Federalism-e

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Welcome to the 2008 Edition of Federalism-e

On behalf of the writers and editors we, Brian Gendron-Houle and Adam P MacDonald, the Chief Editors welcome you to the 2008 edition of Federalism-e. For the last 8 months we have collected, edited, and evaluated numerous articles concerning federalism written by a number of undergraduate students both within Canada and beyond. At Federalism-e our mandate is to produce an annual volume of undergraduate papers addressing various issues within the study of federalism such as political theory, multi-level governance, and intergovernmental relations. Both of us feel it is important to highlight the fact that this journal exists for undergraduate students. Federalism-e provides a forum encouraging research and scholarly debate amongst undergraduates which will hopefully germinate further interest in this field of study.

Federalism-e is an excellent avenue for

proceeding editions of Federalism-e, encouraging undergrads to discuss such pertinent matters in relation to federalism.

vaste réseau de connexions qui se perpétuera d'éditions en éditions, encourageant toujours plus les étudiants à couvrir les multiples facettes du fédéralisme.

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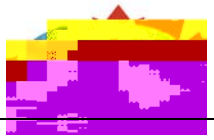
Introduction: a tribute to federalism

Adam P MacDonald (French translation by Brian Gendron-Houle)

The Nature of Federalism

Federalism as a form of political organization is a relatively new construct, with the first federations being developed in the late 18th and early 19th century. Currently in the world there are over 20 countries that are classified as federal states, encompassing roughly 40% of the world's population(1). This grouping includes countries of varying geographic,



is the utility of the state being challenged by the development of supra-state economic, military and social organizations (such as the European Union), as linkages, specifically trade, between various groups of peoples increases, identification appears to be following a path of localization in which individuals identify with an increasingly smaller group and territory. There appears, thus, to be a process of political fragmentation occurring at the same time (and perhaps because of) the world is becoming more economically integrated(5). The perception of a state identity, therefore, is continuously being attacked, which ultimately threatens the utility of the state formation.

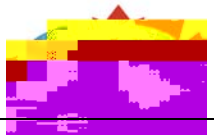
In relation to federal states, as economic asymmetry grows between sub-regions, the development of competitive federalism emerges as a function of these regions attempt to combat or solidify (depending on the region) this enlarging power differential(6) The central government, therefore, of federations are placed in the difficult position of adjusting these disparities while at the same time not alienating certain regions which may believe the federation is inhibiting their political, social and/or economic progress. The ability, therefore, to accommodate growing economic, and therefore political, power differentials within federal states is perhaps the greatest challenge facing federalism in the 21st century.

With this in mind, however, federalism will most likely increasingly become an avenue for states to accommodate local calls for greater authority, while at the same time sustaining territorial integrity(7). As the devolution processes in a number of unitary states such as The

Dans le contexte actuel, le concept même de l'État est fondamentalement mis à l'épreuve par les procédés liés à la modernisation et à la globalisation. Non seulement l'utilité de l'État est mise en doute par les organismes supranationaux émergeants touchant l'économie, le militaire ou la société elle-même (comme l'Union européenne), mais aussi les liens entre les divers groupes augmentent-ils en nombre et le processus identitaire semble-t-il se réduire à des groupes et territoires de plus en plus petit. On voit donc un processus de fragmentation politique qui survient au même moment que le monde devient plus intégré économiquement(5), ce qui doit être la cause même de la fragmentation. La perception de l'identité étatique est donc constamment attaquée, ce qui ultimement mine sa validité comme entité étatique.

En relation avec les systèmes fédéraux, au moment même où l'asymétrie économique croît entre les régions, le développement d'entités fédérales compétitives apparaît comme une représentation de la tentative par ces régions de rejeter ou de se solidifier contre la plus grande poussée de pouvoir divergent.(6) Le gouvernement central des fédérations est donc placé dans une position très sensible où il doit ajuster les disparités, sans pour autant aliéner certaines de ses provinces, qui croiraient qu'on tente de nuire à leur avancement politique, social ou économique. La capacité à accommoder les besoins économiques et politiques grandissants, en plus de ses agents respectifs, le tout à l'intérieur d'un système fédéral, est sûrement le plus grand défi auquel le fédéralisme fait face au XXIème siècle.

Avec cela en tête, le fédéralisme deviendra



United Kingdom and Spain demonstrate, a federal system may be the only method for these states to survive within a growing asymmetric conglomeration of regions. As Daniel Elazar asserts, the state system has been undergoing a paradigm shift over the last 60 odd years from statism, the belief that political organization was best created in highly centralized, self sufficient, homogenous societies towards federalism characterized by decentralization of power, interdependent, heterogeneous societies, to cope with the processes of modernization and globalization(8). The impacts of internal conflicts, also, in developing countries such as Nepal is making federalism seem as the only method of maintaining the state by creating a distribution of powers to regional governments to create peace and co-operation between them(9). Federalism, therefore, as a political construct is a mechanism which is increasingly being used in a number of states for a variety of reasons to adapt to changing internal and external geo-political situations with the goal of preserving the utility and, thus, territorial integrity of the state.

de plus en plus une option de choix pour les États qui devront intégrer les demandes régionales pour plus de pouvoirs, tout en maintenant leur intégrité territoriale(7). Comme les procédés de décentralisation qu'on peut observer dans des États unitaires comme l'Espagne ou le Royaume-Uni le démontrent, un système fédéral est peut-être le seul moyen pour ces États de survivre aux pressions exercées par leurs propres nécessités régionales asymétriques. Comme Daniel Elazar avance, les systèmes étatiques ont traversé un point paradoxal au cours des dernières soixante années d'étrange création étatique, passant de la croyance en des États fortement centralisés, autosuffisants et socialement homogènes à celle de fédérations caractérisés par la décentralisation des pouvoirs, interdépendance et la multiethnicité. Ce changement de direction fut nécessaire pour que les systèmes puissent s'adapter à la modernisation et à la globalisation(8). Les impacts des conflits internes dans les pays en développement, comme le Népal, font apparaître le fédéralisme comme la seule alternative pour maintenir l'État en un tout, en amenant la paix et la coopération entre eux(9). En bout de ligne, le fédéralisme, comme construit politique, est le mécanisme de plus en plus utilisé par de nombreux États, chacun ayant différentes raisons, pour s'adapter aux changements internes et externes de la situation géopolitique. Ils s'assurent ainsi de maintenir l'utilité même de l'État, tout en assurant le maintien de l'intégrité territoriale.

Footnotes / Notes de bas de pages

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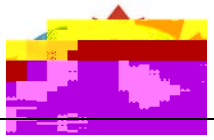

Canadian Federalism: A System of Flexibility and Adaptability

Adam P MacDonald, English Chief-Editor

Royal Military College of Canada

The current edition is largely based within a Canadian context, though we did receive article submissions from as far away as Russia. Specifically, change is a recurring theme underlying and tying the various articles in this edition together. Federalism is not a stagnate form of governance, especially within a large, diverse polity such as Canada. In this regard, Canada serves as a case study of the challenges faced by other conciliatory federations. The current journal has been ordered chronologically to provide a stream of historical and contemporary accounts that demonstrates the constant need for adaptation to deal with change within the Canadian federal system. Though some issues researched in this journal may seem to be nothing more than historical, their impacts on Canadian politics still resonate today for each author, while researching a specific topic is at the same time addressing generic concerns about the nature of the Canadian Federation; concerns that need to be addressed for they have not be resolved

Issues such as federal-provincial transfer payments, disputes over governmental areas of jurisdiction, and constitutional amendments still dominant, to varying degrees, the Canadian political landscape, testing the flexibility of our federal polity to deal with these challenges within a country of constant political transition. At the heart of the matter lies the relationship which exists between the two autonomous levels of government in Canada. Though usually in disagreement over various matters, the nature of how the federal government and their provincial counterparts work with one another in large part dictates how well our system can absorb shocks such as the separation crisis in Quebec in the early 1990s or the rebalancing of the fiscal equilibrium. Co-operation is essential for political stability and, thus, territorial integrity. Saying that, co-operation, ultimately, depends on a sense of identity, a belief in working together for mutual benefit.

