement de la paix dans la région. La situation actuellement précaire de la zone sahélo-saharienne s’explique, selon le gouvernement français, par la présence grandissante de groupes et groupuscules armés, attachés de près ou de loin au salafisme djihadiste, et déstabilisant grandement les gouvernements locaux.1 Il était au départ très étonnant de voir la France s’impliquer dans la région, que ce soit en raison de la promesse électorale du Président François Hollande de mettre fin une fois pour toute à la Françafrique2, ou des critiques internationales envers Paris après la participation française au renversement de Kadhafi en 2011, renversement ayant laissé la Libye en situation de quasi-anarchie.3 Les forces françaises sont d’abord intervenues sous la demande du gouvernement malien pour repousser des forces armées ayant pris le contrôle de la partie nord du pays, la région de l’Azawad (opération Serval).4 Cette intervention s’est transformée en 2014 en l’opération Barkhane, dispositif de sécurité visant à empêcher l’implantation de ces mêmes groupes armés dans la région sahélienne, et de facto, sécuriser les États de la région.5 Paris envoya dans le cadre de Barkhane jusqu’à cinq mille soldats répartis sur un vaste territoire composé des pays du G5 régional, soit la Mauritanie, le Mali, le Niger, le Tchad et le Burkina Faso.6 L’envoi de ces forces sur ce « front Sud » traversant la zone sahélienne constitue pour Paris une extension de la Guerre au terrorisme radical, considérée depuis quelques années comme étant une menace directe pour la sécurité nationale française.7

La présence française semble légitimisée aux yeux de la communauté internationale par l’invitation des pays locaux, à commencer par le Mali, dès les débuts de Serval et les horreurs commises par Boko Haram, l’enlèvement d’une centaine d’élèves étant l’exemple le plus notoire.8 Cependant, la stratégie française est imparfaite et contribue ultimement à aggraver la situation dans le Sahel et ce, même avec les apparentes réussites militaires contre les nombreux groupes armés de la région. Ici seront analysés les dommages et les bienfaits de la stratégie de Paris dans la zone sahélo-saharienne, à commencer par les réussites tactiques de l’armée française pour ensuite enchainer sur les méfaits d’une mauvaise lecture de la réalité socio-politique du terrain, de l’instrumentalisation de la crise et des intérêts non avoués de Paris dans la région. L’approche hautement militarisée à des problèmes émanant principalement de la pauvreté, de la mauvaise

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2 On entend généralement par le terme péjoratif « Françafrique » la multitude de politiques néocoloniales menées par la France sur le continent africain et plus particulièrement dans les pays francophones compris dans la sphère d’influence de Paris.
6 Smirnova, op. cit., p.151. ; Griffin, op. cit., p.902.
gouvernance, de la marginalisation ethnique et de l’absence de sécurité pour les civils, peut nuire à ces problèmes bien plus que d’y remédier.9

Réussite au plan militaire?


Ces initiatives politiques se militarisèrent drastiquement du côté de Paris lorsque, comme mentionné plus tôt, Bamako demanda l’aide de la Vᵉ République. Le déploiement de chasseurs-bombardiers français Rafales et Mirages pour le bombardement des colonnes d’insurgés permit, sans l’ombre d’un doute, de préserver le gouvernement malien et d’empêcher l’apparition d’un vide socio-politique dans la région ce qui, bien entendu, aurait grandement favorisé les insurgés.13 Serval fut une réussite quasi-totale qui refusa aux groupes armés non seulement un territoire et ses ressources, mais aussi toutes possibilités de croissance dans la région.14 Face à cette réussite initiale et à la prise de conscience que la situation était en fait loin d’être stabilisée sur l’essentiel du territoire, Barkhane fut mise en place et constitue encore aujourd’hui une régionalisation de la réponse aux groupes armés.15

