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

The Supreme Court: Longstanding History in Intergovernmental Relations

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

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

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

bargaining power that the participants have in such

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

Intergovernmental Agreements: The New Frontier

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

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

Problems: Legacs(ow)-324.0e8s inly stststststststsm

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

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

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

More Problems: Executive Federalism

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

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

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

Conclusion: A Return to the Court

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

Baier advocates a strong role for the Supreme Court as the reigning authority on intergovernmental dispute-resolution. In fact, such a move has already been predicted by recent intergovernmental agreements which include di-Cuthorimental

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

ERIC SNOW

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

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

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

The distinct society clause was not the only barrier to the approval of Meech Lake. Over the course of the negotiations, it became apparent that Quebec was not the only group of Canadians who felt neglected by the constitutional process. The aboriginal community felt they had been unfairly excluded from the negotiating process. Elijah Harper, an Amerindian member of the Manitoba legislature, significantly raised the profile of aboriginal constitutional concerns when he single-

aboriginal rights.[7] However, while the Meech Lake Accord had not touched on the matter of Senate reform beyond provincial consultation in the appointment of Senators, the

issue; while Quebec felt they were not getting enough, English Canada felt Quebec was getting too much.[10] As a

Jacques Parizeau formed a new government in 1994. Parizeau ran with the promise of immediately bringing forward a second Quebec referendum on sovereignty. Though the –Noǁ side eventually emerged victorious, it was by a far narrower margin, 50.6% to 49.4%, than it had been during the referendum of 1980.[14]

The crises of the Charlottetown Accord and the Quebec referendum on sovereignty referendum had come to a

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

More recently, the Conservative

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

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

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

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

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Striving to Maintainon a Holistic Nation: Preventing Quebec Sovereignty

KIMBERLEY GOSSE

Introduction

–Federalism is essentially a system of voluntary self-rule and shared rule […] a binding partnership among equals in which the parties to the

Canadians and aboriginals disinterest in granting Quebec the luxury of being a –distinct society.‖ This paper will

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

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

Prior to the Constitution Act of 1982, any amendments to Canada's constitution had to go through the British parsor to i01>10<32i0a d

is nevertheless part of the constitution.‖[5]

The Meech Lake Accord

On April 30, 1987, federal and provincial leaders met at a retreat on Meech Lake in Quebec‘s Gatineau Hills to amend the Canadian constitution. This accord attempted to gain Quebec‘s acceptance of the Constitution act of 1982. Since the act, Canadian politics had changed immensely in the following years, at both the federal and provincial level. Under the leadership of Brian Mulroney, the conservatives had defeated the Liberals in 1984. In the following year, the federalist Quebec Liberal Party under the leadership of Bourassa, came to power. Bourassa formulated five constitutional demands that would have to be met in order for Quebec to sign the Constitution Act of 1982. These demands were: constitutional recognition of Quebec as a –distinct society

an annual number of immigrants
based on its share of the population.

demise of Meech Lake. Aboriginal MLA Elijah Harper of Manitoba, refused to support the Accord based on the fact that there was no First Nation representation within its five major

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

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

The Charlottetown Accord

The Charlottetown Accord was the end result of five years of numerous meetings on constitutional reform involving the federal, provincial and

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the definition in the Meech Lake Accord. Although the accord also called for two aboriginal representatives in the House of Commons and the recognition of

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

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

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

Queen's

Quebec's Identity

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

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

Non-constitutional Measures implemented regarding the Accord's Issues

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

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

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

Another piece of legislation addressing Quebec secession was Plan B, which called for a series of initiatives to clarify the process of secession and some of its implications. This tactic stressed the ambiguous process of secession itself. Other groups for example, aboriginals, municipalities or regional municipalities in Quebec could also separate from Quebec. In the words of Stéphane Dion, –if Canada is divisible, Quebec is divisible too. If I give myself a right, I can not stop others from exercising the same right.‖[34] Three questions stemmed from the possibility of secession: Under the constitution, can […] the government of Quebec effect the secession of Quebec from Canada unilaterally? Is there a right under international law […] to effect the secession of Quebec from Canada unilaterally? In event of conflict, between domestic and international law […], which would