There have been and mostly likely will always be identity issues in Canada. Indeed, Canada could be argued to be one of the federal states with the lowest sense of an over-arching national identity, what Edwin R Black explains as the "...stillbirth of Canada as a nation-state"(1).The Canadian public is divided between various identities such as those to one's community, province, region and country. The diverse nature of the Canadian polity, which is a function of mainly, but not exclusively, regional and social cleavages challenges the degree to which we identify, and thus work together. Though there are concerns as to the neglect development of a well defined and broadly accepted Canadian identity, federalism in Canada, demonstrating a willingness to operate under the Canadian construct, does exist. This willingness is most likely as a result of shared common values held by Canadians in general, particularly the belief in the use of the federal system. The ability to develop institutions and procedures to supply flexibility to

this system provides an avenue in which people, regions and governments can utilize to solve political issues, justifying maintaining the current system even in the absence of a strong pan-Canadian identity.

System maintenance, however, is not a static construct for Canadian federalism must be able to aggregate a wide variety, and in many cases conflicting, interests from across the country. For example, with respect to equalization payments, while Alberta and Ontario believe they are contributing too much and receiving too little in the present payment mechanism, the eastern provinces and Quebec feel they are not receiving enough. Issues

multitude of political challenges, some threatening the very fabric of the country. When reading this edition, therefore, try to not only understand the specific issues being addressed, but see the larger, generic challenges facing the Canadian Federation. It should not be assumed that because Canada is in constant political change that the system is unstable. Instead, the ability to adapt to these changes by having a flexible structure demonstrates in many respects how stable our polity really is.

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Non-Constitutional Measures as an Alternative to Constitutional Amendment:

provinces would have the right to nominate Senators and an annual First Ministers' Conferences would be entrenched in the Constitution(7).

This package was unanimously approved by all First Ministers. Why then, with this level of agreement among them, did the Meech Lake Accord fail? Technically, the Accord was not ratified by all of the provinces and the federal government in time. From the day that Quebec ratified the Accord on June 23, 1987, the first province to do so, the rest of the country had three years to follow suit. By June 23, 1990, both Manitoba and Newfoundland had not ratified the Accord. This signified the failure of Meech Lake.

There were various reasons for the erosion of the unanimous consent over the three year period allotted for ratification. These reasons led to the Accord's eventual failure. One such cause was the election of three new provincial premiers after the finalization of Meech Lake on June 3, 1987(8). Frank McKenna was sworn in as Premier of New Brunswick in October, 1987, Gary Filmon of Manitoba in 1988 and Clyde Wells became Premier of Newfoundland in 1989. These Premiers were not signatories to the Meech Lake Accord. McKenna and Wells specifically campaigned against the Accord in their respective election campaigns(9). In Manitoba, Filmon held a minority Conservative government. The opposing Liberals were against the Accord until late in the three year period which led to difficulties in coming to a decision on Meech Lake(10).

The Premier of Quebec himself is also partly to blame for the Accord's failure(11). In 1989, Bourassa decided to invoke the Notwithstanding Clause to protect Bill 101 and the use of French on commercial signs in Quebec(12). This decision created a significant backlash within English-speaking Canada. It caused concern that the "distinct society clause" in the Meech Lake Accord would be used to override other individual rights(13).

Another factor that contributed to the Accord's failure was the process through which it was negotiated, which some have described as undemocratic(14). The Meech Lake Accord was created by eleven men in secret meetings without any input from the public. This demonstration of executive federalism did not sit well with many Canadians. For something as important and radical as changing the Constitution of the country, many citizens felt they should have had greater involvement in the process(15). Canadians were presented with a completed and unalterable document. There was no public debate or opportunity for discussion about the Accord(16). Although executive federalism has characterized the Canadian model of federalism, in this instance Canadians showed that they wanted an opportunity for more participation(17).

The content of the Accord itself was controversial. In order to get all of the provinces to agree to Quebec's conditions, they wanted to be granted the same powers. This would have facilitated a drastic shift of power from the federal government to the provinces. This caused concern among Canadians about the weakening of the "national fabric"(18). Many felt that these powers belonged under the federal government and should stay there to ensure a strong central government and a strong Canada. In a highly decentralized federation, provinces are able to act almost as autonomous units. This is problematic in

that the provision of services may not be consistent across the country. In addition, it has the potential to create a highly fragmented and disjointed nation.

Other Canadians were uncomfortable with granting Quebec “distinct society” status. No one really knew what the vague wording meant or what kind of additional powers it would give to Quebec(19). This caused particular unease for women’s rights groups. The Charter of Rights and Freedoms would not be given precedence over the Accord. There was worry, therefore, that Meech Lake would infringe on women’s rights protected under the Charter(20). Feminists such as Lynn Smith, expressed concern that such a clause would allow the provincial government of Quebec to “defend legislation on the grounds that it seeks to preserve and promote Quebec's distinctness even though it may infringe upon the equality provisions of the Charter”(21).

Another group of individuals who were dissatisfied for being left out of the decision-making process of the Meech Lake Accord were Canadian Aboriginals. Their exclusion from the process, combined with the lack of consideration of their needs or wants, was one of the most integral reasons for the failure of Meech Lake. In Manitoba, by the time the minority Conservative government had gotte

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around the amendment was more inclusive, showing avenues for more public participation.

A referendum in Quebec, and one in the rest of Canada, was held so that Canadians could vote on the Charlottetown Accord. The referendums demonstrated that the federal government had learned the consequences of excluding the public from the Meech Lake process. On October 26, 1992 the Charlottetown Accord was voted on and rejected by a majority of Canadians in a majority of provinces (54%). This included a majority of Quebecers and a majority of Aboriginals living on reserves(39).

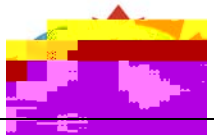
The Charlottetown Accord had failed. Changes had been made since the Meech Lake Accord but they were still not enough to convince a majority of Canadians that this was the solution to the country's constitutional problems. It is not clear why Canadians voted against the Accord in the referendums(40). There are, however, some influencing factors to consider. For one thing, the "Yes" committees were poorly organized. According to James Ross Hurley, "the Accord was sold largely as an honourable compromise that would avoid the unhappy consequences of failure, rather than as a stirring vision of the future"(41). By attempting to accommodate so many diverse groups with one constitutional amendment, the result was a complex and confusing package. This strategy was obviously not the most convincing to Canadians.

The "No" side argued that the whole deal should be rejected because of certain elements that were unfavourable, such as the Canada Clause (which included the distinct society clause) or even the concept of Aboriginal self-government, which was not clearly defined(42). With such a multifaceted agreement, it is not hard to see how this argument would be more persuasive to the general public. It was easier to convince the voters of the drawbacks of particular issues of the larger package, rather than to convince them of the merits of every aspect of the accord.

Opposition to the 25% guarantee of seats in the House of Commons for Quebec was another reason for the failure of the Accord. Some people saw this as anti-democratic while others opposed it because of anti-Quebec sentiment. Many wanted clarification on what Aboriginal self-government would mean. Aboriginal leaders themselves said that they had not had time to make a proper assessment of the Accord. Another issue that created resistance to the Accord was gender. Some women's groups expressed that gender equality issues had not been sufficiently addressed in the Charlottetown Accord. Worries about the ineffectiveness of the equal and elected Senate were also expressed(43). In addition, the multilateral process was to have originally ended in May, 1992 but it did not finish until June. This meant that there was less time to explain the Accord to the people of Canada(44).

Would Canada have been better off had these Constitutional Amendments passed?

Canada would not have been better off had the Meech Lake Accord or Charlottetown Accord been ratified. Both accords would have given too much power to the provinces in



an already highly decentralized federation. This would have created a much more disjointed country with too much power concentrated within the provincial governments. Provinces would have essentially become "semi-autonomous" units and individual premiers would have been given much more control(45). With so many federal powers transferred to the provinces the federal government would have become significantly less effective. Had Meech Lake been ratified, the federal government would not have been able to appoint anyone to the Supreme Court of Canada without them first being nominated by the provinces(46). This would have given the provinces an enormous amount of control over the judicial branch of government. The same would hold true for the Senate. The Accord would also have allowed provinces to either completely stop a constitutional amendment, through the use of their veto, or opt out of it while receiving compensation(47). Again, these powers would have significant effects on the efficiency of the federal government. As Pierre Trudeau argued, the specific recognition of French-speaking Canada and English-speaking Canada would have undermined bilingualism and multiculturalism in the country(48). At the time, political leaders expressed concern that if the Meech Lake Accord was not ratified Quebec would separate from the country(49). Had the Accord passed, however, there was nothing to stop that from happening. As Marjorie Montgomery Bowker suggested, "some future Quebec government might take the position that the promotion of Quebec's "distinct identity" necessitates separation"(50).