Il faut rendre à César ce qui est à César, les réussites militaires françaises dans le Sahel sont notoires et le modus operandi français est, sur un plan strictement militaire, bénéfique à la défaites des groupes armés.16 Malgré le fait que Jean-Claude Cousseran, l’ancien directeur de la Direction Générale de la Sécurité Extérieure (DGSE), ait décrit l’intervention en Afrique comme « our neighborhood Afghanistan »17, la stratégie française et l’actualité opérationnelle dans le Sahel s’éloigne grandement de la longue guerre contre-insurrectionnelle sévissant dans l’Hindou Kouch. Les opérations françaises au Sahel tiennent bien plus du domaine des campagnes antiterroristes que des guerres contre-insurrectionnelles.18 La stratégie française reposant sur l’antiterrorisme, les commandants sur place ont une grande liberté d’action au niveau tactique et les opérations sont généralement menées par des forces d’opérations spéciales privilégiant la vitesse de frappe et la mobilité dans ces vastes étendues où les insurgés sont traqués sans relâche.19 La dispersion de ces

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11 Griffin, op. cit., p.906.
12 Ibid.
13 Ibid.
14 Chivvis., op. cit., p.12 ; Griffin, op. cit., p.906.
15 Griffin., op. cit., p.907.
16 Chivvis, op. cit., p.12.
17 Ibid., p.4.
18 Griffin., op. cit., p.906.
19 Ibid. p.906-907.
unités d’élites entre la principale base d’opération interarmées de Barkhane à N’Djamena au Chad, des bases opérationnelles en Mauritanie et au Burkina Faso et des camps mobiles, à travers le désert, mine la position des divers groupes armés et réduit grandement leur capacité à évoluer à travers cet environnement aride sans couvert forestier pour se dissimuler.20

La stratégie française au Sahel démontre que Paris désirer éviter de répéter l’erreur commise en Irak, en Lybie et en Afghanistan. Pour éviter l’inéluctable entropie socio-politique suivant habituellement l’intervention armée dans un pays, Paris doit concevoir une structure de sécurité mettant en corrélation trois niveaux. Le premier, déjà discuté plus tôt, comprend les forces opérationnelles sensées poursuivre les insurgés; le deuxième comprend des forces africaines pour la stabilisation du territoire (mission MINUSMA de l’ONU et force du G5 Sahel); le dernier échelon est constitué d’un dispositif onusien encadrant, après plusieurs résolutions du Conseil de sécurité, la stabilisation de la région.21 L’intervention française au Sahel dans le cadre de Serval et Barkhane démontre que la réussite d’une opération du genre ne nécessite point le niveau de force en présence atteint par Washington en Irak et en Afghanistan et que l’usage de moyens antiterroristes peut s’avérer plus efficace que les tactiques contres-insurrectionnelles classiques pour nuire à la progression des groupes armés.22 Cependant, malgré ces apparentes avancées à la guerre au groupes armés dans la région, la stratégie militarisée de Paris pourrait être l’un des fondements de l’actuelle instabilité dans la région. Comme le dit l’adage : « lorsque l’on a qu’un marteau, on ne voit que des clous ».

Réalités socio-politiques sâhéliennes

La première critique majeure à l’intervention française au Sahel est celle de la mauvaise lecture du terrain d’opération. La mauvaise lecture sur le plan social et politique contribue ultimement à la déstabilisation de la région car elle est fondamentale au choix de la stratégie à opter pour instaurer la paix et sécuriser la situation. Au point de vue social, les tensions entre divers groupes armés et gouvernements locaux sont parfois présentes depuis des décennies, le conflit dans le nord du Mali en est un bon exemple. Un grand nombre de factions armées avec des intérêts divergents rend la résolution de crise encore plus complexe et requerrait une force diplomatique avec une connaissance approfondie des tensions locales plutôt qu’un contingent hautement militarisé.23 Un bon exemple de ce manque de connaissance approfondies des groupes régionaux est le rapprochement initial entre Paris et le MNLA, un groupe armé malien, auquel Paris se fiait jusqu’à 2015 pour la lutte aux groupuscules rebelles du Nord du pays sans savoir que ce même groupe était perçu à Bamako comme étant initialement responsable de ces rébellions.24

Une erreur commise par Bamako et n’étant pas sanctionnée par Paris se trouve dans l’exclusion de certains groupes des processus de paix, démontrant le manque de connaissance des réalités du terrain par le gouvernement français. Cette exclusion, rappelant l’erreur commise avec l’Accord de Bonn traitant de l’Afghanistan post 2001 et n’ayant pas inclus les Talibans tout juste

22 Chivvis, op. cit., p.17.
24 Ibid., p.74.
vaincus, met en péril les processus de paix en mettant de côté une partie significative des belligérants. AQIM, MUJAO et Ansar Dine sont tous des groupes maliens exclus de la table des négociations par Bamako car ils sont considérés comme des « organisations terroristes ».