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

Collaborative federalism began to be exercised after the descent of the Meech Lake and Charlottetown

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

MEGAN SETO

Introduction

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

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

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

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

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the federal government reconfigured the initial –five demands‖ of Quebec in the new package.[7] However, like its

providing ambiguous words that were not defined and contextually confusing for the voter. The close sovereigntist victory has also been attributed to Chretien‘s initial hands-off approach to the referendum. For scholars such as Patrick J. Monahan, the –yes‖ vote in 1980 and 1995 highlighted key

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

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

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

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

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

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The fundamental aspect that would lay the foundation for the Clarity Act and qualify Lajoie‘s argument is with the SCC‘s rul

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

The Effectiveness Of The Clarity Act:

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

> The federal government recognizes… –the government in any

assumption is dangerous. Thus, elements of the Clarity Act are problematic. This cannot be the

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

The extension of Aboriginal's inclusiveness also overlaps with issues of land and boundaries. The second positive aspect of the Clarity Act is its address to the border issues within Quebec, and the possibility of renegotiating land divisions. The

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

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

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

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

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

Conclusion

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

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

FRANÇOIS LE MOINE

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

Un combat politique

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

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

L'acte fondateur est posé. Mais, il reste à ratifier cette constitution dans les treize nouveaux États. Une large campagne s'organise dans l'opinion ; d'un côté, les anti-fédéralistes, partisans d'une confédération décentralisée et de l'autre les fédéralistes, optant pour un pouvoir central plus fort. Alexander Hamilton, John Madison et John Jay vont s'associer pour publier, sous le pseudonyme de Publius,[4] une série d'articles dans les journaux new-yorkais pour défendre le projet. Dès 1788, les articles seront réunis en un seul ouvrage et publiés, avec le sous-titre : « Recueil d'articles écrits en faveur de la nouvelle constitution telle qu'elle a été adoptée par la Conv tn

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

Le Fédéraliste, X : contre les factions

Les cités antiques et modernes ont été des centres de culture et de savoir de premier plan ; les querelles entre optimates et populares, ou entre Guelfes et Gibelins, sont des sujets historiques passionnants. Mais, les

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

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

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

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

Un problème de taille

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

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

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

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DÅ ÌùÅÓÐÒÉÔ ÄÅÓ , ÏËÓ

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

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

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

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d'origine

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

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

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

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ement, que chez Rousseau, l'une des grande législateur l'instrument de libération populaire et

par l'arrêt

empiètements éventuels de l'autre. Mais dans la constitution américaine, les trois pouvoirs, quoique pour l'essentiel séparés, ont même origine : la volonté du peuple. Où chaque pouvoir trouvera-

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

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l'Homme
n'ayant d'autre but que leur propre intérêt. Par cet

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

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

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

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

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

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

> Notre État [Rome], n'a pas été constitué par l'intelligence d'un seul homme, mais par celle d'un grand nombre ; et non au cours d'une seule vie d'homme, mais par des générations, pendant plusieurs siècles. Il n'a jamais existé, disait-

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

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

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

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

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

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The Canadian Federation and Fiscal Imbalance

KATHERINE GOSSELIN

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

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

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

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

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

accountable in its fields of jurisdiction;‖

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

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

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

Complexities arise as well because there are two types of imbalance to be considered — vertical and horizontal. A vertical fiscal imbalance, the type of imbalance which has garnered recent attention, occurs when one level of government raises more revenue than is necessary for implementation of public programs and the other level of government raises less than is necessary, after transfers (Advisory Panel 2006, 12). According to the Advisory Panel on Fiscal Imbalance, this type of imbalance developed in the 1990s as a result of large-scale cuts to provincial funding from the federal government. The Panel also notes that the fiscal imbalance is perceivable in the lives of all Canadians, given the federal government's increasing presence in areas of provincial jurisdiction. This situation is difficult for the different levels of government to resolve because it would be widely unpopular for provinces t