Brian Mulroney argued that had the Meech Lake Accord been ratified, it would have given the Prime Minister power to counteract Quebec separatists. The separatist claim that the Constitution was illegitimate since Quebec was not a signatory to it, would no longer have held truth(51). Despite this argument, the Constitution applies to Quebec in the same manner as it does to the other nine provinces who did sign it in 1982. This power would not have been worth all of those given up to the provinces by the federal government.

Non-Constitutional Measures

The failure of both Accords brought an end to the era of mega constitutional politics in Canada, which had dominated for arguably 25 years(52). As Peter H. Russell describes, "at the mega level, constitutional politics moves well beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based"(53). Canadians had certainly tired of this type of debate by 1992 when the Charlottetown Accord failed. Since then, the problems surrounding the Constitution have not been forgotten but have simply been approached in a different way. Several non-constitutional measures have been put in place to address the mega-constitutional concerns that both accords attempted to resolve.

Liberal Era

On November 27, 1995 Liberal Prime Minister Jean Chrétien introduced a motion into the House of Commons which was passed a few days later. The motion stated that the

House of Commons recognize that Quebec is a distinct society within Canada. The distinct society includes Quebec's French-speaking majority, unique culture and civil law tradition(54). This legislative recognition does not hold the same weight as a constitutional amendment. It is an attempt, however, to address one of the mega-constitutional issues proposed in both Meech Lake and Charlottetown, through non-constitutional means.

The federal government's spending power is another matter that was addressed by both accords. The Social Union Framework Agreement (SUFA) was signed on February 4, 1999 by the federal government of Canada, all the provinces, except for Quebec, and the leaders of the territories. The agreement clarified the respective roles and responsibilities of both levels of government in regards to social policy. It also acknowledged the federal government's spending power(55). SUFA illustrates another instance where a mega-constitutional issue dealt with by both Accords, has attempted to be addressed by a non-constitutional measure since their failure. Since Quebec, however, did opt out of the agreement it does not really solve the problems that they had with the federal spending power to begin with. It is more of an attempt at non-constitutional change rather than a success.

In regards to Aboriginal self-government, the focus has shifted from addressing the issue by means of constitutional reform, to policy and legislative changes. Several self-government arrangements have been negotiated since the failure of the Charlottetown Accord in 1992. On May 29, 1993 an Umbrella Final Agreement (UFA) was signed between the federal government, Yukon government and the Council for Yukon First

section 29 of the Constitution Act, 1867 but is still consistent with the approach of avoiding mega-constitutional reforms to change the structure of the federation. Such an amendment is much smaller and less complex than the packages proposed by the Meech Lake and Charlottetown Accords.

Conclusion

A diverse group of factors led to the failure of both the Meech Lake and Charlottetown Accords. In the first instance, a lack of public participation in the process and the exclusion of Aboriginals in the negotiations were two main reasons for the rejection of the accord. In the second instance, although the process differed from that of Meech Lake, in that it was more inclusive of Aboriginals and the general public, it was not enough to persuade Canadians to vote in favour of the Charlottetown Accord. Canada, however, would not have been better off had these accords passed. They would have led to too much decentralization in the Canadian federation, resulting in the creation of a weak and ineffective federal government. Many of the mega-constitutional concerns that both accords tackled have been addressed by non-constitutional measures since their failure. This has been a good way to institute change in the federation without renewing the tiring constitutional debate of the 1980s and 1990s. It is not to say that this constitutional change will not be attempted in the future. For the mean time, however, Harper's plan of Open Federalism seems to show the government's willingness to continue addressing the country's issues through legislation and other non-constitutional initiatives. This tendency demonstrates that the failure of the Meech Lake and Charlottetown Accords certainly have not signified an end to Canada's constitutional challenges.

Biography

Jennifer Chisholm is a second year student at Dalhousie University, who hopes to complete a combined honours degree in Political Science and International Development Studies. She has a strong interest in Canadian constitutional politics, bilingualism/multiculturalism and human rights. Jennifer has a passion for travel and plans to continue her studies at a graduate level overseas.

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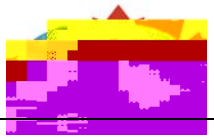


Are We Clear, Now? : Analysis of the Effectiveness and Legitimacy of Bill C-20, the Clarity Act (2000)

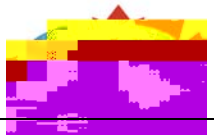
Natalie Bradbury

Dalhousie University

Abstract:

The purpose of this paper is to analyze the effectiveness and legitimacy of the Clarity Act (2000) within the context of federal-provincial relations. Effectiveness is gauged by the extent to which the Act achieves its initial goals of clarifying government's position on separatism, redefining terms (such as 'majority') and diminishing support within Quebec for sovereignty. Legitimacy is assessed through examining whether or not the federal government has the legal ability to make decisions on the type of majority/question that a province needs for sovereignty. There are several arguments that maintain that this should remain within the jurisdiction of the provincial legislature. The historical events that led up to the Act are discussed as evidence of the Act's reflection of continuities that plagued Quebec-Canada relations. While analyzing expert opinion, the author brings together both pro- and anti- Clarity Act perspectives in order to arrive at her conclusion. Revisiting statistical work by Pinal is used to gauge the Quebecois reaction to the Act. The author concludes, ultimately, that the Clarity Act is both an effective and legitimate response to calls for Québec sovereignty. The Act upholds democratic values and supports national unity. The controversy surrounding the Act accentuates the value of debate within the intergovernmental political realm.

Any prime minister faced with th



end of the 1980s, the mounting inevitability of Québec secession was growing at a steady pace.

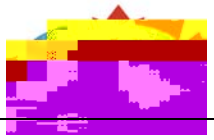
The Mulroney government in the 1980s exercised constitutional federalism through political compromises and settlements as well as institutional changes. Unfortunately, the attempts he (and his successors) pursued fell short. The tensions in Québec increased as a result of the failure of national projects, particularly the Meech Lake and Charlottetown Accords that attempted in vain to bring Québec back into the Canadian Constitution. When these accords died, Québec felt rejected and took this as the ROC's way of "further excluding [it, which] led to a rise for sovereignty support."(3) With Mulroney's retirement and Kim Campbell's short executive stint, Jean Chrétien became Prime Minister with a huge majority in 1993 and brought with him a commitment to ensuring Québec's place in Canada. Ultimately, Québec would remain at the front of the political battlefield. Three main events forced the government to pay serious attention to the province's nationalism as a potentially dangerous issue:

The 12 September 1994 election of a Parti Québeçois government committed to independence with 75 seats versus the Liberals' 48 seats and 1 seat to the Parti Action Démocratique;

The formal launching of the sovereignty referendum process with the 6 December 1994 tabling of legislation in the National Assembly; and

The extremely narrow federalist win, at 50.6% of the vote, when the referendum was eventually held on 30 October 1995. (4)

The federal government needed to respond and strengthen the country because it looked as if it was going to disintegrate. There was considerable panic in the ROC and Chrétien's credibility was on the line. To add even more pressure on Ottawa, the Québec government was "establishing a process that would include consultations with the Quebecers (prior to, and in the form of, a referendum) and the National Assembly (prior to, and in the event of, a "yes" vote after a referendum.)"(5) In response, the government produced several programs that formed what is known as "Plan A" and "Plan B." These projects emerged mostly in 1996 as a means to popularize national unity while attempting to solve some of Québec's constitutional concerns without changing the Canadian Constitution itself. Plan A projects are soft-line approaches that seek to appease Québec. These initiatives consisted of: Bill C-110, a resolution to recognize Québec as a distinct society, talks of opting-out of new shared-cost programs and devolving labour force training to the provinces.(6) The Calgary Declaration was another national unity project but it was rejected by Bouchard's government. The initiative was unattractive to the province's government because it only recognized Québec's society as a unique part of the greater Canadian entity rather than acknowledging the province as a nation which has political implications.



The Plan A initiatives were followed by two main Plan B projects: The Québec Secession Reference to the Supreme Court of Canada and the Clarity Act. To qualify, Plan B refers to the government's preparation in the eventuality that a referendum yields a "yes" response and more specifically, it involved "hardening their position towards Québec."(7) Chrétien was (justifiably) scared by the near breakdown of the country. He referred to the Supreme Court three questions in late 1996 which asked the Court to determine the extent of power that the Québec government legally possessed (by the standards of national and international law) to unilaterally secede from Canada. As a follow up question based on the result of the first two, the Court had to decide which body of law took precedence if the laws conflicted. In the end, the Reference "aimed not only to declare the unconstitutionality under Canadian law, but the invalidity, under international law, of any Québec law that would propose a referendum on the sovereignty of Québec."(8) It is important to note that the Court provided an opinion of the requirements for clarity, not a decision, which meant that it was not legally binding.