Il sera discuté plus tard de la vérité de leur qualification d’organisation terroriste et des retombées que pourrait avoir une mauvaise catégorisation de ces groupes. La marginalisation de ces groupes par les gouvernements locaux et leur alliés français mène presque invariablement à une continuation du conflit de la part des groupes exclus et repressés par leur gouvernement respectif.

L’aspect politique de la mauvaise lecture française du terrain au Sahel tient sur le simple fait que Paris soutient et garde en place des gouvernements parfois autoritaires, corrompus et trop souvent violents à l’encontre de leur propre population. Paris poursuit cette politique, perçue comme obsolète, de soutien aux régimes l’ayant sollicités, même si ces mêmes régimes commettent des crimes contre l’humanité et ne sont que très peu représentatifs de leur population.

Il est même rapporté que les forces de sécurité des États de la région ont fait plus de victimes que Boko Haram et certains autres groupes armés de la région. Le Chad est un bon exemple en tant que l’un des pays les plus corrompus du monde, pays possédant une armée si divisée que le risque de coup d’État y est constant et malgré tout, le régime est maintenu en place par Paris.

En appuyant des régimes s’en prenant à leur propre population, « France’s interventions increase the potential for unrest, rebellion, and even jihadist-inspired terrorism » et rend la lutte aux mouvements insurrectionnels un projet sans horizon à court et long terme. La tendance actuelle de Paris d’ignorer la mauvaise gouvernance des pays soutenus au Sahel pour son propre bénéfice n’est bien entendue pas sans conséquences. En effet, la source des violences dans les zones éloignées de ces pays ne provient pas d’une absence ou d’une inefficacité des institutions gouvernementales mais plutôt de la présence d’institutions trop souvent peu représentatives, violentes et corrompues. Les groupes armés les plus dangereux de la région survivent en fait grâce aux exactions commises par les armées sensées les réprimer et n’ont qu’à attendre des nouvelles recrues, provenant des classes marginalisées de la population et victimes des forces de sécurité locales.

**Instrumentalisation de la « Guerre à la terreur » à des fins stratégiques**

L’intervention française s’inscrit, selon Paris, dans le combat mondial à la « guerre à la terreur » mais, les groupes combattus au Sahel sont-ils réellement liés au djihadisme international? Même si le nombre d’attaques est en croissance dans la région depuis 2016, ces attaques ne se réclame pas forcément du djihad et ont plutôt des fondements et ambitions locales.
armés n’étant pas un bloc monolithique et étant trop souvent sur la défensive, il leur est impossible de s’imposer en force unifiée pour créer un front subcontinental djihadiste travaillant avec une stratégie commune dans la zone sahélo-saharienne.\footnote{Chivvis, op. cit., p.7 ; Prost, op. cit., p.50-51.} Ce manque d’unité entre les divers groupes armés est amplifié par un phénomène de changement d’allégeance courant et de naissance d’alliance de fortune entre des groupes pourtant rivaux.\footnote{Rem Korteweg, « Treacherous Sands: The Eu and Terrorism in the Broader Sahel. », European View 13 no.2 (2014): p.254 \url{https://doi.org/10.1007/s12290-014-0327-1}.} Même Washington, qui opère toujours dans la région, voit apparaître un consensus dans les milieux du renseignement quant à la menace terroriste qui serait exagérée en plus du constat que la majorité des insurrections n’auraient que très peu de connections avec les organisations terroristes transnationales.\footnote{Schmitt, op. cit., p.217.} Boko Haram, le groupe ayant le plus de lien avec les mouvements djihadistes internationaux, est depuis peu, scindé en deux clans, prouvant ainsi l’aspect clanique de ces insurrections dont les fondements remontent au \textit{statu quo ante bellum} de la région.\footnote{Hendricks, Onemna, op. cit., p.92.} Pérouse de Montclos stipule clairement que les groupes armés en présence : « ne correspondent pourtant guère à l’idée que l’on se fait de réseaux transnationaux constitués de cellules dédiées à la réalisation d’attentats »\footnote{Pérouse de Montclos, op. cit., p.180.} et que leurs membres se divisent selon lui en trois catégories : les « idéologues », les « vengeurs » et les « opportunistes ».\footnote{Ibid., p.181-182.} Sans entrer dans les détails, on en conclut rapidement que les seuls posant un danger en tant que réels djihadistes sont les idéologues, les deux autres catégories se battent pour des raisons émanant de la mauvaise gouvernance et des problèmes socio-politiques de la région.\footnote{Ibid. ; Wing, op. cit., p.68.}

