CANADIAN ISSUES
THÈMES CANADIENS

Spring / Printemps 2013

Peter Oliver

Graham Fraser

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Jean-Claude Racine

Victor Armony

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Jan Harvey

Dominique Clément

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INTRODUCTION

Julie Perrone, Directrice adjointe, Association d'études canadiennes

Le 17 avril 2012, nous avons marqué le 30e anniversaire du rapatriement de la Constitution canadienne et l'introduction de la Charte des droits et libertés. Ces documents de base ont eu un impact profond sur notre droit et sur la politique publique. Bon nombre de Canadiens considèrent que la Constitution et la Charte des droits élaborent des aspects importants de notre identité collective et contribuent à définir un ensemble de valeurs partagées. En général, les Canadiens ont une opinion favorable de la Constitution et la Charte. Pourtant, beaucoup croient aussi que ces documents créent de la division.

Comment les débats sur la Constitution ont-ils façonné notre identité ? La Constitution et la Charte des droits et libertés ont-elles renforcé ou affaibli la démocratie canadienne et le fédéralisme ? Que signifient la Constitution et la Charte pour les femmes, les Autochtones, les minorités linguistiques, visibles et ethniques, les groupes religieux et les nouveaux Canadiens ? Quel rôle ont joué les tribunaux dans l'interprétation de la Constitution, et comment la Charte a-t-elle transformé la magistrature au Canada ? La distinction entre le droit et la politique s'est-elle estompée au cours des trente dernières années ? Comment l'expérience canadienne se compare-t-elle avec d'autres pays ? Les tribunaux sont-ils plus ou moins accessibles au public ? Y a-t-il des avantages à une constitution non écrite ? Comment la Constitution a-t-elle affecté l'équilibre des pouvoirs au Canada, et la dynamique du fédéralisme ?

Ce sont quelques-unes des questions auxquelles les contributeurs ont réfléchi dans ce numéro spécial sur l'influence de la Constitution et de la Charte des droits et libertés sur nos lois, notre identité et sur le concept de fédéralisme. Certains contributeurs discutent du concept de fédéralisme plus généralement, certains considèrent l'effet de la Constitution et de la Charte sur les relations inter- ou intra-provinciales, d'autres se concentrent sur les droits de la personne, et cette édition se conclut avec des points de vue non canadiens sur le fédéralisme.

Peter Oliver retrace l'évolution du fédéralisme juridique au cours des 30 dernières années et, bien qu'il voit une « tendance générale à la stabilisation et à la clarification », il suggère que l'exclusivité des compétences et le pouvoir du droit pénal sont deux exemples de la jurisprudence fluctuante. Graham Fraser déclare sans équivoque que « l'importance de la Charte dans le développement des droits linguistiques ne peut pas être surestimée. » Il fait valoir que la Charte des droits a ancré les droits linguistiques de telle manière qu'ils sont devenus une partie de notre identité. Le discours reproduit de l'Hon. Michel Bastarache explique comment l'influence de la Charte diffère au Québec et au Canada, soulignant que le lien que la communauté francophone voit entre langue et la culture est à l'origine de cette différence. Jean-Claude Racine se penche sur la condition constitutionnelle des Canadiens, c'est-à-dire, dans quelle mesure ces derniers peuvent agir sur la Constitution, et conclut que les 30 dernières années ont vu ce qu'il appelle un « statu quo constitutionnel ».

Victor Armony, Raffaele Iacovino, Jack Jedwab et David Kilgour et Jan Harvey discutent des relations inter- ou intra-provinciales dans le système fédéral. Armony examine les sondages d'opinion sur l'attachement et l'identification et affirme que les Québécois, bien qu'ils puissent être parfois ambivalents à l'égard de leur relation avec le Canada, ont tout de même « des sentiments forts quant à leur appartenance au Canada. » Iacovino discute de la relation du Québec avec le Canada dans le cadre des recommandations du rapport Bouchard-Taylor. Il conclut que, pour que ces recommandations soient mises en œuvre, il faut d'abord une « reconnaissance que le Québec est une société d'accueil. » Jedwab analyse les résultats des élections fédérales de 2011 et conclut que les Canadiens se sont éloignés du centre politique. Il soutient que si l'unité nationale devait perdre sa priorité comme objectif politique, nous pourrions commencer à considérer la position des Canadiens sur le spectre idéologique, « pour aider à comprendre la motivation des électeurs ». Kilgour et Harvey offrent un point de vue de l'Ouest du Canada sur l'efficacité du fédéralisme et plaident en faveur de l'égalité dans la politique, l'économie et la culture pour « mettre fin à l'aliénation de l'Ouest ».

Les droits de la personne font l'objet de textes par Dominique Clément, Maxwell Yalden et Ken Norman. Clément se penche sur l'évolution des droits de la personne au Canada et fait valoir que les commissions des droits de la personne ont eu des difficultés à s'adapter aux « conceptions des droits des Canadiens. » Cela menace ces dernières et met l'ensemble du système juridique des droits de la personne en danger. Maxwell Yalden s'attarde plus précisément aux questions liées à l'orientation sexuelle et aux Autochtones dans le contexte des lois sur

les droits de la personne. Ken Norman se remémore un passé plus positif, lorsque le Code et la Commission des droits de la Saskatchewan profitaient de plus de respect et de pouvoir. Il se souvient que ses propositions ont permis plus de pouvoirs à la commission, mais que le nouveau gouvernement « a marqué le début d'un retour en arrière » pour les droits de la personne dans cette province.

Enfin, Leslie Seidle, Irene Bloemraad, Els de Graauw, John Kincaid, Richard Cole, Daniel Béland et André Lecours examinent le fédéralisme ailleurs ; en Australie, en Belgique, en Allemagne, en Espagne, en Suisse et aux États-Unis. Seidle partage les résultats d'une étude de sept pays parrainée par le Forum des fédérations qui nous aide à obtenir une perspective profonde sur les « instruments politiques [...] pour l'apprentissage des langues et l'acquisition de connaissances civiques » utilisés par d'autres pays pour construire l'identité des nouveaux arrivants. Bloengaard et de Grauw discutent du paradoxe des États-Unis, une nation d'immigrants qui n'a pas de « réponse cohérente à l'établissement des immigrants » et concluent que cette situation se traduit par un traitement différent des immigrants à travers le pays. Kincaid et Cole mettent l'accent sur les niveaux d'attachement des Américains et trouvent que bien que les Américains démontrent un attachement important à leur pays, leur état, leur ville et leur groupe ethnique, par exemple, ils semblent ambivalents face à l'immigration, à l'exception de la jeune génération. Enfin, Béland et Lecours offrent la perspective du fédéralisme belge et soutiennent que la séparation des partis selon la langue a « créé une logique de décentralisation qui est toujours présente au sein de l'élite politique flamande », mais a également créé des conflits puisque les francophones résistent à la décentralisation.

INTRODUCTION

Julie Perrone, Assistant Director, Association for Canadian Studies

On April 17, 2012 we marked the 30th anniversary of the patriation of the Canadian Constitution and the introduction of the Charter of Rights and Freedoms. These foundational documents have had a profound impact on our law and public policy. Many Canadians view the Constitution and the Charter of Rights as shaping important aspects of our collective identity and defining a set of shared values. For the most part, Canadians hold a favourable opinion of the Constitution and Charter. Yet many see these defining documents as divisive.

How have the debates over the Constitution shaped our identities? Have the Constitution and Charter of Rights strengthened or weakened Canadian democracy and Federalism? What have the Constitution and Charter meant for women, aboriginals, and language minorities, ethnic and visible minorities, religious groups and new Canadians? What role have the Courts played in the interpretation of the Constitution, and how has the Charter transformed the judiciary in Canada? Has the distinction between Law and Politics become blurred over the past thirty years? How does the Canadian experience compare with other countries? Are the courts becoming more or less accessible to the public? Are there benefits to an unwritten constitution? How has the Constitution affected the balance of powers in Canada, and the dynamics of federalism?

Those are some of the questions upon which contributors reflected in this special issue on the influence of the Constitution and the Charter of Rights and Freedom on our laws, our identity and the concept of federalism. Some contributors discuss the concept of federalism more generally, some consider the effect of the Constitution and the Charter on inter- or intra-provincial relations, others focus on human rights specifically, and this issue ends with non-Canadian perspectives on federalism.

Peter Oliver traces the evolution of legal federalism over the past 30 years and while he sees a "general trend toward stabilization and clarification", he suggests that inter-jurisdictional immunity and the Criminal Law power are two examples of fluctuating jurisprudence. Graham Fraser states unequivocally that the "significance of the Charter in the development of language rights cannot be overstated." He argues that the Charter has entrenched language rights in such a way that they became part of our identity. Hon. Michel Bastarache's reproduced speech discusses the different influence the Charter has had in Quebec and in Canada, highlighting that the Francophone tying of language and culture is at the root of this difference. Jean-Claude Racine reflects on the constitutional condition of Canadians, that is, how effectively they can act on the Constitution, and concludes that the last 30 years have seen what he calls a "constitutional status quo."

Victor Armony, Raffaele Iacovino, Jack Jedwab, and David Kilgour and Jan Harvey look at inter- or intra-provincial relations with the federal system. Armony looks at opinion surveys about attachment and identification and argues that Quebecers, while they may at times be ambivalent towards their relation with Canada, still demonstrate strong feelings "about their belonging to Canada." Iacovino discusses Quebec's relation with Canada in the context of the recommendations of the Bouchard-Taylor report. He concludes that for these recommendations to be implemented, there must first be a "recognition that Quebec is a host society in its own right." Jedwab analyzes results from the 2011 federal elections and takes from these that Canadians may be moving away from the political Centre. He argues that should national unity lose its priority as a political objective, we may start looking at Canadians' position on the ideological spectrum, "to help understand voter motivation." Kilgour and Harvey offer a Western perspective on the effectiveness of federalism and plead for equality in politics, economics and culture for "ending western alienation."

Human rights are the focus of essays by Dominique Clément, Maxwell Yalden and Ken Norman. Clément reflects on the evolution of human rights in Canada and argues that human rights commissions have had difficulties adapting to "Canadians' conceptions of rights." This places them under threat and puts the entire human rights legal system at risk. Maxwell Yalden focuses more closely on issues related to sexual orientation and Aboriginals in the context of human rights laws. Ken Norman reflects on a rosier past when the Saskatchewan human rights code and commission enjoyed more respect and power. He remembers that his proposals allowed the commission more powers, but that a new government "marked the beginning of a good deal of backsliding" for human rights law in that province.

Finally, Leslie Seidle, Irene Bloemraad, Els de Graauw, John Kincaid, Richard Cole, Daniel Béland and André Lecours look at federalism elsewhere: in Australia, Belgium, Germany, Spain, Switzerland, and the United States. Seidle shares the results of a seven country study sponsored by the Forum of Federations which helps us get a deep perspective on how "policy instruments [...] for language learning and building civic knowledge" are used to build newcomers' identity. Bloengaard and de Grauw address the paradoxical United States, a nation of immigrants that has no "coherent response to immigrant settlement" and conclude that this situation results in immigrants being treated differently across the country. Kincaid and Cole focus on levels of attachment of Americans and find that while the American people show tremendous attachment to their country, their state, city and ethnic groups for example, they seem ambivalent towards immigration, except for the younger generation. Finally, Béland and Lecours offer the perspective of Belgian federalism and argue that the separation of parties along language lines has "created a decentralizing logic that is ever present within the Flemish political elite" but has also created conflict since Francophone actually resist decentralization.

CANADIAN LEGAL FEDERALISM SINCE 1982

Peter Oliver's research[1] is in the area of comparative constitutional law, history and theory, principally in relation to Canada, the Commonwealth and the European Union. He is particularly interested in shifting understandings of two central theoretical concepts: sovereignty and legal system. In 2005, he published *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press) which was awarded one of the Peter Birks prizes for outstanding legal scholarship. His present research relates more closely to issues in Canadian federalism. Before coming to the University of Ottawa in 2007, Peter Oliver held a chair in law at the School of Law, King's College London, where he taught Public Law and Jurisprudence. In 2005-6 he was Scholar in Residence in the Constitutional and Administrative Law Section of Justice Canada. In 2006-7 he served as Special Advisor, Legal and Constitutional Affairs at the Intergovernmental Affairs Secretariat of the Privy Council Office. He was a law clerk at the Supreme Court of Canada in 1990-1, Bolton Research Fellow at the Faculty of Law, McGill University in 1991 and Visiting Professor at the University of Toulouse from 1996-2001. He remains a Visiting Professor at King's College, University of London.

La recherche[1] de **Peter Oliver** est dans le domaine du droit comparé, de l'histoire constitutionnelle et de la théorie, principalement en ce qui concerne le Canada, le Commonwealth et l'Union européenne. Il est particulièrement intéressé par les changements dans la compréhension de deux concepts théoriques centraux : la souveraineté et le système juridique. En 2005, il publie *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press), qui a reçu l'un des prix Peter Birks pour recherche juridique exceptionnelle. Sa recherche plus récente examine de plus près les questions liées au fédéralisme canadien. Avant d'arriver à l'Université d'Ottawa en 2007, Peter Oliver était titulaire d'une chaire de droit à la faculté de droit au King's College de Londres, où il a enseigné le droit public et la jurisprudence. En 2005-6, il a été chercheur invité à la Section du droit constitutionnel et administratif de Justice Canada. En 2006-7, il a été conseiller spécial, Affaires juridiques et constitutionnelles au Secrétariat des affaires intergouvernementales du Bureau du Conseil privé. Il a été auxiliaire juridique à la Cour suprême du Canada en 1990-1, chercheur Bolton à la Faculté de droit, Université McGill en 1991 et professeur invité à l'Université de Toulouse de 1996 à 2001. Il est encore professeur invité au King's College, Université de Londres.

ABSTRACT

This article considers the evolution of legal federalism over the past 30 years.[2] It observes that since 1982 we have seen: considerable stability in the interpretation of heads of power; a judicial policy of cooperative federalism whereby both federal and provincial legislatures are afforded considerable room to legislate; an enduring interjurisdictional immunity rule that is weaker and narrower in its application; and a conflict rule that grants federal paramountcy under narrowly construed terms. By way of counterpoint to enduring federal paramountcy we have seen: broad federal powers such as Criminal Law and General Regulation of Trade and Commerce interpreted less expansively; the ancillary doctrine applied more rigorously; and the *Charter of Rights and Freedoms* used to limit federal paramountcy where other rules of legal federalism do not necessarily avail.

RÉSUMÉ

Cet article examine l'évolution du fédéralisme juridique au cours des 30 dernières années.[2] Il observe que, depuis 1982, nous avons vu : une stabilité considérable dans l'interprétation des chefs de compétence, une politique judiciaire du fédéralisme coopératif où les assemblées législatives fédérales et provinciales bénéficient d'un grand espace pour légiférer, une règle de l'immunité durable intergouvernementale qui est plus faible et plus étroite dans son application, et une règle de conflit qui accorde la prépondérance fédérale sous des conditions strictement interprétées. En guise de contrepoint à la prépondérance fédérale durable que nous avons vu : de larges pouvoirs fédéraux, tels que le droit pénal et le règlement général de l'Industrie et du Commerce, interprétés de manière moins expansive, la doctrine auxiliaire appliquée de façon plus rigoureuse et la Charte des droits et libertés utilisée pour limiter la prépondérance fédérale où d'autres règles du fédéralisme juridique ne prévalent pas nécessairement.

LEGAL FEDERALISM

DEFINITION

What do I mean by "legal federalism". I am referring, basically, to the constitutional division of powers, the list of powers set out in ss. 91, 92, 93 and 95 of the *Constitution Act, 1867*.

Federalism was, of course, *not* the subject matter of the 1982 reforms, which are rightly remembered more for a new domestic amending formula, the *Charter of Rights and Freedoms*, and the aboriginal rights protected by s. 35 of the *Constitution Act, 1982*.[3]

To speak of legal federalism after 1982 we need to say a bit about legal federalism before 1982.

LEGAL FEDERALISM BEFORE 1982

This part comes to me quite easily. I studied Constitutional Law (with then-professor Irwin Cotler) in 1981-2. Anyone who studied constitutional law before April 17, 1982 knows that it was almost all about legal federalism: about the Judicial Committee of the Privy Council and the Supreme Court of Canada interpretations of the various heads of power; and about the emergence of various doctrines (for example, the pith and substance doctrine, according to which legislation is characterized according to its true nature and purpose). Perhaps most importantly, the Supreme Court of Canada moved from what was referred to as a "watertight compartments" view of the division of powers to the beginnings of what we now call cooperative federalism, characterized by the recognition that there are matters on which *both* Parliament *and* the provinces can legislate. Laws often have a "double aspect" such that viewed from one perspective and purpose they would be valid federal enactments and viewed from another perspective and purpose they would be valid provincial enactments.

A point which Professor Cotler was keen to emphasize was that prior to 1982 – and especially prior to the 60s and 70s when documents such as the *Canadian Bill of Rights* and the Quebec *Charter of Human Rights and Freedoms* appeared – legal federalism was often the surrogate means by which courts protected rights. So when British Columbia legislation in the 1890s sought to discriminate against Chinese workers, many of whom had built the Canadian Pacific Railway, the Privy Council invalidated the discriminatory legislation on legal federalism grounds.[4] When, during the 40s and 50s, Premier Duplessis and others displayed excessive zeal in persecuting, for example, Communists and Jehovah's Witnesses, the Supreme Court of Canada used the division of powers to invalidate the provincial laws and municipal bylaws. The cases of *Switzman*[5] and *Saumur*[6] come to mind.

So from the pre-1982 period I would like to underline:

1. The development of over a century worth of jurisprudence regarding the various heads of powers in sections 91 and 92.
2. The development of key doctrines such as the pith and substance doctrine.
3. The evolution from a watertight compartments view of the division of powers to the beginnings cooperative federalism based, for example, on the double aspect doctrine.
4. And the frequent use of legal federalism in the defence of human rights.

AFTER 1982

THE 1980S

After 1982 and the entrenchment of the *Charter of Rights and Freedoms* there was no further need to use legal federalism as a proxy for rights protection. And perhaps just as important, it was immediately clear in 1982 that the Supreme Court of Canada would have to devote a huge amount of time, energy and resources to developing virtually from scratch a jurisprudence around the *Charter* and the s. 35 rights for aboriginal peoples.

To my mind, many of the Supreme Court of Canada's legal federalism cases in the 1980s betray a considerable awareness of this new reality.

As early as 1982 when the Supreme Court decided the *Multiple Access* case,[7] Dickson J, as he then was, set out a test for when it is that federal and provincial laws are deemed to be in conflict such that federal law is paramount. The test in *Multiple Access* was, and is (because it is still the test), one of operational conflict, of one statute saying 'yes' and the other saying 'no', of one saying 'hot' and the other saying 'cold'. Such a strict test for what constituted 'conflict' reduced the incentive for parties to litigate on the basis of paramountcy for federal legislation. The *Multiple Access* test encouraged the coexistence of federal and provincial laws and was therefore a key part of the emerging cooperative federalism. And this is true despite the development of a second branch of the test for paramountcy in the *Bank of Montreal v. Hall* case.[8] This second branch is based on "frustration of Parliament's intention" which seems like a broad, easily-satisfied test, but the Supreme Court of Canada has repeated on numerous occasions subsequently that this branch of the test is not to be overused; that is, not overused so as to go against the dominant tide of cooperative federalism.[9]

While the 1982 paramountcy test discouraged federalism-based litigation, it by no means eliminated such litigation. Important cases emerged in the 1980s, even as the Supreme Court of Canada was highly preoccupied with developing *Charter* and s. 35 jurisprudence. What we see

in the legal federalism jurisprudence, perhaps in reaction, is clearer attempts than pre-1982 to codify the law under ss. 91 and 92. So in the *Crown Zellerbach* case[10] in 1988 the Court set out 4 key considerations regarding the Peace Order and Good Government power. In 1989 in the *General Motors* case,[11] Dickson CJC set out a carefully formulated 5-part test regarding the general regulation of trade and commerce, a test that was applied just a few months ago in the *Reference re Securities Act*.[12]

Separately, but just as significantly given my thesis about the Supreme Court of Canada de-emphasizing legal federalism by discouraging litigation, the Court in *General Motors* also set out the new terms of what constitutional lawyers refer to as "the ancillary doctrine". By virtue of this doctrine, provisions which might otherwise be declared invalid as having to do with the other level of powers – so the creation of a tort or delict in a federal statute, or the presence of international trade provisions in a provincial statute – could nonetheless be declared valid if their connection to an otherwise valid statute was at the very least rational as opposed to gratuitous. Once again this has had the result of validating more federal and provincial legislation and discouraging legal-federalism-based litigation.

So to summarize by the end of the 1980s we have:

1. Almost 125 years of jurisprudence clarifying the meaning of the various heads of power, and a further attempt post-1982 to codify some of the larger and more amorphous powers, such as Peace, Order and Good Government and the general regulation of trade and commerce.
2. The thinning out of the test for conflict between federal and provincial legislation and the corresponding reduction of cases of federal paramountcy.
3. The development of doctrines such as the ancillary power doctrine which, together with the double aspect doctrine, again reduced the chances of legislation, or parts of legislation, being declared invalid.
4. *All* this having the effect of stabilizing and clarifying legal federalism and of reducing the volume of litigation.

EXCEPTIONS TO THE EARLY POST-1982 TREND

While the general trend was toward stabilization and clarification, I should probably note two areas of legal federalism jurisprudence which were still in flux: a doctrine (interjurisdictional immunity) and a power: the Criminal Law Power.

Interjurisdictional immunity is in some ways the main relic of the days when legal federalism operated on the assumption of "watertight compartments". On the broadest version of interjurisdictional immunity, each and every power in sections 91 and 92 has a vital and essential core which is immune from the effects – even the secondary effects – of legislation based in the other side of the division of powers. In fact (as opposed to theory), interjurisdictional immunity precedents dealt principally with protecting federal people, things and undertakings situated in the province from generally applicable provincial legislation. So the doctrine served to insulate, for example, banks and federal transportation and communications undertakings from provincial consumer protection, health and safety at work and general labour laws.

However, against the grain of the 1980s federalism-lite trend, the Supreme Court of Canada continued to devote large amounts of time and energy to sorting out the interjurisdictional immunity doctrine, notably in cases such as *Bell 1988*[13] and *Irwin Toy*[14]. And there was little in these cases that demonstrated any prospect of this part of legal federalism analysis getting any simpler or clearer any time soon.

Regarding the Criminal Law power, s. 91(27), the Supreme Court in the 1980s had confirmed the Privy Council view that this power was to be understood "in its widest sense", but it was still important to determine the extent of this power. The existing jurisprudence made clear that valid criminal law required: 1) a prohibition, 2) a sanction and 3) a criminal public purpose. But important questions still needed to be decided. For example, in the *RJR Macdonald*[15] litigation in the 1990s it was necessary to decide whether criminal legislation must directly attack the perceived evil (in that case the health problems associated with tobacco products) or whether it could do so indirectly (by attacking the advertising of tobacco products, for example). In the *Hydro Quebec*[16] litigation, the Court had to decide whether criminal law is limited to the classic criminal law case of simple prohibition and clear sanction, or whether it could be extended to cover complex regulatory schemes.

The answer to both questions was 'yes' and those answers remain relevant, for example, to present and future initiatives by the federal government and Parliament to protect the environment.

So interjurisdictional immunity and criminal law were the exceptions, but the general trend regarding legal federalism was strong. Professors Monahan, Ryder and others[17] have regularly provided evidence of the general trend by pointing out how very few pieces of legislation, federal or provincial, were struck down on federalism grounds in the 80s, 90s and into this century.

LEGAL FEDERALISM IN THE 21st CENTURY

So, to summarize once again, by the turn of the century we had a Supreme Court of Canada general jurisprudential approach characterized by:

1. An ongoing tendency to validate both federal and provincial legislation with help from the double aspect doctrine, the ancillary doctrine and generally speaking an approach termed "cooperative federalism"
2. A narrowly construed test for federal paramountcy based essentially on operational conflicts of a yes/no variety.

But at the same time, we saw:

3. The continuing growth or consolidation of large federal powers such as Criminal law and (the general regulation of) Trade and Commerce; and
4. The continuing presence of a relic of the watertight compartments era in the form of the interjurisdictional immunity doctrine.

In 2007, the last of these – the interjurisdictional immunity doctrine – was brought into line with the general cooperative federalism trend, and this in what is arguably the most important federalism case of the post-1982 era, *Canadian Western Bank*.[18] You will remember that banking is an area of federal jurisdiction which historically benefits from interjurisdictional immunity. *Canadian Western Bank* involved the question of the applicability of provincial consumer protection legislation to the sale of insurance by banks. In the spirit of cooperative federalism, the court adjusted and downgraded the interjurisdictional immunity doctrine in the following ways:

- it adjusted the test so that it only applied to cases where provincial legislation impaired (rather than merely touched or affected) the vital and essential (or core) parts of, in that case, banking;
- it stated that interjurisdictional immunity should only apply in cases where precedents for it already existed (and in so doing it rejected the view that this doctrine applies in theory to all heads of power);
- and finally it changed the default order of analysis in legal federalism cases, moving the paramountcy question ahead of the interjurisdictional immunity question, and this consistent with the reduced importance of the that doctrine.[19]

The downgrading of interjurisdictional immunity in these ways introduced yet another factor having the effect of reducing the incentive to litigate legal federalism questions.

IS THE ERA OF COOPERATIVE FEDERALISM REALLY ONE OF DECLINE IN LITIGATION BASED ON LEGAL FEDERALISM?

One could be forgiven for thinking so. But the study and practice of legal federalism are still highly relevant, as recent case law has illustrated.

For instance, while *Canadian Western Bank* reduced the relevance of interjurisdictional immunity to cases where precedents for its application exist, those precedential situations are being litigated, as we have seen in the Quebec-based litigation involving federal aeronautics jurisdiction and provincial zoning laws. Federal interjurisdictional immunity applied in the recent *COPA* and *Lacombe* cases.[20]

One might then ask, if federalism litigation is still relevant, is it only relevant asymmetrically as the federal victories in recent aeronautics-related interjurisdictional immunity cases would appear to suggest. The answer would appear to be that cooperative federalism benefits the provinces as well.

For instance, cases such as *Chatterjee*[21] and *Rothmans*[22] demonstrate that the Supreme Court of Canada wishes to apply the double aspect doctrine generously and the paramountcy doctrine lightly.

Furthermore, recent indications are that the Supreme Court of Canada is acutely aware that unlimited expansion of federal powers such as Criminal law and the general regulation of trade, combined with the doctrine of federal paramountcy, would be a problem for a balanced approach to federalism.

For example, we saw in the recent *Reference re Securities* Act litigation[23] that the Court was unwilling to expand federal jurisdiction in the general regulation of trade and commerce at the expense of property and civil rights.

By way of further example, we saw in the *Assisted Human Reproduction Act Reference*[24] that a majority of the Supreme Court was inclined, first, to apply the ancillary powers doctrine with increased rigour, and, secondly, to interpret the criminal law power so as to limit that power's ability to crowd out provincial jurisdiction, in that case provincial jurisdiction over health.

But what of a case where federal criminal legislation is valid and where it contradicts provincial health choices. I am thinking here of course of the *Insite* litigation.[25] We saw in that case that rather than use an out-of-date legal federalism doctrine to protect the provincial health choices (as the British Columbia Court of Appeal[26] did by using an unprecedented provincial version of interjurisdictional immunity), the Supreme Court of Canada used the *Charter* as a backstop where no other legal federalism solution seemed available.

And so we see that we have come full circle. Whereas prior to 1982 legal federalism was regularly used as a proxy for rights protection, in the post 1982 era, the Court will not hesitate to bring *Charter* arguments to the fore where the recently stabilized and clarified rules of cooperative federalism cannot produce a satisfactory solution.

NOTES

[1] Professor of Law, Member of Public Law Group, Faculty of Law, University of Ottawa. This article is the lightly edited and footnoted text of a presentation at the CONSTITUTION @ 30 CONFERENCE at the University of Ottawa, April 17, 2012. The views expressed here are those of the author and not any other organization for which he has provided advice.

[2] This article expands and updates, albeit in summary form, Peter C. Oliver, "The Busy Harbours of Canadian Federalism: The Division of Powers and Its Doctrines in the McLachlin Court" in A. Dodek & D. Wright, eds, *Public Law in the McLachlin Court: The First Decade* (Toronto: Irwin Law Inc. 2011): 167-200.

[3] It is true that: the amending formula can change the division of powers (and indeed s. 92A regarding provincial powers over non-renewable natural resources added in 1982 is an example of a new amendment to the division of powers); the *Charter* limits federal and provincial powers; and s. 36 constitutionalizes the federally significant equalization rules. However the federalism side of things is not what 1982 is remembered for, generally speaking.

[4] See *Union Colliery Co. v. Bryden* [1899] A.C. 580.

[5] [1957] SCR 285.

[6] [1953] 2 SCR 299.

[7] *Multiple Access Ltd v. McCutcheon* [1982] 2 SCR 161.

[8] [1991] 1 SCR 121.

[9] See *Canadian Western Bank v. Alberta* [2007] 2 SCR 3, para. 74.

[10] [1988] 1 SCR 401.

[11] *General Motors of Canada Ltd. v. City National Leasing* [1989] 1 SCR 641.

[12] [2011] SCC 66.

[13] *Bell Canada Ltd v. Quebec* [1988] 1 SCR 749.

[14] *Irwin Toy Ltd v. Quebec* [1989] 1 SCR 927.

[15] *R.J.R. MacDonald v. Canada* [1995] 3 SCR 199.

[16] *R. v. Hydro Quebec* [1997] 3 SCR 213.

[17] Patrick Monahan, "The Supreme Court of Canada and Canadian Federalism, 1996-2001" in P. Thibault, B. Pelletier & L. Perret, eds, *Les Mélanges Gérald-A. Beaudoin* (Cowansville: Yvon Blais, 2002); B. Ryder, "The End of Umpire: Federalism and Judicial Restraint" [2006] Sup Ct LR (2d): 345-377.

[18] [2007] 2 SCR 3.

[19] In cases where precedent dictates that interjurisdictional immunity should apply the Court would now seem to be free either to revert to the traditional order of analysis by putting interjurisdictional immunity ahead of paramountcy, or to put paramountcy first (particularly where the existence of a clear and substantial conflict obviates the need to take the analysis further).

[20] See *Quebec v. Canadian Owners and Pilots Association* [2010] 2 SCR 536 and *Quebec v. Lacombe* [2010] 2 SCR 453.

[21] *Chatterjee v. Ontario* [2009] 1 SCR 624.

[22] *Rothmans, Benson & Hedges Inc. v. Saskatchewan* [2005] 1 SCR 188.

[23] [2011] SCC 66.

[24] [2010] 3 SCR 457.

[25] *Canada v PHS Community Services* [2011] 3 SCR 134.

[26] [2010] 100 BCLR (4th) 269, 314 DLR (4th) 209, 250 C.C.C. (3d) 443, 207 C.R.R. (2d) 232, [2010] 2 W.W.R. 575.

CHECKING OUR CONSTITUTION@30: THE INFLUENCE OF THE CANADIAN CONSTITUTION AND THE CHARTER OF RIGHTS AND FREEDOMS, AND METAPHORS OF GROWTH

Graham Fraser has been Canada's Commissioner of Official Languages since October 2006. Before his appointment, he had a long and distinguished career as a journalist. Mr. Fraser wrote in both official languages for *The Toronto Star, Maclean's, Montreal's The Gazette, The Globe and Mail* and *Le Devoir*. He is also the author of five books, including *Playing for Keeps: The Making of the Prime Minister* (1988) and *Sorry, I Don't Speak French* (2006), which helped stimulate renewed public discussion of language policy in Canada. Mr. Fraser has a Bachelor of Arts and a Master of Arts in History from the University of Toronto.

Graham Fraser est Commissaire aux langues officielles du Canada depuis octobre 2006. Avant sa nomination, il a eu une longue et brillante carrière en tant que journaliste. M. Fraser a écrit dans les deux langues officielles pour le *Toronto Star*, la revue *Maclean's, The Gazette*, *The Globe and Mail* et *Le Devoir*. Il est également l'auteur de cinq ouvrages, dont *Playing for Keeps: The Making of the Prime Minister* (1988) et *Sorry, I Don't Speak French* (2006), ce qui a contribué à relancer le débat public sur la politique linguistique au Canada. M. Fraser détient un baccalauréat ès arts et une maîtrise ès arts en histoire de l'Université de Toronto.

ABSTRACT

Graham Fraser, Canada's Official Languages Commissioner, is adamant: the significance of the Charter in the development of language rights cannot be overstated. In this article, Mr. Fraser states how tension between individual and collective rights – often at the heart of language rights – transformed Canada's linguistic landscape and will continue to do so. Reinstating the importance of having both official languages equally visible in all spheres of Canadian society, Mr. Fraser explains how the entrenchment of the Charter 30 years ago established language rights as a fundamental and permanent part of our legislative and legal environment, and made them a key part of our identity.

RÉSUMÉ

Graham Fraser, Commissaire aux langues officielles du Canada, est catégorique: l'importance de la Charte dans le développement des droits linguistiques ne peut pas être surestimée. Dans cet article, M. Fraser indique comment la tension entre les droits individuels et collectifs – souvent au cœur des droits linguistiques – a transformé le paysage linguistique du Canada et continuera de le faire. En rétablissant l'importance d'avoir deux langues officielles toutes aussi visibles dans toutes les sphères de la société canadienne, M. Fraser explique comment l'enchâssement de la Charte il y a 30 ans a établi les droits linguistiques comme élément fondamental et permanent de notre environnement législatif et juridique, et a fait de ces derniers une partie essentielle de notre identité.

Good afternoon.