The 1998 Supreme Court Reference concluded several main points. Firstly it determined that Québec could not secede unilaterally under either Canadian or international law. Secondly, the Supreme Court qualified the referendum issue by saying if a democratic will to secede existed on a clear question and clear majority, the ROC was obligated by law to negotiate with that seceding province. Thirdly, it would be up to the federal government to decide what constituted a "clear" question and majority. Such a vital decision as secession was advised to have an "enhanced majority" since the standard of "fifty percent plus one" of the population's support was simply not sufficient.(9) Finally, the Court interpreted secession as a constitutional change and thus the terms of secession would be "subject to the conditions of the democratic principle" guaranteed by the document.(10)

The Supreme Court offered advice that was both cautious and calculated. The opinion purposefully left the clarity of the question up to the federal government because the Supreme Court felt the decision went beyond their ability and it also recognized that perhaps the best decision makers here should have been the Quebec people themselves. Additionally, the Supreme Court was able to appease both the federal and Québec governments. The Court essentially granted both Ottawa and the Québec government

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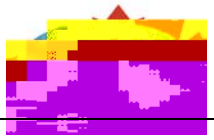
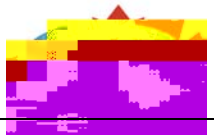


negotiate because the question includes this post-secession extension brings Ryan to basically equate the Act as a Parliamentarian ultimatum.(36)

Finally, the Act does not have a mechanism or formula in place in order to judge whether a strong enough majority has been reached. This ambiguity is certainly a gap. On the other hand, some scholars suggest that if a threshold was settled, this would be politically binding for the government and would have the potential to backfire. Both Ryan and Monahan agree that this should be specified: The former suggesting a majority of the eligible voters as threshold which has "political plausibility in Québec political circles"(37) and the latter believing that the government should "provide a threshold before the referendum takes place to promote accountability and transparency [as opposed to] the alternative reflected in Section 2."(38)

There are some gaps that have no solutions and thus the Clarity Act can be seen as partially flawed. These gaps are that it is unjust that Parliament is pursing a unilateral judgment on clarity and that the legislation does not define what the "other circumstances" in section 1(5) are. Firstly, Lajoie indicates that there is a fundamental problem with the Act which is "the fact that the Canadian government, or, more specifically, the governing party, becomes the sole judge of what constitutes a "clear" question and a "clear" majority."(39) She believes that the lack of input from the National Assembly and debate within Québec is ultimately unfair. This is ironic as the central government seems to be pursuing the very same unilateral strategy that it was



legislation (Bill 99) by the Québec government even though the passage of Bill C-20 did not foster any substantial protest within Québec. Bill 99 contradicted the Supreme Court Reference stating that it does not apply in Québec, the "fifty percent plus one" formula was still valid and that only the Québec government could pursue self-determination. Although the legislation went mostly unnoticed, it proved that the Québec government was not done with the sovereignty question.

The idea that Parliament is intruding in provincial jurisdiction is challenged by the optimists that see the legislation as legitimate and necessary. They believe this because it does not infringe on Quebec's jurisdiction, it follows the constitution's principles and it prevents unilateralism. The Act's main goal is to "indicate the criteria to which federal parliamentarians should refer in the case of a referendum on the secession of a province and to judge both the clarity of the question and the adequacy of the majority."(43) This does not at all refer to removing legislative power from the Québec National Assembly. It is, in fact, in line with section 44 of the Constitution Act (1982) which allows the federal government to "unilaterally amend the constitution on issues that are strictly within the federal jurisdiction."(44)

The Act follows constitutional principles and avoids unilateralism. The Clarity Act reinforces the Peace, Order and Good Government clause "both in respect of entering negotiations for secession and in respect of proposing a constitutional amendment."(45) Furthermore, the Clarity Act maintains democratic values because not only did it follow the opinion of the Supreme Court, but the clarity of the question and majority will be judged by an elected body (Parliament) and the negotiations will be multilateral, not unilateral. Therefore, the Act is legitimate since the federal government is entitled to "indirectly influence [the Québec National Assembly's] members and their electorate."(46) The Clarity Act prevents the alternative, which is the province unilaterally dictating the conditions of secession to the central government, since legislation is binding to all provinces in Canada.

In acknowledging the contradicting opinions on the effectiveness and legitimacy of the Clarity Act, it is possible to see the legislation in two distinct lights. The legislation is both a beneficial safeguard "designed to promote democratic accountability and protection against arbitrary action by government"(47) as well as the federal government's way to keep Canada intact by "ensure that Québec would never meet all the conditions needed to legally secede from Canada."(48) The Clarity Act is effective in promoting national unity as well as most of the principles outlined in the Supreme Court Reference. In terms of its legitimacy, most literature agrees that the Clarity Act has done more good than damage in upholding the democratic values embedded in Canadian political culture. The controversy and dialogue surrounding the Clarity Act and the sovereigntist movement are certainly important features of Canadian politics. In fact, the very reality that debates exist in any political realm is an implication that democracy is in practice.(49) It is within the context of these political debates that the values and principles of Canada's Charter of Rights and Freedoms are able to emerge.

Biography

Natalie Bradbury is a student at Dalhousie University in Halifax, Nova Scotia, completing a double-major in History and Political Science. Originally from Ottawa, Ontario, she attributes her early interest in these disciplines to her own family's diverse history and the inspirational education she received in school. Natalie was inspired by Dalhousie professor Dr. Kristin Good who has assisted Natalie in cultivating and advancing her appreciation for and understanding of the dynamics of Canadian federalism. Natalie's other interests include experiencing first hand other jurisdictions and cultures that she has obtained through extensive international travel. Natalie is considering a career in academia and is particularly interested in specializing in federalism and contemporary history. This summer, she looks forward to her job as an assistant research analyst with the federal government.

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(45) Rocher and Verrelli 229.

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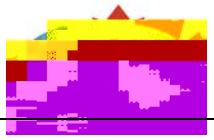
Expanding the Federation?
The Ongoing Process of Devolution in the Yukon Territory

Adam P MacDonald

Royal Military College of Canada

Abstract

Since the 1970s, the transition of jurisdictional authority, spec



The northern territories are vestiges of Canada's colonial past. They are not autonomous political entities like the provinces but are creatures of federal statues in which ultimate power resides in Ottawa. The process of devolution, however, is an ongoing endeavor aimed at transferring powers from the federal government to their territorial counterparts. Of the three territories, the Yukon is the most advanced in this respect. To date the transfer of powers from Ottawa has been well absorbed by the Yukon Territorial Government (YTG), which has developed the institutions and expertise needed to accept these new areas of jurisdictions. Devolution, however, in the Yukon is a dual process involving not just the federal government and YTG, but the Yukon First Nations as well. Aboriginal self-rule is a far more complex issue, with concerns over the lack of an experienced labour force and the cumbersome relationship with Whitehorse characterized by funding and decision-making process disputes. Devolution in the Yukon, therefore, is increasingly concerned with the issue of Aboriginal self-rule since many in the YTG believe the Yukon First Nations have not reached a sufficient stage of institutional development to effectively be an autonomous level of government. The likelihood of the Yukon Territory becoming a province via constitutional reform is minimal considering the general apathetic Yukon political culture towards the issue and the federal government's unwillingness to reopen the Constitution. The Yukon, however, may affect the future devolution processes occurring in the other territories, specifically with regards to Aboriginal self-government.

Devolution as a Model of Political Development

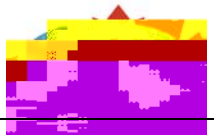
Gurtson Dacks' model of political development and devolution highlights the interdependent relationship which exists between them. Dacks's model is a three dimensional construct, analyzing devolution as a function of 1) civic development, 2) institutional development, and 3) constitutional development. Though not necessarily linear in nature, there is a normative assessment of how each level of political development affects one another in the devolution process. His model provides a methodology for the study of the disparities that exists between the devolution processes of the YTG and the Yukon First Nations (1).

Civic Development

Civic development is concerned about the creation of a political culture articulating a desire for devolution. The development of such a political culture is based on the societal consensus of identification as a group and the need for self-government to address the needs of their community. Within this political culture, an active civil society shall be developed in which a civic elite will emerge, mobilizing and organizing the society while leading the devolution process.