L’utilisation de termes comme « terrorisme », « salafisme » et « djihadisme » pour exprimer des problèmes de sécurité privilégie grandement l’usage de la force armée et légitime certainement la présence étrangère dans un territoire donné. L’usage de ces termes éloigne l’attention de la communauté internationale des problèmes socio-politiques fondamentaux de la région étudiée comme dans le cas présent, le manque croissant de terre arable, la désertification grandissante, les clivages ethniques et les problèmes de gouvernances.\footnote{Wing, op. cit., p.68.} L’utilisation de ce langage est couramment utilisée à des fins stratégiques par les acteurs internationaux pour légitimer leur présence, la France n’en fait pas exception.\footnote{Ibid., p.60.}

**Françafrique et Realpolitik française**

Si Paris ne combat qu’une menace terroriste exagérée tout en ignorant les problèmes socio-politiques des États du Sahel, quelle est la raison pour maintenir une couteuse présence militaire dans la région? Prost avance que la raison pourrait être le désir de prévenir de graves crises migratoires à la suite de conflits dans le Sahel, crises migratoires qui, bien sûr, affecteraient grandement l’Europe et tout le bassin méditerranéen.\footnote{Prost., op. cit., p.48.} Bien que cette explication ne devrait pas être écartée, la raison d’être de la présence française semble tenir de la \textit{Realpolitik} classique. Avoir une présence permanente en Afrique de l’Ouest est, pour Paris, un vieux rêve inachevé depuis les
débuts de la Françafrique. Ces bases sont, bien évidemment, importantes pour la projection de puissance et une certaine dose de prestige géostratégique post-colonial non-avoué que Paris semble ici rechercher. L’intervention du gouvernement de la Ve République dans la région serait donc « a French neocolonialist move to entrench themselves geographically in the Sahel region » et ce, pour son propre bénéfice et non de seulement stabiliser la région pour des raisons purement humanitaires. De plus, l’invitation initiale à intervenir des gouvernements locaux légitimise aux yeux de la communauté internationale l’intervention française. Il serait donc possible de parler d’un maintien de la Françafrique et ce, même si Emmanuel Macron a clairement exprimé qu’« Il n’y a plus de politique africaine de la France » lors d’un discours à Ouagadougou. Paris réussit donc, à travers son intervention, à garder en place des gouvernements qui sont favorables à ses ambitions géopolitiques dans la région et aux relations socio-économiques favorisées par ce nouveau visage de la Françafrique. Il est important de noter que ce renouveau de la politique française de l’Afrique est maintenu au sol par sa composante militaro-politique, composante incarnée par l’armée française qui joue maintenant le rôle d’outil de la politique étrangère et même de diplomatie pour Paris. Les visées françaises au Sahel tenant à un degré considérable de la Realpolitik, il est évident que la région ne se stabilisera pas tant que la France continuera sa campagne post-coloniale de projection d’influence militarisée au lieu de promouvoir des buts humanitaires et socio-économiques dans la région.

Conclusion : vers la stabilisation du Sahel par des moyens locaux?