I would like to thank Jack Jedwab for inviting me to participate in this conference that celebrates the 30 years of our Charter. It is an honour for me to be part of such a prestigious panel and to have the opportunity to reflect on how the country has changed since the Charter was entrenched in our constitution, and what the indications are for change in the future. As a non-lawyer, with so many

distinguished members of the bar on the panel and in the audience, I feel a bit as if I were facing an oral exam for a course in which I missed too many lectures!

Firstly, as Commissioner of Official Languages, I will say that the significance of the Charter in the development of language rights cannot be overstated.

When the Charter became part of Canada's constitution in 1982, additional language rights were enshrined in sections 16 to 23. But what is intriguing about language rights as defined in the Charter is that they are both individual and collective rights. Since the Charter was entrenched, those rights have sometimes been overshadowed by the focus on equality rights, as expressed in section 15. And the debate over equality rights—or the tension between individual and collective rights—will continue to have a substantial impact on the changing landscape of language rights.

For most of Canada's first century, language rights were at best limited and constrained and at worst eliminated. A national conversation on language began more than 50 years ago: a conversation driven by responses to dramatic events. The FLQ bombings in the spring of 1963 contributed to the creation of the Royal Commission on Bilingualism and Biculturalism later that year. General de Gaulle's "Vive le Québec libre!" speech in 1967 and its repercussions laid the groundwork for widespread acceptance of the Commission's recommendations. Those recommendations led to the *Official Languages Act* in 1969 and the creation of the position of Commissioner of Official Languages in 1970. The election of the Parti Québécois in 1976 and the failure of the Quebec referendum on sovereignty-association in 1980 made it possible for Pierre Elliott Trudeau to patriate the Constitution with the Charter in 1982. What will the impact be of political change in Quebec and other provinces? If there is a change of government in Quebec, will it have an impact on majority attitudes towards linguistic minorities? Will there be a similar response in other parts of the country?

I will admit that, when the Charter was entrenched in the Constitution, I was skeptical for several reasons. I was troubled by the fact that it had been brought forward over the objections of Quebec's National Assembly, whose continued refusal to sign the Constitution has overshadowed Canadian politics for the past quarter century. I had misgivings about the relationship between the courts and Parliament. And at the time, I shared the views of many intellectuals, including those of American political scientist Seymour Martin Lipset, who held that the Charter would lead to the Americanization of Canada in terms of its legal culture. But this did not happen. On the contrary, our language rights history clearly shows just how much the case law flowing from the Charter fundamentally sets us apart from American case law.

In their presentations, both Lorraine Weinrib and Michel Bastarache referred to the American tradition of "originalism": the view that judges should limit themselves to the reasoning used by those who drafted the Constitution. Since the very first debates over the Charter, it was clear that the Charter would evolve according to how it was interpreted. The debate over the original intent of the "founding fathers" of the Constitution, which has dominated judicial thinking in the United States, would have no place in Canadian politics. Sophia Muller talked yesterday about legal metaphor: I think Lord Sankey's comparison to a "living tree" is still useful. The Charter is indeed a living tree—or what Professor Weinrib called a "living instrument" and what Karuna Thakur called a "living organism," and later "constitutions as lived cultures"—in each case, one can say that it has been sinking its roots into positive jurisprudence, not into ideology.

The debate over rights would take place mainly in the courtroom—and this was foreseen from the outset. In 1981, NDP justice critic Svend Robinson asked Jean Chrétien, then Minister of Justice, whether the Charter would exclude discrimination on the grounds of sexual orientation. "It might," Chrétien replied. "That will be for the court to decide; it is open-ended." In other words, the original idea of one of the key drafters was that the Charter would grow and change on the basis of the decisions by the courts.

Interprovincial mobility and Francophone immigration could have substantial impact on this dynamic. The challenge is to make sure that official language minority communities become welcoming communities. Article 23 was written under the assumption that communities were static; newcomers do not have access to the schools of the minority.

Michael Bergman presented a rather pessimistic vision of the future of the English-speaking community in Quebec. This confirms one of Statistics Canada's qualitative studies of linguistic minority communities after the 2006 census. Quebec's English-speaking communities had more resources, but were more pessimistic; French-speaking communities had fewer resources, but were more optimistic. The former felt that they were declining, while the latter felt like they were growing, thanks to the institutional changes required by the courts since the Charter in 1982.

In 1982, 70 years after Regulation 17 abolished French as a language of instruction in Ontario, the Charter enshrined the equality and status of English and French and began a process of giving a collective dimension to rights that had been formulated as individual rights.

Parliament significantly revised and strengthened the *Official Languages Act* in 1988 to make it consistent with the Charter, establishing that English and French are

both languages of work for public servants in designated bilingual regions, and introducing the notion of positive measures for the vitality and development of official language communities.

Perhaps even more dramatically, in 1999 the Supreme Court of Canada established a clear principle concerning the protection of official language minorities. The *Beaulac* judgment set the stage for a series of decisions by both the Supreme Court and Parliament that broadened the nature of language rights and deepened government institutions' obligations to protect them.

For the past 25 years, in his capacity as author, lawyer and judge, Michel Bastarache has helped shape Canadian case law in matters of language. In *Beaulac*, writing for the majority he explained that language rights are not negative rights or passive rights; they can only be enjoyed if the means are provided.

Just as importantly, if not more so, *Beaulac* confirmed that the *Official Languages Act* was a quasi-constitutional statute.

Parliament amended the *Official Languages Act* in 2005, making the requirement that federal institutions take positive measures for the vitality and development of official language communities a binding obligation.

Then, in the *DesRochers* case, the Supreme Court concluded that simply making services available to the minority based on the needs of the majority does not meet the obligations laid out in section 20 of the Charter and in Part IV of the *Official Languages Act*.

In the *Arsenault-Cameron* case, the Supreme Court focused on the scope and application of section 23 of the Charter, which covers minority-language educational rights. In keeping with the spirit of *Beaulac*, the Court held that governments must consider Charter requirements when exercising their discretionary power and conducting public affairs.

Finally, in *Solski* (2005) and *Nguyen* (2009), the Supreme Court required the provinces to be more flexible in establishing who has the right to attend minority-language schools.

In each case, parliamentarians and the Supreme Court have acted to ensure that language rights are not simply individual rights, but also collective rights; these rights are not in place simply to protect a single person, but to ensure the vitality of official language communities across the country.

There are three cases before the courts now that may (or may not) continue this process: a case involving French-language education in the Northwest Territories, the Caron case on Francophone rights in Alberta and Saskatchewan, and the case that I have brought against CBC/Radio-Canada, which will be the first test of the scope of Part VII of the Act and the obligations of federal institutions to take positive measures for the growth and development of official language communities.

Through the Charter, the Supreme Court has drawn on Canada's democratic tradition and established its foundations, including minority rights. A lot will depend upon future appointments to the Court, and whether they build on these foundations.

We often refer to the "Charter generation" when we think of the children who attended schools created following the establishment of the Charter. But I believe that there are two "Charter generations," because there is a huge generation gap between the lawyers who graduated before 1982 and those who studied law after 1982. That gap is now beginning to disappear, as post-Charter lawyers are now in their late 50s and thinking about retirement. However, at the time of the debates leading up to the Charter, this generation gap was at the very heart of the paradox. On the one hand were lawyers who had taken the law course taught by Pierre Elliott Trudeau and, on the other, those who had studied under Jacques Yvan Morin at the Université de Montréal's law school. It was a debate between Civil Code lawyers and Civil Code law professors. Politicians and common-law legal advisors watched from the sidelines like spectators at a tennis match.

Five, six and even seven years later, from 1987 to 1990, the Charter became firmly anchored in the mindset of English Canadians. What had been a debate between Quebecers suddenly became a sacred trust in English Canada.

It may be that, despite the controversy that surrounded the creation of the Charter, Quebec's political class and legal profession have assimilated it into their way of thinking. Its origin, after all, was rooted in Quebec's legal tradition.

However, the quasi-mythological memories of Quebec's refusal to sign the repatriated constitution and of the determination with which, for three years, it systematically invoked the notwithstanding clause for each statute to be enacted are still painful ones.

Thirty years later, where are we at with the Charter, and what do we see for the future? We are entering a new legal era, with many court decisions based on interpretations of the Charter, and the implementation of language rights well under way. However, we are lagging far behind in terms of compensation and symbolic value, and we need to address this. Under the Charter and the Constitution, language rights are considered to be guaranteed, as the Constitution is the supreme law in Canada. The rights conferred by the Charter are so fundamental that they must take precedence over all other rights.

This means that where values are concerned, language rights are of the utmost importance to Canadians. Although these rights have pride of place in our legal system, there seems to be a double standard when it comes to monetary damages awarded by the courts for violations. The monetary awards to victims for damages are minimal and in no way reflect the value that our legal system purports to attach to them.

Recently, the Supreme Court of Canada awarded only $5,000 in damages for a violation of section 8 of the Charter for an abusive strip search.[1] Last year, the Federal Court, based on this same Supreme Court ruling, awarded $1,500 in damages for a violation of the language rights guaranteed by the *Official Languages Act*. Considering the wording of section 24.1 of the Charter, which deals with the powers of the courts to grant remedies, the amount of the awards is very small. I believe that, as a society, we have to ask ourselves the following questions: What importance must we attach to the collective nature of rights? How can we protect our fundamental rights if we attach so little importance to them in terms of damages? If language rights are fundamental rights that define our Canadian identity and if they are immutable and inseparable, they must be a true embodiment of this value and genuinely reflect the idea of primacy. Only by attaching true "value" to the equality of both official languages will linguistic duality become a fundamental value of our Canadian identity. Symbolism is not enough when it comes to language rights—we need substance. We have to put our money where our constitution is.

This leads me to say a few words about the economic context, which is so often used these days as an unquestioned justification for taking—or not taking—political action.

Language rights are not a frill. To become part of our social landscape, they have to be understood as a fundamental value and as a key part of our identity. Austerity cannot be used as an excuse for backsliding on individual and collective rights—or on the obligations of governments towards official language communities.

Canadians' language rights are a fundamental and permanent part of our legislative and legal environment; they need to be an equally visible part of our public space. The presence of both official languages needs to be a given, the same way that we take for granted that at curbs there is a place where people in wheelchairs can cross the street, that there are more recycling bins than garbage cans, and that same-sex couples may hold hands without hiding from their fellow citizens. These are social changes that will endure.

It would never occur to anyone that, because of the economic situation, we would roll back fundamental rights. Language rights need to be visible and audible in our public spaces, to make sure that the presence of both official languages is a statement about Canadian identity.

Thirty years on, it is clear: our Charter really is a living tree. In fact, a more useful metaphor might be a living garden, with different plants that bloom at different times as the seasons change and as Canada and its society evolve.

NOTES

[1] *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28.

BILAN ET DIRECTIONS FUTURES

L'**Hon. juge Bastarache**, BA, LL.L., LL.B., D.E.S. a étudié à l'Université de Moncton (BA), à l'Université de Montréal (LL.L.), à l'Université d'Ottawa (LL.B.) et à l'Université de Nice (diplôme d'études supérieures en droit public). Traducteur juridique au gouvernement du Nouveau-Brunswick, vice-président et directeur du marketing chez Assumption Life, ensuite président et chef de la direction pour Assumption Life et ses filiales. Professeur de droit et doyen de la faculté de droit de l'Université de Moncton, 1978-83. Directeur général, promotion des langues officielles, ministère du Secrétariat d'État du Canada, 1983-84. Vice-doyen, Section de common law de la Faculté de droit, Université d'Ottawa, 1984-87. A pratiqué le droit à Ottawa avec Lang, Michener, Lash, Johnston, 1987-89, et à Moncton avec Stewart, McKelvey, Stirling, Scales, 1994-95. Rédacteur en chef et auteur principal de trois livres : *Language Rights in Canada* (Yvon Blais, 1987 et 2004 (2e éd.)), *Précis du droit des biens réels* (Yvon Blais, 1993 et 2001 (2e éd.)) et *The Law of Bilingual Interpretation* Butterworths, 2008). Nommé à la Cour d'appel du Nouveau-Brunswick, le 1er mars 1995, et à la Cour suprême du Canada, le 30 septembre 1997. Le juge Bastarache a pris sa retraite le 30 juin 2008.

Mr. Justice Bastarache, B.A., LL.L., LL.B., D.E.S. educated at University of Moncton (B.A.), University of Montréal (LL.L.), University of Ottawa (LL.B.) and University of Nice (graduate degree in public law). Legal translator in the New Brunswick government, Vice-President and Director of Marketing at Assumption Life, later President and Chief Executive Officer of Assumption Life and its subsidiaries. Law professor and Dean at the University of Moncton Law School, 1978-83. Director General, Promotion of Official Languages, Department of the Secretary of State of Canada, 1983-84. Associate Dean, Common Law Section, Faculty of Law, University of Ottawa, 1984-87. Practised law in Ottawa with Lang, Michener, Lash, Johnston, 1987-89, and in Moncton with Stewart, McKelvey, Stirling, Scales, 1994-95. Editor and principal author of three books: *Language Rights in Canada* (Yvon Blais, 1987 and 2004 (2nd ed.)), *Précis du droit des biens réels* (Yvon Blais, 1993 and 2001 (2nd ed.)) and *The Law of Bilingual Interpretation* (Butterworths, 2008). Appointed to the New Brunswick Court of Appeal, March 1, 1995, and to the Supreme Court of Canada, September 30, 1997. Justice Bastarache retired on June 30, 2008.

RÉSUMÉ

Michel Bastarache réfléchit sur deux questions clé qui sous-tendaient la tenue d'une conférence en 2012 intitulée « Un regard sur notre Constitution 30 ans plus tard »: l'influence de la Charte des droits et libertés sur le régime politique du Canada et sur les droits. M. Bastarache avance, en se fondant sur la pensée de Charles Taylor, que l'influence de la Charte diffère entre le Québec et le Canada entre autres à cause du lien différent que les Anglophones et les Francophones entretiennent entre la langue et la culture. Quant à l'influence de la Charte sur les droits, le constat général de l'auteur est que l'on a américanisé le système juridique en préférant les droits individuels.

ABSTRACT

Michel Bastarache reflects on two key issues addressed at a conference in 2012 entitled "Checking our Constitution at 30": the impact of the Charter of Rights and Freedoms on the Canadian political system and on Canadians' rights. Mr. Bastarache suggests, based on the thought of Charles Taylor, that the influence of the Charter differs between Quebec and Canada, among other reasons because of the different link that Anglophones and Francophones maintain between language and culture. About the impact of the Charter on rights, the author's general observation is that the legal system has been Americanized in preferring individual rights.

- La question initiale posée au colloque consistait à évaluer l'influence de la Loi constitutionnelle de 1982 sur le régime politique au Canada, vu que l'on s'intéresse *aux lois, aux identités et au fédéralisme*.
- Il est intéressant que l'on ait parlé d'identités au pluriel parce que je considère qu'il ne faut pas se limiter à une analyse technique de l'impact de la Charte, mais qu'il faut aussi examiner son influence sur l'identité nationale et l'évolution politique de la fédération canadienne. Il y a quelques semaines, j'ai participé à un colloque en hommage à Charles Taylor. On m'a demandé de rappeler les craintes qu'il exprimait à

l'occasion du rapatriement de la constitution et de voir si elles étaient fondées à la lumière de l'expérience vécue. Je voudrais faire état de la pensée du philosophe parce qu'elle est pertinente pour ceux qui s'interrogent sur ce que nous réserve l'avenir.

Voici en quelques mots la situation telle que décrite par M. Taylor.

Le Québec se voit comme une société distincte au Canada et en Amérique du nord. Son identité tient à son caractère français. L'identité des québécois a évolué en un sens parce l'on est passé d'un concept de deux nations, l'une française englobant la minorité francophone hors Québec, l'autre anglophone et assez mal définie, à un concept fondé sur les institutions politiques, celles du Québec et celles du reste du Canada. Le rejet de l'entente du Lac Meech a eu un effet profond justement parce qu'il correspond à un rejet du statut particulier du Québec en faveur du concept de la mosaïque canadienne et de l'absolutisme de l'égalité des provinces. Le Québec vise donc un fédéralisme plus décentralisé et un régime constitutionnel asymétrique alors que les autres provinces semblent toutes favoriser un régime fondé sur l'égalité des provinces et la péréquation, qui servirait à briser les inégalités d'opportunité. Le Québec veut en fait la liberté d'adopter un mode de gouvernement où l'État joue un rôle plus prononcé, notamment dans les domaines culturel et linguistique; le Canada anglais veut une fédération uniforme qui valorise les libertés individuelles et moins d'interventionnisme gouvernemental. Le Québec favorise aussi une politique d'intégration culturelle qui cadre mal avec le multiculturalisme, même avec son contenu flou. Au départ le multiculturalisme était défini en fonction de l'ethnicité, de l'origine nationale et de la race. Aujourd'hui on y a ajouté la religion, l'orientation sexuelle. M. Taylor note que dans les faits le Québec est déjà distinct à plusieurs points de vue mais que le Canada anglais refuse de le reconnaître dans les textes légaux et continue de prétendre que le principe artificiel de l'égalité des provinces est une nécessité. Selon M. Taylor, la résistance « is at the level of feeling ».

Quel est donc l'apport de la Charte des droits et libertés dans ce contexte? Pour aborder cette question il faut d'abord se demander s'il y a véritablement une différence de valeurs entre la société québécoise et celle des autres régions du Canada. La question est importante parce que l'on considère à tort ou à raison que la Charte reflète les valeurs de la nation canadienne et qu'elle serait de ce fait un instrument d'uniformisation. Reconnaissons d'abord qu'en matière de culture politique il n'y a pas de grosses divergences : la primauté du droit, la démocratie représentative, la liberté d'expression, l'aide sociale et bien d'autres valeurs sont partagées. Mais il y a une divergence au plan de la philosophie politique qui est assez grande pour que plusieurs soient d'avis que les québécois ont toujours eu de la difficulté à se sentir tout à fait membres de ce que l'on appellerait la nation canadienne. Pour M. Taylor, c'est la réponse à la question « What is Canada for » ? qui importe. Qu'est-ce qui unit les canadiens et leur donne une identité? Pour le Canada anglais, ça été le « britishness », puis le « englishness », mais le changement démographique a changé les choses et ce sont les institutions elles-mêmes qui comptent le plus maintenant. Pour plusieurs, il est surtout important que l'on se distingue des américains. Ici on ferait plus confiance aux gouvernements, on serait moins portés à s'en remettre aux tribunaux et on serait plus généreux avec les défavorisés. En somme nous ne sommes pas des américains et croyons à nos programmes sociaux comme l'assurance maladie universelle et étatique, à la péréquation aussi, et nous avons une culture politique distincte de celles des États-Unis. Mais on semble se questionner sur son identité au Canada anglais seulement parce que le mouvement indépendantiste au Québec nous y oblige. Il y a cependant des tensions maintenant parce que les inégalités régionales persistent, que l'équilibre des pouvoirs est mis en doute, que les programmes sociaux sont trop chers. Certains juristes diront que l'identité créée par la Charte est fragilisée par la concurrence et la réconciliation des droits. D'autres en raison du fait que la composition de la Cour suprême change et que les réexamens judiciaires se multiplient. Il faut aussi se demander si les immigrants, très nombreux, adhèrent à cette définition de l'identité nationale, ce que le multiculturalisme signifie à leurs yeux. Vise-t-on l'intégration, l'assimilation, ou autre chose dans notre mosaïque canadienne?

Selon M. Taylor ce serait la Charte canadienne des droits et libertés qui aurait aujourd'hui assumé le rôle principal dans la définition de l'identité nationale, fait surprenant parce qu'elle n'était pas revendiquée en 1981 et que son contenu ne figurait pas dans les éléments de la définition à cette époque. La Charte est largement fondée sur une philosophie libérale de droits individuels où le concept d'égalité tient une place importante.

Mais que répondra-t-on à la question « What is Québec for? ». La question existentielle se pose différemment au Québec parce que l'identité québécoise est une question de langue et de culture; ces valeurs ne sont pas simplement individuelles, elles sont collectives et doivent être promues par les institutions politiques. Il n'est pas question de se comparer avec les américains pour se définir; il est seulement question de préciser le contenu de la solidarité nationale. Le multiculturalisme est très problématique dans ce contexte, d'autant plus qu'il est difficile de lui trouver une définition commune. La Charte est bien acceptée au Québec, sauf dans la mesure où elle est perçue comme une entrave à la politique linguistique

du gouvernement. Elle contient des éléments de droits collectifs, en matière d'éducation religieuse et d'éducation dans la langue officielle minoritaire au plan provincial, pour ce qui est des droits des autochtones aussi, mais elle reste centrée sur une philosophie individualiste. « Pourquoi le Québec » si ce n'est pour défendre la nation, en promouvoir la langue et la culture ? En somme, ceci signifie qu'il est difficile de souscrire à la fois aux valeurs de la nation canadienne et à celles de la nation québécoise puisque la première croit à l'égalité des provinces et à la primauté des droits individuels, à la mosaïque canadienne, et la deuxième à la primauté des droits collectifs et au statut particulier requis pour en assurer la mise en œuvre, à l'intégration des immigrants. Pour les anglophones, il est nécessaire de séparer la langue de la culture si on veut agir dans ce domaine, alors que pour les francophones, langue et culture sont liés. Il faut aussi dire que la majorité des canadiens n'accepte pas cette idée des deux nations qui serait venue se substituer au dualisme canadiens-anglais et canadiens-français qui prévalait autrefois. Pourtant chacun sait que le dualisme est réel ; il explique en fait le fédéralisme décentralisé et la reconnaissance des deux langues officielles dans la constitution.

La vraie question est celle de l'autonomie du Québec. Il y a sur cette question un conflit réel. Québec veut sa reconnaissance comme société distincte et plus de pouvoirs, les autres provinces disent qu'elles sont toutes égales et que la Charte unit les canadiens en raison de sa force morale et juridique. Le statut spécial pour le Québec serait contraire à la thèse de l'égalité des provinces et des personnes. Pourtant, l'idée que les francophones soient servis en français est acceptée, mais c'est parce qu'elle répond à une demande individuelle. Mais c'est là mal comprendre la nature des droits linguistiques. Dans l'arrêt Beaulac, la Cour suprême dira que le droit à un procès dans sa langue n'est pas seulement assuré par une mesure d'accommodement mais qu'il comporte l'obligation pour le gouvernement de créer une infrastructure institutionnelle qui assurera un accès à la justice comparable pour les deux communautés linguistiques officielles. Pareillement, dans l'arrêt Mahé la Cour suprême dira que le droit à l'instruction comprend le droit pour les représentants de la minorité linguistique provinciale de contrôler ses institutions scolaires. Ce qui est remarquable ici c'est que cette dimension communautaire du droit ne vient pas des élus mais des tribunaux.

C Taylor est aussi d'avis que même si les droits linguistiques se justifient parce qu'ils sont exercés par des particuliers, ils sont reconnus parce que nécessaires à la survie des communautés linguistiques en situation minoritaire. Si cela n'est pas accepté, il faudra se demander ce que sera le vrai patriotisme canadien ; le mariage de raison n'est pas suffisant pour définir l'identité canadienne. S'il n'est pas accepté, il faudra aussi se demander quelle approche l'on devra adopter pour réformer nos institutions politiques. Pour M. Taylor, « Canada has never gelled as a nation ». Ne faudrait-il pas admettre que la reconnaissance de la spécificité du Québec est un des buts mêmes de notre fédération ? Y a-t-il espoir de changement ?

La Charte semble jouer un rôle négatif à cet égard en définissant les valeurs canadiennes sans égard au conflit philosophique qui déchire le Canada. La crainte que le Canada soit américanisé par la Charte semble avoir été fondée parce que les ambitions communautaristes au Québec se heurtent clairement à un droit individualiste. Tout ce qui est communautaire semble discriminatoire. On suit les américains dans la définition d'une société libérale. On mettra l'accent sur la révision judiciaire pour contraindre l'État plutôt que de favoriser le consensus social par la discussion politique et l'action législative. Mais l'État québécois ne veut pas la neutralité ; il a choisi les valeurs prédominantes et veut assurer non seulement un comportement compatible avec elles, mais la continuité même de la communauté. Pour le tenants de cette approche, le Québec n'est pas pour autant une société intolérante ou discriminatoire ; il a tout simplement choisi un modèle de société libérale différent. Il protège les minorités, garantit les libertés fondamentales. Il tient cependant pour acquis qu'il y a une grande différence entre les droits, d'une part, et les privilèges et immunités, d'autre part. Il saura aussi respecter la diversité, mais d'une manière différente.

Nous avons donc deux visions différentes de la société libérale, deux façons de concevoir l'identité nationale. La Charte peut favoriser une vision et rendre bien difficile l'accommodement qui permettrait à deux formes d'identité de trouver place. La Charte est importante non seulement à cause de la force du libéralisme procédural mais aussi parce que la société multiculturelle a besoin d'un fondement à son identité et qu'elle s'y réfère à cette fin. Ceci fait problème parce que l'on pense que la Charte doit s'appliquer partout de la même manière. Le conflit ne peut se résoudre que par une réforme en profondeur des institutions politiques selon M. Taylor parce que celles-ci sont d'une époque révolue.

- On nous a aussi invités à considérer l'impact de la Charte sur les lois. Il est bien évident qu'elle a été très importante en raison de l'élargissement de la révision constitutionnelle. Six canadiens sur dix considèrent que la société évolue dans le bon sens sous l'impulsion de la Charte. On voit les tribunaux comme un rempart contre les excès des gouvernements et de la police. Pour les spécialistes, ce n'est pas aussi simple. On s'intéresse à l'interprétation de la Charte avant tout ; pour les uns elle est trop conservatrice, pour les autres trop libérale ou interventionniste. Certains adoptent une analyse cas par cas. La grande question est celle de l'équilibre entre les pouvoirs législatifs et judiciaires. C'est pour cela que les plus importants débats ont

porté sur l'article 1 et l'article 33, et plus récemment sur l'article 7 de la Charte. On a généralement salué les décisions renforçant les identités et droits des minorités en matière linguistique et scolaire, eu égard aux droits des autochtones et métis. On s'est cependant inquiété du fait que la Cour suprême ait élargi la notion de droits positifs et adopté la notion de préjudice comme critère de base. Une autre inquiétude tient au fait que l'interprétation de textes constitutionnels a beaucoup influencé l'interprétation des lois ordinaires et créé une tendance à s'éloigner facilement de l'intention législative. Dans ce domaine, il est impossible de prédire l'avenir. Le rôle de la cour est clair au plan théorique mais il dépend largement de l'approche des juges qui la composent. La composition de la Cour suprême du Canada va changer beaucoup d'ici 3 ans et ceci aura un impact certain. Déjà les commentateurs disent que depuis 10 ans la cour est devenue plus conservatrice ou plus pragmatique selon son point de vue, plus disposée à contrôler les politiques sociales pour les uns ou trop disposée à revenir en arrière en matière de droit à l'égalité pour les autres. Le seul constant général c'est que l'on a de fait américanisé notre système juridique en mettant l'accent sur les droits individuels et la révision constitutionnelle. Bonne chose ou pas ? Cela dépend de sa philosophie politique et de son évaluation de la performance des tribunaux. Pour ce qui est du fédéralisme, on peut signaler deux choses. D'abord la reconnaissance du principe même dans le renvoi sur la sécession du Québec, ensuite la mention de la notion de fédéralisme coopératif dans quelques décisions où il était question des notions d'immunité juridictionnelle et de prépondérance fédérale. Je ne suis pas convaincu que ces choses aient été inspirées par la Charte.

Tout revient en somme à une question d'interprétation constitutionnelle. On peut se pencher sur les théories de « originalism » (ou intention première du constituant), de « new originalism » (ou le sens premier (original meaning) de la norme de « living constitutionalism » (soit la constitution en évolution déterminée de façon discrétionnaire). Dans tous les cas il y a des difficultés d'application et de ce fait une difficulté à prédire l'avenir. Ici, au Canada, on a rejeté l'« originalism », mais on examine les sources historiques ; on insiste sur la définition de la question justiciable, mais on tient compte du contexte politique, économique et social. De fait les juges vont attribuer un sens en fonction de multiples facteurs dont leur propre expérience, leur psychologie et les influences extérieures qui ont formé leur pensée. Les guides sont historiques et jurisprudentiels, mais même cela n'est pas déterminant. L'opinion des juges sur la valeur relative de l'histoire ou de l'obligation de suivre un précédent de façon générale ou précise va varier. Difficile de voir ici beaucoup d'objectivité. Les valeurs courantes vont souvent peser plus que l'histoire législative. La conclusion évidente est que l'interprétation va être plutôt riche et surprenante. Dworkin dit qu'il n'y a qu'une bonne réponse à toute question constitutionnelle. Mart dit que nous travaillons avec « an open textured language » et que cela invite à des jugements moreaux et des choix politiques, voire des choix basés sur le bon sens. Un autre auteur, Solum, nous rappelle que le sens est une chose, l'application une autre chose. En somme, les philosophes aident à préciser la pensée juridique plus qu'à solutionner les problèmes courants.

LA CONDITION CONSTITUTIONNELLE DES CANADIENS: ÉTAT DES LIEUX ET PERSPECTIVES

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RÉSUMÉ

Cet article se propose de produire une synthèse nécessairement incomplète, parce que le corpus des textes portant sur cette question est infini, mais néanmoins structurée, argumentée et, il faut l'espérer, éclairante de la réponse donnée par la science politique à la question suivante : suite à la réforme constitutionnelle de 1982, les Canadiens sont-ils devenus constitutionnellement souverains ? Quelle est, en somme, leur condition constitutionnelle ? Cette condition se définit par le critère démocratique, c'est-à-dire la capacité des citoyens à agir sur leur constitution. L'article suggère que bien que plusieurs changements aient été apportés à la Constitution, ces derniers ont été sectoriels et régionaux. Examinant les trames explicatives institutionnaliste, réformiste, organiciste et idéaliste, le texte conclut au statu quo constitutionnel depuis 30 ans, appuyé par une majorité de Canadiens.

ABSTRACT

This paper proposes a synthesis, necessarily incomplete given the infinity of texts on this subject, but nevertheless structured, reasoned and, hopefully, illuminating of the response given by political science to the question: Following the constitutional reform of 1982, are Canadians now constitutionally sovereign? What is, in fact, their constitutional condition? This condition is defined by the democratic criterion, i.e. the ability of citizens to act on their constitution. The article suggests that although many changes have been made to the Constitution, they were mostly sectoral and regional. Examining the institutionalist, reformist, organicist, and idealist explanatory frames, the text concludes on the constitutional status quo experienced in the last 30 years, and supported by a majority of Canadians.

Quelque trente ans ont passé depuis la proclamation de la *Loi constitutionnelle de 1982* qui consacrait le plus important remaniement constitutionnel depuis l'adoption de l'*Acte de l'Amérique du Nord britannique* en 1867. Pour nombre d'observateurs, cette réforme modifiait si profondément l'ordre constitutionnel canadien qu'elle équivalait – c'était l'opinion de Pierre Elliott Trudeau mais aussi d'un fervent nationaliste comme Fernand Dumont – à une refondation du Canada.

L'événement a frappé les imaginations. Il a été abondamment commenté par les experts. Devant la pluralité et la diversité des regards posés sur 1982, cet article se propose de faire une synthèse nécessairement incomplète, parce que le corpus des textes portant sur cette question est infini, mais néanmoins structurée, argumentée et, il faut l'espérer, éclairante de la réponse donnée par la science politique canadienne à la question suivante : suite à la réforme constitutionnelle de 1982, les Canadiens sont-ils devenus constitutionnellement souverains ? Quelle est, en somme, leur condition constitutionnelle ?

LA NOTION DE « CONDITION CONSTITUTIONNELLE »

La notion de « condition constitutionnelle » n'est pas une notion juridique. Elle nous renvoie plutôt à la face politique de toute constitution, c'est-à-dire au type de rapports entre les citoyens eux-mêmes et entre les citoyens et leur État que la Constitution contribue tantôt à structurer, tantôt à exprimer. Elle parle d'abord et avant tout des citoyens.

La condition constitutionnelle effective des citoyens peut être évaluée selon une pluralité de critères : dans quelle mesure la Constitution se révèle-telle, à l'usage et pour les citoyens, un vecteur de justice sociale, de liberté, de solidarité, de prospérité économique ou de stabilité politique ?

Le critère cardinal à partir duquel cet article propose d'évaluer la condition constitutionnelle des Canadiens est le critère démocratique. Celui-ci pose que le pouvoir qu'ont les citoyens d'agir sur leur constitution à l'intérieur de règles procédurales convenues, équitables et efficaces donne la mesure de leur souveraineté constitutionnelle et est un trait essentiel de la démocratie constitutionnelle. Le critère démocratique subsume tous les autres parce qu'il découle de la volonté librement exprimée des citoyens et de l'efficacité de cette volonté.

La capacité de changer la Constitution devient ainsi le test ultime de la légitimité de la Constitution. À travers cet exercice, les citoyens « consentent » aux règles qui régissent leur communauté politique, règles qu'ils ont eu la liberté effective de contester, de débattre et de modifier. Ce consentement dès lors va au-delà d'un consentement tacite ou passif des citoyens : il implique leur participation active, délibérée, explicite et déterminante à l'énonciation des règles constitutionnelles qui les régissent : "This is the social contract in its purest form, where community comes into being through the meeting of minds that occurs in contract[1]".

Si les citoyens, pour quelque raison que ce soit, n'ont pas le pouvoir de changer leur Constitution à l'intérieur de règles procédurales convenues, équitables et efficaces, force est de reconnaître dès lors que l'ordre constitutionnel qui est le leur n'est pas aussi totalement démocratique qu'il se prétend. La légitimité de la Constitution est alors en cause. Le cas échéant, les citoyens doivent composer avec un déficit démocratique dont l'importance et la portée doivent être correctement appréciées, puisque la « condition démocratique » des citoyens est plus large que la seule condition constitutionnelle. Il faudra néanmoins conclure que les citoyens jouissent, au mieux, d'une souveraineté constitutionnelle incomplète et que cette incomplétude, si elle est significative, durable, voire irrémédiable, révèle les limites de leur condition constitutionnelle et, du même coup, celles de leur condition démocratique.