Institutional Development

The creation of effective government institutions and procedures, such as representation and accountability, which are supported by the society, is essential for establishing the



infrastructure needed for self-rule. The development of an institutional elite, having the specific expertise to implement new areas of authority, is also a crucial factor. Institutional development is aimed at establishing an organization with the skill assets and resources needed to present an alternative form of government, legitimizing claims for greater autonomy.

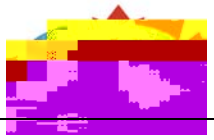
Constitutional Development

Dacks argues that constitutional entrenchment of the devolution process is heavily dependent on the levels of civic and institutional development. If there is a strong political culture for self-rule combined with the political infrastructure to assume the responsibilities of a previous government, the likelihood of constitutional development is high. Defining the status of a region constitutionally, however, may create new powers or simply entrench those previously granted through other forms of legislation.

The History of Devolution in the Yukon Territory

Before beginning an analysis into the current stage of political development with respect to devolution in the Yukon, a short history of this process is needed to provide a context for its contemporary study. Indeed, many of the issues affecting the present state of devolution are products of past political actions. By investigating this history, therefore, the roots of such concerns can be analyzed, resulting in a predictive capability in forecasting the future avenue(s) of the devolution process.

Following the Gold Rush in the late 19th Century, the Yukon Territory was created in 1898 via the Yukon Act(2). The territory was governed by a Commissioner, a federal appointee, whom had an executive council advising him/her. Though the committee gradually became to be exclusively comprised of elected officials, executive power remained solely with the federal appointed Commissioner who was in charge of the day-to-day governance of the territory. The Commissioner was



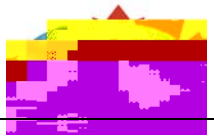
Devolution had been a major campaign issue in the territorial election and following Joe Clark's victory in 1979 at the federal level, the Conservatives, which supported devolution in the Yukon, moved quickly to remove the Commissioner from the decision-making process. On 9 October 1979, then Minister of DIAND, Jake Epp, sent a Letter of Instruction to Commissioner Christensen stating "You will not be a member of the cabinet or the Executive Council, and will not participate on a day-to-day basis in the affairs of the Cabinet or the Executive Council"(5). Though the move created initial political turmoil, resulting in the resignation of the Commissioner Christensen, the role of the Commissioner had essentially become the equivalent of a provincial Lieutenant-Governor, fully accepting the advice of the premier who was the head of government. By removing the Commissioner from the Executive Council, also, the Legislative Assembly became the institution responsible for the creation and implementation of the territorial budget, giving the elected government legitimacy as the real organization of power(6). These new found powers introduced the concept of responsible and representative government into the territory by connecting the government, which had essentially inherited the former powers of the Commissioner, to the populace through elections.

The new political arrangement became entrenched in the amended Yukon Act of 2002 which states in the preamble "Whereas Yukon is a territory that has a system of responsible government that is similar in principle to that of Canada"(7) [emphasis added]. Though the Commissioner retains executive power, it is the elected government, the responsible government that has the actual political power. Responsible government is supported by Article 10 which states the Executive Council, the decision-making body in the Yukon, shall comprise only of the elected members of the Legislative Assembly(8). Furthermore, Article 4 (3) limits the ability of the Commissioner to intervene in the decision-making process by forcing him/her to act in accordance with any written instruction given either by the Governor in Council (the Premier of the Yukon) or the Minister of DIAND. The position of the Commissioner, therefore, retains its executive functions but is obligated to act in accordance with the wishes of the elected government.

After de facto political power had been transferred from the Commissioner to the elected government, the next phase of devolution consisted of transferring federal areas of jurisdictions, administered by DIAND, to the YTG. One of the first major agreements was the Yukon Oil and Gas Accord (YOGA) which came into effect in 1998. YOGA established the process of transition of the administrative control of the Yukon's oil and gas industries to the YTG(9). All other resource control was handed to the YTG following the implementation of the amended Yukon Act (2002).

Discussions concerning amending the Yukon Ac

Aboriginals comprise over 50% of the population are Carmacks (pop. 430), Mayo (pop. 365) and Ross River (pop.335) (24). Due to the small numbers of Yukon Aboriginals inhabiting their settled lands,



agreements between the First Nations and developers. On many occasions, however, the YTG has taken opposing interests to those of the First Nations over development issues, creating a relationship of conflict, usually leading to the abandonment of developing deals simply because the Yukon First Nations feels they are not being treated as equals in negotiations. In some instances, the YTG has signed agreements with developers which in theory imply Fist Nations consent, but usually are in opposition to Aboriginal interests. Further deteriorating the relationship is the issue of the royalty regime funding formula, specifically the continual under-valuing of gold by the YTG which reduces the amount paid to the Yukon First Nations(29). Disagreements, also, between Ottawa and Whitehorse over compensation with regards to PSTAs has completely left the Yukon First Nations out of the discussions(30).

The lack of funding puts a significant strain on the Yukon First Nations measures for self-government. The absence of reliable financial support from either the YTG or the federal government inhibits development of the institutions and technical expertise needed to manage their settled lands. The funding that they do receive, also, is mostly in the form of conditional transfer payments, further limiting the ability to exercise their authority(31). This inability to institute resource management programs, in large part due to a lack of funding, serves as a justification of the YTG concerns over Aboriginal self-government. The problem, however, is that it is the YTG which is disrupting the funding process, creating the conditions for the Yukon First Nations to fail in developing the institutions and procedures needed for self-rule.

The Future of Devolution in the Yukon Territory

The YTG

As has been demonstrated, the dual process of devolution occurring has been asymmetrical towards development, both civic and institutional, in relation to the YTG and the Yukon First Nations. Since the implementation of the DTA, with the transfer of former federal employees and the adoption of mirror legislation, there exists a functional bureaucracy which has given the YTG the capability to assume the responsibilities previously controlled by DIAND. Though through the amended Yukon Act there has been the implementation of a more autonomous territorial government, the prospects of constitutionally entrenching this status seem unlikely.

Referring to Dacks' model of political development and devolution, though the YTG has created the institutional capacity to assume new powers, civic development, one of the key components to constitutional development, is missing; the Yukon populace has no real desire to seek provincial status. Though recent public opinion data is lacking, in a November 2000 survey, only 29% of the respondents believed devolution was a top governmental priority. In another poll conducted in October 2002, shortly after the implementation of the amended Yukon Act, 3% of those asked believed devolution was the top governmental issue; this percentage decreased to 1.4% in February 2003(32). It seems political concerns are centered more on implementing the services inherited as a

result of the devolution process and not on entrenching the growing autonomous nature of the YTG. There are, however, plans by the current Yukon Party Government to continue to process through consultations with Ottawa to eliminate the subordinate relationship that exists between the Yukon Commissioner and the Minister of DIAND, ensuring the YTG has the exclusive right to make decisions concerning territorial matters(33). Still, with a lack of popular support advocating provincehood, it appears measures to further devolve powers from O

on the Yukon First Nation and Self Government Agreements. Key discussion points of

Adam's research interests include federalism, Canadian politics, strategic studies, and Asian politics. Next year, Adam will be pursuing his MA in Political Science at the University of Victoria.

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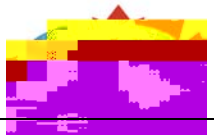

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Restoring Fiscal Equilibrium in the Canadian Federation: The Strides of the Harper Government

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Abstract

The Canadian federation is by no means a fiscal equilibrium and this imbalance has been a growing area of weakness for decades. However, the Harper Conservatives have acknowledged Canada's fiscal imbalance and have placed it as a top priority for their government. Since 2006 Harper and his government have committed, and followed through with, several significant efforts towards fixing Canada's fiscal imbalance through measures included in both the 2006 and 2007 federal budget plans. No other government in decades has taken such measures and actions to meet this goal. The paper begins by describing how Canadian fiscal relations have evolved into what has been termed the fiscal imbalance. The paper then outlines the actions the Harper Conservatives have taken to properly address the imbalance since 2006; including both the vertical and horizontal fiscal imbalances and the corresponding changes to the CST, CHT, the Equalization Program and the TFF. Lastly, the paper discusses the fiscal imbalance in relation to municipal governments and Harper's initiatives in that area.