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

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

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

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

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

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

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

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

When Stephen Harper was elected Prime Minister in 2006, it was

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

Is Canada, thanks to the government of Stephen Harper, now in a state of fiscal equilibrium? The 2006 and 2007 budgets drafted by the Conservative government claim to restore balance, but do they reconcile the disparities in the aforementioned cases of large municipalities, Ontario, and Saskatchewan? Does the current state of the federation meet Alain Noël's three criteria for fiscal balance? The 2007 federal budget focuses significantly on resolving fiscal imbalance and makes the lofty claim that the Conservative government –follows through on every commitment of the [2006 budget] plan and goes further‖ (Department of Finance 2007, 3). Budget 2007 allegedly –restores fiscal balance with provinces and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Aboriginal Self-Government: Finding A Path

KRISTOPHER STATNYK

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

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

territories population (Abele and Prince 574-575).

Canadian federalism. This third order model would give the Aboriginal order of government jurisdiction over issues that concern the Aboriginal peoples as well as give them the opportunity to be more self determined than in previous models of Aboriginal self-government. This idea of Aboriginal

what it would evolve into.

The Chrétien government took notice of this model of Aboriginal government proposed by the Penner Report and formed its own modified version. However, the modified version excluded the most fundamental aspects of the Penner Report. The proposed model by the Chrétien government would allow the Aboriginal peoples to –govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages, and institutions, and with respect to their land and their resources‖ (Canada 1995 3-4). However, the Chrétien government ignored the recommendation from the Penner Report that the Aboriginal peoples –by themselves should, by free choice, determine the form and structure of government they desire‖ (Boldt 90). Chretien‘s modified version of the Penner Report stipulated that Aboriginals would not have full jurisdiction on law making and that they would be subject to the Canadian *Constitution*, the *Canadian Charter of Rights and Freedoms*, and strict standards of accountability imposed by the federal government (Abele and Prince 577-578; Pointing and

Aboriginal people have a unique communal culture (which even the Chrétien government recognized) that defines values, justice, law, power, and rights differently than the discourse of the Canadian state that is dominated

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

The aforementioned models or paths to Aboriginal self-government, excluding the recommendations of the Penner Report, are illegitimate. This illegitimacy stems from –the concept that the existence of the Canadian state is not a given in the legal and political relationship‖

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

The models of Aboriginal self-government examined here pose different challenges and criticisms that the Aboriginal peoples and the Canadian government face when searching for a solution to right

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pan-Canadian rights regime orchestrated by the Court. These two

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

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

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

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

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

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

assume based on their high ranking. As previously outlined by Morton, Lamer officially opposed abortion provisions in the Criminal Code because he thought some of the language surrounding its legality was too ambiguous. He later stated he really opposed the provision because he believed most Canadians were opposed to making it a criminal offence, even though that was incorrect. It is hard to avoid thinking that Lamer's decision was made dubiously. In his official decision, Lamer was opposed to the provision

judicial supremacy.‖ He argues that judicial activism does not necessarily lead to judicial supremacy (Kelly 2002: 98). This is a va

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

In the 1988 case *Ford v. Quebec,* the Quebec government famously enacted the clause to override the provision of freedom of

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

With the Notwithstanding Clause seemingly damaged beyond repair, legislatures are at a distinct disadvantage when it comes to rights disputes. Leeson suggests that the Notwithstanding Clause needs to be evoked more often (Leeson 2000: 2). This seems like the best way to get the Clause back into the good graces of the public. The more it is avoided the more it becomes stigmatized and deteriorates as a practical solution to rights disputes. Furthermore, the longer it is dormant the longer legislatures put themselves at the mercy of the decisions of the judiciary. Legislatures get caught up in a vicious cycle of feeding the conception of something which continues to hold them down the chain of command. Bringing the Clause into a positive

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

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

There also needs to be a way for Supreme Court decisions to be

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

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