Enfin, la notion de « condition constitutionnelle des Canadiens » n'est pas sans connotations politiques en lien avec le débat qui opposent les tenants du projet national canadien et ceux des projets nationaux québécois et autochtones. L'utilisation qui est ici faite de cette expression revient à reconnaître que la réforme constitutionnelle de 1982 a effectivement établi la prédominance du projet national canadien sur ses rivaux.

UN BILAN DE 1982

Ces premières considérations nous amènent à la réforme constitutionnelle elle-même : quels en étaient les principaux objectifs ? Dans quelle mesure ont-ils été atteints ?

La réforme de 1982 poursuivait essentiellement trois objectifs, à savoir : rapatrier la Constitution de la Grande-Bretagne vers le Canada ; assurer la prédominance définitive du projet national canadien sur les projets nationaux concurrents ; et rendre les Canadiens maîtres de leur Constitution, c'est-à-dire leur donner les moyens de modifier leur Constitution selon leurs besoins et leurs désirs dans le respect des règles de la démocratie canadienne.

Quelques trente ans plus tard, on peut raisonnablement prétendre que l'ambitieux projet de Pierre Elliott Trudeau a atteint ses deux premiers objectifs : la Loi de 1982 est une loi canadienne et l'ordre constitutionnel issu de la réforme a résisté avec succès aux coups de butoirs successifs que les projets nationaux québécois et autochtones lui ont asséné au cours des années 1980 et 1990. La pérennité du Canada de 1982 ne semble plus aujourd'hui sérieusement menacée.

La réforme de 1982 a toutefois failli à la tâche en ce qui concerne son troisième objectif : force est de reconnaître qu'elle ne confère aux Canadiens qu'une souveraineté constitutionnelle tronquée, qu'une capacité limitée et insuffisante de modifier formellement leur Constitution. Qu'est-ce à-dire ?

IMPACT SUR LA CULTURE CONSTITUTIONNELLE CANADIENNE

Malgré ce que croient la vaste majorité des Canadiens, la réforme constitutionnelle de 1982 ne les a pas rendus constitutionnellement souverains. La culture constitutionnelle canadienne des années 2000 reflète bien ce constat d'échec : toute évocation d'une mesure de portée nationale exigeant une éventuelle modification de la Constitution est désormais toujours renvoyée aux calendes grecques, qu'il s'agisse de réintégrer le Québec dans le giron constitutionnel canadien ou de réformer le sénat autrement que par des modifications à la marge. Dans la bouche des leaders politiques canadiens, le discours constitutionnel se développe désormais sous le signe de la procrastination et du bricolage infraconstitutionnel. Pour les citoyens, le constat en est un d'impuissance.

Cette impuissance n'a pas été immédiatement apparente, ni pour le grand public, ni d'ailleurs pour les leaders politiques des années 1980 et 1990. Elle a plutôt fait l'objet de prises de conscience successives à travers les péripéties référendaires, juridiques et constitutionnelles qui ont ponctué cette période.

Il serait certes abusif d'affirmer que la procédure formelle de modification de la Constitution est si dysfonctionnelle qu'elle prive les Canadiens de tout pouvoir sur leur Constitution. Dans les faits, la procédure de modification – qui est en fait un bouquet de cinq procédures régies par des conditions spécifiques et applicables à différents types de modification – a été utilisée plus d'une dizaine de fois depuis son adoption en 1982, notamment par le Nouveau-Brunswick en 1993 pour changer le statut linguistique de la province, par le Québec en 1997 et par Terre-Neuve et Labrador en 1998 pour modifier leur régime scolaire respectif.

Dans ces trois cas comme dans presque tous les autres, les modifications ont été réalisées en faisant appel à l'article 43 de la partie V, qui régit les modifications ne concernant que quelques provinces. Elles échappaient en fait aux procédures de modification plus exigeantes relatives à des enjeux de portée pancanadienne prévues par la partie V, à savoir celle du « Consentement unanime » de toutes les provinces et du gouvernement fédéral, et celle du « 7-50 », qui exige le consentement du gouvernement fédéral et de sept provinces représentant 50 % de la population.

Si le nombre de modifications constitutionnelles réussies depuis 1982 est significatif, la portée de ces changements, par contre, est essentiellement sectorielle et régionale. En fait, les projets plus ambitieux de portée pancanadienne – on pense ici à l'accord du Lac Meech en 1987-1990 et à l'accord de Charlottetown en 1992 – se sont soldés par des échecs spectaculaires qui ont marqué profondément et de manière indélébile la culture politique canadienne.

Ces échecs ont fait ressortir les lacunes de la procédure de modification. Ils ont de plus et surtout clairement montré que le rapport des Canadiens à leur Constitution avait profondément changé depuis 1982, que ceux-ci exigeaient désormais d'être partis au processus de modification de leur Constitution en même temps que rien, dans cette Constitution adoptée en leur nom, ne leur donne vraiment les moyens de le faire directement. Malgré certaines tentatives maladroites pour combler ce déficit démocratique – au premier chef desquelles le référendum constitutionnel de 1992 qui est venu se superposer à la procédure formelle de modification, déjà fort exigeante –, il n'existe à ce moment-ci aucun plan gouvernemental ou autre pour remédier à cette situation.

PARADIGMES ET TRAMES EXPLICATIVES

La condition constitutionnelle réelle des Canadiens, telle que nous venons de la voir, a été amplement décrite dans la littérature politologique canadienne. Elle est le résultat de la quête séculaire des habitants de ce pays pour apprendre à vivre ensemble. En raison de sa permanence dans l'histoire, de ses thèmes récurrents et de sa logique contraignante, elle correspond dans le discours politique canadien à un paradigme historique, « le paradigme constitutionnaliste » : on s'inscrit dans le paradigme constitutionnaliste si l'on voit dans la constitution, quelle qu'elle soit, la source première des maux politiques et de leur solution, si l'on estime que la solution au malaise canadien, celui lié à la présence de projets nationaux concurrents, passe nécessairement par la négociation d'un nouvel arrangement constitutionnel.

On peut faire remonter l'émergence du paradigme constitutionnaliste à l'époque de la Conquête (1759-1760) et à l'absorbation de la Nouvelle-France dans l'Empire britannique. L'une des conséquences de ce tournant historique, en effet, fut de forcer les vainqueurs et les vaincus de 1759-1760 à se doter d'institutions politiques adaptées aux nouvelles circonstances qui étaient désormais les leurs. L'histoire canadienne des XIX^{e} et XX^{e} siècles peut être lue comme le récit de cet effort toujours frustré de doter l'Amérique du Nord britannique d'institutions politiques et de modes de fonctionnement capables de concilier les exigences des uns et des autres sous une même autorité politique et sous une même règle de droit : la Proclamation royale de 1763, l'*Acte constitutionnel de 1791*, l'*Acte d'Union de 1840*, l'*Acte de l'Amérique du Nord britannique de 1867* et les pourparlers constitutionnels de la seconde moitié du XX^{e} siècle sont autant de manifestations de ce désir des élites politiques de surmonter les tensions politiques de l'époque par la création d'institutions mieux adaptées aux priorités et aux intérêts en présence.

La réforme constitutionnelle de 1982 n'est pas le chapitre le plus récent de cette odyssée ; elle en est néanmoins un moment paroxystique dont les effets structurants sur la culture politique canadienne contemporaine ne sont pas encore tous connus. Elle relève clairement du paradigme constitutionnaliste en même temps qu'elle en épuise le potentiel. Depuis 1982, le paradigme constitutionnaliste, en perte de vitesse dans l'imaginaire politique canadien – nous y reviendrons – se décline dans la littérature politologique en quatre cas de figure ou trames explicatives, à savoir :

La trame institutionnaliste

La trame institutionnaliste est le premier de ces cas de figure du paradigme constitutionnaliste tel qu'il s'exprime dans la littérature politologique post 1982. Elle est la trame de référence dominante à partir de laquelle nous venons d'esquisser les traits essentiels de la condition constitutionnelle des canadiens depuis 1982.

Les institutionnalistes – on pense ici à des auteurs comme Alan C. Cairns, Donald V. Smiley, Keith Banting, etc. – dressent un tableau plutôt sombre mais nuancé de la condition constitutionnelle des Canadiens. Ils constatent et déplorent que la réforme de 1982 ait fait l'impasse sur les revendications du Québec et qu'elle ait fait entrer en collision, en les cristallisant, deux traditions constitutionnelles aux logiques incompatibles.

La première de ces traditions, reflétée par la procédure de modification décrite à la partie V de la *Loi constitutionnelle de 1982*, renvoie à la tradition parlementaire britannique qui place le *locus* de la souveraineté dans les parlements, comme le faisait l'*Acte de l'Amérique du Nord britannique* de 1867. Selon cette tradition, nous dit Alan C. Cairns[2], la Constitution est l'affaire des gouvernements. En matière de constitution, les citoyens n'ont droit au chapitre qu'indirectement, par l'intermédiaire des élus, du Sénat et de la Couronne, qui ont tout autorité pour modifier la Constitution sans nécessairement devoir retourner au peuple. Tel fut le parcours suivi en 1867 et tel fut le parcours suivi en 1982.

La deuxième tradition, reflétée par la *Charte canadienne des droits et libertés*, renvoie à une conception républicaine, nationaliste, voire unitaire de la communauté politique. Elle situe le lieu de la souveraineté au-delà des parlements, directement dans le peuple. Cairns parle à son propos d'une Constitution de la *Charte* ou d'une Constitution des citoyens. La *Loi constitutionnelle de 1982*, par la *Charte*, qui en est l'âme, place les citoyens au cœur du régime constitutionnel canadien. Elle leur confère *de facto* le statut de premiers constituants, mais elle s'arrête là, sans leur donner les moyens de leur statut, les moyens de changer leur Constitution. L'échec de Meech et l'addition *post facto* d'une procédure de consultation populaire dans la foulée de l'Accord de Charlottetown sont autant de manifestations, sous l'influence de la *Charte*, de l'émergence d'un nouvel acteur constitutionnel rapidement devenu incontournable, à savoir le citoyen canadien.

En bref, c'est la leçon que nous enseigne la trame institutionnaliste – celle d'une fin de non recevoir donnée aux revendications historiques du Québec et d'une tension irrésolue au sein même de la *Loi constitutionnelle de 1982* entre une constitution des gouvernements et une constitution des citoyens.

C'est à partir de la trame institutionnaliste que les trois autres trames, les trames réformiste, organiciste et idéaliste, se démarquent et se comprennent.

La trame réformiste

La deuxième trame, la trame réformiste, prend le relais des analyses institutionnalistes. Les réformistes – on pense ici à des auteurs tels David E. Smith et Peter H. Russell, s'intéressent aux moyens par lesquels l'immobilisme constitutionnel engendré par la réforme constitutionnelle de 1982 peut être surmonté sans modifier formellement la Constitution dont ils reconnaissent le grippage.

Les réformistes parlent à ce propos de « micro politique constitutionnelle ». La micro politique constitutionnelle est le recours à des stratégies de contournement des rigidités de la Constitution, comme des ententes de gouvernement à gouvernement, comme moyens d'en assurer l'évolution.

Les réformistes opposent la micro politique constitutionnelle à la « macro politique constitutionnelle », qu'ils récusent. La macro politique constitutionnelle procède d'une remise en question globale des fins de la communauté politique ; elle ouvre, à terme, sur des réformes constitutionnelles de grande envergure, conflictuelles par la force des choses et souvent contre-productives pour cette raison. Meech, Charlottetown et les deux référendums québécois sont de parfaits exemples « macro politique constitutionnelle ».

Les réformistes continuent de croire que la Constitution peut être changée, mais de manière informelle, en évitant le plus possible les grands débats nationaux, jugés contre-productifs. Ils sont convaincus que la fédération peut perpétuellement se réinventer sans avoir à changer formellement la Constitution.

La trame organiciste

Les tenants de la troisième trame, la trame organiciste, tendent à minimiser le rôle des « agents » politiques et celui de la procédure formelle de modification de la Constitution pour jeter un regard plus systémique sur toute la question. C'est la vision dominante de la communauté juridique canadienne et celle que partage la plupart des juges de la Cour suprême. Elle a été développée avec une vigueur particulière par des auteurs comme W.J. Waluchow, Alan C. Hutchison et le réputé juriste Peter W. Hogg.

Les organicistes voient la Constitution comme une entité vivante, animée par son dynamisme propre et en perpétuel devenir. Ils accordent une place prépondérante au pouvoir juridique et à la métaphore de la constitution comme « arbre vivant capable de grandir et de grossir dans ses limites naturelles[3] » pour expliquer la vraie nature de la Constitution et du devenir constitutionnel. La trame organiciste fait sauter le loquet de l'enfermement

constitutionnel qu'on pouvait attribuer aux lacunes de la *Loi constitutionnelle de 1982* : elle réintroduit la notion de changement constitutionnel non plus conçu comme un acte ponctuel, délibéré et contrôlé, souverainement politique, mais comme le résultat de la compétence interprétative des tribunaux. Les tribunaux ont ainsi pour fonction d'interpréter la Constitution et d'en réconcilier les termes avec les conditions changeantes de l'environnement dans lequel elle s'inscrit.

Pour plusieurs analystes, pour Peter Hogg notamment, l'élargissement du rôle des tribunaux que consacre la *Loi constitutionnelle de 1982* instaure un dialogue nouveau et fécond entre le pouvoir juridique et le pouvoir législatif, en même temps qu'il infuse un élément de flexibilité indispensable au régime constitutionnel canadien. Pour d'autres, tel Andrew Petter et les tenants de « l'école de Calgary », il consacre un recul du pouvoir législatif, qui serait ainsi mis en tutelle par les tribunaux ; il constitue, pour cette raison, un appauvrissement inquiétant de la vie démocratique canadienne.

La trame idéaliste

La quatrième et dernière trame, la trame idéaliste, est porteuse d'espoir en même temps qu'elle dénonce l'ordre constitutionnel en place. Elle fait la promotion d'une communauté politique plus juste et d'une structure constitutionnelle remodelée en profondeur pour en assurer la meilleure adéquation à la réalité canadienne. On pense ici à des auteurs comme Guy Laforest, André Burelle, Alain G. Gagnon, Benoît Pelletier, du côté francophone, et Kenneth McRoberts, Will. Kymlicka et James Tully du côté anglophone.

La trame idéaliste procède de la dénégation explicite par ses tenants du caractère durable ou irrémédiable de l'impasse constitutionnelle canadienne. Cette dénégation laisse le champ libre à l'élaboration de projets de réformes constitutionnelles surtout fondés sur le caractère multinational du Canada et sur le droit des peuples à disposer d'eux-mêmes. Ces auteurs n'ont que faire de laisser au pouvoir juridique, comme l'évoque la trame organiciste, le soin de faire évoluer la Constitution. Comme les réformistes, les idéalistes croient à la volonté politique et à son pouvoir de changer les choses pour le mieux.

Les scénarios de réforme des idéalistes – souveraineté-association, souveraineté-partenariat, États associés, formes fortes du fédéralisme asymétrique, etc. – n'ont généralement qu'un faible coefficient de faisabilité et trouvent aujourd'hui pour la plupart peu d'échos au sein de la classe politique. Ils procèdent le plus souvent de positions de principe et tendent à négliger, au nom de ce qui doit être fait, la force d'inertie de l'ordre constitutionnel canadien et la nature des rapports de force qui s'y nouent. Les idéalistes ont le mérite de stimuler notre imaginaire politique en explorant dans leurs travaux des avenues politiques novatrices. Ce faisant, ils ouvrent des perspectives inusitées et, à défaut de changer les choses, ils témoignent de leur espérance politique propre et de celles de leurs contemporains.

QUELLES LEÇONS TIRER DE TOUT CECI ?

La réforme constitutionnelle de 1982 modifiait en profondeur l'ordre constitutionnel canadien : cette refondation, avons-nous dit, est l'aboutissement historique d'un double-conflit entre, d'une part, le Canada comme « nation » ou comme « multination » et, d'autre part, la Constitution comme la chose des gouvernements ou celle des citoyens.

La *Loi constitutionnelle de 1982* prend parti sur ces deux questions en faveur d'un Canada « one nation » et d'une constitution des gouvernements. Ce choix n'aboli pas d'un coup le double-conflit sous-jacent à la réforme. Son résultat net est néanmoins celui-ci : après les secousses des années 90 – comparables à des répliques sismiques – la réforme de 1982 préside au tournant des années 2000 à un apaisement du débat constitutionnel et à une perte d'importance de ce débat dans l'imaginaire politique canadien : la Constitution perd indéniablement du gallon comme enjeu politique, reflétant en cela un déclin du « paradigme constitutionnaliste » comme figure explicative et agissante de la culture politique canadienne.

Si le paradigme constitutionnaliste est en déclin, à quoi ressemble son paradigme successeur ?

En réponse à cette question, on peut raisonnablement poser l'hypothèse que l'élaboration de ce nouveau paradigme passera probablement par un amalgame en voie de réalisation des trames réformistes et organicistes avec, comme toile de fond, l'idée que le Canada, comme les États-Unis, a atteint sa maturité constitutionnelle et nationale.

Certes, il reste une bonne part d'indétermination dans ce processus même si certains facteurs, comme la marginalisation du Québec, le principal foyer de contestation du nouvel ordre constitutionnel canadien, a eu pour effet de réduire considérablement la zone d'incertitude que cette province contrôle au sein de la fédération et, ce faisant, de piper les dés constitutionnels en faveur du Canada « one nation ».

Cet état de fait a des conséquences différentes, selon qu'on est nationaliste québécois ou canadien en même temps qu'il sanctionne pour les uns comme pour les autres un « état d'enfermement constitutionnel ».

Pour les premiers, les tenants du projet national québécois, cet enfermement est une source de morosité politique chronique : les Québécois francophones

surtout sont à la recherche d'un moyen terme entre un ralliement honteux à l'ordre constitutionnel de 1982 et la rupture impossible du lien fédéral, entre la résignation et l'impuissance démocratique. C'est ainsi qu'on doit interpréter le flirt maladroit le l'Action démocratique du Québec (ADQ) avec la notion d'autonomie il y a quelques années, la naissance récente de la Coalition Avenir Québec (CAQ), l'effondrement soudain du Bloc québécois à Ottawa et l'engouement non moins soudain des Québécois pour le NPD lors des élections de mai 2011. Ces comportements apparemment erratiques de l'électorat québécois ne sont pas irrationnels ; ils ont un dénominateur commun : ils apparaissent comme autant de manifestations de ce syndrome d'enfermement et de la recherche toujours insatisfaite d'une nouvelle façon de cadrer la relation entre le projet national québécois et le projet canadien.

Pour les nationalistes Canadiens, qu'ils résident au Québec ou ailleurs au Canada, l'enfermement constitutionnel auquel les réduit la *Loi constitutionnelle de 1982*, tout réel qu'il soit, pèse de peu de poids : la nouvelle Constitution est en somme l'acte de naissance de leur Canada, un pays moderne, aux institutions centrales fortes, dont la pérennité n'est désormais plus menacée par l'existence d'un projet national concurrent majeur. L'élection en 2011 d'un gouvernement majoritaire à Ottawa sans l'appui du Québec les conforte dans cette conviction, tout comme le déclin du poids relatif du Québec dans l'ensemble canadien. Quant aux projets nationaux autochtones, ils sont toujours vigoureux, mais ils ne menacent pas l'intégrité du Canada comme le faisait le projet national québécois.

La réforme constitutionnelle de 1982 a doté le Canada d'une architecture constitutionnelle incomplète, dysfonctionnelle à certains égards, mais durable et jouissant d'un appui populaire considérable. Dans le temps long de l'histoire – dont les 30 dernières années ne sont que l'amorce – elle semble bien avoir définitivement convaincu les Canadiens qu'ils forment nation et que cette nation a atteint sa maturité constitutionnelle.

Simultanément, il se pourrait fort bien que1982 ait signé la fin du projet national québécois conçu dans les termes d'une nation distincte, « aujourd'hui et pour toujours, […] libre et capable d'assurer son destin et son développement ». S'il n'est pas mort, le projet national québécois semble constitutionnellement et définitivement harnaché, une conclusion que la plupart des Québécois refusent catégoriquement de considérer, mais qu'ils devront probablement tirer, tôt ou tard.

En somme, le *statu quo* constitutionnel, assoupli par le travail studieux du pouvoir juridique et par un certain art politique de composer avec les rigidités de la *Loi constitutionnelle de 1982*, semble installé à demeure au Canada. Il n'est pas une erreur de parcours susceptible d'être redressée à court terme, comme toute une génération de Québécois l'ont cru et l'espèrent encore, ni quelque chose assimilable à un lent processus de murissement constitutionnel qui jouerait à l'avantage du Québec, comme les fédéralistes réformistes essaient toujours de nous le faire croire.

Le *statu quo* constitutionnel est devenu, par la force des choses et depuis 30 ans, avec ses imperfections, avec l'appui d'une vaste majorité de Canadiens, la matrice du présent et de l'avenir constitutionnel des Canadiens.

Telle est désormais la condition constitutionnelle des Canadiens, Québécois inclus, trente ans après la réforme constitutionnelle de 1982.

NOTES

[1] Webber, Jeremy et Colin M. Macleod (dir.) [2010] *Between Consenting Peoples : Political Community and the Meaning of Consent*, Vancouver, UBC Press, viii, 269 p. : 28.

[2] Cairns, Alan C. [1992], *Charter versus Federalism. The Dilemmas of Constitutional Reform*, Montréal-Kingston, McGill-Queen's University Press, 150 p.

[3] Edwards *c.* P.G.du Canada, [1930] A.C. 124.

[4] Déclaration faite le 22 juin 1990 par le premier ministre du Québec Robert Bourassa à l'Assemblée nationale du Québec à la veille du délai prévu pour la ratification de l'Accord du lac Meech. (http ://fr.wikipedia.org/wiki/Declaration_du_22_juin_1990).

FRANCOPHONE QUEBECERS' AMBIVALENT ATTACHMENT TO CANADA

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ABSTRACT

The strength of the connection between Quebecers and Canada is a matter of debate, not the least because there is no agreement on what to measure and how to do it. Opinion surveys use the terms "attachment" or "identification" to gauge the presence or absence, as well as the intensity of the sense of belonging that people may have towards their group, community, or country. Such surveys show that Quebecers are, as a whole, comparatively less attached to Canada than other Canadians and that, proportionally, more French speakers in Quebec than English speakers elsewhere in Canada tend to put their province ahead of their country. However, the differences are not as clear-cut as one would expect. Polling data, as well as voting patterns, paint an ambiguous portrait of Quebecers' dispositions, but that doesn't necessarily mean that Quebecers themselves do not have strong, yet mixed feelings about their belonging to Canada.

RÉSUMÉ

La force du lien entre les Québécois et le Canada est un sujet de débat, notamment parce qu'il n'y a pas d'accord sur ce qu'il faut mesurer et comment le faire. Les sondages d'opinion utilisent les termes « attachement » ou « identification » pour évaluer la présence ou l'absence, ainsi que l'intensité du sentiment d'appartenance que les gens peuvent avoir à l'égard de leur groupe, d'une communauté ou d'un pays. Ces enquêtes montrent que les Québécois sont, dans l'ensemble, relativement moins attachés au Canada que les autres Canadiens et que, proportionnellement, plus de francophones du Québec que d'anglophones du reste du Canada ont tendance à placer leur province avant leur pays. Toutefois, les différences ne sont pas aussi claires que l'on pourrait s'y attendre. Les données de sondage, ainsi que les modes de vote, peignent un portrait ambigu des dispositions des Québécois, mais cela ne signifie pas nécessairement que les Québécois eux-mêmes n'ont pas de sentiments forts, quoique partagés, quant à leur appartenance au Canada.

How attached are French-speaking Quebecers—and more to the point, those who identify with the Québécois nation—to Canada? This lingering question goes back to the emergence of the sovereigntist movement in the 1960s and no single response has ever proven altogether satisfactory. The strength or weakness of the connection between Quebecers and their country is a matter of debate, not the least because there is no agreement on *what* to measure and *how* to do it. Of course, the most obvious and direct approach is to ask Quebecers themselves how they feel about Canada. This has been done once and again, and the polling data, while often illuminating about collective moods and reactions to specific circumstances, have not yielded conclusive results. That is, little else can be asserted after admitting the obvious fact that Quebecers are, as a whole, comparatively less attached to Canada than other Canadians and that, proportionally, more French speakers in Quebec than English speakers elsewhere in Canada tend

to put their province ahead of their country in terms of attachment; or that "Canada" elicits more attachment than "Confederation", "Ottawa", or "the federal government", thus showing that often the feeling of alienation stems more from the perception of (unfair or ineffectual) institutional arrangements than from a inherently negative attitude towards Canada as a nation or as an idea. The figures from many polls are consistent and significant with regards to these trends, but the gaps between Quebecers and other Canadians are not as extreme as an impartial, external observer could expect given the political rhetoric that builds on Quebec's nationalist claims: 25-to-35 percentage-point spreads indeed make a difference, but the core question remains open when we see that Quebecers still show a 62% rate of attachment to Canada—certainly much lower than that of the rest of Canadians (95%)[1], but nevertheless surprisingly high for a group which supposedly rejects Canada with recurring gestures of anger or contempt.

Let's then look at other ways of gauging Quebecers' attitude towards Canada. If the most direct approach is to simply put the question to individual Quebecers, as pollsters do in order to aggregate opinions into a collective portrait, the other reasonably straightforward approach is to examine voting patterns. Voting is actually an aggregation procedure through which a vast number of separate, private actions establish a single collective, public outcome. For almost two decades, the common assumption was that Quebecers, and particularly French-speaking ones, expressed their disconnect with Canada by massively turning to the Bloc Québécois in federal elections. This political party, born as dissident movement among various representatives from Quebec in the federal parliament, captured a large constituency through six national elections between 1993 and 2008, winning each time a majority of seats (in average, almost two thirds of the 75 seats from the province). The Bloc Québécois thus became the preeminent voice of Quebecers in Ottawa—and hard-core nationalistic at that too. Without getting into the debate on its actual political worth (how to assess the performance or usefulness of a party whose main goal is to "sit out" the political process or, as detractors would argue, to "destroy the country"?), we can briefly examine some of the numbers behind the phenomenon: since its creation and until 2008, this party attracted, in average, 42,6% of the popular vote, peaking in 2004 at almost 49% (in the aftermath of the "Sponsorship Scandal" that left many Quebecers repelled by the federal government's dubious or outright illicit use of public funds to counteract the nationalist movement), and then declining in 2006 (42,1%, 51 seats) and 2008 (38,1%, 49 seats), eventually crashing with the 2011 debacle (23,4% of the provincial vote, only 4 seats won).

Contrary to the widely held assumption that a cohesive majority of Francophone Quebecers would steadily support the Bloc during its period of political dominance in Quebec, this was never actually the case. Even in 2004, when the *Bloquiste* tide seemed unbeatable, it failed to muster a majority of French-speaking voters in as many as 17 electoral districts outside the main cities. Regarding the apparent split between Quebec's urban and rural areas, election expert Pierre Drouilly wrote in the 2005 edition of *L'Annuaire du Québec*, that "the Francophone *Bloquiste* vote is rather an urban vote, and mainly a Montreal vote". Moreover, in a 2008 piece published in *L'Action nationale*, Pierre Serré, also an expert on voting trends, argued that "since its arrival, the Bloc Québécois explicitly expresses the Québécois' malaise within the Canadian federation". The key word in Serré's quote is "malaise". This rather tepid, general sense of discomfort hardly conveys the acute and active disgruntlement that "separatists" are supposed to collectively hold against Canada. Should we lay this apparently undecided, uncommitted disposition on the usual cliché of Quebec's proverbial "ambiguity"? If evidence seems to show that, as humourist Yvon Deschamps famously declared, "Quebecers want an independent Quebec in a strong and united Canada", painting them as fence-sitters (or worse, "wanting the cake and eating it too"), we should also consider the possibility that "ambiguity" doesn't mean the same thing as "ambivalence". In other words, Francophone Quebecers may express, as a community, ambiguous—as in "equivocal", "unresolved"—claims, resulting from the aggregation of attitudes and preferences, but this reality could stem from strongly felt but mutually conflicting personal dispositions—which is the precise meaning of ambivalence.

ATTACHMENT, AMBIGUITY AND AMBIVALENCE

What does "attachment" or, for that matter, "identification" mean? Naturally these are the terms that pollsters will utilize to survey the presence or absence, and the intensity of the sense of belonging that people have towards their group, community, or country. I'm not suggesting that these are not the right words to employ, mostly because no one seems to offer any better alternative. However, it might prove useful to explore the underlying psychosocial configuration of what opinion surveys are struggling to observe. To this end, drawing from the sociology of knowledge and social psychology, it is possible to conceptualize the phenomenon of belonging through the words that we use to describe it. We—both as ordinary speakers and as experts—resort to a vocabulary over which we have little control, because language, like any objective system, has already embedded crucial but subtle distinctions between similar units. It's important to stress this aspect: the crucial element is in the distinctions, not in the units themselves.

Let's address this in a much more concrete manner. What's the meaning differential between "attachment" and "identification" when referring to belonging? Both words share the idea of a sense of connection to an identity, or more specifically to a collective that embodies that identity. "I'm attached to Canada", "I identify with Canada". Both phrases convey a fundamentally similar message, and both are apt to be qualified by degrees or intensity, and also to be negated. "I am not very attached to Canada", "I do not identify with Canada", etc. That's why they work in opinion polls. But, as I suggested, language as a system needs to be scrutinized through the internal differences that finely but effectively separate its units – its words. It goes without saying that not all speakers (or experts) use words in this self-conscious way, but that's not really a problem for my argument. I examine language to understand basic meanings that are rooted in it, not the words themselves.

So, what's the subtle difference between "attachment" and "identification", and how that may help us better understand the issue of belonging? At first, and this is certainly obvious to any of us: "attachment" seems to imply some emotional connection. An attachment is a bond, implicitly natural, spontaneous, even involuntary. We think immediately to our attachment to a particularly person, to our roots, or to our homeland. Conversely, although identification may suggest a similar sort of link, the term clearly veers towards a more rational experience. Two particular aspects of this become evident here: choice and conceptualization. Choice, of course, derives from rationality, which itself is entrenched on freedom. That is, one needs to be free from external influence and determinations to be rational to make a choice.

The other aspect is conceptualization, by which I refer to the process of extracting abstract qualities from an empirical entity. Identification, particularly in a psychological perspective, involves the assimilation by one's self of an attribute from another person or from an object. I may have an emotional attachment to my father (that is I love the whole concrete person with all his flaws), and I can identify with my father (that is I admire his virtues and try to live up to them). This little exercise in basic semiotics leads us directly to the well-known theoretical framework that opposes, among other things, ethnic and civic nationalism, or the organic idea of collective identity to the one grounded on the social contract. Now, how does this affect our discussions in general, or in particular to Quebec vis-à-vis Canada? For one very practical matter, it may affect what we are trying to measure and compare. Let me mention an example of this problem. When I took part in the design of a similar survey in Argentina, we had to translate the same questions into Spanish. This posed a momentous problem: the word "attached" (or "attaché", in French) does not really work in Spanish, as there is no corresponding term. A direct equivalent word was considered: "enganchado", but it can only be used in the mechanical, physical sense of attachment (i.e. a wing is attached to the plane), or else within the Argentinean slang as "being hooked on" (someone or something). Eventually, after careful consideration, we had to settle on "sentirse identificado", that is, "to feel identified with" (which, though ill-sounding in English, works in Spanish as an approximate mix of the two meanings).

While this discussion might sound rather technical (e.g. a methodological issue regarding polling), one can nevertheless wonder about the effect of choosing one or the other expressions (attachment or identification) when surveying about Canadian identity among Quebecers. If attachment to Canada is relatively low, that may be explained by heightened emotional links to Quebec (to its history, to ancestry, to the mother tongue, etc.) and to the negative feelings towards federalism that are a staple of the sovereignist narrative. However, we could speculate that identification with Canada could rate a little stronger, particularly if that's framed in terms of values (e.g. what Canada stands for, for example as opposed to the United States).

But I would like to dig a little deeper in the ways in which a sense of belonging is felt, expressed, and eventually measured. I'll resort now to a central tenet of political science: self-interest as a source of action. People's identities are important to them, obviously, but they're also important to others because identity can be the source of action. Not every identity, even if strongly felt by an individual, causes or explains behaviour. But we know that, when identity motivates people's behaviour, it can be a very powerful phenomenon. Attachment to one's group explains much of the ethnic and religious conflict that we see all over the world. People may fight for their community, for their motherland, for their race or blood. Also, group identification can be a source of action, as many would be ready to fight for a just cause or to uphold democracy and fundamental freedoms. In less dramatic contexts—for instance an election—citizens' behaviour is to a large extent explained by emotional attachment and rational identification (as in the following question: What part of emotional attachment and what part of rational identification underlie a Quebecer's vote for the Bloc Québécois?).

Both in the emotional attachment to a collective and in the rational identification with a collective, self-interest is a key factor, albeit generally concealed, even to the individuals themselves. This reality creates a fascinating dynamic by which attachment as a source of action is considered the purest form of disinterested motive. This

is of course rooted in the Western culture's notion that affections are strictly not a matter of choice, and constitute ends in themselves, never a means to achieve another goal. "I love my country", "I love my mother", nothing else is required to explain an action caused by that emotional "fact". This observation is relevant when dealing with public opinion and political attitudes and behaviour. In the name of social cohesion (Canada's national unity facing the challenge posed by Quebec; Quebec's survival as a French-speaking society facing the challenge posed by immigrants and minorities), emotional attachment is at the same time the answer (implying that the problems would be solved if Quebecers developed an emotional attachment to Canada, and if immigrants developed an emotional attachment to Quebec), and *the very single thing that cannot be imposed*. The command "Love me!" (or "be emotionally attached to me!") is the psychological counterpart of the logically impossible "I order you to be free!" How could we force Quebecers to become attached to Canada or immigrants to become attached to Quebec, and even if we could by means of some sort of enticement, what would be the value of that attachment—given that we culturally frown upon "interested" affection?