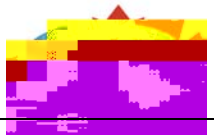
This history of Canadian fiscal relationships leads us to the present era. From 1995-2006, the governing Liberals acknowledged the presence of the horizontal fiscal imbalance, but year after year refused to acknowledge the vertical fiscal imbalance claiming there is merely a fiscal 'pressure' on the provinces, but ultimately they have access to the same revenue bases as the federal government.(10) For the first time in history, a Canadian government, the Harper Conservatives, has acknowledged and addressed both of Canada's fiscal imbalances and has made it a top priority to close these gaps. Budget 2006 began to outline the direction the Canadian federal government would take to achieve fiscal equilibrium, and Budget 2007 has furthermore provided the detailed and precise steps to meet that end. Minister of Finance, Jim Flaherty, announced during his March 2007 Budget; "through this budget we are delivering an historic plan worth over $39 billion in additional funding to restore fiscal balance in Canada."(11) Budget 2007 has provided realistic action plans for restoring vertical and horizontal fiscal imbalances and addressing the issue of municipal fiscal relations.

Restoring the Vertical Fiscal Imbalance

Canada's vertical fiscal imbalance has long been a topic of heavy debate within the federation. In a letter from the federal government to the Council of the Federation's Advisory Panel on Fiscal Equilibrium in 2005, the Liberals wrote:

The Government does believe in the existence of a fiscal imbalance between the federal and provincial governments in Canada. Both orders of government have access to all the major sources of tax revenues and have complete autonomy in setting their tax policies to address spending pressures related to their respective jurisdictions.(12)

In 2006 the Advisory Panel completed their report on the fiscal imbalance and found that the fiscal prospects of the provincial governments look unsatisfying for the next 20 years. The report stated that on average the provincial and territorial revenues would increase by 3.6 percent each year until 2024-2025, however this must be compared to the expected 4.7 percent growth in total program expenditures during the same period.(13) This is a vertical fiscal imbalance and will only serve to widen the gap if left untreated. The forecast deals mainly with expenditures provided in the Canada Social Transfer and the Canada Health Transfer. In their publication titled "Reconciling the Irreconcilable," the Advisory Panel on Fiscal Imbalance argued that when the federal government restored fiscal health (by cutting transfers and producing surplus budgets) in the late 1990s it did not return to the provinces what it had taken.(14) They continued by commenting th Tc.015103.665 une



so long as the provinces offer a similar program with similar accountability structures.(16) The Harper government has addressed the vertical fiscal imbalance and has implemented many initiatives in their 2007 Budget to restore equilibrium.

The major themes of the Budget's solution to the vertical fiscal imbalance include placing transfers on a long-term principles-based footing to ensure the provinces elements of stability and predictability. Equally important, the Budget seeks to clarify the roles and responsibilities of each level of government so as to eliminate non-jurisdictional spending. The Harper government also plans to restore vertical fiscal equilibrium mainly by channeling money through the Canada Social Transfer and the Canada Health Transfer systems rather than direct spending.

The Canada Social Transfer includes funding for three main areas: post-secondary education, social assistance and childcare. Previously, this transfer system was stunted due to lack of financial weight and unequal per capita allocation to all Canadians.(17) In Budget 2007, the Harper government will add $687 million to the transfer in 2007-2008 to ensure equal per-capita funding to all provinces. In addition, $800 million more will be included in the CST in 2008-2009 to cover post-secondary initiatives. As well, $700 million will be added to the CST's 2006-2007 level of $6.2 billion for social programs. Finally, in Budget 2007 the Harper government has allocated $5.6 billion in 2007-2008 alone to childcare, (this includes the new addition of $250 million for 25 000 new childcare spaces). Compare this with the Liberal Budget 2005 where the issue of childcare was touched upon only very briefly: "5 billion over the next five years to start building a framework for an Early Learning and Child Care initiative in collaboration with provinces and territories."(18) In Budget 2007, the childcare plan has a clear direction with numerous goals, numbers and detailed allocation paths that demonstrate the Conservative's commitment to ensuring effective national childcare. Overall, the CST base will be increased by $687 million in 2007-2008, in 2009-2010 an addition $1.05 billion will be added to that base and the 3 percent annual escalation rate will begin from there.(19) Moreover, the CST has been renewed until 2013-2014, placing it right alongside the Canada Health Transfer.

The changes made to the Canadian Health Transfer are another area of the 2007 Budget that is serving to narrow the vertical fiscal gap. In 2004 the Liberal government

In the Advisory Panel's 2006 report on the vertical fiscal imbalance, a few major conclusions were drawn, based upon data that made educated predictions until the years 2024-2025. To begin, they predicted that the federal governments would be in a much more favorable stance than the provincial governments in terms of fiscal positions. Secondly, using the aforementioned position they decided it was within reach for the federal government to make solid, long-term commitments to restoring the vertical fiscal imbalance – this was an attainable possibility. Thirdly, they concluded that the provinces are extremely dependent on their ability to contain health and education costs to a minimum because even though both governments have access to similarly increasing revenues, the expenditures of the provinces and territories are presumed to grow at a much faster rate.(22)

Fortunately, Harper has taken these forecasts into consideration when his government drew their 2007 Budget. Public policy expert France St. Hilaire claims that since 1997 the federal government has preferred direct spending in areas of provincial jurisdiction, causing serious strain on the provincial governments.(23) Changes to the Canada Social Transfer and Canada Health Transfer have been designed with heavy emphasis on relieving this strain and closing the fiscal gap between the federal and provincial governments. Harper's Conservatives have drawn an attainable route to achieving vertical fiscal equilibrium; it is now in the hands of the current government and the successive governments to follow through.

Rebalancing Horizontal Fiscal Arrangements

Due to Canada's vast geography, diverse population and wide range of social conditions, no two provinces are alike. These factors lead to multiple differences in economics and politics. All provinces vary in population, revenue-raising abilities, resources, personal initiatives and self-interests. There is no denying the fact that horizontal fiscal imbalances are prevalent and very present in the Canadian federation. The Harper Conservatives successfully installed action plans in their 2007 Budget to address and reform this issue. Their main focuses lie with the Equalization Program and the Territorial Financing Funding arrangement. The new initiatives within these two programs focus toward bringing them back to principle-based formulas that will ensure stability and predictability. Combined efforts will include $2.062 billion more over the next two years than the previous system.(24) Harper's Conservatives have taken the issue of horizontal fiscal imbalances seriously, as it has been a looming and highly debated issue in the Canadian federation for decades. His government has placed a firm commitment on this topic and has outlined their actions to ensure equilibrium in the near future.

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of the horizontal fiscal imbalance they found that this interim formula "abandons a key feature of Canada's Equalization Program – namely, the principle that equalization payments to a province are to be determined by its fiscal capacity relative to that of a standard."(25) This formula did not address the fiscal varieties of the provinces, however the Harper government has made many adjustments to meet those ends.

The Harper Conservative's 2007 Budget included many of the recommendations set forth in the O'Brien Report of 2006. Most importantly, this includes a shift to a ten-province standard (rather than a five-province standard) in order to heighten the national Equalization standard and ensure less wealthy provinces are brought up to a national average. Next includes adjustments to the highly contested inclusion of natural resource revenues: 50 percent exclusion from the Equalization formula to ensure that resource-producing provinces gain some economic benefits from these revenues. In addition, Harper has implemented a fiscal capacity cap to make sure "have-not" provinces do not gain higher fiscal capacity than the "haves." Lastly a "smooth transition" has been included in the 2007 Budget so as to guarantee stability and predictability. This transition will make sure receiving provinces obtain no less than the 2007-2008 payments in the coming years.(26) In accordance with the new Equalization program, the province's CST and CHT transfers would also not drop below 2007-2008 levels.

The adjustments made to the Equalization Program in the Harper government's Budget were designed to restore the fiscal imbalance among the provinces. The current government has made significant efforts and has consulted numerous review panels and reports (Advisory Panel, O'Brien Report) in order to implement the most beneficial program for all Canadians. In Paul Boothe's essay "The Stabilization Properties of Canada's Equalization Program", he points out "provincial and territorial ministers have been urging the removal of the Equalization ceiling and for a return to a ten-province standard rather than the current five-province standard."(27) The Conservative government has taken into consideration the desires of the provinces and is working with them in order to ensure a highly advantageous program for as many provinces as possible.