En somme, la présence française au Sahel alimente l’instabilité socio-politique de la région et ce, malgré un modus operandi militaire novateur mettant en doute l’efficacité des stratégies contre-insurrectionnelles précédemment utilisées en Irak et en Afghanistan. Le soutien à des gouvernements autoritaires, une mauvaise lecture des problèmes socio-économiques de la population, une instrumentalisation de la guerre à la terreur et la présence évidente d’intérêts français non-avoués dans la région nuisent à la stabilisation du Sahel. Il est de plus en plus apparent que la présence française « is required to fight terrorism and that very terrorism is perpetuated by the French presence. » et s’explique par la montée des sentiments nationaux des populations sahéliennes qui crient au retour du colonialisme à la vue de la présence prolongée de soldats étrangers sur leurs terres. Paris devrait repenser la sur-militarisation de sa présence dans la région car, les réponses militaires au Sahel ont clairement montré leurs limites dans un conflit qui tient principalement de la mauvaise gouvernance des États sahéliens. La simple idée que l’intervention française dans la zone sahelo-saharienne est nécessaire pour éviter une répétition des évènements de 2015 est erronée. Il n’y a pas de « front Sud » à la guerre à la terreur, mais plutôt un hémisphère Sud faisant face à des crises internes qui nécessitent des solutions tout aussi endogène et non des...
moyens armés provenant de l’étranger.\textsuperscript{53} Le rétablissement de la paix dans la région nécessitera un processus de réconciliation local incluant tous les belligérants en présence et constitue le meilleur espoir de miner l’influence des groupes extrémistes dans la région.\textsuperscript{54} La France devra travailler avec les groupes issus de la société civile, réduire son soutien aux gouvernements répressifs, recentrer le soutien militaire à la mission onusienne de maintien de la paix, financer les groupes civils demandant la responsabilité des États en place et soutenir les organisations œuvrant à la démobilisation des combattants provenant des divers groupes armés de la région. Paris devrait finalement continuer son travail de monitorage des groupes extrémistes de la région, travail accompli avec brio jusqu’à maintenant.\textsuperscript{55} Si toutes ces conditions sont remplies, alors un espoir de stabilisation de la région naîtra enfin.

\textsuperscript{53} Prost, \textit{op. cit.}, p.58.
\textsuperscript{54} Powell, \textit{op. cit.}, paragr.12.
\textsuperscript{55} \textit{Ibid.}, paragr. 13-14.
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Algorithms and the Border:
The Human Rights Implications of Automated Decision Systems in Canadian Immigration

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While Canada is revered as migration friendly, discriminatory practices remain a persistent issue at Canada’s borders. Since 2014, the Canadian government has deployed artificial intelligence-led decision making in Canada’s immigration system. Furthermore in 2017, the RCMP was publicly condemned for distributing Islamophobic, religiously coded questionnaires amongst Muslim migrants on the border between Quebec and the United States. The use of these technologies has an alarming impact on the internationally recognised human rights, and s15, s2, s8 and s6 of the Canadian Charter of Rights and Freedoms. This essay will argue that the use of predictive analysis and automated decision-making systems in Canada’s immigration decisions can lead to serious breaches of the right to privacy, the right to movement, the right to freedom of association and the right to be free from discrimination. The first half of this paper will define predictive analysis and automated decision-making systems and outline how AI is used in immigration in the Canadian context. The second half will discuss the human rights protections violated through automated decision systems in the Canadian immigration system.

Defining AI Technologies

In contemporary social science, Artificial Intelligence is as a “growing resource of interactive, autonomous, self-learning agency, which enables computational artefacts to perform tasks that otherwise would require human intelligence to be executed successfully.” Powered by big data, a large volume of structured and unstructured data parsed daily to extract and process information, AI algorithms primarily streamline repetitive tasks and functions, notably those that are too mammoth for humans. Science & technology literature to date has focused on the revolutionary potential of AI systems in society: from work to leisure to the way our states and international organisation’s function. In the realm of migration, AI can drastically change the way states manage migration, as these systems can perform various relevant tasks like identity checks, border security and data analysis. AI can be used extensively towards national visa and asylum processes. As is the focus of this paper, this is already a reality in Canada, who uses algorithmic decision-making in immigration and asylum determination. (Molnar and Gill 2018)


2 Ibid.

3 Beduschi, A. International migration management in the age of artificial intelligence. Migration Studies 0, no. 0 (2020): 1-21

4 Ibid.


6 Ibid.

7 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”

8 Ibid.
For the most part, there is no singular artificial intelligence technology, as the term encompasses many technologies and/or functionalities such as machine learning, natural language processing, computer vision, neural networks, big data analytics, predictive models, algorithms, and robotics—all of which are situated in the various systems where they are developed and deployed.\(^9,10\) In this essay, I will focus on the use of AI technologies for predictive analysis and automated decision making.\(^11,12\)