The alternative answer to the challenges of social cohesion when attachment is weak or absent is to turn to identification. Because identification is considered a matter of choice, and inherently rational, people can be exposed to the virtues with which to identify, and be asked to voluntary adhere to them. That's the basis of the Parti Québécois' 2008 bill on national identity, which included a pledge of allegiance, and also the Liberal government's Declaration of values that all immigrants must sign in Quebec since 2009. This Declaration commits the prospective immigrant to "agreeing to respect the common values of Quebec society" and to "declare that I wish to live in Québec within the framework of and abiding by its common values, and that I want to learn French, if I do not speak it already". The idea that identification can be stimulated through allegiance, in a kind of "moral contract", which in turn will eventually generate attachment constitute the underlying rationale of similar formal declaration of loyalty and adhesion to common values being now discussed or adopted in countries such as France and Israel.

SELF-INTEREST AND IDENTIFICATION

Let's go back to our dilemma as societies seeking cohesion, particularly when a sizable group does not seem to hold a strong bond with the rest of society. We'd like to elicit a sincere attachment, which we consider to be defined by the lack of ulterior motives (i.e. we deeply believe that true emotions cannot be a means to an end), but because of the very nature of attachment, it cannot be a matter of choice. Like faith or love, it appears that either "you have it or you don't". Much collective frustration stems from this reality: you could say that Quebecers don't waste affection on Canada, just like many immigrants and members of minorities don't waste affection on Quebec. But if there's one thing that aggravates even more the majorities, it's when the lack of attachment by some is combined with unabashed self-interest. As I said, attachment is seen as inherently disinterested, never instrumental to an end other than attachment itself. Even though this notion does not hold water against any serious sociological analysis—identity is indeed a form of self-interest—the reaction to interest-based claims by groups or individuals perceived as not bound by emotion to the rest of society—thus seen as disloyal, ungrateful, uncooperative, etc.—is generally extremely negative. This is the case in Canada regarding Quebec nationalism, and particularly the Bloc Québécois representation in Parliament, as well as Quebec regarding the reasonable accommodation controversy in 2007-2008.

In conclusion, one could argue that the most rational way of addressing the relative lack of attachment among some groups would be to openly discuss interests: What is gained by both groups from maintaining the bond that holds them together? Francophone Quebecers don't seem collectively ready to separate from Canada, but they certainly feel rather unattached to it. Many immigrants and minorities come and stay in Quebec, but they don't feel Québécois. In many respects, self-interest more than identity explains those difficult relations. But we have a deeply ingrained conception of identity and belonging that excludes self-interest, because we feel that identity should be an end in itself. What about identification? As I said, there is a clear trend towards dressing lists of common values, norms, or elements of a culture heritage that are somewhat detached from the collective in order to set seemingly abstract attributes with which one could identify. Some think that this might do the trick: it's rational, the result of a free choice by individuals, completely disinterested (we embrace democracy or gender equality as an end in itself regardless of the benefits we may derive from them). Thus we elude the dead-end of trying to impose an emotional attachment, then expecting it to be sincere and intense, and also we avoid dealing openly with interests when addressing the issue of identities. However, self-interest remains a key unspoken issue, as well as the paradox that adhering to principles (through signing a pledge or a declaration) by choice presupposes freedom from any constraint, which the required "contract" undoubtedly is, and sincerity ("good faith", in legal terms), which cannot be ascertained or enforced by the state. But, as we do in polite society, we ignore inconvenient facts and we act as if we don't expect any gain from doing what is right.

NOTES

[1] Jack Jedwab, "Love U Anyways: To What Degree Do Federal-Provincial Grievances Affect the National Bond?", paper presented at the "Governance, Attachment and Identities in Federal States: Comparing Canada, the United States, Germany and Spain" Conference, Ottawa, April 6th 2011.

COLLECTIVE IDENTITY AND FEDERALISM: SOME REFLECTIONS ON BELONGING IN QUEBEC

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ABSTRACT

The salience of questions pertaining to belonging and collective identity in Quebec continues to mark Quebec's political landscape, as revealed recently with the debates over reasonable accommodations. Yet recommendations and criticism about managing this diversity are often taken in isolation, without considering the broader political-institutional context in which Quebec finds itself. This brief essay examines the debate in Quebec by assessing the recommendations of the Bouchard-Taylor Commission in light of some structural elements of Canadian federalism. It argues that appropriate recommendations for social and political integration in Quebec must be preceded by some formal recognition that Quebec is a host society in its own right, as an integral aspect of Canadian citizenship.

RÉSUMÉ

La pertinence des questions relatives à l'appartenance et à l'identité collective au Québec continue de marquer le paysage politique du Québec, comme l'ont révélé récemment les débats sur les accommodements raisonnables. Pourtant les recommandations et les critiques sur la gestion de cette diversité sont souvent prises isolément, sans tenir compte de l'ensemble du contexte politico-institutionnel dans lequel le Québec évolue. Ce court texte examine le débat au Québec, en évaluant les recommandations de la Commission Bouchard-Taylor à la lumière de certains éléments structurels du fédéralisme canadien. Il soutient que les recommandations appropriées pour l'intégration sociale et politique au Québec doivent être précédées d'une reconnaissance officielle que le Québec est une société d'accueil en soi, ce qui représente une partie intégrante de la citoyenneté canadienne.

The notion of a distinctly Québécois citizenship has seen a spectacular progression. In the space of a lifetime, the dominant identification of Quebeckers has been profoundly transformed. From Canadians, they became French-Canadians, then Franco-Québécois, and finally, Québécois [...]. These transformations cannot be interpreted as a simple evolution of a sort of sentiment of belonging to the tribe. Rather, they represent a continuing progression of Québécois identity in which its foundations have passed from non-citizenship to citizenship.[1]

The ongoing furor over 'reasonable accommodations' goes a long way to revealing the extent to which questions about collective identity in the public sphere continue to dominate the political landscape in Quebec. The common denominator beneath the 'progression' identified by Will Kymlicka above is that Quebecers interpret their place in Canada through a collective lens, one that they *ought* to be responsible for shaping through their representatives. This brings us to the link between federalism and identity. For Quebec, determining the contours of belonging implies carving out a distinct citizenship space, which flows from a conception of Canadian federalism in which its desire for national affirmation, or self-determination, is institutionally acknowledged. The *telos* of federalism in Canada is to allow for the flourishing of a distinct host society in Quebec, not as the institutional basis for the construction of a larger transcendent identity.

For other observers, however, Kymlicka's interpretations of the development of a distinct citizenship are misguided – Quebec is and always will be concerned with "the tribe". In this view, national identity should not be invoked to obfuscate ethnic sectarianism. The language of citizenship is a political position undertaken by Quebec nationalists that, in the final analysis, can only be interpreted as a threat to Canadian citizenship. Indeed, a common reaction to the fact that Quebec was having this very public and sometimes painful exercise in sociocultural introspection was that Quebec society was less amenable or open to cultural pluralism.

Most states, however, grapple with the challenge of recognizing minority cultures and religious practices without being attacked as sectarian. Liberal polities regularly engage in debates about the limits of cultural pluralism without facing accusations of undermining citizenship. This debate, however, is particular due to Quebec's ambiguous status as a host society. Under the present federal system, Quebec is not formally recognized as a constituted political community. In this brief commentary I want to explore the importance of considering the larger role of federalism in these deliberations about cultural and religious accommodation, social and political integration, and ultimately, the sources of national identity in Quebec society.

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In Canada, federalism itself is a contested concept, and the story of collective identity demonstrates that this constitutive condition is not merely academic. For some, federalism is meant to transcend differences while others see it as the expression of a normative acknowledgment of difference – unity in diversity. Yet the place of collective identity in the Canadian polity is not neatly reflected in federal institutions. Many non-territorial groups have achieved constitutional protections, Aboriginal groups have largely made claims on the basis of nationhood yet have largely been shut out of the federal architecture, and Quebec has traditionally viewed itself not as a province like the others but as a political community or 'societal culture'[2] in its own right – an internal nation[3] rather than a territorial or administrative unit of a larger nation. This has resulted in competing visions with regards to the constitutive bases of Canadian federalism. In contrast to Quebec's view, federalism in Canada is formally organized around principles of provincial equality, a Charter of Rights and Freedoms as a lynchpin of citizenship, bilingualism based on the personality principle[4] and multiculturalism. In other words, it is difficult to provide a normative framework for collective identity if the boundaries of citizenship are themselves subject to continuous contestation. Who determines the boundaries of citizenship, including questions about culture; (re)distribution and the bundle of rights and obligations?

The larger setting of federalism thus only serves as the institutional backdrop for either the recognition of differentiated citizenship, where rights and responsibilities in Quebec are understood to be distinct, or universal citizenship, where strict equality from coast to coast prevails. The recommendations of the Commission, as I will show below, will be directly affected by this larger institutional/ideational setting. The larger environment cannot simply be set aside. Quebec identity is not and should not be conceptualized as a site for the expression of 'culture'. This trivializes what Quebec is and its role in carving out a space for itself as a host society, and furthermore, it treats Quebec as an object of cultural policy. Within the larger federal system, and particularly Quebec's position on matters relating to integration and immigration, Quebec views itself as a hub of social and political integration.

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In 2008, the Final Report of the Bouchard-Taylor Commission[5] made several recommendations that touch on the question of belonging in Quebec. Among its observations, the Commission encouraged the Quebec government strengthen its model of 'interculturalism', defined as a pluralist approach (integrative pluralism), through a law or more pronounced policy statement and to favour open secularism, a less rigid approach relative to strict secularism that allows for wide expression of religious belief in the public sphere with some qualifications. Several assumptions underscore these recommendations. First, Quebec's debates about identity markers are to be resolved through continuity rather than rupture – the Commission

noted that Quebec has been successful in its integration efforts, and dismissed many of the recent social clashes as the product of irresponsible media reporting. Second, in opting for integrative pluralism and open secularism, the Commission left itself open to criticism from Quebec nationalists on two fronts – that it trivialised Quebecers' genuine anxieties about contemporary threats to national identity and that it was a disguised re-iteration of Canada's policy of Multiculturalism. Third, the Commission was thus forced to explicitly state that interculturalism is different than multiculturalism, yet its only justification was that multiculturalism was unsuitable for Quebec, and that it was not in the mandate of the Commission to examine Quebec-Canada dynamics in this area.

I will not look very closely at the model of interculturalism[6] as it was conceptualized by the Commission, which sought to strike an appropriate balance between social cohesion and diversity, and more specifically, around the place of the francophone majority in relation to ethno-cultural minorities. I believe the model of social and political integration outlined by the Commission is well-reasoned, clearly articulated and defensible for Quebec society.

I want to take this space to examine the fact that there is no justification for Quebec's elaboration of a distinct model in the first place. The very idea of 'national models' of integration assume that a society's particular constitutive trajectory – through various nation-building initiatives – establish it as an appropriate site for the elaboration of citizenship.[7] While I argue that a model of cultural pluralism for Quebec is necessary, and appropriately debated and developed in Quebec (as a host society), the matter is nevertheless proceeding in a unique social and political context. Quebec is an internal nation in a federal structure that does not recognize differentiated citizenship based on the existence of a plurality of nations. Quebec thus cannot engage in national integration in a neutral environment – it must contend with the presence of Canadian citizenship – a competing narrative.

In exploring the boundaries of cultural practices, the Commissioners were confronted with two broad sets of concerns. The first relates to ensuring the flourishing and continuation of a sense of collective identification centred on the French language in Quebec. Within these aims we find more robust concerns about the cultural continuity of the majority francophone group in Quebec; a less demanding aim that a French-speaking community ought to be available to future generations; a project for the secession of Quebec as an independent nation; and so on. The common thread is that a particular collective identity, however defined, ought to be relevant to any model purporting to manage diversity.

The second broad area of concern is to navigate through questions of ethno-cultural diversity through the lens of certain norms, such as equality, recognition, access, participation, reciprocity, dialogue, participation, and so on. From this view, social relations are taken as a bounded reality in Quebec. While particular to the political sociology of Quebec, most liberal democracies are grappling with similar challenges. The concern here is ensuring that minority groups enjoy access to public goods; participate in democratic deliberations on the orientations of society; in other words – to feel at home. Essentially, this involves fulfilling the responsibilities of a host society.

I chose to frame the challenges confronting the Commission as such is because I want to argue that these two sets of concerns cannot be reconciled simply through the elaboration of a single model of social and political integration, regardless of how coherently it is formulated and defended. While I applaud the Commission's commitment to continuity, there was nevertheless a missed opportunity to explore the entire set of challenges at work here. Indeed, other than a constant reminder that identity in Quebec is subject to insecurities that do not exist in the broader North American context, there is barely any mention of the significance of elaborating a national model of integration from the structural position of an internal nation.

Most political communities grappling with the challenges of diversity can safely deliberate without a lingering existential angst. In entering this game, Quebec is in effect engaging in a political act of circumscribing a community of reference. Undertaking the task and committing resources to formulating a model of integration is an act of national affirmation, yet there is no recognition of this fact from the wider society, thus nation-building becomes a zero-sum game, with national integration resembling a competition of sorts.[8] In other words, formal citizenship makes no substantive claims on citizens to be engaged with Quebec society as a democratic space involving a distinct set of rights and responsibilities. Unlike other states in a similar position of articulating the boundaries of citizenship in conditions of socio-cultural diversity, Quebec is constantly forced to justify its involvement in this exercise on top of its substantive positions on the limits of cultural pluralism.

What are some of these initiatives in 'national affirmation'? Here we can include the many statements of introspection about markers of belonging, including the activities of the Commission itself, the evolution of interculturalism as defined by a series of policy statements over the past 25 years or so, the Quebec state's prominent role in the area of immigration (including selection and integration), the Quebec Charter of Rights and Freedoms

and the Charter of the French language – in other words, the organic citizenship activities specific to Quebec society that are endowed with an inherent 'identity-forging' character.

The success of Quebec's efforts in this area, or the extent to which this affirmation is allowed to result in effective integration policies, depends almost entirely on the recognition that the affirmation activities of Quebec are legitimate. This is particular to a multination state.[9] Indeed, it was well within the mandate of the Commission to make recommendations about how Quebec's attempts to carve out a citizenship space ought to be strengthened, recognized, and at least negotiated prior to delving into the specifics of a conceptual framework for the management of diversity. In this context, citizenship becomes matter of political interpretation and, ultimately, contestation. As such, the reciprocity and dialogue required to negotiate the recognition of national pluralism at the larger federal level must precede any elaborate model for the management of ethno-cultural relations in Quebec. I believe the Commissioners were mistaken in assuming that they could navigate through these issues while claiming that Quebec's place in Canada is of little concern in their deliberations.[10]

In advocating interculturalism and open secularism, the Commission privileged a conception of integration based on cultural synthesis rather than cultural convergence.[11] If we return to the twin phenomena of affirmation and recognition, however, we can point to a paradox. Whether we speak of cultural convergence, common public culture, civic pact, Quebec citizenship, or integrative pluralism, they are all manifestations of Quebec's project of national affirmation. Because of this inherent attribute of multination states, the act of explicitly defining a community of reference rather than simply managing its social components must be built into the model. An emphasis on a pure 'synthesis' model fails to achieve this. Quebec simply cannot subscribe to an unqualified model of cultural pluralism in the same way that Canada can.

As such, the idea of cultural convergence cannot merely be dismissed as a sectarian affront to Canadian multiculturalism – it must inevitably enter the picture because of the twin requirements of affirmation and recognition confronting an internal nation. Whether cultural convergence ought to be directed 'towards' the francophone majority culture as the primary point of reference, in a robust sense, is a matter of hotly contested debate in Quebec. However, at a minimum, citizens require some recognition that their loyalties, contestations, demands, participation, collective goals, individual goals, etc., are directed at a political community deemed to legitimately exist. Their energies must converge towards some defined reference. This political dilemma limits the extent to which a 'pure' model of cultural pluralism, devoid of contingencies and qualifications, can be applied in Quebec. In short, recognition itself assumes the role of a founding moment for the elaboration of a point of convergence – it establishes that a distinct host society actually exists and in a sense provides a 'normal' outlet for these debates about national identity to proceed. What the Commissioners refer to as a 'creative tension' between the majority francophone culture and minority cultural groups is not negotiated on neutral ground, as might be the case in most other contexts.

In the end, whether there exists a true 'Quebec identity' that it is threatened misses the crux of the challenge. National identity only takes shape to the extent that the state in Quebec is responsible for a bundle of formative projects related to social, political and cultural integration. With regards to the actual markers of Quebec identity, I believe that the Commission rightly points out that cultural interaction will cause this to evolve. We tend to confuse the affirmation of a majority group in Quebec that seeks to perpetuate certain collective traits with the existence of something called Quebec culture – two very different concepts with regards to the development of a model of social and political integration. No integration policy can deal uniquely with the latter – it is a much larger historical question that needs to be constantly revisited through day-to-day interactions.

Indeed, if the Canadian experience has revealed anything it is that culture is often treated as a target of central policy-making decisions and not the basis for structuring citizenship relations. In this context, how can we have a fruitful debate on the contours of the *projet de société* if the society in question does not really exist in the eyes of many citizens whose allegiance is actively sought through the cultural policies established in Ottawa. From this vantage point, it is not surprising that sociocultural relations in Quebec are strained regardless of the actions of the Quebec state – the anxieties and subsequent debates seem to be taking place among francophone Quebecers, and it is seen as a problem related to its place in the universe, not a real debate about how to accommodate cultural minorities. As long as this situation persists, some citizens will view Quebec's deliberations about belonging as a sectarian movement that seeks actively to strip them of the gains they made in attaining recognition for cultural pluralism at the pan-Canadian level – again, a zero-sum game.

The real question here thus concerns sovereignty – it involves the actual capacity and legitimacy to manage cultural relations in the first place. Whatever the term

employed: context of choice, host society, nation, distinct society, societal culture, etc., the idea of integration in Quebec cannot be tackled without the involvement of the larger Canadian multination, and this is where the Commission fails to address the totality of the problem as it relates to cultural relations in Quebec.

To conclude, cultural pluralism and a minority nation are in a tenuous relationship precisely because of the tendency to equate a minority nation with a sectarian culture that is less inclined to embrace diversity. As such, the Commission's recommendations alienate those that view Quebec's role in this area as exorbitant – as a wrecker of Canadian citizenship, because there is no apparent reason why Quebec has to determine these boundaries when they already exist in the formal citizenship structures of the country. On a second front, the model alienates Quebec nationalists that believe Quebec is not well served by a policy that completely disregards the prominent role of Francophone culture in the overall terms of integration – those that want to see either a more substantive cultural pole of allegiance or those that want a civic or republican conception of the terms of membership in Quebec. A constitutive question ought to be treated as such – it is not a debate about cultural relations per se, but about participation, rights, access, belonging, and so on – it is about citizenship. The Commission does not go far enough in exploring the consequences of this distinction.

NOTES

[1] Will Kymlicka, *Théories récentes sur la citoyenneté*, (Ottawa: Multiculturalisme et Citoyenneté Canada, 1992): 45. (My translation).

[2] This concept is attributed to Will Kymlicka, *Multicultural Citizenship*, (Oxford: Oxford University Press, 1995).

[3] Other terms often employed include sub-state nation, or minority nation.

[4] See Kenneth McRoberts, "Struggling Against Territory: Language Policy in Canada," in Tony Judt and Denis Lacorne (eds) *Language, Nation, and State: Identity Politics in a Multilingual Age* (New York: Palgrave MacMillan, 2004): 133-160; and Linda Cardinal, "Language Planning and Policy Making in Quebec and in Canada", in S. Gervais, C. Kirkey and J. Rudy, (eds.), *Quebec Questions*, (Toronto: Oxford University Press, 2010): 184-201.

[5] Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation*, Final report of the Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles (CCPARDC), (Québec: Gouvernement du Québec, 2008).

[6] The Commission's defines the model of interculturalism as follows:
a) institutes French as the common language of intercultural relations;
b) cultivates a pluralistic orientation that is concerned with the protection of rights;
c) preserves the necessary creative tension between diversity, on the one hand, and the continuity of the French-speaking core and the social link, on the other hand;
d) places special emphasis on integration and participation; and
e) advocates interaction.

[7] The idea that citizenship policies reflect a sense of national self-understanding was brilliantly brought to the fore in a now classic work by Rogers Brubaker, who highlighted the contextual importance of national identity. In other words, nations have different ideas about citizenship despite shared understanding of liberal or democratic justificatory schemes. The idea of distinct 'national models' is thus particular salient for our purposes because of the particular political sociology of the multination state. See *Citizenship and Nationhood in France and Germany*, (Cambridge, Mass.: Harvard University Press, 1992).

[8] See Micheline LaBelle and Francois Roçher, "Immigration, Integration and Citizenship Policies in Canada and Quebec: Tug of War Between Competing Societal Projects", in R. Zapata-Barrero, (ed.), *Immigration and Self-Government of Minority Nations*, (Brussels: Peter Lang, 2009).

[9] For more on this point, see Chapter 4 of Alain-G. Gagnon and Raffaele Iacovino, *Federalism, Citizenship and Quebec: Debating Multinationalism*, (Toronto: University of Toronto Press, 2007).

[10] For more on Quebec's role in the articulation of citizenship with its standing as a minority nation and/or the constitutive principles of Canadian federalism, see Gagnon and Iacovino, *Op. Cit.* [2007] and Guy Laforest, *Pour la liberté d'une société distincte: Parcours d'un intellectuel engage*, (Ste.-Foy: Presses de l'Université Laval, 2004).

[11] See Raffaele Iacovino and Charles-Antoine Sévigny, "Models of Managing Diversity", in C. Kirkey, S. Gervais and J. Rudy (eds.), Québec Questions: *Québec Studies for the 21st Century*, (New York: Oxford University Press, 2010). Briefly, a common public culture will result from intercultural exchange, in a fusion of horizons, while convergence stresses the importance of the majority francophone culture as a pole of allegiance.

FEDERALISM, UNITY FROM RIGHT TO LEFT: IS THE CANADIAN IDEOLOGICAL SPECTRUM EVOLVING?

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ABSTRACT

This essay considers whether the success of the New Democratic Party in the 2011 federal election indicates a shift on the part of Canadians away from the centre of the ideological spectrum and a growing polarization around the right and the left. Based on several public opinion surveys, it is suggested that the erosion of the federal Liberals was likely accompanied by some decline of Canadians identifying with the Centre. The continued success of the Federal Conservatives in 2011 was accompanied by an expansion of their base amongst those persons identifying with the ideological centre. In the absence of national unity as a priority issue for Canadians, it is contended that social and economic perspectives have increasingly defined the national political agenda. If national unity stays off the top of the political agenda we will pay increasing attention to the ideological spectrum to help understand voter motivation.

RÉSUMÉ

Ce texte considère le succès du Nouveau Parti démocratique à l'élection fédérale de 2011 et si celui-ci indique un mouvement des Canadiens loin du centre du spectre idéologique et une polarisation croissante autour de la droite et de la gauche. Sur la base de plusieurs sondages d'opinion publique, il est suggéré que l'érosion des libéraux fédéraux a probablement été accompagnée par une baisse du nombre de Canadiens s'identifiant avec le centre. Le succès continu des conservateurs fédéraux en 2011 s'est accompagné d'une expansion de leur base parmi les personnes s'identifiant avec le centre idéologique. En l'absence de l'unité nationale comme question prioritaire pour les Canadiens, il est affirmé que les perspectives économiques et sociales ont de plus en plus défini l'agenda politique national. Si l'unité nationale demeure une priorité politique, nous porterons une attention croissante au spectre idéologique pour aider à comprendre la motivation des électeurs.

INTRODUCTION

The 2011 federal elections have generated considerable discussion about whether the traditional perspective of Canada as a country that fashions itself as ideologically in the centre is shifting. The results of the election have contributed to growing interest in this issue as there is speculation that the record drop in support of the historically "centrist" federal Liberals implies an increasing number of voters make choices on the basis of whether they perceive the party to be more to the right or to the left

of the spectrum. Some observers contend that the federal election was characterized by the inability of the Liberals to hold down the centre ideologically, thus resulting in the third place finish behind the governing Conservative majority—widely identified with the ideological right or centre right and the opposition New Democratic Party (NDP) usually associated with the left or the left of centre. The inability of the federal Liberals to insist that only they can bridge Quebec and the rest of Canada may also contribute to reinforcing ideology in guiding voter choices.

Another political victim of the 2011 federal election was the Bloc Quebecois. That political party is generally associated with the ideological left was largely displaced by the NDP in Quebec. Some assume that the historic rise of the NDP in Quebec will encourage collaboration with the ideological left or centre-left elsewhere in Canada around a set of shared concerns even if this is not the reason that Quebecers voted massively for the NDP. For the time being, it is the NDP that is best able to leverage Quebec support and claims it is best positioned to bridge the francophone and non-francophone Canadians on a nation-wide basis.

The political erosion of the federal Liberals may be less attributable to the declining popularity of the ideological centre than it is a function of the ability of the other political parties to redefine the centre's meaning and target voters identifying with its contours (i.e. the right and left of centre). That which follows will employ public opinion surveys conducted in the months of March and April 2012 by the firm Leger Marketing in order to examine whether there has been a shift away from the centre and how Canadians situate themselves on the ideological spectrum in 2012.

THE ISSUE OF FEDERALIST GOVERNANCE AND NATIONAL UNITY

Debates around national unity are often described as pitting federalists against sovereigntist or put another way those who defend a federalist system of governance versus those rejecting this form of governance. Underlying this assumption is the idea that federalism is at the root of Quebec sovereigntist discontent. However accurate that may be, it does not follow automatically that supporting an independent Quebec requires rejecting federalism as a system of governance. As observed in the table below those surveyed who indicate that they would vote for sovereignty narrowly favour a federal form of government.

The manner in which responsibility/jurisdiction is divided between different levels of government has been the object of considerably greater discussion in relations between the Government of Quebec and the Federal Government. When such issues arise they are closely associated with questions of Quebec identity as the case is frequently made that the province needs the authority in order protect its identity (i.e. on language or related issues). Hence the resolution of such matters is often become part of the agenda of national unity. That is not the case elsewhere in the country, where discussions over jurisdiction are not about protecting regional identity and hence not regarded as matters of national unity. Our intention is not to diminish the importance of issues of division of powers between the governments of Quebec and Canada, but rather that such questions arise from concerns articulated around identity.

	IF A REFERENDUM ON QUÉBEC SOVEREIGNTY WERE HELD TODAY, WOULD YOU VOTE FOR OR AGAINST QUÉBEC SOVEREIGNTY?		
A FEDERAL FORM OF GOVERNMENT IN WHICH POWER IS DIVIDED BETWEEN A NATIONAL GOVERNMENT AND STATE/PROVINCIAL AND LOCAL GOVERNMENTS IS PREFERABLE TO ANY OTHER KIND OF GOVERNMENT	FOR	AGAINST	I DON'T KNOW
Strongly agree	16.1%	16.0%	7.2%
Somewhat agree	35.1%	49.8%	30.6%
Somewhat disagree	22.7%	16.0%	18.9%
Strongly disagree	7.9%	5.6%	5.4%
I don't know	14.0%	11.2%	32.4%
I prefer not to reply	4.1%	1.5%	5.4%

DEMOGRAPHIC FEATURES OF CANADA'S IDEOLOGICAL SPECTRUM

How do such characteristics as age, gender, education, income and language background affect the ideological preferences of the Canadian population? On the basis of age the survey reveals that it is the baby boomers that are more likely to stake out some ideological ground than those Canadians under the age of 55. Across the age spectrum, shades of left seem more popular than right until retirement age. The 18-24 group are considerably more left-leaning than right.

	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
18-24 years of age	8.4%	6.2%	21.9%	16.9%	12.4%	34.3%
25-34 years of age	7.4%	10.3%	21.9%	18.2%	7.9%	34.3%
35-44 years of age	3.7%	13.3%	25.9%	17.7%	6.8%	32.7%
45-54 years of age	7.9%	11.9%	29.0%	15.2%	2.6%	33.3%
55-64 years of age	7.6%	13.4%	28.6%	23.2%	5.8%	21.4%
65-74 years of age	9.5%	19.4%	27.5%	23.2%	5.7%	14.7%
75 years of age or older	3.7%	27.8%	33.3%	25.9%	3.7%	5.6%

Women seem much less inclined to position themselves ideologically than do men. Men opt near equally for the left and the right while women clearly prefer the left over the right.

FROM AN IDEOLOGICAL STANDPOINT, DO YOU CONSIDER YOURSELF TO BE…?	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
A man	8.5%	18.6%	27.4%	20.2%	5.8%	19.5%
A woman	5.9%	8.0%	25.2%	18.0%	6.8%	36.1%

The more educated segments of the population are more likely to situate themselves on the ideological spectrum. The most educated have a marked preference for the left over the right.

FROM AN IDEOLOGICAL STANDPOINT, DO YOU CONSIDER YOURSELF TO BE…?	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
High school, general or professional (8 to 12 years)	10.1%	8.5%	22.6%	17.3%	5.0%	36.5%
College pre-university, technical training, certificate (CEP), {br} accreditation (ASP) or proficiency diploma (DEP)	6.9%	11.5%	32.6%	13.3%	4.1%	31.7%
University certificates and diplomas	7.5%	16.3%	28.7%	30.0%	2.5%	15.0%
University Bachelor (including classical studies)	5.3%	16.9%	24.5%	23.5%	8.8%	21.0%

The lowest income groups (earning under 40k) prefer the left over the right (though the center is their principal preference). The highest income earners (100 000 and over) show a slight preference for the right.

	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
$19,999 or less	12.9%	5.9%	30.7%	13.9%	7.9%	28.7%
Between $20,000 and $39,999	6.8%	10.2%	23.3%	19.1%	6.4%	34.3%
Between $40,000 and $59,999	6.9%	13.0%	27.5%	21.5%	8.1%	23.1%
Between $60,000 and $79,999	9.2%	15.5%	24.3%	18.0%	5.8%	27.2%
Between $80,000 and $99,999	6.5%	14.1%	26.1%	21.2%	4.9%	27.2%
$100,000 or more	8.5%	19.6%	29.5%	19.9%	4.4%	18.1%

As to those born in Canada and those born outside of the country, the March Leger survey reveals that non-immigrants are equally split in the degree to which they would openly describe themselves as to the right or left at just above one-quarter each. Immigrants are more likely to describe themselves as being on the right with some one in three doing so openly than they are on the left with some one in four doing so.

		DO YOU PERSONALLY CONSIDER YOURSELF AS A PERSON WHO IS… / …TO THE RIGHT?		
		YES	NO	I DON'T KNOW
Were you born in Canada?	Yes	27.0%	40.4%	32.7%
	No	32.3%	39.5%	28.2%
		DO YOU PERSONALLY CONSIDER YOURSELF AS A PERSON WHO IS… / …TO THE LEFT?		
		YES	NO	I DON'T KNOW
Were you born in Canada?	Yes	27.3%	38.8%	33.9%
	No	24.9%	47.2%	27.9%

As observed below, Francophones situate themselves far more on the left and centre-left than on the right and centre-right. Anglophone Canadians are slightly more to the left and centre-left than to the right and centre-right and allophones are more inclined to the left and centre-left than to the right and centre-right.

FROM AN IDEOLOGICAL STANDPOINT, DO YOU CONSIDER YOURSELF TO BE…?	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
French	7.3%	8.9%	24.8%	21.7%	8.3%	29.1%
English	7.8%	14.4%	26.8%	19.1%	5.6%	26.2%
Other	5.3%	13.3%	26.9%	16.3%	6.6%	31.6%

Over the period May 2011 to April 2012 Quebecers appear to have moved slightly more to the left.

LEGER MARKETING	QUEBEC	
D'UN POINT DE VUE IDÉOLOGIQUE, VOUS CONSIDÉREZ-VOUS COMME ÉTANT UNE PERSONNE…? FROM AN IDEOLOGICAL STANDPOINT, DO YOU CONSIDER YOURSELF TO BE…?	MAY 2011	APRIL 2012
De droite/ Right wing	5%	6%
Du centre-droit/ Centre-right	14%	9%
Du centre/ Centre	22%	24%
Du centre-gauche/ Centre-left	20%	21%
De gauche/ Left wing	8%	11%
Je ne sais pas/ Je préfère ne pas répondre	26%	32%

FEDERALISM AND REGIONAL POSITIONING ON THE LEFT AND THE RIGHT

The data from the 2012 surveys suggest that on the ideological spectrum the country can be divided into four parts. Some one in five Canadians situate themselves on the right and it's that there is a powerful right wing current

that affects Western Canada and which results in a wide ideological gulf with Quebecers. The table below suggests that this observation oversimplifies the reality and indeed the westernmost province of Canada, British Columbia has considerable ideological affinity with Quebec and far less with Alberta, the province that is clearly the source of the political gulf to which many Quebecers are purportedly averse. Like Quebecers, for every British Columbian that situate themselves on the right of centre of it, two persons position themselves to the left of the centre. For Albertans, the inverse of that pattern emerges wherein for every individual that associates with the left- and left of centre-there are more than two that picture themselves in shades of right. Manitobans appear closer to Albertans whereas Ontarians seem to be somewhere in the middle of it all with near equal percentages of persons on the left and the right of centre, just one over four right in the centre, one in five on the left and its centre and nearly 28% either don't know or refuse to respond. Some Quebec observers have repeated.