The Territorial Formula Financing (TFF) arrangement is another program that has undergone changes in the recent budget. Similar to the Equalization Program, in 2004 the TFF also had its formula-based calculations suspended. The 2007 Budget, however, reinstalls these principle-based formulas in order to meet the needs of Canada's three territories. The Harper government consulted the territories and came up with a fully endorsed set of guidelines for the new TFF. To start, the formula-based approach would return with additional 'gap-filling' grants to recognize the differences among the three territories. For instance, Nunavut is much less developed in areas of healthcare, education and social well-being than the other territories.(28) Next, there would be a new and easy approach to how resources are incorporated in territorial revenue measurements. In addition, the government will provide the territories with new incentives in order to increase revenue and economic growth so that eventually they can become self-reliant and self-sufficient. Budget 2007, also, sets out a simple transfer and estimate system so

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Conclusion

The fiscal imbalances present in the Canadian federation have been a growing area of weakness for far too long. In 2006 with the elec

Footnotes

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Fédéralisme américain et environnement : le rôle des États fédérés dans le développement d'une diplomatie parallèle

Annie Chaloux

Résumé

Les enjeux environnementaux, et plus particulièrement le phénomène des changements climatiques constituent un élément significatif dans la redéfinition des relations internationales contemporaine. L'État central, bien qu'il reste un acteur majeur sur la scène internationale, n'est plus considéré comme l'unique représentant des intérêts nationaux. Sur le plan environnemental, les collectivités locales et régionales acquièrent une légitimité leur permettant de définir leurs propres intérêts sur la scène internationale, en dépit des positions de l'acteur central, appelé phénomène paradiplomatique. Aux États-Unis, ce phénomène est de plus en plus important dans le secteur environnemental, notamment depuis le rejet de Washington du protocole de Kyoto en 2001. Certains États ont dénoncé la position de Washington et ont développé une diplomatie parallèle avec d'autres États fédérés dans le monde afin de dénoncer la position du gouvernement central sur la question des changements climatiques. Cet article traitera donc du développement du phénomène paradiplomatique aux États-Unis, dans le secteur environnemental. Particulièrement, il se concentrera sur l'évolution de la politique environnementale américaine concernant le réchauffement climatique, l'intensification de la paradiplomatie des États fédérés, ainsi que du rôle de ces entités subétatiques suite au rejet de Washington du protocole de Kyoto en 2001.

un possible déficit démocratique. En somme, les traités internationaux doivent obtenir l'aval du sénat pour qu'ils puissent par la suite être ratifiés et devenir loi sur l'ensemble du territoire du pays et dans chaque État fédéré, et ce, « nonobstant des dispositions contraires insérées dans la Constitution ou dans les lois de l'un quelconque des États(13) ».

D'autre part, le système politique états-unien est un système fédératif, ce qui fait en sorte que l'État fédéral et les États de la fédération se partagent certains pouvoirs. En effet, « tout ce qui n'est pas attribué expressément au gouvernement fédéral relève de la compétence des États(14) », ces pouvoirs étant énumérés dans la section 10 de l'article 1. Entre autres, le gouvernement fédéral acquiert par cet article l'exclusivité de la négociation des traités internationaux. Toutefois, cette exclusivité ne laisse pas au fédéral le monopole absolu des relations internationales et de la politique extérieure(15), tel que nous le verrons dans la section 2.1.2.

L'Exécutif fédéral possédant l'autorité sur la politique extérieure et celle de négocier les traités internationaux, on pourrait facilement croire qu'ils peuvent exercer cette prérogative alors que certains États pourraient être en désaccord avec ces politiques. Néanmoins, dans un premier temps, il faut se rappeler que tout traité international doit obtenir l'aval du sénat, composé de personnalités élues dans chacun des États (soit 2 par État, pour un total de 100). Les États possèdent donc un certain pouvoir sur les politiques extérieures(16).

D'autre part, les États fédérés ont la capacité d'établir certaines politiques extérieures de par leurs compétences énoncées dans la Constitution du pays.

The 50 states of the United States of America possess limited international competence divided from their (1) constitutional authority to engage the international arena in limited ways as states but not nation-states, (2) political freedom to pursue state-local interests internationally, and (3) governmental capacity to act independently in the international arena(17).

Les gouvernements des États fédérés établissent depuis plusieurs années déjà leurs propres politiques extérieures, et ce, dans de nombreux domaines. Paquin soutient par ailleurs que « les 22 300 États, comtés et villes américains ont une latitude non négligeable en matière de relations internationales(18) ». Les États fédérés posséderaient à l'heure actuelle autant de bureaux permanents à l'étranger que le gouvernement fédéral ne dispose d'ambassades(19). De plus, certains gouverneurs états-uniens mènent davantage de missions économiques de commerce international annuellement que le président des États-Unis et le

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commitment to realistic and binding limits that will significantly reduce our emissions of greenhouse gases.(27) »

En l'an 2000, l'accession de George W. Bush à la présidence des États-Unis a transformé radicalement la politique étrangère des États-Unis face aux changements climatiques.

Là où l'Administration Clinton était fortement partisane d'une politique agressive sur les changements climatiques, l'Administration Bush se montre très critique, et ce, même après la parution des résultats d'une étude commandée par elle […] dont les conclusions sont identiques à celles des rapports de l'IPCC(28).

Ainsi, tel que mentionné précédemment, en mars 2001, les États-Unis se retirent du protocole de Kyoto. Ce qu'il faut toutefois regarder, c'est qu'à partir de ce moment, plusieurs initiatives des États fédérés vont émerger et les États fédérés développeront leur propre politique étrangère en matière de changements climatiques. La position de l'Administration Bush ne représentera pas la position de l'ensemble des États américains dans la lutte aux changements climatiques.

Quoique le président Bush ait reconnu en juin 2001 la réalité et la gravité des changements climatiques(29), et malgré qu'il ait implanté en 2002 un plan d'action visant la réduction en intensité des GES dans l'atmosphère de près de 18 %(30), son Administration ne reconnaît toujours pas l'impact humain sur les émissions de GES. D'ailleurs, lors de la 10e conférence des Parties qui a eu lieu en 2005, « le négociateur en chef des États-Unis a continué de soutenir que les fondements scientifiques de l'origine anthropique des changements climatiques demeuraient incertains(31) ».

On constate donc que jamais l'Administration Bush ne s'est rapprochée des positions européennes face au protocole de Kyoto et qu'il n'a jamais voulu proposer du moins des mesures concrètes de réduction des GES sur le sol états-unien. Il a par ailleurs affirmé quant aux changements climatiques que « la croissance économique est la solution, pas le problème. Car une nation dont l'économie progresse est une nation qui peut se permettre de faire des investissements dans les nouvelles technologies(32). »

Législation fédérale en environnement

Tout d'abord, il n'existe aux États-Unis aucune forme de ministère ou d'agence qui a pour objectif de coordonner les différentes institutions et les différents acteurs liés à l'environnement. Cette carence fait en sorte de rendre « difficile toute affirmation sur l'élaboration d'une politique de l'environnement aux États-Unis(33) ».

De plus, le partage des compétences au sein des institutions fédérales fait en sorte de décentraliser « l'autorité gouvernementale ». En effet, l'Exécutif fédéral possède certaines compétences liées à l'application des politiques environnementales, qui sont à leur tour divisées entre les différentes agences et ministères. Puis, au sein même du législatif, il y a encore une fois un fractionnement des pouvoirs entre les deux chambres

législatives, soit le sénat et la chambre des représentants(34). Finalement, il y a une très forte décentralisation des pouvoirs envers les États fédérés. Or, pour ce qui est des changements climatiques particulièrement, les États peuvent établir leurs propres politiques environnementales, puisqu'ils possèdent une large part des champs de compétences, qui est estimé à environ 70 % en ce qui concerne les législations environnementales(35).

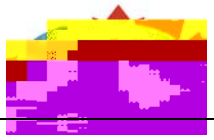
Ainsi, nonobstant l'absence de politique environnementale ambitieuse sur les changements climatiques au niveau fédéral, de nombreuses actions limitant les émissions de GES ont été entreprises par les entités subétatiques(36). Ce phénomène paradiplomatique en l'environnement sera traité dans la section suivante, mais il démontre assez clairement que les politiques de Washington ne sont plus représentatives des valeurs des États fédérés et surtout, en ce qui concerne les changements climatiques,

Le développement de la paradiplomatie aux États-Unis est le résultat de plusieurs facteurs. Or, en se basant sur les variables de la paradiplomatie développée par Stéphane Paquin, il est possible de constater que l'essor du phénomène paradiplomatique en environnement serait le résultat du processus d'internationalisation de la problématique qui aurait poussé à acteurs subétatiques à élaborer des stratégies pro-Kyoto malgré le rejet de Washington sur cette question. Le réchauffement climatique affecte toutes les régions du globe et ne se limite pas aux frontières. Également, le régime fédéral ainsi que la personnalité des certains gouverneurs seraient une autre variable qui aurait favorisé l'essor de la paradiplomatie de l'environnement aux États-Unis.