Predictive analysis is defined as a system to automate activities conducted by immigration officials to support the evaluation of applications, as outlined by Molnar and Gill. Furthermore, it is used to “identify the merits of an immigration system.”\(^13\) The IRCC (Immigration, Refugees and Citizenship Canada), since 2014, has been developing a “predictive analytics” system to automate the work of immigration officials, and support the evaluation of immigrant, refugee, and tourist applications. As outlined in their initial 2014 report, the systems will be able to “to identify the merits of an immigration application, spot potential red flags for fraud and weigh all these factors to recommend whether an applicant should be accepted or refused.”\(^14\) AI technologies operate using training data: an extensive database, collected by the engineer, to produce output. In migration management, a database could include a wide range of information such as statistical information about a group of people, depending on the ultimate “decision” required. One example of this is through the application of AI to predict the “recidivism risk” of criminals, to automate the identification of fraudulent behaviour, to predict future criminal locations and the automation of decisions within the justice process.\(^15,16\)

At the base level, these algorithms raise serious ethical concerns. There is a surplus of scholarship available on the ethical implications of an algorithmic process. Specifically, the focus has rested on the quality of data input, as this quality directly affects the viability of the output data. As Molnar and Gill explain: “[Input based] machine learning assumes the future will look like the past. When the past is biased, machine learning will propagate these biases and

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\(^9\) Beduschi, A. International migration management in the age of artificial intelligence.


\(^11\) Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”


\(^13\) Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”

\(^14\) Ibid.


\(^16\) Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
enhance them through feedback loops.” Essentially, any biases, preconceptions, shortcomings, or falsehoods involved in the selection process by the engineer of amongst the training data itself will have an undeniable impact on the output and outcomes of an automated decision-making system. Issues of bias are further exacerbated as training data is the primary of human engineers, who hold pre-existing direct or indirect biases. We cannot factor these biases as erroneous variables, especially when the aforementioned biases are not coded as discriminatory at first glance. In the RCMP questionnaire: questions such as “Do you believe women have the right to work?” towards Muslim migrants may not seem discriminatory at face value, yet this is a historical type of indirect discrimination, as this is a very religiously coded question.\(^{18,19}\)

### Automating the Canadian Immigration Process

Molnar and Gill refer to Canadian immigration as a “high-risk laboratory” for automated system applications. As a migration hotspot, hundreds of thousands enter Canada annually, either as temporary workers or for permanent status. The immigration system of Canada is federally regulated by the Ministry of Immigration, Refugees and Citizenship Canada (IRCC). It is governed by the Immigration and Refugee Protection Act (IRPA), the Immigration and Refugee Protection Regulations (IRPR), and enforced through the Canadian Border Services Agency (CBSA).\(^{20}\) The potential impact of automated decision-making systems on immigration goes far beyond improving the speed of decision making—there are greater, more far-reaching implications on individual human rights and safety.\(^{21}\) Bias, erroneously rejected claims, falsely flagged fraud—any mistake can inflict irreparable damage to individuals. Applying the context of algorithmic oppression is especially relevant for vulnerable communities like non-citizens, as they are under-resourced and have less access to human rights protections.\(^{22,23,24}\) On account of the black-box nature of AI algorithms, inaccuracies can be harder to sport, meaning that migrants may not be able to access traditional forms of legal redress in the event of human rights infringement. Beduschi’s concludes that AI-capable states may worsen the immigration for

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17 Ibid.
18 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
20 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
23 Beduschi, A. International migration management in the age of artificial intelligence.
24 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
migrants, reinforcing any existing non-entrée barriers and measures aimed at “obviating access by migrants and asylum-seekers to a state’s territory.”

Molnar and Gill's report maps out the implication of automated decision making in the immigration and refugee context at every stage of a person’s immigration proceeding. Through analysing the administrative process of the Canadian Border Services Agency (CBSA), they map out the profound effects algorithmic decision making can have on human rights. At the pre-arrival stage, there are many ways that an automated decision system could affect an application for temporary or permanent status. The automated decision systems employed by the CBSA for prospective applicants, according to Molnar and Gill, have not been explicitly evaluated for how they work or what criteria they use as input data. For example, a pre-arrival algorithm could be operationalised to make the following decisions: how “complete” an application is, whether your answers are factually correct and the likelihood that your application is fraudulent. Yet the question remains: what input data will assess “fraud” under section 33? What type of input data will be harvested to test completion or fact check?