FROM AN IDEOLOGICAL STANDPOINT, DO YOU CONSIDER YOURSELF TO BE…?	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
Canada	7.2%	13.1%	26.2%	19.1%	6.3%	28.2%
Alberta	12.9%	22.6%	24.5%	12.9%	4.5%	22.6%
British Columbia	5.5%	11.4%	26.4%	27.9%	6.5%	22.4%
Manitoba	9.3%	18.5%	20.4%	9.3%	5.6%	37.0%
Ontario	7.7%	13.8%	27.4%	17.0%	5.3%	28.7%
Quebec	6.1%	8.7%	24.3%	21.2%	10.6%	29.1%

FEDERAL POLITICAL PARTY SUPPORTERS ON THE LEFT AND THE RIGHT

The 2012 Leger survey reveals that Liberal supporters identifies predominantly with the left and its centre. The Liberals ideologically resemble the NDP with the exception that a far more important percentage of the support base of the latter party does not define themselves on the ideological spectrum. For their part, the majority of the Conservatives ideologically identified supporters are on the right or its centre.

LEGER APRIL 2012	RIGHT WING	CENTRE-RIGHT	CENTRE	CENTRE-LEFT	LEFT WING	I DON'T KNOW
Liberal Party of Canada	3.1%	9.0%	33.6%	37.2%	6.7%	10.3%
Conservative Party of Canada	17.6%	32.4%	27.1%	2.1%	1.6%	19.2%
New Democratic Party	1.5%	6.4%	23.6%	31.0%	8.7%	28.7%
Bloq Quebecois	4.7%	4.7%	21.2%	31.8%	15.3%	22.4%
Green Party of Canada	8.2%	6.2%	25.8%	17.5%	16.5%	25.8%

Yet further insight into the current success of the Conservatives is illustrated in the table below. It reveals that over 60% of Canadians surveyed by Leger Marketing that identify as either right or to centre of it say they support the Conservatives. More telling perhaps is that the largest plurality of those identifying with the ideological centre supports the Conservatives although they only hold a slight advantage over the NDP who in turn are ahead of the Liberals.

LEGER APRIL 2012	LIBERAL PARTY OF CANADA	CONSERVATIVE PARTY OF CANADA	NEW DEMOCRATIC PARTY	BQ	GPC	OTHER / I WOULD NOT VOTE / DON'T KNOW / REFUSE
Right wing	6.4%	61.5%	5.5%	3.7%	7.3%	15.6%
Centre-right	10.1%	62.1%	12.6%	2.0%	3.0%	10.1%
Centre	19.0%	26.1%	23.3%	4.6%	6.3%	20.7%
Centre-left	29.0%	2.8%	42.3%	9.4%	5.9%	10.4%
Left wing	15.6%	6.3%	35.4%	13.5%	16.7%	12.4%

LEFT, RIGHT AND THE PLACE OF QUEBEC WITHIN CANADA

It is interesting that on the issue of support for Quebec sovereignty, the March 2012 Leger Marketing poll reveals that those Francophones endorsing the idea are far more likely to describe themselves as being on the left of the ideological spectrum (63.4%) than they are on the right (35.9%). Indeed, it may be suggested that when there is erosion of support for sovereignty it is amongst those segments of the francophone population that position themselves ideologically to the right of the spectrum. This is not without significance since the sovereignty option traditionally aimed at uniting the right and the left ideologically around a societal project-"projet de société"—that trumped potentially divergent orientations for State when tackling economic and social concerns. Still, both the right (82.6%) and the left (69.5%) in Canada agree that they've grown tired of the national unity debate and this applies to Francophones and non-Francophones alike.

	DO YOU PERSONALLY CONSIDER YOURSELF AS A PERSON WHO IS…	
IF YOU HAD TO CHOOSE, WOULD YOU PREFER THAT QUÉBEC REMAIN IN CANADA OR BECOME A SOVEREIGN COUNTRY? FRENCH	RIGHT	LEFT
Remain in Canada	58.6%	32.2%
Become a sovereign country	35.9%	63.4%
I don't know	5.5%	4.4%

The ideological left and right hold somewhat different views on Quebec's place within Canada. When asked whether because of their language and heritage, Quebec is different from the rest of the country, on the right some 62% of Canadians agree compared with 74% on the left. Amongst Francophones, the ideological right (47.5%) is more likely to agree with the view that no concessions to Quebec will ever be satisfactory, compared with one in four Francophones that identify with the left ideologically. That view is held amongst a significant majority of non-Francophones in Canada on either end of the ideological spectrum.

	RIGHT	LEFT
AGREE THAT	NO MATTER WHAT CONCESSIONS ARE MADE TO QUÉBEC, THIS PROVINCE WILL ALWAYS BE DISSATISFIED	
French	47.7%	27.5%
English	83.2%	63.9%
Other	82.0%	72.2%
AGREE WITH THE STATEMENT THAT	FOR CANADA, DO YOU FIND QUÉBEC TO BE MORE OF AN ASSET…	
French	63.3%	55.2%
English	34.9%	58.3%
Other	26.2%	47.2%

Quebec is most frequently identified by English Canadians when asked to name one province they believe gets more than its fair share in the Canadian federation. Quebec is also identified more often by those Anglophone Canadians on the right (53.3%) than those on the left (33.7%). These views nonetheless represent an important gulf with Quebec Francophones and notably those on the left where there is a far greater inclination to claim that it is Alberta (14.2%) and Ontario (15.7%) than Quebec (4.4%) that get more than their fair share within the Canadian federation.

	FRENCH		ENGLISH	
IF YOU HAD TO NAME ONE PROVINCE OR REGION WHICH GETS MORE THAN ITS FAIR SHARE WITHIN THE CANADIAN FEDERATION, WHICH ONE WOULD IT BE?	RIGHT	LEFT	RIGHT	LEFT
The Atlantic Provinces	5.5%	5.5%	4.4%	6.2%
Québec	11.0%	4.4%	53.3%	33.7%
Ontario	15.7%	18.2%	11.9%	12.8%
Western Canada	14.2%	27.1%	3.2%	3.8%
Alberta	14.2%	18.2%	4.2%	8.1%
British Columbia	0.8%	1.7%	1.0%	1.0%
I don't know	22.0%	15.5%	9.1%	21.1%

CONCLUSION

The 2011 Federal Election was a historic contest given the rise of the New Democratic Party to the status of Canada's official opposition. The NDP succeeded in securing an important number of seats in Quebec and it became by far the principal political vehicle through which that province's electorate engages with the federal government. Most of the NDP's support is situated in the ideological space previously occupied by the Federal Liberals who saw considerable erosion of their traditional political base amongst people identifying with the centre. Although we lack time-series data to track the change in identification along the ideological spectrum it is very likely that the erosion of the federal Liberals was accompanied by a decline in the percentage of Canadians identifying with the political centre. The ongoing success of the federal Conservative in the 2011 election is from an ideological standpoint likely attributable to an increase in its constituency on the centre and to its immediate right. The lack of urgency of the national unity issue has undoubtedly contributed to the electoral fortunes of the Conservatives. Were that issue to again become a national priority it would no doubt be an advantage to the NDP given its potential influence in Quebec. Otherwise we can expect that the social and economic priorities of the national population will trump the importance attributed by the electorate to relations between Quebecers and other Canadians.

A WESTERN CANADIAN PERSPECTIVE

David Kilgour grew up in Manitoba and later represented southeastern Edmonton in the House of Commons from 1979 to 2006.

Jan Harvey is a retired Vancouver school teacher who grew up in Southern Alberta.

David Kilgour a grandi au Manitoba et a ensuite représenté le sud-est d'Edmonton à la Chambre des communes de 1979 à 2006.

Jan Harvey est enseignante à la retraite de Vancouver qui a grandi dans le Sud de l'Alberta.

ABSTRACT

For a number of years, concerned Westerners have suggested that Western alienation could be alleviated by more regionally fair federal government procurement/cultural spending, democratic changes in the practices of the House of Commons, and Senate reform. By reference to survey findings, the history of high tariffs on Western farmers, freight rate and political inequalities in Prairie Canada, and the energy wars, the writers challenge the economic domination of the Western region since Confederation by Ontario and Québec, and make a plea for political, economic and cultural equality as a means for ending western alienation.

RÉSUMÉ

Depuis un certain nombre d'années, les Canadiens de l'Ouest ont suggéré que l'aliénation de l'Ouest pourrait être atténuée par les dépenses du gouvernement fédéral en approvisionnement/en culture plus équitablement distribuées pour les régions, par des changements démocratiques dans les pratiques de la Chambre des communes et la réforme du Sénat. En référence aux résultats de sondages, l'histoire des droits de douane élevés pour les agriculteurs de l'Ouest, le taux de fret et les inégalités politiques dans les Prairies canadiennes, et les guerres de l'énergie, les auteurs questionnent la domination économique de la région de l'Ouest depuis la Confédération par l'Ontario et le Québec, et plaident pour l'égalité politique, économique et culturelle comme moyen de mettre fin à l'aliénation de l'Ouest.

Since more than two decades have elapsed since one of the writer's authorship of books on regional disaffection in the West and elsewhere in Canada, it is time to call again for more regionally fair federal government procurement/cultural spending, democratic changes in the practices of the House of Commons, and Senate reform.

First, some comments on three surveys commissioned by the Association for Canadian Studies as background for its 2010 conference on Evolving Federalism:

1. It should surprise no thoughtful Canadian that those surveyed in the West, Quebec and Atlantic Canada were more concerned than Ontarians about the amount of respect accorded to their provinces.
2. Majorities in all provinces wanted the federal government to play a key role on issues like climate change and the economy, and were concerned that federal and provincial governments were not working well together.
3. Most respondents didn't see Canada as ten equal provinces, preferring instead the Charter of Rights concept of 33 million equal members of a national family. The Western region, given its populist tradition, held this opinion as strongly as anywhere.
4. Outside Quebec, most respondents identified with "Canada only" and with having national interests prevail rather than those of one's province. Stronger Identification with one's province in the West appears to have weakened, probably because of the passage of more than three decades from the enactment of regionally divisive policies such as the National Energy Program.

ORIGINS OF 'WESTERN ALIENATION'

The phrase still reflects a perception among many Westerners that some Canadians are "more equal than others" or that they are in a permanent minority. My books

(Uneasy Patriots-Western Canadians in Confederation (1988) and *Inside Outer Canada* (1990)), accessible at www.david-Kilgour.com, offer examples of this phenomenon as of the times of writing and earlier. One would hope that things have improved in terms of regional fairness since then, but current research data is unavailable.

FARMER ANGST

The first albatross was hung around the necks of western farmers in 1879 when Prime Minister Macdonald began to enact the high tariff feature of his National Policy to encourage new Ontario and Quebec manufacturers by penalizing the entry of competing products, primarily from the United States and Britain. For western producers, however, the result was that they were forced to pay high duties on imported farm machinery and the like, or to buy more expensive substitutes from Central Canada. For almost a century, Westerners, who obtained no visible benefit from high tariffs in terms of manufacturers locating their plants near their most important customers, believed that they were paying for most of the mahogany in the homes and offices of manufacturers in Toronto and Montreal.

Their complaint, persisting until well into the 1970s, was that world export realities required Westerners to sell their agricultural products, notably wheat, into highly competitive world markets, while concurrently being obliged by Ottawa to buy production necessities in a domestic market made less competitive by high protective tariffs.

"DAMN THE RAILROADS"

Another ongoing major farm issue in the West was the railway monopoly in general and freight rate equalization in particular. Except for a few items, rates in the West were 50% higher than the Grand Trunk Railway's rates for Central Canada for the same services. Wheat travelled 200 miles for ten cents a bushel in Ontario and Quebec but for twice that in parts of the Prairies. Manitobans paid a higher rate than Central Canadians, residents of what is now Alberta and Saskatchewan paid a higher rate than Manitobans, and British Columbians paid the highest rate of all. Ottawa rail officials later approved this as "fair discrimination."

Westerners argued unsuccessfully during most of a century thereafter for equalization of rates so that all Canadians would pay the same rate for the same distances for the same kind of material shipped in any part of the country. However, convincing Ottawa's Board of Railway Commissioners to do that became an almost untenable goal.

POLITICAL INEQUALITY IN PRAIRIE CANADA

This generated as much alienation as tariffs and freight rates combined. The issue surfaced particularly in disputes over natural resources ownership and the setting of provincial boundaries. Manitoba barely crawled into being as a province in 1870, lacking control of even its crown land and resources, which it didn't obtain until sixty years later. The Macdonald government felt that giving Manitoba a constitutional status equal to the five existing provinces, including Prince Edward Island, would deprive the federal government of much of the rich Prairie lands. The Manitoba Act declared that crown lands in the new province were reserved 'for the purposes of the Dominion.' The same principle was applied in 1905 to Saskatchewan and Alberta when they too achieved provincial status. British Columbia maintained control of its resources on entry to Canada in 1871, presumably because no one in Ottawa would have dared to try to take away what was already won.

The eventual success of the three provinces in obtaining control of their own resources probably had more to do with political clout than the self-evident merits of their case. Some still argue the transfer symbolized the end of the establishment phase of the first National Policy. Many weary Westerners concluded that the real reason Ottawa transferred land and resources was because it felt neither was worth keeping. Prairie economist V.C. Fowke deplored: "The remaining natural resources [...] transferred to the prairie provinces in1930 would not have tempted any railway company, nor any hard-bitten farmer from Ontario, or [...] even the unsuspecting immigrant."

The Calgary Herald described the Laurier government's refusal to accord Alberta and Saskatchewan equality with the original provinces on the resources issue as an "autonomy that insults the West." Even now, some believe that this act of gross discrimination by Ottawa demonstrated clearly that it regarded the West as an exploitable colony.

1970S AND 1980S

A number of issues arising during this time increased the western sense of being disfavoured by their national government: Ottawa Mandarins.

Many of my observations made two decades ago don't seem to have changed markedly, although statistical analyses to confirm such conclusions today are lacking.

"There can be little doubt that Canada has been dominated economically since Confederation by Ontario and Québec and particularly by a relatively small group of people and companies located in Montréal and Toronto," concluded David Walker of the department of geography, University of Waterloo in 1983.

A continuing conviction shared by Outer Canadians is that they are chronically under-represented in Canada's public service. Kenneth Kernaghan, Professor Emeritus of Brock University, concluded in a 1978 study that middle levels of the public service were more representative of the country as a whole than were senior ones in terms of both birthplaces and geographical regions. Two years later, Dominique Clift, journalist and author of *Québec Nationalism in Crisis*, wrote that a disproportionate number of top officials were from Ontario. The *Globe and Mail*'s Jeffrey Simpson noted during 1981 that only one deputy minister and three of 198 assistant deputy ministers were Albertans.

Data on the regional or provincial composition of federal officials are difficult to find because they are rarely recorded. My own 1989 survey of the 220 most senior individuals in twenty-eight federal departments and agencies indicated that about 10% were born and educated in Western Canada, 4% were from Atlantic Canada, and 70% were born and educated in Ontario or Québec. 8% of the top job holders at that time were born outside Canada, but all had received some of their education in Ontario or Québec.

Canada's federal public service and its ability to respond to legitimate regional aspirations have been largely ignored for research purposes. Donald Savoie, an expert on Parliament, has suggested that it may be because so few academics understand the workings of our Ottawa public service. "Many people still cling to the belief that politicians set policies and public servants simply administer them and carry out ministerial directives." Having served as a parliamentary secretary to four different cabinet ministers and in the Chrétien cabinet for seven years, I came to the conclusion that, in reality, appointed Ottawa officials play key roles in shaping most policies and in the decision-making process.

Our national government appears to remain a highly centralized organization with a disproportionate number of key-decision makers originating from Inner Canada. Its organizational capacity to reflect regional circumstances seems to remain both inadequate and unreformed.

CULTURE AND COMMUNICATIONS

The CBC should be a major unifying vehicle, providing a broad cultural highway of national self-expression which allows Canadians everywhere to share a cultural heritage that reflects their full national diversity.

However, up until 1990 at least, neither its English nor its French television network provided an adequate contribution with respect to regional and cross-cultural communications. This issue was first documented in 1977 when the Boyle Commission of Inquiry concluded that virtually all regular network CBC English television series were produced in Toronto, with Ottawa providing some political programs. Other than *Little Mosque on the Prairies*, *Heartland*, and *InSecurity*, both the English and French CBC television networks still appear to give insufficient attention to Outer Canadians. Canadians generally will have to assess for themselves whether CBC television is doing significantly better today.

Regarding CBC English radio news, one internal corporation analysis about 20 years ago suggested an exemplary record in reporting regularly from many centres across Canada. Radio news is clearly much more portable than television news, but even so it deserves accolades as a vehicle for having Canadians speak to each other across often vast distances.

In this new decade, our technology of communication has changed dramatically from 24-hour news to personal news on twitter. The regional origins of today's news and creative content across Canada of both new and traditional media are fodder for research.

ENERGY WARS

It is often forgotten that the national Liberal party was historically strong in Western Canada. Pierre Trudeau and his Just Society and One Canada, blended with his iconoclastic personal style, were attractive to many Westerners during the 1968 election campaign. Trudeaumania provided an excellent opportunity for him to break the existing political mold in the West.

How the Liberals destroyed their political base both federally and provincially in the region between 1968 and 1980, when they won but two of the West's seventy-seven federal constituencies, has been well chronicled. More than anything else, the National Energy Policy reinforced the western suspicion that the Trudeau government regarded the West as a continuing colony of Central Canada. Energy undoubtedly has divided Canadians on a regional basis on price and is perhaps now doing so somewhat on the basis of global warming and 'going green'.

The National Energy Program (NEP) was introduced in the House of Commons by the Liberal government after the 1980 general election. The four announced objectives seemed the soul of reason: greater energy self-sufficiency, conservation, "nation-building" and Canadianization. The unspoken objective was clearly continued Liberal party hegemony in Central Canada at the expense of Western Canadians generally and Albertans in particular. As most oil and gas exploration stopped throughout the West, the regional economy suffered enormously.

The NEP's conservation feature was praised initially across Canada, including the West. Some NEP programs, such as grants for better home insulation and for converting to natural gas heating, were excellent. Unfortunately for the authors of the NEP, price is the major factor determining the amount of oil and gas used by both individuals and commerce. In keeping domestic oil prices across Canada at about half of international levels from 1980 to 1984, the government ensured great waste. A longer term consequence of cheap energy to both industry and agriculture was that both sectors were able to postpone investing in the more efficient machinery with which competitors around the world were retooling. The future international competitiveness of the exports from every region of Canada was thereby harmed by the NEP.

Its defenders agree that one of its objectives was to establish the leadership of Ottawa in the energy sector. The means chosen was a bold attempt to create a new community of energy leaders with a primary loyalty to the federal government. This group was to join industrial-financial elites in Toronto and Montreal who have historically identified closely with Ottawa because of various federal measures such as the Bank Act. The NEP was thus profoundly anti-western because until 1980 the energy industry was one of the very few sectors centred in Western Canada. It was, to many Westerners, as if a national government with no elected representation on either coast had told our east—and west-coast fisheries that they should relocate their industry decision-makers to Ottawa.

In many western minds, the key goal of the NEP was to keep Central Canada on the Liberal side of the political fence by pursuing a consumer-oriented oil strategy. Rather than creating a policy which attempted to balance the interests of both the producing West and the consuming centre and east, Trudeau's government came down almost entirely on the consumer side. The Liberals, having learned to govern with virtually no representation from the West, wished to be seen as the defender of Central Canada regardless of economic consequences in the West.

In late July 2011, Canadian federal and provincial energy and mines ministers convened in Kananaskis, Alberta, to discuss a "national energy strategy," not to be confused with the NEP.

In his July 12, 2011 article in the *National Post* "Harper faces green caliphate," Peter Foster, *National Post* columnist and author of *The Blue-Eyed Sheiks*, excoriated the NEP, saying that it was "part naked tax grab, part industry nationalization, part labyrinthine system of price controls, and part strategy to subsidize frontier exploration." The result was "a poisoned atmosphere not only between Ottawa and Alberta but between Ottawa and Washington, a spate of ill-timed acquisitions, the rapid expansion of Petro-Canada as a financial sinkhole, and an Arctic conflagration of taxpayers' dollars."

"Thirty years ago," wrote Foster, "the main threat to the petroleum industry was economic nationalism; now it's radical environmentalism. Although both creeds are motivated by the same moralistic, authoritarian mentality […] the threat no longer comes from the policymakers themselves, at least at the national level."

Noting that Prime Minister Stephen Harper had suggested that Canada could be an 'Energy Superpower,' Foster observed, "The problem is that the energy in question is mainly oil and gas, which has put him on a collision course with environmental NGOs and their climate rationale for a green caliphate."

Foster lauded the Canadian Council of Chief Executives (CCCE) for calling for emphasis on "rational" regulation and market diversification, which are in fact related, since the major diversification under question involves shipping more energy from the West Coast. He also stressed that the impediment to megaprojects to serve new markets, such as Enbridge's Northern Gateway proposal, is coming from Environmental Non-Governmental Organizations (ENGOs). "ENGOs' misinformation campaigns not only stand across the path to West Coast exports but also are behind the campaign against TransCanada's Keystone XL pipeline to take up to 800,000 barrels a day of diluted oil sands bitumen to the Gulf Coast […] Indeed, the holdup of a project which offers so much in terms of jobs and energy security to a country that claims to be desperate for both is a measure of ENGOs' grip on the White House. This is another reason why the Harper government will continue to concentrate on climate change primarily as an issue of trade and diplomacy rather than a global existential threat."

Foster's viewpoint is that a Canadian national energy strategy should attempt to create a coherent framework to exploit its bountiful fossil-fuel resources, adopting a balanced environmental policy that confronts the dangers of radical environmentalism's impacts on jurisdictions with which Canada trades, and addresses a Balkanized approach to regulation at home.

Part of the government's national energy strategy, he urges, should be to hold hearings on the state of climate science, "even if it invites the wrath of the ENGOs, the United Nations, the European Union and the U.S."

CONCLUSION

TOWARDS 'EQUAL REGIONS'

What is the policy remedy? Some institutional changes are clearly required, but the major obstacle is probably the ongoing indifference of government and private sector policy-makers in Inner Canada. Westerners seek major changes on both the attitudinal and institutional fronts. They believe strongly that their region is vital to Canada. Experience indicates that democratization of Canada's national institutions is long overdue. Canada has developed a truly multicultural and confident society. Westerners wish neither to dominate nor to be dominated as a region; they ask only for what they would also seek for their fellow citizens across the country.

Political, economic and cultural equality is the means of ending western alienation. Western Canadians from Kenora to Nanaimo seek only fair play from their national government and institutions. They want every Canadian to be treated as well as those in the central provinces; they expect to be full players when their region's contribution and potential is recognized. The old national policy created diversified, stable and strong communities in Central Canada at least until the Great Recession of 2008; a new one must do the same for the entire country. Western Canadians have achieved much for Canada and they can help make it a place where every young person from sea to sea will believe that opportunities in life are equal regardless of where one happens to have been born.

Westerners cannot afford to be short of either wind or goodwill. Indifference is the real enemy of those seeking regional justice. To quote Nobel Laureate Eli Wiesel's words in another context, indifference is "the worst disease that can contaminate a society; evil is not the worst; indifference is the worst [...] indifference is the end." Combating this form of inertia is a cause worthy of the best efforts of all Canadians."

LEGACIES AND IMPLICATIONS OF HUMAN RIGHTS LAW IN CANADA

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ABSTRACT

The following article traces the historical evolution of human rights in law, political culture, social movements and foreign policy in Canada. It also documents the remarkable diversity of rights-claims by drawing on opinion polls, newspaper coverage and position papers of non-governmental organizations. Canadians' conceptions of rights have expanded so fast – and in such a short period of time – that human rights commissions are struggling to adapt. As a result, there is a backlash against human rights laws that threatens to undermine the system.

RÉSUMÉ

L'article qui suit retrace l'évolution historique des droits de la personne dans le droit, la culture politique, les mouvements sociaux et la politique étrangère au Canada. Il documente également la remarquable diversité des revendications de droits, en s'appuyant sur les sondages d'opinion, la couverture de presse et les prises de position des organismes non gouvernementaux. La conception des droits des Canadiens s'est développée si vite – et dans un si court laps de temps – que les commissions des droits de la personne ont du mal à s'adapter. En conséquence, il y a un retour de bâton contre les lois des droits de la personne, ce qui menace de saper le système.

In the same month Canadians celebrated the thirtieth anniversary of the *Charter of Rights and Freedoms* a host of new human rights claims garnered international headlines. The Ontario Human Rights Tribunal ruled that the province was discriminating against transgendered people by refusing to recognize a male to female gender change without written proof of a vagina. The government was given 180 days to "revise the criteria for changing sex designation on a birth registration." Around the same time that Jenna Talackova was expelled from the Miss Universe Canada beauty pageant because she was born a man, a bill to add gender identity and gender expression to the Canadian Human Rights Act reached second reading in Parliament. Meanwhile, the Ontario Human Rights Commission raised the possibility that requiring a job applicant to reveal their Facebook password was a human rights violation. In another case, the Federal Court ordered the Canadian Human Rights Commission to consider whether or not the federal government is discriminating against First Nations children by providing less per-capita funding for education, health and welfare services.[1]

Rights-talk in Canada has evolved dramatically over the past two generations. Until recently, Canadians largely spoke of rights solely in terms of fundamental freedoms and discrimination against racial, religious and ethnic minorities. The following article traces the evolution of human rights in Canada with a particular focus on law, political culture, social movements and foreign policy. It documents the remarkable diversity of rights-claims in Canada today by drawing on opinion polls, newspaper coverage and the positions advanced by non-governmental organizations. Canadians' conceptions of rights have

expanded so fast – and in such a short period of time – that human rights commissions are struggling to adapt to a host of unexpected issues. Meanwhile, human rights commissions in Canada are facing a backlash that threatens to undermine the most sophisticated human rights legal regime in the world.

1944 TO 1962: CIVIL LIBERTIES IN CANADA

Until the 1960s Canadians spoke of rights as *civil liberties*. The first civil liberties organizations were created in the 1930s. They fought for what they defined as fundamental freedoms: free press, free speech, religion, association and assembly as well as the right to vote and due process. In the 1940s they also campaigned for tolerance towards racial, ethnic and religious minorities. It was a narrow vision that reflected how most Canadians conceived of rights. For example, there were no self-identified "human rights" associations and the federal government was a reluctant human rights advocate in international affairs. Canada initially abstained in a vote on the Universal Declaration of Human Rights and only grudgingly agreed to support it in the General Assembly vote in 1948. John Humphrey, the Canadian who drafted the Declaration, described his government's position as "one of the worst contributions" and "a niggardly acceptance of the Declaration."[2] Canadian foreign policy was far more concerned with protecting state sovereignty rather than human rights.

After the Second World War, Canadians began to talk seriously about a national bill of rights. A series of Parliamentary committees were instituted in 1947, 1948 and 1950. These discussions, which ultimately came to nothing, focused almost exclusively around fundamental freedoms as well as racial, ethnic and religious discrimination.[3] No one, for instance, suggested that the constitution should enshrine equal rights for women. What is notable about postwar public discourse in Canada is that the term "human rights" was rarely employed. Even amidst widespread debates during the war about government abuse of rights, it was rare for commentators to use the term "human rights."[4]

Canadians' limited conception of rights was reflected in law. The first anti-discrimination statute was Ontario's 1944 *Racial Discrimination Act*, which prohibited the display of discriminatory signs and advertisements. Saskatchewan passed a provincial Bill of Rights in 1947. The statute recognized the rights to free speech, assembly, religion, association, and due process, while at the same time prohibiting discrimination on the basis of race, religion, and national origin. Beginning in 1951 in Ontario, most provinces introduced a series of fair employment and fair accommodation practices acts: essentially bans on racial, ethnic and religious discrimination. None of these pioneering pieces of legislation banned sex discrimination. There were, however, beginning in Ontario in 1951, a series of equal pay laws passed in most jurisdictions. And in 1960 the federal *Bill of Rights* banned sex discrimination in employment. In the end, these laws failed to achieve even their own limited mandate.[5]

1962 TO 1998: CANADA'S RIGHTS REVOLUTION

Canada experienced a genuine rights revolution beginning in 1962. In that year Ontario introduced its landmark *Human Rights Code*, which would eventually be copied in every other Canadian jurisdiction. And yet it was not until 1969 when two provinces, British Columbia and Newfoundland, added sex discrimination to human rights legislation. By the time the federal *Human Rights Act* was enacted in 1977 every jurisdiction had replaced failed anti-discrimination laws with comprehensive human rights legislation. Banning discrimination against women was the first step in a shift towards more expansive legislation that, over time, evolved to include pregnancy, disability, sexual orientation, political affiliation, income, addiction, marital status, and pardoned criminal conviction. Several jurisdictions also banned sexual harassment and hate speech, while recognizing equal pay for work of equal value. Systemic discrimination entered the human rights vernacular and the province of Quebec experimented with social and economic rights. The *Charter of Rights and Freedoms* provided constitutional recognition of, among others, multiculturalism, education, Aboriginal peoples and women's equality.

Human rights legislation in Canada was the most sophisticated in the world. Equality commissions in the United Kingdom, Australia and the United States, for example, had far more restrictive mandates and less effective enforcement mechanisms.[6] Despite the proliferation of human rights laws since the 1970s, including in Eastern Europe and South America, few of these models incorporated all the strengths of the Canadian system: professional human rights investigators; public education; research for legal reform; representing complainants before inquiries; jurisdiction over the public and private sector; a focus on conciliation over litigation; independence from the government; and an adjudication process as an alternative to the courts.

This period also saw a historically unique proliferation of social movements.

A new generation of civil liberties and – for the first time in history -human rights associations emerged beginning in the 1960s. The Ligue des droits de l'homme and the Newfoundland Human Rights Association, for example, adhered to the principles of the Universal

Declaration of Human Rights. They campaigned for a human right to housing, education and social assistance. Social movements led by women, Aboriginal peoples, people with disabilities, ethnic and racial minorities as well as a host of others embraced human rights as a vision for social change.

The rights revolution also transformed Canada's political culture. For many years, the principle of Parliamentary supremacy had been used as a justification to reject a bill of rights on the premise that courts should not overrule Parliament. By the 1970s this argument was being used less and less. A Special Joint Committee on the Constitution in 1970 explicitly attacked this principle, although the committee's hearings revealed that there was still some reluctance to move beyond Canadians' traditional notions of rights. Except for Manitoba, the provinces only considered fundamental freedoms as appropriate for the constitution, and most of the NGOs participating in the hearings shared this assumption. Within a decade, however, it was apparent that Canadians were using the language of human rights to articulate a host of grievances. The federal government's 1981 Special Joint Committee on the Constitution was the most widespread consultation on human rights in Canada at that time. A wide range of non-governmental organizations participated in the hearings. They wanted the *Charter of Rights and Freedoms* to recognize the right to, for example, language, learning, health care, education, minimum wage, self-determination, rest and leisure, meaningful work, abortion, day care, mobility, family reunification and cultural retention. What is significant is not that they were making these demands – workers had been fighting for more leisure time for generations – but that they were framing these grievances as *human rights*.

Even foreign policy was undergoing a rights revolution. A 1970 white paper recognized, for the first time in Canadian history, the need to incorporate human rights into multilateral and bilateral relations. Over the next two decades Canada acceded to several human rights treaties, began to incorporate human rights into decisions surrounding humanitarian aide, to participate in international human rights institutions, and to impose sanctions on human rights violators abroad.[7]

By the mid-1980s rights-talk in Canada had evolved far beyond what had been envisioned with the first human rights laws. To be sure, these developments were highly contested. Justice Rosalie Abella produced a royal commission report in 1984 that expressed dismay over the failure of human rights laws to address systemic discrimination, particularly those "practices we customarily and often unwittingly adopt [that] may have an unjustifiably negative effect on certain groups in society."[8] French Canadians and Aboriginal peoples raised the challenge of collective rights. Feminists were at the forefront of advancing a more nuanced understanding of discrimination: intersectionality. An intersectional analysis recognized that reducing discrimination to one factor, such as sex, failed to account for how some individuals experienced discrimination.[9] Someone might be discriminated against, not because she was a woman or a person with a disability, but because she was a woman with a disability.

The most contentious issue by far was sexual orientation. Quebec was the first jurisdiction to ban discrimination on the basis of sexual orientation (in 1977). And yet by the 1990s many provinces still refused to recognize sexual orientation as a human right. The Newfoundland Minister of Justice in 1990, for instance, feared that banning discrimination on the basis of sexual orientation would protect pedophiles, and insisted that such discrimination did not exist.[10] Alberta, in particular, became the battleground for competing notions of rights. One cabinet minister, reflecting the prevailing attitude within the provincial government, declared that the province would never ban discrimination if it meant allowing homosexuals to teach in schools. Another insisted that "two homosexuals do not constitute a family." The government even went so far as to introduce legislation in 1999 restricting common law marriages to heterosexual couples.[11] The Supreme Court of Canada ruled in 1998 that the Alberta *Human Rights, Citizenship and Multiculturalism Act's* omission of sexual orientation violated the Charter and ordered the government to interpret its legislation as if it included sexual orientation.

1998 TO 2012: EMERGING CHALLENGES

The scope of how people are using the language of human rights today is astounding. Opinion polls suggest that Canadians are becoming more receptive to expansive human rights claims. In a 1944 Gallup poll, for example, Canadians were divided on whether or not communists should have a right to free speech (a majority said no).[12] Three years later the residents of Dresden, Ontario voted *against* a proposed bylaw banning discrimination against racial minorities. Polling between the 1940s and 1970s on human rights was dominated by questions about fundamental freedoms, due process, race and religion. In the 1980s and 1990s, a growing number of polls framed sex, sexual orientation and disability as human rights violations. Opinion polls over the past ten years have linked human rights to prostitution, parental leave, family status, abortion, sexual orientation, euthanasia and same-sex marriage.

Meanwhile, NGOs are challenging how we think about human rights. EGALE, for instance, has adopted the position that young people should be free from sexual harassment and that there is a human right to "a safe learning environment." EGALE also insists on the inclusion of gendered identity or gender expression in human rights legislation, as well as equal marriage rights and benefits for sexual minorities. The Assembly of First Nations has framed clean water, natural resources, self-determination, culture, language, education, land and the environment as human rights. The Ontario Coalition Against Poverty wants recognition for the rights of disabled poor to better public and private services among other socio-economic rights. Vancouver Rape Relief has adopted the position that a man's ability to pay for sexual access to other humans often supersedes the right for a woman to not be involved in prostitution. From this perspective, prostitution is a violation of human rights, and women are uniquely vulnerable to this rights violation.

The media has also identified an expanding repertoire of rights-claims in Canada. Some of the most prominent recent coverage has included: a Sikh's right to refuse to wear a motorcycle helmet or hard hat; the right for employers to ask employees about mental disabilities, notably depression; sexual orientation and open access to men-only bars; schoolchildren with mental and physical disabilities; parental rights over children's education; racial and ethnic discrimination among the police; women denied the opportunity to compete in sports; sexual discrimination among college instructors; housing as a human right, including a right against evictions; age discrimination in employment; women in sports; prostitution; genetic characteristics as a basis of discrimination; internet access; and sexual harassment through social media.[13]

HUMAN RIGHTS UNDER ATTACKS

Human rights have become the dominant language Canadians use to address their grievances. Ironically, one of the implications of this development has been the emergence of a movement attacking the legitimacy of human rights law. Whereas the *Charter of Rights and Freedoms* has broad public support, human rights laws are under attack. "Human rights commissions" proclaimed the editors of the *Globe and Mail* in February 2008, "were never intended to serve as thought police. […] It's time to rein them in before further damage is done to Canadians' right to free expression."[14] The media's portrayal of human rights commissions has presented an image of overzealous, bureaucratic activists who have lost touch with Canadian values. While George Jonas of the *National Post* characterizes human rights commissions as a "complainants forum" for providing free counsel to complainants, Rex Murphy and Margaret Wente have dedicated dozens of columns in the *Globe and Mail* to what the latter has called "self-perpetuating grievance machines."[15] In response to a case involving a man with bipolar disorder who successfully launched a human rights complaint against an employer for dismissing him because he failed to show up at work (for three months), Wente suggested that human rights commissions were "more and more disconnected from common sense. They're taking on cases that would strike most of us as absurd. […] These bodies are fast losing their legitimacy."[16]

Attacking human rights law has gone beyond mere rhetoric. British Columbia eliminated its human rights commission in 2002, severely restricted the mandate of the new tribunal, cut staff, and streamlined the process for dismissing complaints. Ontario introduced modest reforms in 2006 which, although nowhere near as regressive as British Columbia, eliminate the role of the Human Rights Commission in pursuing complaints and assisting victims. The Progressive Conservative Party of Ontario has raised the possibility of eliminating the human rights system, which is an idea no politician seriously contemplated a generation ago. Alberta passed a *Human Rights Act* in 2010 that permits parents to haul teachers before the Human Rights Commission for teaching about religion, sex, or sexual orientation. The Wildrose Party, which became the official opposition in April 2012, is committed to eliminating the Human Rights Commission and leaving it to the courts to adjudicate complaints. Saskatchewan set the precedent in 2011 when the government eliminated its Human Rights Tribunal and now requires victims to seek restitution in court. Without the tribunal, Saskatchewan will depend on judges with minimal (if any) experience in handling discrimination cases. These developments also shift the burden on pursing complaints to victims who are most often the most vulnerable, marginalized and lack the skills or resources to go to court. If the twentieth century was a period of human rights innovation, the twenty-first century may be an era of retrenchment, if not the complete dismantling, of Canada's human rights legal system.

NOTES

[1] XY v Ontario (Government and Consumer Services) [2012] HRTO 726; Shannon Corregan, "MP, Talackova Fighting for Basic Rights." *Victoria Times-Colonist*, 13 April 2012; Nicole Bogart. "Asking for Facebook Passwords a Violation of Human Rights: Commission." *Global News*, 27 March 2012; Heather Scoffield. "Federal Court Orders a New Hearing for First Nations Child Welfare." *Winnipeg Free Press*, 23 April 2012.

[2] Hobbins, A.J. 1998. "Eleanor Roosevelt, John Humphrey and Canadian Opposition to the Universal Declaration of Human Rights: Looking Back on the 50th Anniversary of the UDHR." *International Journal* 53: 325-342.

[3] Clément, Dominique. [2008] *Canada's Rights Revolution: Social Movements and Social Change, 1937-1982*. Vancouver: UBC Press.

[4] Clément, Dominique. [2000] "The Royal Commission on Espionage and the Spy Trials of 1946-9: A Case Study in Parliamentary Supremacy." *Journal of the Canadian Historical Association* 11:151-172.

[5] Clément, Dominique. [2010] "Human Rights Law and Sexual Discrimination in British Columbia, 1953-1984." in *The West and Beyond*, edited by S. Carter, A. Finkel, and P. Fortna. Edmonton: Athabasca University Press, Howe, R. Brian and David Johnson. 2000. *Restraining Equality: Human Rights Commissions in Canada*. Toronto: University of Toronto Press.

[6] Yalden, Maxwell. [2009] *Transforming Rights: Reflections from the Front Lines*. Toronto: University of Toronto. Reif, Linda. 2000. "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection." *Harvard Human Rights Journal* 13: 1-69.

[7] On human rights and Canadian foreign policy, see Clément, Dominique. [2012] "The Evolution of Human Rights in Canada: From "Niggardly Acceptance" to Enthusiastic Embrace." *Human Rights Quarterly*.

[8] Canada, [1984] *Report of the Commission on Equality in Employment*: 9.

[9] On intersectionality see Minow, Martha. [1997] *Not Only for Myself: Identity, Politics, and the Law*. New York: New Press. and Pothier, Diane. [2001] "Connecting Grounds of Discrimination to Real People's Real Experiences." *Canadian Journal of Women and the Law* 13: 37-73.

[10] Newfoundland House of Assembly, *Hansard*, nº8 [1990]: 30; Newfoundland House of Assembly, *Hansard*, vol. 16, nº88 [1990]: 22-4.

[11] Ibid.

[12] Canadian Institute of Public Opinion/Gallup. [1949] *Canadian Gallup Poll 191*.

[13] For sources on opinion polls, newspapers and NGOs, see Clément, Dominique, Will Silver, and Dan Trottier. [2012] "The Evolution of Human Rights in Canada." Canadian Human Rights Commission, Ottawa.

[14] Editorial. "Human Rights Commissions: Shake that role of policing ideas." *Globe and Mail*, 4 February 2008.

[15] George Jonas. "George Jonas on the Trouble with Human Rights Commissions." *National Post*, 8 April 2008; George Jonas. "Speech Commissars are the Problem." *National Post*, 5 May 2006; Margaret Wente. "A Day at the Theatre of the Absurd." *Globe and Mail*, 15 February 2008; Margaret Wente. "The Rights Revolution Run Amok." *Globe and Mail*, 26 February 2008. See also: Rex Murphy. "Coming to a Human Rights Commission Near You." *Globe and Mail*, 25 January 2006.

[16] Margaret Wente. "The Rights Revolution Run Amok." *Globe and Mail*, 26 February 2008.

HUMAN RIGHTS COMMISSIONS – CHALLENGES AND RESPONSES

Maxwell Yalden received his BA at the University of Toronto, and M.A. and PhD at the University of Michigan. He joined the Department of External Affairs in 1956 and was posted to Moscow, Geneva and Paris, as well as serving in various capacities in Ottawa. He was appointed Assistant Under-Secretary of State in the Department of the Secretary of State in 1969, and subsequently Deputy Minister of Communications in 1973. In 1977 he became Commissioner of Official Languages for a term of seven years. In 1984 he was appointed Ambassador of Canada to Belgium and Luxembourg. In 1987 he became Chief Commissioner of the Canadian Human Rights Commission. In 1996 he was elected to the United Nations Human Rights Committee, and reelected in September 2000. Mr. Yalden is a Companion of the Order of Canada, and Commandeur de l'Ordre de la Pléiade. He has been awarded honorary doctorates by the University of Ottawa and by Carleton University.

Maxwell Yalden a reçu son BA à l'Université de Toronto, et une maîtrise et un doctorat à l'Université du Michigan. Il est entré au ministère des Affaires extérieures en 1956 et a été affecté à Moscou, Genève et Paris, ainsi qu'à divers titres à Ottawa. Il a été nommé sous-secrétaire d'Etat au Département du Secrétaire d'Etat en 1969, et par la suite ministre adjoint des Communications en 1973. En 1977, il est devenu commissaire aux langues officielles pour un mandat de sept ans. En 1984, il a été nommé ambassadeur du Canada en Belgique et au Luxembourg. En 1987, il est devenu commissaire en chef de la Commission canadienne des droits de la personne. En 1996, il a été élu membre du Comité des droit de l'homme des Nations Unies, et réélu en septembre 2000. M. Yalden est Compagnon de l'Ordre du Canada, et Commandeur de l'Ordre de la Pléiade. Il a reçu des doctorats honorifiques de l'Université d'Ottawa et l'Université Carleton.

ABSTRACT

Two illustrations of challenges dealt with by the Canadian Human Rights Commission during Mr. Yalden's tenure as Chief Commissioner are examined. Discrimination on grounds of sexual orientation is considered. A success for all concerned: the Charter has been interpreted by the courts as including sexual orientation; the Human Rights Act amended to add it as a prohibited type of discrimination; and parliament has adopted the Civil Marriage Act, permitting same-sex marriage. The troubling situation of Canada's aboriginal peoples is reviewed: "at the bottom of every positive scale; at the top of every negative one". The difficulty of devising comprehensive solutions that government will implement is discussed. It is argued that the resolve of both sides to persist is encouraging. The most disturbing current controversy involves the conflict between freedom of expression and hate speech. On June 6th 2012, the House of Commons voted to repeal section 13 of the Canadian Human Rights Act dealing with that issue. And some media sources suggest that commissions should be "shut down" because they have exceeded their mandate. It is argued that the commissions should rally their forces to combat "persistent untruths" about their activities.

RÉSUMÉ

On examine ici deux illustrations des défis abordés par la Commission canadienne des droits de la personne au cours du mandat de M. Yalden en tant que commissaire en chef. La discrimination fondée sur l'orientation sexuelle est considérée. Un succès pour toutes les parties concernées : la Charte a été interprétée par les tribunaux comme incluant l'orientation sexuelle ; la modification de la Loi sur les droits de la personne l'a ajouté comme type de discrimination prohibée ; et le Parlement a adopté la Loi sur le mariage civil, ce qui permet le mariage homosexuel. La situation préoccupante des peuples autochtones du Canada est passée en revue : « en bas de chaque échelle positive, au sommet de chaque échelle négative ». La difficulté de concevoir des solutions globales que le gouvernement peut mettre en œuvre est discutée. Il est soutenu que la volonté des deux parties de persister est encourageante. La controverse la plus inquiétante actuellement implique le conflit entre la liberté d'expression et le discours haineux. Le 6 juin 2012, la Chambre des communes a voté pour abroger l'article 13 de la LCDP qui traite de cette question. Et certains médias suggèrent que les commissions devraient être « fermées » parce qu'elles ont dépassé leur mandat. On fait valoir que les commissions devraient rallier leurs forces pour lutter contre les contre-vérités « persistantes » sur leurs activités.

I have been asked to speak about "obstacles" that I experienced in my time at the Canadian Human Rights Commission, and on "current controversies".

In my nine years as Chief Commissioner of the Human Rights Commission, I need hardly say that were there many occasions for running into "obstacles". This was especially true, of course, with governments of the day, both Prime Minister Mulroney's and Prime Minister Chrétien's.

Controversy is also the lifeblood of the media, and they were very active players in the human rights game. Probably more so than they are today. However, there is to my mind a major difference between those times and the atmosphere today. In spite of being critical, which is perfectly normal, the media at the time were largely positive in their approach, at least when it came to chivvying the government. And although they had a good go at the commissions when they fumbled the ball, on the whole they were not out to get them, as they not infrequently are today. I will come back to that.

But first, let me return to earlier days. At the federal commission, there are and were hundreds of problems to be dealt with, both in the way of individual complaints and problems of a wider scope that required a broader approach, for example, to matters of systemic discrimination. As a result, and to limit myself to manageable proportions, I want to concentrate briefly on only two illustrations of "obstacles": one where I think I can say our efforts were rewarded with a measure of success; the other an ongoing and particularly stubborn barrier to progress.

My first illustration is the matter of discrimination on grounds of what we have come to call "sexual orientation".

It is interesting to note, to begin with, that sexual orientation was not even included in the Canadian Human Rights Act when it was first adopted. Homosexual acts had been decriminalized in 1969, but it was clear some eight years later, as my predecessor, Gordon Fairweather, put it, that MPs "did not have the stomach" to accept an amendment to the Human Rights Bill, then before the House, that would have added "sexual orientation" to the types of discrimination to be prohibited by law. The excuse given at the time was that they did not wish to add a contentious matter of that sort "in order not to imperil the swift and unanimous passage of the Bill".

In the end, it was to take some twenty years before the Chrétien government finally worked up the courage to take the fateful step of amending the Human Rights Act. In the meantime, there was much activity in the courts, and pressure from our commission to get on with the job. As I put it in testimony to a Senate committee, "the Canadian Human Rights Commission has been arguing in favour of the inclusion of sexual orientation in the Canadian Human Rights Act for some time […] The issue for us is not a matter of lifestyle; it is a matter of fairness. Ensuring that all Canadians enjoy the same rights and benefits regardless of their race, religion, sex, age […] and sexual orientation is what equality rights are all about, no more and no less."

In the event, the government finally moved in 1996 to amend the Human Rights Act to include sexual orientation. And in 2005, it introduced the Civil Marriage Act, whose purpose was to provide that "marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others", instead of the traditional reading, "of a man and a woman to the exclusion of all others".

Nevertheless, there was still considerable opposition in Parliament. Thus, pressure built up for the then newly elected Conservative government to reopen the same-sex marriage debate in the House of Commons, a commitment first stated in the party's electoral platform. In the event, the motion to re-open was brought forward at the end of 2006 and defeated in the House on 7 December by a vote of 175 to 123.

And so it was, with those few words, 'the lawful union of two persons,' what one observer has called "a social revolution" came to pass. The Charter had been interpreted by the courts as including sexual orientation; it had been incorporated in the Human Rights Act as a prohibited type of discrimination; and Parliament had passed legislation permitting marriage between two individuals of the same sex. And all this had come about exceptionally quickly, when one thinks of the usual time frame for significant social change.

My second illustration is a much less rewarding one: the situation of our aboriginal peoples, which I described as "without a doubt Canada's most shameful human-rights-discrimination problem". And one that goes a long way back in Canada's history. In a Royal Proclamation in the mid 18th century, for example, King George III noted, "the great Frauds and Abuses [that] have been committed […] […] to the great Dissatisfaction of the […] Indians". Such has been the unhappy, centuries-long story of our relationship with the aboriginal peoples, combined with conditions of life in which many of them live that are a distressing stain on Canada's human rights record.

In my time at the Canadian Human Rights Commission, this was the issue that we took up most vigorously, indeed passionately. As we persistently argued, they represented the major human rights failure in this country. Not that we were without fault in other areas, but their plight was of a different order of magnitude. At the bottom of every positive scale, at the top of every negative one, living, many of them, in appalling circumstances, plagued with depressing records of incarceration, gas sniffing, family violence, and suicide, to cite only a few of many troubling examples.

The expansion of the white population in the nineteenth century was the excuse for a mixture of unalloyed land grabs, discriminatory practices, and misplaced Christian charity. Thus, on the one hand, the gradual confinement of native people to "reserves", a few hundred, often uneconomic enclaves carved out of all those vast lands not occupied by agreement with aboriginal leadership; and on the other, attempts to "civilize" them through residential school programs and other wrongheaded paternalistic enterprises. And all of this was topped off in the latter part of the century by the Indian Act – an extreme example of colonial legislation if there ever was one.

If this is a not unreasonable sketch of the problem, what is more difficult to discern is some notion of the solution. Even in a country like this one, where at last our political leaders seem to have awakened to its magnitude and seriousness, and where, I believe, there is a genuine desire to do something about it, the way out is not evident.

Thus far, all manner of stratagems have been tried to come to grips with the problem. Throwing money at it is clearly not the answer; if it were, we would be home free. Nor, it appears, are traditional Canadian approaches to human rights problems. Compared with this one, other rights issues are relatively simple, both the principles involved and practical questions of implementation.

Probably the main consideration for getting started, or restarted, is to accept that complicated global solutions are not likely to fit the bill. The report of the Royal Commission on Aboriginal Peoples, for example, contains no less than 440 recommendations covering 115 pages of text, on everything from fundamental constitutional change to administrative details. In the circumstances, it is not surprising that, whatever the proposals' substantive merits, no government was or is likely in the future to pick up the challenge of actually implementing all or even most of them.

The Indian Act has been singled out as well on many occasions (not least by the Canadian Human Rights Commission) as an outmoded approach to relations with Canada's Aboriginal communities that should be substantially altered or simply done away with. For the foreseeable future, this is probably beyond the capacities (or at least the priorities) of government. In the circumstances, where rights are concerned, following the Charter and the Canadian Human Rights Act, as the courts and commission have been doing, is doubtless the best course of action, with governments and Aboriginal representatives onside so far as possible, both with respect to the principles and the actions necessary to implement changes as they become more practicable.

And there is after all a gleam of light in the resolve by both sides not to abandon the field, and to continue to look for realistic solutions, however distant they may seem. I am sure that human rights commissions will continue to play their part in removing the "obstacles" that this may entail.

CURRENT CONTROVERSIES

Probably the most troubling matter that embroils human rights commissions at the present time is the conflict between freedom of speech and hate propaganda, which has spread to wholesale denunciations of all manner of alleged sins committed by the commissions.

A recent article in the Calgary Herald (March 17) carries the media's warlike stance to unbelievable lengths:

> *"It is difficult to imagine a greater public policy fiasco and a state branch in greater disrepute than human rights commissions. Human rights are essential, but their enforcement by commissions has an appalling record of violating religious liberty, censoring the press and abusing fundamental legal rights of Canadians [...] these afflictions alone should be enough to shut human rights commissions down [...]"*

These words, embellished with all sorts of largely inaccurate observations about commissions' procedural methods and their "often frivolous and sometimes nefarious accusations", amount to the most outlandish set of allegations about human rights commissions that I have seen in all the years I have been in the business.

Why should this be so? Put in simple terms, the furore has been generated because the "frivolous" complaints in question appeared to be directed against the media themselves.

As a result, some have argued that section 13 of the Human Rights Act, the clause relating to hate speech, should be repealed. Indeed, a Bill (C 304) with that effect has been introduced in the House of Commons, and, I believe, is now in Committee.[1]

And yet, it is worth noting that section 13 is not a new prohibition. It has been included in the act since its inception more than thirty years ago. The fact is that a more recent amendment designed "for greater certainty" explicitly to include the Internet has exacerbated the whole issue to an extent that was never anticipated.

It should be underlined that only a very small percentage of complaints addressed to the federal commission (some 2 per cent in the period 2001–8) involve section 13; and that an even smaller number are sent to a

human rights tribunal and judged to have been in violation of that section (roughly .04 per cent). And finally, of the few cases sent by the commission to the tribunal, almost all have involved "extreme and hateful" expression, rather than harmless jabs, as one might conclude from some media reporting on the matter.

Also to be noted for the record is the wrangling over complaints launched by Muslim law students over an allegedly anti-Muslim article published in Maclean's magazine and on their website that managed to trap Canadian human rights agencies in the crossfire. The Canadian and Ontario commissions and the B.C. tribunal were all seized of the issue. However, what is important to emphasize, and has been little reported, is that the federal commission and the B.C. tribunal dismissed the complaint, and the Ontario commission said it could not deal with it for want of jurisdiction.

For my own part, I believe that, while we all uphold the right of free speech as important in a democratic society, particularly in the Internet era, most of us also believe that "hate speech" can have serious consequences and cannot be exempt from any limitations whatever, simply because it has been carried in the mass media. After all, just how far is speech as such removed from inciting people to take action against vulnerable groups? I cannot believe that throwing aside the worldwide condemnation of that kind of conduct – in the Universal Declaration of Human Rights, the U.N. covenants, and even our own Charter of Rights and Supreme Court decisions based on it – would be acceptable.

On the other hand, it strikes me that the slightest disparaging remark about, say, an ethnic or racial minority or even a so-called joke in bad taste is in a different category. It may be just that, in bad taste, but is probably not inadmissible in an open society or in violation of human rights legislation.

At the same time, those who are involved in the human rights business should recognize that the problem has become a much broader one. Some representatives of the media seem, as I have already suggested, determined to "get" the commissions, and in order to do so, spread the false belief that they are not performing the role they were given by parliament and provincial legislatures. To a degree, they are getting their message across.

And what should be done about it? Whether it is too late to do anything about Bill C 304 is not for me to say. However, at the very least, the commissions should fight back. They should insist on having "equal time" and they should use their access to legislatures and the media to press their views whenever the occasion presents itself. Individually and collectively, they simply should not allow persistent untruths about human rights commissions and human rights law in Canada to pass unchallenged.

NOTES

[1] On June 6, 2012 the House of Commons voted to repeal section 13.

PROMOTING AND PROTECTING HUMAN RIGHTS: SNAKES AND LADDERS

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ABSTRACT

In light of current attacks on Canada's human rights institutions, a reflection on a more hopeful time with regard to institutionalizing the promotion of protection of human rights is offered. Professor Norman recalls his work in drafting Saskatchewan's first comprehensive human rights code and in administering the legislation for its first few years. His proposals equipped the Saskatchewan commission with new proactive regulatory agency roles, including exemption power, affirmative action approval and monitoring and rule-making authority; with a robust law enforcement capacity to redress individual acts of discrimination, including a provision enabling the commission to initiate a complaint on its own motion, and with public education and community liaison mandates to promote a culture of human rights in the province. By the end of these initial years, a new government had come to power in Saskatchewan, which marked the beginning of a good deal of backsliding on the systemic discrimination fronts that had been opened-up by the *Code* and the commission.

RÉSUMÉ

À la lumière des attaques en cours sur les institutions canadiennes des droits de la personne, ce texte offre une réflexion sur un temps plus optimiste en ce qui concerne l'institutionnalisation de la promotion de la protection des droits de la personne. Le professeur Norman se souvient de son rôle dans l'élaboration du premier code complet des droits de la personne de la Saskatchewan et dans l'application de la loi durant les premières années. Ses propositions ont équipé la commission de la Saskatchewan avec de nouveaux rôles proactifs d'organismes de réglementation, y compris le pouvoir d'exemption, d'approbation et de suivi de l'action positive et le pouvoir réglementaire, avec une capacité d'application robuste pour réparer les actes individuels de discrimination, y compris une disposition permettant à la Commission de lancer une plainte de sa propre initiative, l'éducation du public et des mandats de liaison communautaire pour promouvoir une culture des droits de la personne dans la province. À la fin de ces premières années, un nouveau gouvernement est arrivé au pouvoir en Saskatchewan, ce qui a marqué le début d'une bonne dose de retour en arrière sur les fronts de discrimination systémique qui avaient été ouverts par le Code et la Commission.

If the platform of the Wildrose Party in Alberta is any measure, there is reason to worry about the state of our human rights institutions. A plank in that platform rests on this assertion, "Over the last 20 years, the Human Rights Commissions in Alberta have probably been the single worst offender of Rights: i.e. freedom of speech; politically correct activists have used them to punish religious and right-wing social commentators." The Wildrose sentence for this 'offender' is, "We'll replace the Human Rights Commission with a new Human Rights Division of the Provincial Court of Alberta, which will adjudicate all human rights complaints." [1]

This regressive signal from Alberta wistfully takes me back some 34 years to a very different time: a time of promise for the promotion and protection of human rights in my neighboring province. In August of 1979, *The Saskatchewan Human Rights Code*[2] came into force. Its ambition was to be comprehensive and transformative in novel ways. In the early summer of 1978, I was appointed "chairman" of the Saskatchewan human rights commission. This position was attractive to me because it seemed to offer a new way forward in terms of promoting and protecting a culture of human rights as envisaged by the *Universal Declaration of Human Rights*[3] *[UDHR]*. A review of a decade's experience on the part of human rights commissions in Ontario and several other provinces left me with no confidence that Saskatchewan should have *that* as its main idea as to what a human rights commission was about. To my eye, marginalization and exclusion of disadvantaged minorities and women was a continuing story left pretty much untouched by their work.

By the early fall of 1978, I announced that I would be proposing several fundamental changes to the structure, function and inquiry procedure of the commission at the next sitting of the Saskatchewan legislature.[4] The proposals would equip the commission with new proactive regulatory agency roles; with a robust law enforcement capacity to redress individual acts of discrimination, including a provision enabling the commission to initiate a complaint on its own motion, and with public education and community liaison mandates to prevent discrimination from occurring. As well, save for Quebec, no other human rights statutes went beyond the field of anti-discrimination law. The proposal envisaged was to incorporate the fundamental freedoms set out in *The Saskatchewan Bill of Rights*[5] in order to make the *Code* comprehensive and thus to justify a proposal that it be given paramountcy over all other legislation.

In terms of "structure", I aimed first to elevate the purposes of the *Code* above the current understanding of a human rights commission being just about protecting individuals from discrimination at the hands of misguided others to the level of the grand purposes of the *UDHR*. Therefore I proposed that the *Code* set out, in the body of its text, an "objects" clause mirroring the *UDHR*'s vision of a world where the inherent dignity and the equal inalienable rights of all members of the human family would be recognized. This was novel. The Ontario *Code* had made such linkage in its preamble. However, preambles just weren't given the same weight as statutory text:

> *The preamble is not [...] of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts.*[6]

No doubt for this reason, preambles were "rarely used these days".[7]

In the hope that this "objects clause" [8] would illuminate the dignitary underpinnings of the *Code* and provide interpretive guidance to its text, I proposed language expanding on the "notice, sign, symbol" prohibition against hate propaganda in *The Saskatchewan Bill of Rights*.[9] The new provision extended to any "representation [...] which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person [...] or group" protected by the *Code*. By using the word "dignity", this clause linked with the "inherent dignity" language of the objects clause.[10] No human rights code had reached this far[11] to fashion a shield against attacks from free speech absolutists. I was influenced by the *Cohen Report, The Special Committee on Hate Propaganda in Canada*, 1966, which lead to the 1970 hate crime provision of the *Criminal Code*[12]. The first sentence of the *Cohen Report* stated, "This Report is a study in the power of words to maim, and what it is that a civilized society can do about it." [13] It seemed to me that the transformative capacity of a human rights code had a better chance of moving towards a civil society based on respect for the inherent dignity of marginalized minorities than did the *Criminal Code*, with its narrow language requiring proof beyond a reasonable doubt of intent willfully to promote hatred against an identifiable group. Recently, Jeremy Waldron has argued that the best justification for a law curbing hateful speech *is* to stand it on the firm ground of human dignity. Waldron argues that it is vital to the democratic project that "reputational assurance" thereby be promised to vulnerable minorities.[14]

In the same vein, I meant to break new ground by proposals to equip the commission with administrative/regulatory agency capacity to move forward in building a culture of human rights by overcoming systemic barriers to the full participation of marginalized groups in society. This proactive role for the commission included a "rule-making" function to set standards for overcoming systemic

barriers as well as an approval and monitoring function to ensure that change actually took place. In support of this transformative vision, I proposed that the *Code* be elevated to a quasi-constitutional level, as paramount legislation in the hands of the commission. This was accomplished by s. 44 of the *Code*:

> *Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.*[15]

Related to the first exception set out in this clause was a power given to the commission, in section 48, either on the application of a person or class of persons or on its own motion to grant, to review and revoke an exemption from "any or all of the provisions of this Act." Vesting authority in the commission, in this way, seemed to me to signal that the commission could temporize in a progressive way, in circumstances where the institution involved might be granted a temporary exemption on the ground that it was taking steps to overcome systemic barriers; to bring itself into compliance with the values of the *Code*. As it turned out, shortly after the *Code* was proclaimed the following August, the commission engaged in just such an exemption exercise with regard to facilitating a staged removal of barriers to the employment of female correctional officers in provincial jails.[16]

With regard to "function", there were two areas, in addition to this exemption power, where I thought the commission needed to be mandated to enable it to go beyond being responsive to investigate individual complaints of discrimination. Barriers denying access to protected groups needed to be brought down. And, if fostering a human rights culture was the objective, then the classroom was an obvious site of activity for the commission. As to barriers, the two urgent fields of interest, for me, were the underrepresentation of disadvantaged groups both in the workforce and in educational institutions *and* the physical barriers found everywhere in the built environment barring access for people with disabilities. To me, neither of these vast systemic challenges seemed likely to be transformable by means of a case-by-case litigation process.

So, I drew from the work of K.C. Davis[17] who had argued that rule-making by administrative agencies "was one of the greatest inventions of modern government."[18]

> *Affected parties who know facts that the agency may not know or who have ideas or understanding that the agency may not share have opportunity by quick and easy means to transmit the facts, ideas, or understanding to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient.*[19]

Ralph Nader's Center for Study of Responsive Law had recently published a manual for citizen access to such processes.[20] This book discusses a number of U.S. federal agencies and the opportunities their mandates afforded to concerned citizens to make their voices heard with regard to regulatory policy development.[21] Thus, on democratic grounds, I thought it quite appropriate, albeit "unCanadian", for a human rights commission to be proactive in policy develpment in this very public "rule-making" way.

Section 47 of the proposed legislation gave the commission authority to "approve or order any program to be undertaken by any person if the program is designed to prevent disadvantages [...] that are suffered by" disadvantaged groups protected by the *Code*. The commission was to have the power to "make inquiries concerning the program, vary the program, impose conditions on the program or withdraw approval of the program". Finally, as an incentive for employers and educational institutions to come forward with such "affirmative action" programs, section 47 ended with "Nothing done in accordance with a program approved pursuant to this section is a violation of the provisions of this Act."[22] To my eye, section 47's reference to the commission's authority envisaged for the commission an open and democratic "rule-making" responsibility for the working out of regulations governing affirmative action to be submitted to the Cabinet for adoption and proclamation.[23]

Concerning physical barriers in the built environment faced by people with disabilities, no specific legislative proposal was made. Rather, I drew from K.C. Davis' assertion that "power to make rules always accompanies discretionary power and need not be separately conferred."[24] Should the legislature accept the recommendation to add "handicap" to the list of protected grounds in the *Code*, then the commission would be free to launch a public consultation process with a view to framing accessibility standards for the built environment. In the short run, the hope was to persuade municipalities to amend their building codes and street-scaping practices so as to make the built environment accessible to people with mobility limitations. In the long run, the objective was to persuade the Blakeney government to bring forward a new uniform accessibility standard statute.[25]

On the educational front, the commission was mandated by the proposed *Code* to "develop and conduct educational programs designed to eliminate discriminatory practices related to" protected disadvantaged groups.[26] With this in hand, the commission proposed that a budget be developed to enable a Director of Education to move forward not only on the sort of materials published by other commissions in Canada but also to work with the Ministry of Education on curriculum reform to bring human rights education into the classroom.[27] In an interview with a reporter from the *Star-Phoenix* I stated that I will recommend that the commission be given "a broader mandate so it can get involved in public education in the area of human rights." If young people in the classroom for example, could be taught to understand tolerance and the dignity of the individual, we would have the battle won.[28]

With regard to the formal inquiry procedure, in order to promote expedition, expertise and independence, I proposed that an end be put to the commission's dual role as both the investigator and the adjudicator of complaints; that adjudication of complaints be done by a member of an appointed panel of inquirers—a tribunal system. Though the Ministry was open to the creation of an adjudication process at arm's length from the commission, by letter of December 19, 1978, the crown solicitor in charge of the file on the human rights commission's legislative change project advised that this proposal had been rejected in favour of *ad hoc* appointments of a single inquirer by the Attorney General on application to him from the commission[29].

Come the proclamation of the *Code* and its regulations in August, I sought to make the most of the unanimous support given to it by the assembly.

> ***New human rights code now law*** *– Norman was instrumental in designing the new code and feels it is an accomplishment that it gained unanimous approval of both parties in the legislature this spring [...] In fact, the cabinet accepted his proposals in full, except for one section which dealt with anti-discrimination protection for homosexuals [...]*[30]

November of 1981 saw the intense first ministers' negotiations around the proposed language of the *Constitution* and *Charter*. At a certain point Premier Blakeney made some positive comments about the Saskatchewan *Code*'s affirmative action provisions and how they would fit with the *Charter*. I commented in the press:

> *[...] the commission is pleased by Premier Allan Blakeney's support for affirmative action programs in Saskatchewan. The recent public debate over removing the override clause from [...] the constitutional proposal has brought the Premier's commitment to affirmative action out very strongly.*[31]

So, the way ahead looked like clear sailing to me. Premier Blakeney had come to be persuaded that affirmative action *was* a good Saskatchewan idea. And, that his cabinet had not taken the step of approving the affirmative action regulations "made" by the commission in April, 1980[32], didn't seem to be any kind of problem as the commission was carrying on regardless; fettering its statutory discretion by these standards to no one's apparent dismay. In a speech at *A Practitioners' Workshop on Affirmative Action*, in Toronto, on April 15, 1983[33], I noted, "At least in the Province of Saskatchewan, there is no longer any doubt about the definition of what amounts to an acceptable affirmative action plan. It must entail: (1) a systematic analysis of an employer's current workforce, (2) A comparison of the make-up of that workforce with that of the larger surrounding community; (3) establishment of management policies which will move in the direction of overcoming those imbalances which have been identified, with a certain time frame; (4) a monitoring system in order that the goals not slip out of sight and the timetables not be ignored.[34] This amounted to my "swan song" given what the Devine Government had in mind for my tenure as chief commissioner.[35]

To come full circle, the Wildrose Party's current proposal to scrap human rights institutions in Alberta is in the same vein as recent developments in Saskatchewan, which have seen the human rights tribunal abolished and commission staff cut in half leaving it with no credible law enforcement capacity.[36]

NOTES

[1] The Wildrose web site, "Justice, policing and human rights", http://www.wildrose.ca/policy/justice-policing-human-rights/. Last visited on April 14, 2012.