Also, post-arrival migrants in Canada face a similar situation. Migrants within Canada can file a Humanitarian and Compassionate application (H&C) for permanent residence under section 25 of the IRPA to stay in Canada. They can also apply for Pre-Removal Risk Assessment (PRRA) to assess the risk you will face if you are removed from Canada. For these post-arrival applications, the federal government is also applying “risk determining” algorithms, just as unclear as with the pre-arrival algorithms. What does “fraud” mean in such applications for protection and/or permanent residence? In an H&C or PPRA application, how can an automated system weigh your evidence against you? What input data will the machine decide is acceptable for “compassionate” grounds? There are also concerns over how the data will be protected and distributed in both cases.

Implications on the International Human Right to be Free from Discrimination

Canada has ratified many international human rights legal instruments against discrimination: The International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Universal Declaration of Human Rights. At the domestic level, section 15 of the Charter covers equality rights and the right to be free from discrimination. A similar situation exists at

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26 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
27 Ibid.
the regional level, with initiatives such as the 2018 “Toronto Declaration” which covers equality and non-discrimination regarding artificial intelligence systems.\(^{28, 29, 30}\)

Algorithms are vulnerable to the same decision-making concerns that plague human decision-makers: transparency, accountability, discrimination, bias, and error.\(^{31, 32}\) A plethora of scholarship concerning AI and bias have revealed that certain AI systems, because of their implementation process, their engineers or both, are inherently discriminatory.\(^{33, 34}\) AI in the migration context can be deployed for dialect recognition, streamlining applications, and determining fraud. If the dataset is biased, these algorithms of oppression could cement existing discriminatory practices vis-à-vis Canada’s immigration system. Situations like these only exacerbate automation belief—the human belief that all computational decisions are correct.\(^{35, 36}\) Algorithms can also be trained through unsupervised learning, so the machine can learn from itself and make predictions a human might not make, further blurring the lines for accountability.\(^{37, 38}\) As outlined in the previous section, the opaque nature of immigration and refugee decision-making creates an environment ripe for algorithmic discrimination. Decisions in this system—from whether a refugee’s life story is “truthful” to whether a prospective immigrant’s marriage is “genuine”—are highly discretionary and often hinge on an individual officer’s assessment of credibility. As long as the parameters within the algorithmic process remain vague, AI will remain a considerable threat to the right to be free from discrimination.

**The Right to Freedom of Association, Religion, and Expression**

Automated immigration decisions can infringe on individuals’ freedom of association, religion, and expression. Freedom of association is protected under international law: Article 19 of ICCPR protects one’s right to hold opinions without interference, as “well as the freedom to seek and receive information and ideas of all kinds, including oral, written, print, through art, and

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29 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
30 The Toronto Declaration. Toronto Declaration.
35 Beduschi, A. International migration management in the age of artificial intelligence.
37 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
any other media, including digital.” Likewise, freedom of expressions is a fundamental right under section 2(b) of the Canadian Charter.\(^{39,40}\)

In immigration, predictive analysis can incorrectly mark people from a certain group as being “higher risk”, or liable for further screening, severely affecting their freedom to associate with others, as outlined in the RMCP questionnaire. If the data at input level holds the biases of its inputters, it will make predictions based on biased information, leading to biased outcomes. Any internet data harnessed by migrants can be used within design systems and can affect an individual's ability to be accepted pre-arrival.\(^{41}\) Concerning freedom of religion protected by Article 18 of the ICCPR and section 2(a) of the Charter, automated decision making infringe on an individual’s capacity to “worship along/or in a community with others, and the ability to manifest religious practices…” \(^{42}\) If an AI capable state used algorithms within their immigration system, and take part in practices that discriminate against groups like Muslims, they infringe on their right to association and religious participation.\(^{43,44,45}\)

**Right to Freedom of Movement and Mobility**

The right to freedom of movement and mobility is enshrined in Article 12 of the ICCPR and section 6 of the Charter, involving the ability to enter, leave and travel within a country.\(^{46,47}\) Automated decision systems used in immigration can affect people’s ability to exercise this freedom. If an automated decision flags an individual as high risk of fraudulent, there can be risks of deportation. Such erroneous decisions can prevent individuals from applying for status to remain in Canada or exercising their right to appeal if they have received a similar outcome on their immigration and refugee application.\(^{48}\)