[2] R.S.S. [1978] c. S-24.1.

[3] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[4] http://sain.scaa.sk.ca/collections/index.php/ken-norman-fonds;rad, Archives, University of Saskatchewan, Ken Norman's fonds, Retrieval NºMG 79, [Box 7], *The Leader Post*, Regina, September 13, 1978.

[5] S.S. 1947, c.35.

[6] *A.G. v. Prince Ernest Augustus of Hanover* [1957] A.C. 436, per Lord Normand at 467; discussed in E.A. Driedger, *The Construction of Statutes* [Toronto: Butterworths, 1974] at 120 and Sir Rupert Cross, *Statutory Interpretation* [London: Butterworths, 1974] at 109.

[7] *Ibid*, Driedger at 120.

[8] Supra, *SHRC*, note 2, s. 3, The objects of this Act are: (a) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

[9] *Ibid*, s. 14.

[10] *Ibid*.

[11] Tarnopolsky, *Discrimination and the Law in Canada*, Canada [Toronto: Richard De Boo Limited, 1982] at 330, refers to this language as being "the most extensive."

[12] http://www.chrc-ccdp.ca/publications/srp_2009_rsp/page3-eng.aspx. Last visited on April 14, 2012.

[13] *The Report of the Special Committee on Hate Propaganda* [Ottawa: The Queen's Printer, 1966] at 1.

[14] Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate", [2010], 123 Harvard Law Review 1597.

[15] Supra, *SHRC*, note 2, A year after the *Code*'s proclamation, Howard McConnell wrote that "It is patent that considerable publicity would attend the infrequent employment of such a *non obstante* clause, and that for political and other reasons it would not be invoked by the Legislature without the most anxious forethought and canvassing of alternatives." W.H. McConnell, *Prairie Justice* [Toronto: The Carswell Co. Ltd., 1980] at 243. This notwithstanding clause preceded the *Charter's* like clause by three years.

[16] *Archives*, supra, note 4, [Box 14], *Annual Report of The Saskatchewan Human Rights Commission*, filed on March 14, 1983, at 15.

[17] K.C. Davis, *Administrative Law Text* [St. Paul: West Publishing Co., 1972].

[18] *Ibid*: 142.

[19] *Ibid*.

[20] *Working on the System* [New York: Basic Books, Inc,. 1974].

[21] *Ibid*, at 67 and following.

[22] This language was largely drawn from s. 19 of the *Nova Scotia Human Rights Act*. 1969 and s. 13 of the *New Brunswick Human Rights Code*, 1971 with one significant difference. Both of the maritime provisions had vested the commissions with power to approve programs "to promote the welfare of any class of individuals" whereas the Saskatchewan power was more clearly directed to overcoming systemic barriers to disadvantaged groups protected by the *Code*. The language used to achieve this was drawn from s. 15 of the *Canadian Human Rights* Act, 1977. Though, there is no approval and monitoring role given by s. 15 to the new Canadian Human Rights Commission. Ontario had amended its code in 1972, by s. 6 (a), to give the commission power to approve employment programs for the benefit of disadvantaged groups protected by the code. Manitoba had done something similar in s. 9, in 1974.

[23] By the end of my time as chief commissioner, the SHRC's *Annual Report, 1983*, reflected how important the work of the commission had become in transforming the hiring practices of major employers in Saskatchewan. *Archives*, supra, note 4 [Box 14] *Annual Report of the Saskatchewan Human Rights Commission*, filed on March 14, 1983. In this Report to the new Devine Government's Attorney General, Gary Lane, the commission explains, at p. 13, that seven affirmative action programs were granted full or provisional approval by the commission in the preceding year "[…] pursuant to the proposed regulations of April 9, 1980, which the commission incorporated by reference into each of its published decisions." The approved programs were (1) Potash Corporation of Saskatchewan, (2) Saskatchewan Housing Corporation, (3) The Co-operators, (4) Pre-Employment Trades Exploration for Women, Prince Albert Natonum Community College, (5) Saskoil Affirmative Action Program, (6) Key Lake Mining Corporation, Construction Phase, (7) Sask Tel Affirmative Action Program.

[24] K.C.Davis, supra note 17 at 143.

[25] This was accomplished by *Bill 33, The Uniform Building and Accessibility Standards Act*, First Reading on March 19, 1982. *Archives*, supra note 4, [Box 7] *Star-Phoenix*, March 20, 1982. However, the newly elected Devine Government had no interest in taking this any further. *Archives*, supra, note 4, [Box 14], *Annual Report of The Saskatchewan Human Rights Commission*, filed on March 14, 1983.

[26] *SHRC*, supra, note 2, s. 25 (c).

[27] McConnell, *Prairie Justice, 1980*, supra, note 14, at 246, "Since the publication of the reports, *Sex Bias in Primary Readers* and *Prejudice in Social Studies Textbooks*, [the commission] has brought to the attention of educators the danger of propagating in textbooks negative images of women and members of visible minority groups. Such images could, it was contended, foster prejudicial attitudes about vulnerable social groups on grounds of race, colour or sex. Valuable discussions were also held with teachers on how to deal with prejudice and stereotypes in material currently in general use in schools."

[28] *Archives*, supra, note 4, [Box 7], *Star-Phoenix*, December 15, 1978.

[29] *Archives*, supra, note 4, [Box 14].

[30] *Archives*, supra, note 4, [Box 7], *Star-Phoenix*, August 8, 1979. For the record, the recommendation that I had pressed in a meeting with the Attorney General on February 1, 1979, [Box 7] Letter from Ken Norman to Roy Romanow of February 5, 1979 – to leave room for analogous grounds – also bit the dust.

[31] *Ibid*, [Box 7] *Weyburn Review Weekly*, December 9, 1981.

[32] *Archives*, supra, note 4, [Box 16] File entitled "Affirmative Action Regulations", Letter Ken Norman to Roy Romanow, April 9, 1980.

[33] *Ibid*, [Box 7] Notes for an address by Ken Norman, Chief Commissioner, Saskatchewan Human Rights Commission, Friday, April 15, 1983 – on commission stationery. Ontario Institute for Studies in Education, "The Future for Affirmative Action Practitioners".

[34] *Ibid.*

[35] The next notable event, spelling the end of my time with the commission and the beginning of a good deal of backsliding on the systemic discrimination fronts that we had opened up, was a courteous letter to me from new Attorney General Lane thanking me for my services during my tenure as chief commissioner, commending me for my dedication to human rights and wishing me well in the future. *Archives*, supra, note 4. [Box 7] Letter, Gary Lane to Ken Norman, October 19, 1983.

[36] http://www.leaderpost.com/life/wrong+moves+Sask+human+rights/6507191/story.html http://www.thestarphoenix.com/news/Obligation+defend+human+rights+applies+Canadians/6514111/story.html Last viewed April 25, 2012.

IMMIGRANT INTEGRATION IN FEDERAL COUNTRIES: LANGUAGE SKILLS, CIVIC KNOWLEDGE AND IDENTITY

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ABSTRACT

A number of countries have adopted laws or developed programs to further newcomers' language skills and the adoption of core civic and social values. Drawing on a study of seven federal countries sponsored by the Forum of Federations, this article addresses some of the main policy instruments used for language learning and building civic knowledge – familiarity with the core values, institutions and history of the receiving society. It includes a brief discussion of how government action (notably the education system) is used to influence the identity of newcomers and their descendants, including within Quebec and other subnational communities.

RÉSUMÉ

Un certain nombre de pays ont adopté des lois ou développé des programmes pour améliorer les compétences linguistiques des nouveaux arrivants et pour favoriser leur adoption des valeurs fondamentales civiques et sociales. S'appuyant sur une étude de sept pays fédéraux parrainée par le Forum des fédérations, cet article aborde quelques-uns des principaux instruments utilisés pour l'apprentissage et l'acquisition de connaissances civiques – la familiarité avec les valeurs fondamentales, les institutions et l'histoire de la société d'accueil. Il comprend une brève discussion de la façon dont l'action du gouvernement (notamment le système éducatif) est utilisée pour influencer l'identité des nouveaux arrivants et leurs descendants, y compris au Québec et dans d'autres communautés nationales.

The integration of immigrants has become an important, sometimes contentious, public policy issue, even in countries whose flows of newcomers are only a fraction of Canada's. In some cases, governments have enacted legal measures intended to ensure that immigrants accept the receiving society's core values. The Netherlands was probably the 'first mover' in this regard, and some of its requirements – such as civic knowledge tests administered outside the country to applicants for family reunification – have been labelled "integration from abroad" (Joppke 2007). Although a number of other countries have adopted laws to encourage the adoption of core civic and social values, more often they use multiple policy instruments to foster immigrant integration. This fits with the fairly widely accepted view that immigrant integration is multi-faceted, comprising economic, social, civic and political dimensions; and that the process continues for quite some time after arrival in a new country – even beyond naturalization.[1]

In federal countries, policy making in this area gives rise to additional questions. Which order of government – federal, subnational (i.e. provinces, states, etc.), local – is

best suited to provide programs and services directed at the different dimensions of immigrant integration? Does the federal government fund the activities of subnational and local governments; and, if so, what means are used? In federal countries with more than one language group (often referred to as multination federations), do regulations and programs vary among the subnational units? These are some of the issues addressed in a recently completed Forum of Federations project on immigrant integration in Canada, Australia, Belgium, Germany, Spain, Switzerland and the United States. (Joppke and Seidle 2012).

This article draws on the main findings of this project. The first section, on language training, highlights some of the different approaches used among these countries. The second section addresses programs to build civic knowledge – newcomers' familiarity with the core values, institutions and history of the receiving society. The final section discusses briefly how these programs and others (notably the education system) are used in efforts to mould identity, including within Quebec and other subnational communities.

LANGUAGE TRAINING

Immigrants' competence in the language, or one of the languages, of their new country is crucial to their economic, social and civic integration. Even countries (such as Canada and Australia) that select a large share of their immigrants and test language at the application stage provide language training for many new arrivals. In some other federal countries, language learning programs may not be targeted solely at immigrants, but at least some newcomers (including children) are reached through these avenues.

Citizenship and Immigration Canada (CIC) has funded for decades a range of 'settlement services' through its Integration Program; total spending in 2009-10 was $966 million (Citizenship and Immigration Canada 2010). CIC administers settlement services for immigrants in seven of the 10 provinces. Language training, a major component of the Settlement Program, is delivered by service provider organizations (SPOs), many of which (but not all) are non-profit. Although attendance is not obligatory, the programs reach a significant proportion of immigrants: in 2009-10, 56,823 newcomers received language training under CIC programs (Citizenship and Immigration Canada 2010). Under its 1991 accord with the federal government, the Quebec government, in addition to acquiring the responsibility for selecting all economic immigrants to the province, took over reception and integration services for new arrivals.[2] The federal government provides it with an annual grant.[3] In the late 1990s, administration of settlement services was also devolved to Manitoba and British Columbia. Language training was expanded in these two provinces, and a number of innovations in programming were introduced (Seidle 2010). However, in April 2012 Jason Kenney, the federal immigration minister, announced that the federal government would, within the following two years, resume management of federally funded settlement programs in British Columbia and Manitoba.

In Australia, the budget of the Commonwealth government's immigration department for settlement, citizenship and social cohesion programs was $A276 million in 2008-09. Delivery is largely managed by state governments, with nongovernmental organizations playing a significant role. One of the most important federally funded programs is the Adult Migrant English Program, which provides for language training upon arrival, followed by employment-related English courses.

Although Germany took decades to accept that it had become a country of immigration, this is now reflected in policy. Following adoption of a new immigration law in 2005, a new national integration course – one part of which is directed at language learning and the other at civic knowledge – was introduced. As the *Länder* governments are responsible for administration in most policy fields, it was expected they would deliver the courses. However, they declined to provide funding, so management authority was assigned to a federal office. Participation is usually obligatory for new immigrants from outside the European Union. The course is also open to people who have lived in Germany for a time but have not yet learned sufficient German. Qualifying immigrants receive up to 900 hours of language training (delivered by a range of organizations outside government), the objective of which is to "teach [them] about the language and the circumstances in Germany such that they are able, without the help or mediation of third parties, to deal with all day-to-day matters independently" (*Bundesamt für Migration und Flüchtlinge* 2008). Between 2005 and 2008, 484,322 people participated in the integration courses (Heckmann 2010).

Unlike Canada, Australia and Germany, the United States federal government does not have a program devoted explicitly to language training for immigrants. However, as Gary Freeman and Stuart Tendler explain in their chapter for the above-noted book, certain federal programs support the learning of English as a second language (ESL). For example, under the Adult Education and Family Literacy Act, the US Department of Education allocates formula grants to the states, which have flexibility to prioritize spending. As of 2007, this program funded at least 3,100 adult education programs nationwide, with

more than half of the 2.4 million participants enrolled in programs for ESL education. Another funding program, for English language instruction in the public education system, is governed by the 2001 *No Child Left Behind Act*. Again, the US Department of Education provides grants to state governments; the latter then distribute grants to local education authorities. The program's 2010 budget was $750 million. The governments of some states, especially those with large immigrant populations, have language training programs that specifically target immigrants, as do some of the larger cities and even some smaller centres.[4]

It is not only in the US that the school system plays an important role in language acquisition for the children of immigrants. Except in cases where public education is offered in more than one language, children from a migration background are most often schooled in the language of the country or the subnational unit (e.g. in French in the French-speaking cantons in Switzerland and in German in those where that is the official language).[5] This has important implications for the children's overall integration and even their sense of identity (this is discussed further below).

CIVIC LEARNING

Many countries have programs aimed at familiarizing immigrants with the values, ways of life and institutions of their new country. Integration courses, which in some cases are obligatory, have become a fairly popular avenue in Western Europe. In other cases, governments provide less formal services directed at familiarizing immigrants with their new environment and helping them build links with the receiving society.

In Canada, CIC has long had voluntary programs that fund SPOs to help immigrants integrate into their community; in addition to language training, these include reception and orientation services, translation and interpretation, employment assistance and counselling. One of the 'streams' under the Settlement Program is Community Connections. In 2009-10, 8,292 newcomers participated in activities to be better connected to their communities in the seven provinces where CIC still manages settlement programs (Citizenship and Immigration Canada 2010).[6] Civic learning also occurs when immigrants prepare for naturalization. The 53-page study guide opens as follows: "Canadian citizens have rights and responsibilities. These come to us from our history, are secured by Canadian law, and reflect our shared traditions, identity, and values (Citizenship and Immigration Canada 2011)." According to the guide, responsibilities of citizenship include obeying the law, voting, helping others in the community and protecting the environment and Canada's heritage.

Immigrants in Germany who have completed the language training described above take the orientation course. Participants spend 45 hours learning about democratic values and the legal system, culture and history of Germany. The objectives of the course include the following:

- developing an understanding of the German political system;
- developing a positive assessment of the German state;
- teaching about rights and obligations as a resident and citizen;
- enabling immigrants to participate in community life.[7]

In contrast to the Canadian and German models, the US federal government has virtually no dedicated programming directed at civic learning. One exception is a program under which the Office of Citizenship provides grants to a range of organizations for immigrant integration initiatives, with a focus on preparing for naturalization. In financial year 2010, US$11 million was provided, with about $7 million for citizenship education, including civics-focused ESL instruction, citizenship instruction, resources such as textbooks, language software and computers, and assistance with naturalization applications. Approximately 45 grants of up to $100,000 were available for locally based citizenship service providers. For a country with such a large population and high immigrant flows, this is a modest level of activity. It is nevertheless supplemented by a range of programs sponsored by state and local governments, foundations and civic organizations, some of which focus on the role of communities in welcoming newcomers.[8]

The Belgian federal government has no overall immigrant integration policy. Rather, as Marco Martiniello recounts in his chapter for the above-noted book, the regions and linguistic communities have a range of programs. Flanders has a two-part integration course that is obligatory for newcomers. The first phase is comprised of Dutch language training, social orientation (covering the norms and values of Flemish society) and career counselling. The second phase, for those who succeed in the first, includes professional training and advanced Dutch classes. French-speaking Wallonia has no integration course, but regional integration centres provide language training and labour market and social orientation services. In Brussels, the French-speaking part of the government provides services (including language training) for newcomers and their children, and the Flemish part has an integration course that is similar to the one in Flanders but is not obligatory.

Looking to some of the other federal countries studied in the Forum of Federations project, further variety is evident. Switzerland, like Belgium, does not have a countrywide integration policy. Some of the cantons and

larger cities have programs, but there are no integration courses such as the one in Flanders. Further examples of policy difference among federal countries could be provided. It is nevertheless fair to observe that, despite growing interest in the civic integration of immigrants, approaches vary considerably – in part, a reflection of whether or not the federal government is taking an active policy and funding role.

IDENTITY

Although immigrant integration policies may underline the importance of developing newcomers' capacity to become engaged with the broader community, they often also reflect an implicit objective: building a sense of belonging to their recently adopted country. In federations where more than one language has official status, the situation is often more complex: the federal and subnational governments (or at least some of the latter) may both have policies aimed at identity formation on the part of immigrants and their descendants. This has been the case in Quebec and Catalonia.

Since the late 1960s, various steps have been taken to safeguard the primacy of the French language in Quebec. One of the most contentious parts of this campaign concerned access to public schools for the children of immigrants. For decades, a considerable share of immigrant parents sent their children to English-language schools. As immigration to Quebec rose, Francophone leaders began to argue for measures to direct these children to French schools. Initial efforts at regulation were highly controversial, even leading to violent clashes in the Saint-Léonard neighbourhood of Montreal (with its large concentration of Italian-background residents). Following the election of Quebec's first *Parti québécois* (sovereignist) government, Bill 101 was adopted in 1977. One of its key provisions stipulated that the children of immigrants to Quebec must attend French public schools (there are some exceptions, notably for those who have at least one parent who was educated in English in Canada).

This important component of Bill 101 has been a major instrument of Quebec's continuing *francisation*. But there are potential impacts beyond language. Research has suggested that the children of immigrants who have gone to school in French, sometimes referred to as "*génération 101*," have become more supportive of the *Parti québécois* and of Quebec sovereignty. An empirical study based on a 2006 survey of francophone, anglophone and allophone Quebec youth[9] suggests there has not been such a clear shift. According to Éric Bélanger and Andrea Perrella (2008), 62 percent of young francophones were in favour of sovereignty-partnership,[10] compared to 29 percent and 14 percent for allophones and Anglophones respectively.

The Canadian federal government, for its part, has numerous programs that seek to promote Canadian identity in Quebec (as elsewhere). According to one assessment: "It is evident that ethnocultural minorities are targeted directly by both levels of government. Their loyalty is solicited, politicized and ultimately instrumentalized by politicians who use them for their own aims of consolidating the identity within their respective spaces." (Labelle and Rocher 2009: 74) It is difficult to measure the impact of the two governments' activities on the complex process of identity formation. For now, a large share of Quebecers from an immigrant background seem to combine a relatively strong Canadian identity with a Quebec identity. According to a 2010 survey, 59 percent of allophones selected one of the following three categories: Canadian only, Canadian first and also a Quebecer, and equally a Quebecer and a Canadian. In contrast, 28 percent of francophones fell into the three categories (for further details, see Table 1).[11]

Table 1: Identification of Quebecers by first language

	FRANCOPHONE	ANGLOPHONE	ALLOPHONE
Quebecer only	31%	2%	6%
Quebecer first, also Canadian	39%	12%	19%
Equally Quebecer and Canadian	20%	21%	26%
Canadian first, also Quebecer	7%	45%	20%
Canadian only	1%	18%	13%

The question, asked in a web panel survey carried out in December 2012, was: "People have different ways of defining themselves. Do you consider yourself to be: [five choices as in table]?" Source: Jedwab 2010.

Some see a similar dynamic in Catalonia. In his chapter for the above-noted book, Ricard Zapata-Barrero recounts that in 2009 the Catalan Parliament passed an immigrant reception bill aimed at providing immigrants with the capabilities to be autonomous within Catalan society. It thus recognizes the need for immigrants to have a minimum ability in Catalan and to acquire knowledge of the government, history, politics, economy and culture of Catalonia. The education system also has potential impacts on the identities of children from a migration background: as in Quebec, they have no choice but to pursue their schooling in Catalan. For Zapata-Barrero, such measures to protect the Catalan language (which apply not only to immigrants), are a condition for maintaining the considerable capacity for self-government Catalonia has acquired during Spain's federalization process.

In conclusion, it is evident that federal countries such as the ones mentioned in this article have chosen quite a variety of routes to promote (actively or otherwise) improved language skills and civic learning for immigrants. This variation may be seen as a logical response to differences in local conditions such as language and public values – one of the purported strengths of federalism. However, this may result in inequities if immigrants have considerably different rights (and obligations) depending on where they settle in a given country. In this regard, the key consideration is not which order of government administers the programs. Rather, it seems important to strike a balance between legitimate policy variation and common objectives for the country as a whole. In the absence of the latter and a reasonable level of coordination among the governments involved, even well-designed programs may not have the intended impact.

NOTES

[1] For an expansion of this view of immigrant integration and a discussion of relevant studies and reports, see the "Introduction" in Joppke and Seidle [2012].

[2] Starting in the 1960s, Quebec policy-makers, concerned about the province's slowing population growth, sought to attract more immigrants. A key argument was that the Quebec government was better suited to select newcomers who could be expected to integrate into Quebec society. A modest agreement with the federal government in 1971, followed by two others, led to the 1991 accord. Under the latter, the federal government can overrule candidates selected by Quebec only for serious security or medical reasons.

[3] In contrast to the situation in the other provinces, most of Quebec's language training is provided by public servants; only about 7 percent of the Quebec government's spending on this goes to nongovernmental organizations (Reichhold 2011).

[4] Such as Littleton, Colorado; see Jones-Correa, *All Immigration is Local*, 17.

[5] Although immigrant parents have some choice in the three officially bilingual (German-French cantons). In Belgium, the children of immigrants attend Flemish schools in Flanders and French schools in Wallonia. In Brussels, which is a bilingual (though largely French-speaking) region, they have the choice of public education in French or Flemish.

[6] For example, funding is provided for activities that introduce newcomers to 'host families' who help them improve their language ability, learn about Canadian society and develop networks. Other activities that qualify for funding are youth leadership projects, conversation circles and mentoring (Citizenship and Immigration Canada 2009).

[7] *Bundesamt für Migration und Flüchtlinge*, "Concept for a Nationwide Integration Course": 24-25.

[8] A number of examples are provided in Jones-Correa, *All Immigration is Local.*

[9] Allophones are Quebecers whose first language learned and still understood is neither French nor English. The age group for the 1212 respondents was 18 to 34 years.

[10] The option that was put to Quebecers in the 1995 referendum.

[11] A recent study (Bilodeau, Nevitte and White 2010) used a number of survey questions to explore the federal and provincial loyalties of immigrants in Quebec. The authors found that immigrants who speak English or another language at home are more oriented to the federal than to the Quebec government. Those who speak French at home (which would include some immigrants from France and North African countries) have political loyalties similar to those of the native-born francophone population. Using results from the 2002 Ethnic Diversity Survey, Keith Banting and Stuart Soroka (2012) find that racial-minority immigrants to Quebec have considerably stronger attachment to Canada than to the province; however, there is a notable decline in the former attachment among the second generation. The book by Denise Helly and Nicholas van Schendel (2001), which is based on extensive qualitative research, provides a nuanced analysis of the sense of belonging of immigrants to Quebec from various backgrounds.

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PATCHWORK POLICIES: IMMIGRANT INTEGRATION IN THE UNITED STATES*

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ABSTRACT

The United States is known as the quintessential immigrant nation, one that has successfully integrated tens of millions of newcomers over its history. This integration has occurred, we contend, in the absence of any coordinated national integration policy. Indeed, the U.S. federal government has no official definition of immigrant integration. Rather, the prevailing approach of U.S. governments and the American public is one of laissez-faire integration: immigrants are expected to use their own resources, family, friendship networks, and perhaps the assistance of local community organizations to survive and thrive in the United States. While there are examples of federal, state, and municipal policies that can facilitate immigrants' integration, these offer, at best, a patchwork of policies that do not form a coherent response to immigrant settlement. As a result, immigrants can be treated very differently in different parts of the country.

RÉSUMÉ

Les États-Unis sont connus comme le pays par excellence des immigrants, celui qui a intégré avec succès des dizaines de millions de nouveaux arrivants depuis ses débuts. Cette intégration a eu lieu, à notre avis, en l'absence de toute politique d'intégration nationale coordonnée. En effet, le gouvernement fédéral américain n'a pas de définition officielle de l'intégration des immigrants. Au contraire, l'approche dominante des gouvernements des États-Unis et du public américain est une intégration de style laissez-faire : les immigrants sont censés utiliser leurs propres ressources, la famille, les réseaux d'amitié, et peut-être l'assistance des organisations communautaires locales pour survivre et prospérer aux États-Unis. Bien qu'il existe des exemples de politiques fédérales, étatiques, et municipales qui peuvent faciliter l'intégration des immigrants, celles-ci offrent, au mieux, un ensemble de politiques qui ne forment pas de réponse cohérente à l'établissement des immigrants. En conséquence, les immigrants peuvent être traités très différemment dans différentes parties du pays.

A. WHO MIGRATES TO THE UNITED STATES? LAW AND DEMOGRAPHICS

While the popular image of the United States is one of enduring immigration, national origin quota laws shut off large-scale migration between the 1920s and 1965, relegating issues of immigration and integration to relative insignificance. Only after Congress repealed these laws in 1965 did the United States again become an immigrant nation: in 2010, almost 40 million foreign-born people constituted 12.9 percent of the country's 309 million residents, a proportion four times the global average.[1] The majority of these immigrants, 53 percent, were born in Mexico, Central and South America, or the Caribbean, with Mexicans the largest group.

The 1965 Immigration and Nationality Act still structures immigrant admissions today. A series of preference categories, which heavily favour family reunification, allocate between 416,000 and 675,000 visas to would-be migrants. U.S. citizens can also sponsor an immediate family member outside the annual limit imposed by Congress. As a result, two-thirds to three-quarters of legal immigrants enter the United States in any given year due to family ties. The remainder enter as economic migrants, usually high-skilled workers sponsored by U.S. employers, or as refugees or asylees.

The United States is also home to a significant undocumented population, migrants who enter the country clandestinely or overstay legal visas for tourism, study, or temporary work. In 2010, an estimated 11.2 million migrants lacked legal residency papers, about 29 percent of the country's foreign-born individuals (Passel and Cohn 2011). Undocumented, or "illegal," migration has become a defining feature of American immigration debates, as has the issue of border control. A majority of U.S. residents think most immigrants in the country are illegal.[2] Border enforcement was already a priority before the terrorist attacks of 11 September 2001, but since 2003, when immigration services and enforcement were transferred to the new U.S. Department of Homeland Security, policing borders has gained further salience within a framework of national security.

While the U.S. government has no official definition of integration, many Americans would associate successful integration with an absence of significant differences between immigrants and the native born in socio-economic outcomes like labour market participation and college attendance, and in socio-political indicators, such as adopting U.S. citizenship and speaking English.[3] Here we see both successes and challenges. The foreign born work more than the native born, but they earn less and are more likely to live in poverty.[4] Part of the income gap stems from the low level of schooling among a large proportion of immigrants—32 percent do not hold a high school diploma—but this does not account for the entire difference, raising questions about employment equity and discrimination. Because only a minority, 43 percent, are naturalized citizens, many immigrants cannot vote and consequently have a hard time using the ballot box to exert political pressure for policies to benefit the foreign born.[5]

B. THE POLICY-MAKING FRAMEWORK: U.S. FEDERALISM AND PUBLIC OPINION

The United States is a federal system, with power divided between a national (federal) government, 50 states, and about 20,000 municipalities. The laws that the national government creates are, according to the U.S. Constitution, "the supreme law of the land." Congressional authority is clearest and strongest in deciding who may enter the country and under what conditions, a prerogative repeatedly confirmed by the courts, most recently in June 2012 when the U.S. Supreme Court invalidated most provisions of a controversial immigration law enacted by Arizona state policymakers in 2010. The federal government does not, however, administer a formal immigrant integration policy beyond a modest refugee resettlement program.

In the absence of a national policy, integration is left to families and ethnic communities, and states and localities, which have power to legislate in areas such as education and social programs. Increasingly, local governments and their electorates resent the fact that they shoulder this responsibility, and associated cost, but have no authority over admissions. Sub-national governments consequently have become important sites of integration debates, especially as migrants disperse to new metropolitan and rural areas. Policymakers have proposed, and sometimes enacted, a growing number of state bills and local ordinances; some aim to facilitate integration, but many others seek exclusion (Laglagaron et al. 2008; Newton 2012; Ramakrishnan and Wong 2010). A full portrait of integration policy in the United States would require an analysis of 50 states and thousands of municipalities home to immigrants.

Contemporary American immigration and integration politics are also enmeshed in internally fragmented party politics and public opinion. Two-thirds to three-quarters of Americans disagree with statements that *legal* immigrants are a burden on social services, increase crime, or increase the likelihood of a terrorist attack, but when queried about *illegal* migrants, between half and three-quarters of Americans express agreement (German Marshall Fund 2009, 2011). Unlike in many European countries, immigrants' cultural and religious diversity does not raise much concern. Two-thirds of Americans feel that immigration enriches the culture of

the United States. The legal status of migrants—not their culture or work ethic—is the central public policy issue in the United States.[6]

C. INTEGRATION, SETTLEMENT, AND EXCLUSION: A POLICY PATCHWORK

Many policies that facilitate immigrants' integration flow from the legacies of the 1960s civil rights movement, when native-born minorities led by African Americans mobilized for equality in law and practice. Increasingly, though, contemporary policy-making directed specifically at immigrants emphasizes exclusion. Immigrant advocates have turned to the courts to fight exclusionary measures.[7]

1. Civil Rights Legacies: Education and Language Access

Primary and secondary education is largely a state responsibility, but the federal government has stepped in to enforce civil rights laws. In 1968, Congress enacted the Bilingual Education Act (BEA), which—until it expired in 2002—provided a federal remedy for discrimination against students who did not speak English. It also made federal funding available for programs taught in languages other than English. During its 34 years, the BEA generated constant controversy, especially over whether it should help maintain minority languages and cultures or only provide remedial or transitional English instruction (Schmid 2001; Spolsky 2004). Voters in California, Arizona, and Massachusetts adopted ballot measures to ban bilingual education in public schools in 1998, 2000, and 2002, respectively. In 2001, the federal English Language Acquisition Act (ELAA), enacted as Title III of the No Child Left Behind Act, replaced the BEA. ELAA contains no reference to "bilingual education" and prioritizes English-only instruction by measuring school success in English language proficiency alone. The change in teaching pedagogy that ELAA forces on states, some claim, will hurt the academic achievement of immigrant children and makes it more difficult for them to adapt to life in the United States (England 2009).

Unlike in Canada, the U.S. government has done little to create and fund programs that teach English to adult immigrants even though more than half of the 85 percent of immigrants who speak a language other than English at home report not speaking English very well. The Workforce Investment Act of 1998, which includes as Title II the Adult Education and Family Literacy Act, is the main national program for adult ESL instruction. Inadequate funding has resulted in long waiting lists for ESL classes, sometimes up to three years, and overcrowded, understaffed classrooms (Tucker 2006). The case of adult language instruction illustrates well the American public's laissez-faire philosophy on immigrant integration. While 91 percent of Americans feel it is very or somewhat important that immigrants speak English, only 30 percent believe the government should pay for English language classes.[8]

Immigrants with limited English do enjoy some language access guarantees, rooted in Title VI of the 1964 Civil Rights Act. Congress and the President have used the Act to mandate that administrative agencies at various levels of government hire bilingual personnel and translate forms, notices, and applications for limited-English proficient (LEP) individuals.[9] Similarly, Section 203 of the 1975 amendments to the Voting Rights Act of 1965, another piece of civil rights legislation, provides language access at the ballot box.[10] As of 2002, 466 local jurisdictions in 31 states were legally required to provide voting information and ballots in non-English languages (U.S. Commission on Civil Rights 2006). Large immigrant gateway cities such as San Francisco, New York, and Washington, D.C. have also adopted their own, more expansive, language access policies.

2. Citizenship and Legality: Who Deserves Social Benefits?

The U.S. government provides a number of public benefits that constitute an important, though minimal, safety net for the poor, elderly, and disabled. The major programs include food stamps, Supplemental Security Income (SSI, a monthly income supplement for the aged, blind, and disabled), welfare assistance to indigent families (known as Temporary Aid to Needy Families, or TANF), Medicaid (health care for the poor), and Section 8 subsidized housing. Because many newcomers are poorer than the native born, federal benefits can provide much needed assistance with integration.

Government policy, however, increasingly uses citizenship and legal status as criteria for receiving public benefits. Undocumented immigrants are not eligible to receive federally-funded benefits other than emergency Medicaid. Legal immigrants used to be eligible for benefits on the same basis as U.S. citizens, but this ended with the Personal Responsibility and Work Opportunity Reconciliation Act, commonly known as the Welfare Reform Act, in 1996. In its original form, the Act terminated or limited federal benefits to legal immigrants, with the exception of refugees and immigrants with long work histories or military connections (Fix, Capps, and Kaushal 2009). As of 2012, some benefits have been restored to some immigrants, but many exclusions stand.

Anti-immigrant rhetoric over public benefits, also heard in recent debates over healthcare reform, carries serious consequences for integration. For example, many legal immigrants eligible for Medicaid avoid using the program because they are confused by complex eligibility requirements or because they have the mistaken impression

that using Medicaid would make them a "public charge," possibly rendering them ineligible for U.S. citizenship (Feld and Power 2002). This can have disastrous consequences for immigrants' health and for the public purse; uninsured immigrants often lack access to preventative services and then rely on costly emergency room visits when they become critically ill.

3. Fighting the Turn toward Exclusion: The Role of the Courts

Policy reforms over the past two decades have shifted the burden of determining and financing social policy from the federal government to state and local governments. A number of these sub-national governments have responded with exclusionary legislation aimed at non-citizens. Cities such as Hazleton (PA), Escondido (CA), and Farmers Branch (TX) gained national attention in 2006 when they passed ordinances barring undocumented migrants from working and renting homes in their cities. In 2007, legislatures in Arizona, Oklahoma, Tennessee, and West Virginia made it illegal for employers to hire undocumented workers (Laglagaron et al. 2008). More recently in 2011, the state of Alabama enacted a law that is even harsher than a similar anti-immigrant law enacted in Arizona in 2010. The Alabama law, among other things, requires police to ask the immigration status of people stopped or arrested if the police have "reasonable suspicion" that the individual is an unauthorized migrant, makes it illegal to harbor or transport undocumented immigrants, and requires schools to track the immigration status of their students. Subsequent court rulings have blocked several of the law's provisions, but others have been allowed to go into effect. While exclusionary legislation often targets undocumented migrants, it can affect legal immigrants, too. For example, 28 U.S. states have adopted—often by direct popular vote or referenda—policies that declare English the official language of government (English First 2012).

The terrorist attacks of 2001 also spawned a series of laws undermining non-citizens' legal rights and their ability to carry out daily activities. The federal USA PATRIOT Act of 2001 restricts immigrants' civil liberties by creating new grounds for deportation and making it easier for federal officials to detain foreign-born individuals suspected of terrorist activities. The REAL ID Act of 2005 requires proof of lawful immigration status to get valid state-issued photo identification. This makes it impossible for undocumented immigrants to obtain a driver's license, which in the United States commonly serves as identification for everything from using the public library to opening a bank account. Finally, a total of 68 law enforcement agencies in 24 states had, by September 2011, entered into agreements with the U.S. Department of Homeland Security, pursuant to Section 287(g) of the 1995 Immigration and Nationality Act, to help federal officials enforce immigration laws by apprehending undocumented immigrants in their jurisdictions (USCIS 2012).

Many such laws and policies face legal challenges. Cases brought forward by immigrant rights and civil liberties advocates have ended in some notable victories. For example, in 1975, Texas enacted a law denying educational funding for undocumented immigrant children and allowing local school districts to prevent these children from enrolling. The U.S. Supreme Court struck down the state law in its 1982 *Plyler v. Doe* decision, ruling that undocumented children have a constitutional right to a free, public education. Courts also declared unconstitutional a 1994 California initiative that prohibited illegal immigrants from accessing social services, health care, and public education, since it infringed on federal jurisdiction over immigration. The courts are not always sympathetic to immigrants' claims, however. For example, undocumented workers lost some important labour protections in the 2002 Supreme Court decision, *Hoffman Plastic Compounds Inc. v. NLRB*. Also, while many of the provisions of both Arizona's and Alabama's anti-immigrant laws have recently been struck down, controversial provisions that allow police to check a person's immigration status while enforcing other laws still stand. In our assessment, despite bright spots including President Obama's recent decision to stop deporting certain undocumented youth, the current turn to exclusionary policies contributes to a climate of fear that hinders the integration of immigrants, including those not directly targeted by legislation.

D. THE FUTURE OF IMMIGRANT INTEGRATION POLICY IN THE UNITED STATES

It is important to emphasize that the United States continues to be a land of opportunity for many immigrants, and especially their children. It provides stable government under a rule of law, economic mobility for many, and a relatively open society tolerant of religious, cultural, and racial diversity. All those born in the United States, regardless of their parents' legal status, receive U.S. citizenship at birth. While no paradise, many migrants move to the United States because it offers a better life than many other places in the world, for them and their children.

This does not mean that exclusionary, or even laissez-faire, policymaking should continue. We believe that immigrants' integration would be faster, easier, and more successful if the federal government instituted a comprehensive set of settlement policies focused on language training and socio-economic security. While U.S. politicians and voters tend to be suspicious of

government intervention, often adopting a "pull yourself up by the bootstraps" mentality, we see an important precedent for federal action in refugee settlement policy.[11] Working through public-private partnerships, the federal government provides funding to community-based organizations for refugee integration. Refugees have also been protected during welfare reform, remaining eligible for various programs despite cuts to other immigrants. Refugee settlement programs appear to work: refugees enjoy better outcomes in education and the labour market (Portes and Rumbaut 2001, 2006) and greater civic and political integration (Bloemraad 2006) than similarly situated non-refugees.

Refugee programs were justified, initially, as in the national interest since many refugees fled Communist countries. These policies were also defended then, and even more today, on humanitarian grounds. If immigrant settlement were also seen to be in the national interest and an important humanitarian endeavour, it might be possible for the United States to develop a comprehensive national integration policy. This will require vigorous advocacy by civil society groups and support by a significant group of voters. If the growing second generation, who hold U.S. citizenship and can vote, takes to heart the challenges their parents faced, the coming decades may bring change to U.S. policies, thereby ameliorating immigrants' integration.

NOTES

* This article is a highly condensed version of the authors' chapter: "Immigrant Integration and Policy in the United States: A Loosely Stitched Patchwork.": 205-232 in *International Perspectives: Integration and Inclusion*, edited by James Frideres and John Biles. Montreal and Kingston: Queen's Policy Studies Series, McGill-Queen's University Press, 2012.

[1] The United Nations estimates that in 2005, 191 million people lived outside their country of birth, three percent of the world population (UNPD 2006). As with the global statistics, the U.S. percentage counts the proportion of foreign-born individuals, regardless of legal status. Unless otherwise indicated, all U.S. statistics are from multiple years of the American Community Survey, conducted by the U.S. Census Bureau. Available at http://www.census.gov/acs/www/.

[2] According to a 2011 survey, 55 percent of Americans think most immigrants are illegal, an increase from the 48 percent with a similar view in 2008 (German Marshall Fund 2009, 2011).

[3] U.S. scholars and policymakers often examine the "second generation," the children of immigrants, to assess integration, even if all children born in the United States are citizens and not technically immigrants. Of all children under the age of 18 in the United States, 23 percent (or 16.3 million) live in a household with at least one immigrant parent. The mixed legal status of many immigrant families, with children who are citizens but parents who are non-citizen legal residents or undocumented, generates fierce debates over whether such families should receive public benefits, which are often tied to citizenship or legal status.

[4] For more details, see Bloemraad & de Graauw (2012: 211).

[5] With the exception of a very few municipalities, non-citizens cannot vote in the United States, unlike in some European countries. There is some evidence that more immigrants are applying to naturalize (Baker 2009), but migrants without legal residency can never access citizenship under their current status.

[6] When it comes to working hard, Americans hold similar views on legal and illegal immigrants, with about 9 out of 10 judging that migrants are hard workers.

[7] It is impossible to cover all the policies, at all levels of government, which could be seen as promoting (or harming) immigrant settlement. Here we provide some key illustrations of the legacies of civil rights legislation, and the anti-immigrant turn in contemporary legislation.

[8] This survey was also conducted in Canada and six European countries: France, the U.K., Germany, Italy, the Netherlands, and Spain. A virtually identical proportion of residents in the other countries, 89 percent, felt it important that immigrants know the national language, but only respondents in the U.K. were less likely to support government language classes, at 25 percent, than Americans; Canadians, at 48 percent, were most likely to support public funding of language instruction (German Marshall Fund 2009).

[9] Following complaints about spotty implementation, President Clinton issued Executive Order 13166, "Improving Access for Persons with Limited English Proficiency," in 2000, an order reaffirmed by the Bush Administration in 2002.

[10] Election officials must provide bilingual voting assistance in communities where a single language minority group makes up five percent of the voting-age population or has more than 10,000 voting-age citizens and is limited-English proficient. Section 203 applies to persons of American Indian, Asian, Alaskan Native, or Spanish heritage, the groups that Congress found to face barriers in the political process.

[11] In addition, some localities in the United States are formulating and implementing policies to promote the social integration of newcomers in their jurisdictions (de Graauw 2008, 2012). Since the federal system facilitates policy "borrowing" between governments, we might see the diffusion of inclusive as well as exclusionary policies.

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ATTACHMENTS TO MULTIPLE COMMUNITIES AND PUBLIC AMBIVALENCE TOWARD IMMIGRATION IN THE UNITED STATES

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ABSTRACT

In a 2010 survey, Americans expressed moderate levels of trust in their local, state, and federal governments in that order but high levels of attachment to the English language, their country, state, city, ethnic and ancestral group, the world, neighborhood, and religious group in that order. Americans expressed more ambivalent attitudes about immigrants, although responses were likely colored by long-standing controversies about illegal immigration. Higher educated and younger Americans expressed the most positive attitudes toward immigration.

RÉSUMÉ

Dans une enquête réalisée en 2010, les Américains ont exprimé des niveaux modérés de confiance dans leur gouvernement local, d'état et fédéral, dans cet ordre, mais des niveaux élevés d'attachement à la langue anglaise, à leur pays, leur état, leur ville, leur groupe ethnique et ancestral, le monde, le voisinage, et les groupes religieux dans cet ordre. Les Américains ont exprimé des attitudes plus ambivalentes au sujet des immigrants, bien que les réponses aient probablement été colorées par la controverse de longue date liée à l'immigration clandestine. Les Américains plus instruits et plus jeunes ont exprimé des attitudes plus positives envers l'immigration.

Relying mostly on 2010 data collected by the Association for Canadian Studies of a representative sample of the U.S. population, we examine degrees of attachment reported by Americans to various political and non-political communities and also analyze attitudes toward immigrants and several immigration issues. We further investigate social and demographic factors related to attachments and immigration attitudes and speculate on some possible political and policy consequences of the findings.

TRUST VERSUS ATTACHMENTS

Public trust and confidence in political institutions declined markedly during the late 1960s and early 1970s from an 80 percent range to less than 50 percent. Although trust has not rebounded, Americans still generally report high levels of trust in their federal, state, and local governments compared to citizens in some other federations (Kincaid and Cole 2011). However, Americans usually trust their local governments the most. The federal government ranks lowest; the states fall in between. The 2010 survey found 43 percent of Americans expressing "a great deal" or "fair amount" of trust in their federal government, followed by 52 percent for state governments and 55 percent for municipal governments. On questions such as "which order of government gives you the most for your money," "which order needs more power," and "which order do you trust most to deliver programs and services important to you," Americans also rate local governments the best, followed by state governments and the federal government as the worst (Konisky 2011; Cole, Kincaid, and Rodriguez 2004). Public support for the federal government has declined further since the late 1970s while support for local and state governments has increased slightly (Cole and Kincaid 2000).

Given Americans' comparatively high levels of government trust, it is not surprising that they also reported high levels of "attachment" to the United States of America, their home state or region, and their city or town (see Table 1). However, Americans' attachments to these arenas of political community are the *opposite* of their evaluations of the governments of each arena. As shown in Table 1, 91 percent of respondents reported being very or somewhat attached to the United States, while just about 80 percent were so attached to their state and nearly 74 percent so attached to their city or town.

At the same time, 44 percent of Americans considered themselves as being from their country only, 26 percent from their country but also their state, and 18 percent equally from their country and state. Furthermore, only 53 percent believed that "it is a problem for American unity when people have a state identity that is stronger than their national identity" (results not shown in tables).

These patterns are not surprising. Americans have long distinguished country from government. Attachment to country (and also the U.S. Constitution) remains extraordinarily high even when most Americans believe the government in power is ruining the country. At least since 1742 when the prominent preacher Jonathan Edwards called for "an agreement of all God's people in America" and for a union based on "love of the brethren" (quoted in Niebuhr and Heimert 1963:16-17), political leaders have emphasized affection for country (not "nation" or "state") and Constitution as the foundation of an American identity forged in a melting pot (Zangwill 1909). Although multiculturalists have tried to replace the melting-pot metaphor with the "salad-bowl" metaphor, most Americans construe their union as a covenant embracing a single people, not separate peoples.

Table 1: Attachments to Various Communities*

ATTACHMENT TO:	LEVEL OF ATTACHMENT				
	VERY	SOMEWHAT	NOT VERY	NOT AT ALL	NO RESPONSE
English Language	74.6	19.3	3.9	1.0	1.1
Combined	93.9		4.9		
Country	66.9	24.5	5.2	1.7	1.6
Combined	91.4		6.9		
State/Region	39.7	40.1	13.5	5.0	1.8
Combined	79.8		18.5		
City/Town	32.9	40.8	18.9	5.8	1.5
Combined	73.8		24.7		
Ethnic/Ancestral	34.2	34.9	19.9	8.2	2.8
Combined	69.1		28.1		
The World	26.5	41.1	23.5	5.9	3.0
Combined	67.6		29.4		
Neighborhood	27.5	38.5	24.0	9.5	1.6
Combined	66.0		32.5		
Religious Group	31.8	23.7	18.4	19.5	6.7
Combined	55.5		37.9		

* Responses ranked by degree of "very" or "somewhat" attached, so that highest level of attachment is shown to be the "English language," lowest is shown to be "religious group."

These orientations help explain why Americans are less attached to their state and locality than are citizens of many other federal countries. U.S. states and localities are congeries of individuals who choose to live there and create community through social, economic, and political interactions. Except for Indian lands, regions and localities are not sites of primordial attachment, transcendent identity, or ethnic, religious, or linguistic self-government. Americans, moreover, are highly mobile geographically. In any given year, roughly 40 million Americans report living at a different address than the year before, and roughly 20 percent of all moves from year to year occur across state boundaries (U.S. Census Bureau 2007). In turn, therefore, only about two-thirds of the American respondents reported being very or somewhat attached to their neighborhood. Given that nationalist-minded leaders since the Federalists have inveighed against the evils of sectionalism, states' rights, and local parochialism, it is surprising that Americans are not less attached to states and localities.

Statistical analyses (not shown in tables) revealed that higher proportions of older Americans reported higher levels of attachment to the United States, but not to states or localities. Higher levels of education also are related to attachment to the United States, but not to the other arenas. So too is birthplace. Those born in the United States reported higher levels of attachment to the country than did those born elsewhere. The only other statistically significant relationship is that a higher level of attachment to city or town was reported by those *not* born in the United States. Perhaps this is a function of locality as the experiential locus of assimilation into American society.

Quite fascinating, however, is that despite multicultural criticisms of the United States and the role of race as an enduring cleavage, race is not a statistically significant differentiator of attachment to country, state, or locality. By contrast, blacks are significantly more trustful of the federal government than are whites, perhaps because of the historic association of states' rights with racism (Kincaid and Cole 2008).

The survey also found 68 percent of Americans being very or somewhat attached to the world. Absent in-depth and longitudinal data, it is impossible to assess this result, although the fact that the United States is home to people from all over the world and is also the only federation that is a super-power might be relevant.

Given the high level of attachment to the United States, it is not surprising that 94 percent of Americans also felt very or somewhat attached to their language. More than 82 percent of U.S. residents speak only English at home. The next most spoken language, at 10.7 percent, is Spanish, although most Spanish-speaking parents urge their children to learn English so as to be bilingual (Stritikus and Garcia 2005). For Americans, English, which is technically a foreign language because there is no "American" language, is a tool, not an identity (Kincaid 2010).

More surprising is that 69 percent of Americans said they were very or somewhat attached to their ethnic or ancestral group—more so than respondents in Canada, Germany, and Spain. Perhaps the absence of nationalistic, linguistic, and religious struggles between peoples in the United States has enabled Americans to be comfortable retaining ethnic identities voluntarily. Given that such identities have no governmental expression (except on Indian reservations) as they do in many federations, they pose little threat to the federal polity. Furthermore, as the United States has historically sought to meld immigrants into a single people, ethnic identities remain harmless markers of differentiation. Additionally, the United States is a product of revolution based on an idea as expressed in the 1776 Declaration of Independence; hence, Americans identify with their country and their homeland, not with a fatherland, motherland, or "nation" in terms of blood lineage. This allows Americans to be attached to ancestral identities while still being attached to their country.

The lowest level of attachment reported by Americans is to "religious group," although more half (56 percent) said they were very or somewhat attached to their religion—more than Canadians, Germans, and Spaniards. Most international surveys show the United States to be one of the world's most religious countries. Three overriding factors probably contribute to this vitality. First, competition among religious groups in an environment of freedom has facilitated their vigour. Second, in many European countries and elsewhere, revolutionaries viewed religion as a major legitimator of an oppressive *ancien régime*, but most American religious groups supported revolution and federal democracy. Furthermore, religious leaders have often championed social change (e.g., the Rev. Dr. Martin Luther King). Third, Americans have tended to have a messianic view of themselves, which has melded God and country into a potent symbol of unity (Kincaid 1971).

ATTITUDES TOWARD IMMIGRATION AND IMMIGRANTS

Although the United States has been termed "a nation of immigrants" (Kennedy 1964), Americans have often been ambivalent about immigrants. More than 20 million immigrants arrived between 1880 and 1920, but federal legislation in 1921 and 1924 sharply curtailed immigration, especially for all regions of the world except western and northern Europe. The Immigration Act of 1965 reopened immigration and abolished discriminatory quotas. Consequently, 38.5 million immigrants now live in the United States.

However, illegal immigration has emerged as a major controversy. Some 10.8 million illegal aliens reside in the country, and about 62 percent of them come from Mexico. Of these, 47 percent live in California, Florida, and Texas (U.S. Department of Homeland Security 2010). Arguing that the federal government has done too little to enforce its own immigration laws, Arizona enacted an omnibus immigration-enforcement law in 2010. Alabama, Georgia, Indiana, South Carolina, and Utah did the same in 2011. Federal courts have enjoined enforcement of key provisions of all these laws. However, many states also have enacted laws beneficial to illegal immigrants, and the federal government has not blocked those laws.

This controversy makes it difficult to interpret surveys because advocates for illegal immigrants have successfully blurred distinctions between illegal and legal immigrants by framing the issue as merely immigration. One cannot know, therefore, whether responses to questions about "immigrants" reflect public attitudes toward legal or

illegal immigrants. Given the virtual absence of public controversy about legal immigration, question responses are probably influenced by individuals' attitudes toward illegal immigrants, most of whom are perceived, correctly, to be Mexicans.

This could be why nearly half (48 percent) of respondents agreed either "strongly" or "somewhat" that there are too many immigrants in the country. Over half (63 percent) also said recent immigrants have different values from the majority of Americans, and 38 percent agreed that "immigrants should be encouraged to give up their customs and traditions" (see Table 2).

Table 2: Immigration Attitudes

AGREEMENT OR DISAGREEMENT WITH THE FOLLOWING:	STRONGLY AGREE	SOMEWHAT AGREE	SOMEWHAT DISAGREE	STRONGLY AGREE	N/A
There are too many immigrants in my country	24.1	23.6	19.8	19.3	13.2
Combined	47.7		39.1		
Recent immigrants have different values from that of the majority of the country	24.0	38.6	18.7	6.7	11.9
Combined	62.6		25.4		
Immigrants should be encouraged to give up their customs and traditions	15.2	22.7	29.6	23.1	9.4
Combined	37.9		52.7		

Nevertheless, compared to Canadian, German, and Spanish respondents, Americans were the least likely to say that immigrants have different values and should give up their customs and traditions. These responses seem consistent with our previous finding that Americans were the most likely to express attachment to their ethnic or ancestral group. Furthermore, 69 percent of Americans strongly or somewhat agreed that "people with different ethnic and religious backgrounds than the majority make an important contribution to" American culture, while 72 percent agreed that there are shared American values, and 64 percent reported shared values in their state.

At the same time, among the four surveyed countries, Americans were the least likely (50 percent) to agree that "all children born in the United States should automatically be granted citizenship irrespective of their parents' citizenship status." This response is quite likely a reaction to illegal immigration and to news stories about "anchor babies" and "birth tourists."

Combining the three items shown in Table 2 into a single scale of "immigration attitudes" and treating this scale as the dependent variable (where high scores represent more "pro" immigration attitudes), Table 3 sheds some light on demographic factors related to these views.

Table 3: OLS Regression Model Explaining Immigration Attitudes as a Function of Various Socio-Demographic Variables

DEPENDENT VARIABLE = SCALE OF IMMIGRATION ATTITUDES (HIGH SCORE = POSITIVE ATTITUDES) SCALE OF IMMIGRATION ATTITUDES (HIGH SCORE=POSITIVE ATTITUDES)			
INDEPENDENT VARIABLES	B	BETA	SIG.
Born in US? (1=yes, 2=no)	.150	.013	.010
Gender (1=male, 2=female)	.429	.090	.010
Age	-.103	-.152	.000
Income	.087	.969	NS
Education	.294	.199	.000
Race (1=white, 2=Black)	.409	.045	NS
Hispanic? (1=yes, 2=no)	.119	.011	NS
Region (south=reference)			
North	.224	.039	NS
Midwest	.579	.105	.01
West	-.008	-.001	NS
Constant	4.506		.000
R	.301		
R^2	.091 (.079 adjusted)		

Demographic characteristics contributing to statistically significant *positive* scores on the immigration scale are female gender, higher levels of education, and Midwest residency. Demographic characteristics contributing to *negative* scores are male gender and age. Of these factors, the most important are education and age. Higher educated and younger Americans far more often reported positive immigration attitudes than did others.

Interesting also are the factors not related to the immigration scale. Neither place of birth (born in the United States or not) nor race or Hispanic status contribute significantly to scores on the scale. Scores of respondents from the West are negative relative to the scores of respondents from all other regions, but the difference is not statistically significant.

CONCLUSION

Despite today's political polarization, which has reached an unprecedented level in the U.S. Congress, and the "culture wars" pitting traditionalists and religionists against progressives and secularists, the U.S. survey suggests a strong underlying stability as reflected in public attachments to country, state, and locality. Quite important, moreover, is that race is not a significant differentiator of attachment. Also, even though slightly more than half of Americans said that a state identity stronger than national identity would be "a problem for American unity," only one percent considered themselves to be from their state only, and only 5 percent said they were from their state but also from their country. This underlying attitudinal stability about fundamental matters mitigates the divisiveness of political conflict.

The results also suggest a culture compatible with federalism as an expression of unity and diversity and with the United States as "compound republic," to use James Madison's phrase in *Federalist* 51, which is neither wholly confederal nor wholly national. Americans express high levels of attachment to their country and their shared language while simultaneously expressing high levels of attachment to their ancestral and religious groups.

Although attitudes toward immigrants are tainted by controversies over illegal immigration, it seems safe to conclude that Americans are ambivalent about immigration but not hostile to immigrants. While 63 percent said immigrants have different values from most Americans, 69 percent agreed that people with different ethnic and religious backgrounds than the majority make important contributions to American culture. These results suggest that, despite polarization among elites and activists over immigration policy, most Americans would be receptive to a compromise resolution of immigration issues that would not be punitive for illegal residents.

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SOCIAL INSURANCE AND THE POLITICS OF FEDERALISM IN BELGIUM

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ABSTRACT

The objective of this short article is to provide the necessary historical and institutional background to shed light on the debate about the decentralization of Social Security in Belgium before exploring the meaning of the recent political crisis and its resolution through the formation of a federal government in December 2011. It is argued that the politics of the federalism-social policy nexus is an enduring source of political tensions that played a major role in the long discussions leading to the formation of the new federal government in 2011. The authors suggest that institutional design, especially the decision to split parties in the 1960s, has created a decentralizing logic that is ever present within the Flemish political elite. This logic clashes with the positions of Francophone parties, who have thus far resisted a large-scale decentralization of Social Security.

RÉSUMÉ

L'objectif de ce court article est de fournir le contexte historique et institutionnel nécessaire pour faire la lumière sur le débat concernant la décentralisation de la sécurité sociale en Belgique avant d'explorer le sens de la récente crise politique et sa résolution par la formation d'un gouvernement fédéral en Décembre 2011. On fait valoir que la politique du lien fédéralisme-social est une source permanente de tensions politiques qui a joué un rôle majeur dans les longues discussions menant à la formation du nouveau gouvernement fédéral en 2011. Les auteurs suggèrent que la conception institutionnelle, en particulier la décision de diviser les partis dans les années 1960, a créé une logique de décentralisation qui est toujours présente au sein de l'élite politique flamande. Cette logique entre en conflit avec les positions des partis francophones, qui ont jusqu'à présent résisté à une décentralisation à grande échelle de la Sécurité sociale.

INTRODUCTION

The reform of federalism is a most contentious issue in Belgium, a country where politicians representing the Flemish, Dutch-speaking majority, have long pushed for a greater decentralization of the country's institutions and public policies. This is the case in the field of social policy, where the decentralization of Belgium's large social insurance system (Social Security) has been on the agenda since the 1990s. In the context of the long political crisis that followed the June 2010 election, the decentralization of part of this system became a central aspect of the negotiations among Flemish and Francophone parties to form a government and reach an agreement over what is known in Belgium as "state reform." The objective of this short article is to provide the necessary historical and institutional background to shed light on the debate about the decentralization of Social Security in Belgium before exploring the meaning of the recent political crisis and its resolution through the formation of a federal government in December 2011.

FEDERALISM AND SOCIAL POLICY IN BELGIUM[1]

The Belgian state was created as the result of a revolution that saw populations living on the territories of present-day Belgium (both French- and Dutch-speaking but all Catholic) secede from the Protestant Kingdom of the Netherlands in 1830. The Belgian revolution was dominated by the French-speaking bourgeoisie but received support from the Flemish clergy and petty bourgeoisie, which spoke French at the time (Beaufays, 1988). The new country emerged as a highly centralized polity dominated by a French-speaking elite. It is in this centralized context that the Flemish Movement emerged (Wils, 1996). At first, the Flemish Movement sought to end the hegemony of French by making Dutch one of the official languages of Belgium (the new country had no official language originally, but French was the dominant language in public life). It was only in 1898 that the formal equality of Dutch and French was recognized through the enactment of the *De Vriendt-Coremans Law*. By then, strong opposition to bilingualism on the part of Francophones had helped transform the Flemish Movement from a movement seeking to restructure the Belgian state to one increasingly articulating a distinct Flemish cultural and political identity (Deschouwer and Jans, 2001). Language issues remained central to the Flemish Movement during the first decades of the twentieth century. In the end, the country was divided into monolingual regions. In Flanders, it was widely believed that the exclusive use of Dutch would open up social, economic, and political opportunities for Flemings. After World War II, struggles over language policy proved enduring. This is most likely why social policy issues only began to move onto the agenda of Flemish parties in the 1980s, when most of the language-related issues had been solved. For the first time, Flanders had become more prosperous than Wallonia, where deindustrialization created a long-term economic crisis. Thus, by the 1980s, Flanders had not only the largest population but was economically and fiscally stronger than Wallonia (Béland and Lecours, 2008).

It is in this context that Flemish politicians began highlighting the fiscal and social service transfers between the North and the South. To understand these criticisms, it is important to point out that the successive waves of institutional reforms that gradually decentralized Belgium starting in 1970 did not reshape the country's large social insurance system, which is known as Social Security. Although many policy fields have since been decentralized and Belgium formally became a federal state in 1993, Social Security, the core of the Belgium social policy system, remains untouched, at least from a territorial standpoint. Like in countries such as France and Germany, social insurance in Belgium is fragmented among occupational groups but it remains a country-wide system regulated by the central government (for an historical outlook: Vanthemsche, 1994). Pressures to decentralize this system are strong in Flanders. In a country where political parties split among language lines back in the 1960s, there is no real unified public space in Belgium anymore, and Flemish politicians only speak to Flemings. Because they do not need to seek votes from Francophones living in the South, the focus of these politicians has increasingly been on the regional interests of Flemings and the perceived unfairness of inter-regional transfers. As a consequence, it is good politics to denounce North-South fiscal and Social Security transfers. Although the true scope of these transfers is contested, a growing number of voices in Flanders have called for a splitting of at least some components of Social Security (Poirier and Vansteenkiste, 2000). Francophones generally oppose this, as they seek to preserve the territorial redistribution they benefit from in the context of the country-wide social insurance system, which addresses clear social needs in the economically depressed South. For many Francophones, Social Security has also become more than a tool of economic solidarity and territorial redistribution (Poirier and Vansteenkiste, 2000). It is now seen as one of the few things that keep the country together and, in Wallonia at least, mentions by Flemish leaders of federalizing Social Security is understood as a move towards a final and irrevocable national divorce. For many Francophones, however, this system is one of the last vectors of national unity and solidarity in a country they view as threatened by centrifugal forces. Flemings, in contrast, are increasingly more focused on Flanders than on Belgium

as a whole, even if most do not support the independence of Flanders. Largely because Francophone elected officials have a veto point over "state reform" within Belgium's complicated political system, the territorial splitting of Social Security in Belgium remains an unfulfilled project for Flemish parties (Béland and Lecours, 2008).

THE POLITICAL CRISIS, THE AGREEMENT ON "STATE REFORM" AND THE FORMATION OF A NEW GOVERNMENT

The debate over the federalization of Social Security has taken immense political importance over the last few years insofar as it has been a major contributor to the difficulty of forming governments. Indeed, constitutional rules stipulate that federal cabinets must feature an equal number of Flemish and Francophone ministers, which means that governing coalitions must include both Flemish and Francophone parties. As Flemish parties have increased their pressure to decentralize at least some parts of Social Security while their Francophone counterparts staunchly defended the status quo, government formation at the federal level has become a very tricky proposition in Belgium.

The campaign prior to the June 13, 2010 federal elections exhibited a familiar dynamic. In Flanders, political parties, led by the surging nationalist *Nieuw-Vlaamse Alliantie* (N-VA), took strong Flanders-focused positions that featured the splitting of the bilingual electoral riding of Brussel-Halle-Vilvoorde/Bruxelles-Hal-Vilvorde (BHV) as well as the decentralization of at least some elements of Social Security. Francophone parties opposed these proposed changes. The results of the elections created a complicated dynamic for subsequent negotiations over government formation since the predictable Socialist win in Wallonia was accompanied by a more surprising victory of N-VA in Flanders. N-VA's maximalist position on state reform was immediately a problem for Francophone parties and no real progress was made for over a year, or until the other Flemish parties accepted to negotiate with Francophone parties without N-VA.

In September 2011, the Francophone and Flemish parties (excluding N-VA) finally agreed on a package of state reform that opened the way towards the formation of a government more than a year and a half after the last federal elections. This package involves the decentralization of a relatively minor component of Social Security, family allowances, as well as greater fiscal autonomy for Belgium's constituent units. These reforms met some of the decentralist demands of Flemish parties. Francophone parties, for their part, saw it that increased fiscal autonomy for the Communities and Regions (which will hurt poorer Wallonia) be accompanied by a mechanism of "solidarity," which will compensate Wallonia for its losses during the first 10 years following the implementation of the reform.

On December 6, 2011, the new Belgian government was sworn in following a December 1 agreement on "political agenda" (*Projet de Déclaration de Politique Générale*). This agenda presents a focus on fiscal retrenchment combined with the implementation of state reforms linked to decentralization and greater fiscal autonomy of the Regions and Communities as well as projects of social and economic policy reform designed to tackle long-term problems such as population ageing.

The question of where Social Security fits within Belgium federalism still remains open. Flemish positions and discourse in favor of further Social Security decentralization are unlikely to change. Flemish parties, especially the N-VA as well as the Liberals and Christian-Democrats are focused on building up Flanders as a political community; this requires bringing the boundaries of redistribution in line with the boundaries of the Flemish community. From a discursive perspective, highlighting the transfers of money from Flanders to Wallonia and the lack of efficiency of a centrally-run Social Security will, in all likelihood, remain persuasive for many Flemings. From now on, it is clear that Francophone refusals to agree to further Social Security change will jeopardize government formation and risks placing the country in a delicate position after every federal election. Therefore, although Francophones understand the importance of Social Security for holding Belgium together as a political community, a rigid position can lead Flemish parties to radicalize and further the argument that Belgium simply cannot function as a federal country. Indeed, the different visions of the country and of federalism held by the two communities make is a major issue as Flemings see federalism as a dynamic process while Francophones would like every new reform to be the last one.

The current dynamics surrounding the territorial aspects of Social Security are therefore strongly entrenched in Belgium and a change in the politics of territorial solidarity is hard to foresee. Where could we look to spot possibilities, if only remote, that a change away from confrontation and conflict over the territorial structuring of Social Security could occur in Belgium? The Belgian government created in late 2011 is different in at least one fundamental way from its predecessors since the 1970s insofar as it is led by a Francophone, Socialist Elio Di Rupo. From this position of power and national responsibility, it might be more difficult for Francophone Socialists to keep saying "no" to Flemish demands for change, in Social Security and beyond. The nature of this government also means that in future negotiations over government formation, there will be a recent precedent

for a Francophone Prime Minister. Consequently, a party like the N-VA will not be able to assume that it can force through its agenda even if it wins the elections in Flanders and, in doing so, hold all of the other parties hostage to its maximalist positions as was the case after the 2010 elections, while Francophone parties might more readily accept change if a Francophone politician has access to the position of Prime Minister.

CONCLUSION

In Belgium, as evidenced in this article, the politics of the federalism-social policy nexus is an enduring source of political tensions that played a major role in the long discussions leading to the formation of the new federal government in December 2011. As suggested here, institutional design, especially the decision to split parties in the 1960s, has created a decentralizing logic that is ever present within the Flemish political elite. This logic clashes with the positions of Francophone parties, who have thus far resisted a large-scale decentralization of Social Security.

NOTES

[1] The following section draws on Béland and Lecours, 2008.

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