\(^{39}\) Canadian Charter of Rights and Freedoms, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11  
\(^{40}\) Molnar, P., & Gill, L.”Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”  
\(^{41}\) Ibid.  
\(^{42}\) Canadian Charter of Rights and Freedoms, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11  
\(^{44}\) Molnar, P., & Gill, L.”Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”  
\(^{46}\) Canadian Charter of Rights and Freedoms, s 6, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11  
\(^{48}\) Molnar, P., & Gill, L.”Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
Right to Privacy

The UN Resolution of the Right to Privacy in the digital age recognizes the importance of privacy rights and calls on states to develop remedies for this issue. In the words of the resolution, the report was to examine “[t]he protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or interception of digital communications and collection of personal data, including on a mass scale.”\(^49\) It advises states to address privacy concerns in a manner that is consistent with their obligations, and to be cognizant that personal data is increasingly at risk in our digitised world. Nestled within the resolution is a spotlight on the increased vulnerability of women, children, and marginalized communities regarding privacy. This is the first resolution from the UN that tackles human rights in the digital age.\(^50\)

Data privacy is a serious concern in immigration matters. Privacy is a well-established human right, recognised internationally under Article 17 of the ICCPR and the UN Resolution. Under the Canadian Charter, privacy is safeguarded under section 8 which covers the right to be free from “unreasonable” search and seizure.\(^51\) Automated decision systems can infringe on privacy rights in various ways. First, predictive analysis almost “inherently requires the mass accumulation of data for [both] training and analysis.”\(^52\) Automated decisions, such as electronic surveillance practices, disproportionately target and affect marginalised, vulnerable individuals. This is the case in the EU, where mobile metadata from refugees are used to track and deport them.\(^53, 54\) Patterns, similarities and correlations extracted from predictive analysis may reveal private information about individuals or certain communities, and this information may be protected grounds under Canadian and/or international law for discrimination, like race or religion.

The output from automated decision systems can be used as grounds for “reasonable belief” and justify privacy infringement. In R v. Chehil, the Supreme Court found that the elements considered as grounds under reasonable suspicion of belief must respect the Charter and “relate to the actions of the subject of an investigation, and not his or her immutable

\(^{51}\) Canadian Charter of Rights and Freedoms, s 8, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
\(^{52}\) Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
\(^{53}\) Meaker, M. “Europe is using smartphone data as a weapon to deport refugees.” Wired, February 7, 2018. https://www.wired.co.uk/article/europe-immigration-refugees-smartphone-metadata deportations
\(^{54}\) Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
characteristics.” Beyond this, Canada also has an obligation to the 1985 Privacy Act. In the case of accurate data, section 6(2) of the Privacy Act prescribes that government institutions “shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.” In the 2018 Supreme Court decision Ewert v. Canada, the majority found that the Correctional Service of Canada (CSC) failed to meet their Section 6 obligation in taking reasonable steps to ensure that their use of psychological assessment tools was accurate and scientifically viable. This is one harrowing example of how biased, erroneous data can have serious implications vis-à-vis the justice system.

**Conclusion**

Basok and Carasco highlight that while all migrants have rights as human beings, international human rights law does not bind states or inter/intrastate organisations to comply with ensuring these rights. For automated decision systems to benefit the common good, its design and deployment must avoid inherent biases that infringe on human rights. Artificial intelligence is not the elixir for erroneous systems, and it cannot provide a perfect model for migration management. While it may innovate and increase operability, the nuanced and complex nature of immigration processes may be worsened by these technologies, leading to serious breaches of internationally and domestically protected human rights, as bias & discrimination, privacy breaches, freedom of movement and freedom of religion. Canada is in a “fundamental paradox” between appearance and action: it wants to appear the benevolent saviour, yet its immigration system has been the focus of various human rights concerns like indefinite immigration detention. Adopting algorithmic interventions within a discriminatory system will have Canada simply repeating its “dark and exclusionary past” with a new, algorithmic face.

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56 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
61 McGregor, Murray and Ng 2019
62 Molnar, P., & Gill, L. “Bots at the Gate: a human rights analysis of automated decision-making in Canada’s immigration and refugee system.”
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