Certes, certains États fédérés se sont alignés sur la politique de Washington. Toutefois, spécifiquement pour cet article, nous nous concentrerons sur les États fédérés qui ont décidé d'adhérer aux valeurs de Kyoto, et/ou qui ont établi des liens avec d'autres entités subétatiques et voire même certains États, en ce qui concerne les changements climatiques.

Initiatives des États fédérés

Alors qu'ils ne représentent que le vingtième de la populati



En 2006, l'État de la Californie a décidé de poursuivre en justice les six grands constructeurs automobiles pour avoir construit des voitures polluantes, qui coûtent aujourd'hui des milliards de dollars à l'État, soit les compagnies Chrysler, General Motors, Ford, Toyota, Honda et Nissan. « Le but est de rendre les fabricants d'automobiles responsables des sommes dépensées par les contribuables pour faire face aux dommages(50) » liés au réchauffement de la planète. La poursuite, au nom du « peuple californien », est une poursuite au civil et il s'agit d'une première aux États-Unis(51).

Aussi, le 27 septembre 2006, le gouverneur Schwarzenegger annonçait l'entrée en vigueur d'une loi intitulée Global Warming Solutions Act sur la réduction des émissions de gaz à effet de serre sur son territoire. Les objectifs de réductions des GES dans l'atmosphère sont de l'ordre de 25 % pour 2020 et de 80 % pour 2050(52), s'engageant du coup à respecter les objectifs internationaux de réduction de GES pour 2050. Cette loi, AB 32, a donné pour mandat au CARB (California Air Ressources Board) de réglementer et de développer des mécanismes qui permettraient à la Californie de réduire ses émissions de GES de 25 % pour 2020. Particulièrement, l'organisme californien doit entre autres réglementer les différentes sources d'émission de GES pour janvier 2009, adopter un plan de réduction des GES pour la même période, ainsi que développer un marché du carbone(53).

La Californie a reconnu très tôt l'importance des regroupements régionaux et des alliances dans la lutte aux changements climatiques. L'État californien est désormais membre du Western Regional Climate Action Initiative depuis sa création en 2003, et a signé des ententes avec certaines provinces canadiennes dont la Colombie-Britannique et l'Ontario. Au surplus, en 2006, le Premier ministre britannique Tony Blair et le gouverneur Schwarzenegger de la Californie ont conclu un pacte de coopération dans la lutte au réchauffement climatique. Le pacte signé par les deux parties stipulait que le Royaume-Uni et l'État de la Californie s'engageaient à mettre en place rapidement des actions concrètes pour réduire les émissions de GES et de soutenir le développement des technologies peu émettrices de GES(54).

États de la Nouvelle-Angleterre

Le Massachusetts, le Rhode Island, le Maine, le Connecticut, le Vermont et le New Hampshire luttent depuis de nombreuses années déjà contre le réchauffement climatique, puisque l'élévation des mers affecterait directement ces États côtiers. Ils se sont donc servi d'une tribune et d'une association régionale, soit la Conférence des Gouverneurs de la Nouvelle-Angleterre et des premiers ministres de l'Est du Canada, pour discuter de la problématique des changements climatiques, et en 2001, lors de la 26e rencontre annuelle des gouverneurs de la Nouvelle-Angleterre et des Premiers ministres de l'Est du Canada, ils ont adopté un plan d'action collectif sur les changements climatiques. Ainsi, les différents États américains et provinces canadiennes se sont entendus sur des mesures de réductions chiffrées et communes. Les objectifs sont une stabilisation des GES au niveau

de 1990 pour l’année 2010, puis une réduction de 10 % des émissions de GES pour l’année 2020(55).

Les États de la Nouvelle-Angleterre ont également développé un marché régional du carbone, qui devrait devenir effectif pour 2009(56). Certai

Alors que le gouvernement fédéral tarde à reconnaître les effets néfastes des GES sur les changements climatiques à l'échelle internationale, certains États américains dont la Californie et le Massachusetts ont porté devant les tribunaux l'Agence de protection de l'Environnement états-unien (EPA), pour forcer cette dernière à faire reconnaître les émissions de GES comme étant des gaz polluants. Ces onze États américains souhaitaient contraindre l'EPA à légiférer pour restreindre les émissions de GES sur le sol américain, avançant que les gaz à effets de serre étaient polluants et nocifs(61). Le jugement de la Cour suprême, rendu en avril 2007, a donné raison aux États poursuivants, en reconnaissant les GES comme étant des gaz polluants et en affirmant « que le

représentent « l'intérêt national » de leur communauté politique, les faits démontrent que la réalité est bien différente(64).

Ainsi, en traitant des positions états-uniennes et des entités fédérées face aux changements climatiques, nous avons constaté que les États-Unis ne sont pas le seul État central à avoir décidé unilatéralement de la ratification du protocole de Kyoto. Alors que Bush s'est servi de son pouvoir présidentiel pour ne pas ratifier la convention internationale, nous avons remarqué également que le Canada a ratifié quant à lui le protocole de Kyoto sans un consensus av

Notes de bas de pages

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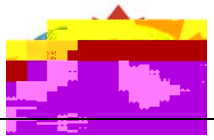

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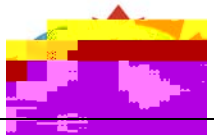

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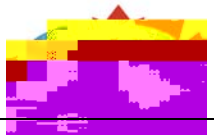

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38. « Bourse du carbone : un marché [illegible]

Aucun article scientifique n'a examiné l'efficacité des politiques provinciales et fédérales en ce qui a trait aux ERFI eu égard au cadre institutionnel canadien : le but de ce travail est de combler ces lacunes en triangulant l'objet « ERFI au Canada » par l'examen de différentes sources se penchant sur différents as

développement d'ERFI. Les provinces peuvent jouer sur un dernier aspect des politiques

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provinces » (Harrrison 2003). C’est même le Conseil de la Fédération qui s’est saisi, depuis 2003, de la coordination interprovinciale en matière énergétique (Lipp 2007), et pas le gouvernement fédéral. Cette po

développement des ERFI, avec une élaboration de normes de qualité et de sécurité, la mise en place d'un organisme fédéral de coordination, et la cartographie des sources d'énergies vertes (qui n'a toujours pas été réalisée!) par Ressources Naturelles Canada (Alliance Canadienne d'Énergie Renouvelable 2006). Par delà la coordination et l'harmonisation des politiques, on voit donc que c'est un véritable appel au leadership que lancent les activistes au gouvernement fédéral.

Pour conclure, on voit donc que le palier fédéral possède une marge de manœuvre importante et concrète dans la promotion et le développement des ERFI : le cadre institutionnel canadien lui permet de mettre en place une vaste gamme de politiques publiques de soutien à la production d'énergie verte et de promotion de son utilisation, et il a le soutien des environnementalistes pour prendre le leadership sur cette question au Canada. À la lumière de toutes ces possibilités, on peut se demander quel est le bilan concret, pratique des actions du gouvernement fédéral afin d'en tirer un bilan éclairé.

Le bilan concret des actions du gouvernement fédéral canadien dans le domaine des ERFI

L'absence de vision globale

Notes en bas de page :

(1) On définit les ERFI comme des « formes d'énergie (lumière du soleil, vent, chaleur géothermique, puissance de vague, énergie de marée, hydro-électricité à faible impact, et matière organique) qui traversent la biosphère de la terre, disponibles pour l'usage humain indéfiniment, à condition que la base physique pour leur écoulement ne soit pas détruite. » (Jaccard2004, 413)

(2) Sauf indication, les données présentées dans cette sous-partie proviennent de larticle de Judith Lipp : « Renewable Energy Policies and the Provinces ».

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Concluding Comments

In the end Federalism-e is a big project that involves a lot of people. We would like to thank every one, but even then we might forget someone. To start, let us thank you all the writers whom participated in this year's journal, giving their best so that this edition was possible. Our thesis advisor, Dr. Christian Leuprecht, and our technical assistants, Ryan Zade and Frederic Drolet also deserved a good thank you. Without their vital contributions, none of this would have been possible. Also, the editorial board cannot be forgotten. They have worked behind the scenes, but were key members for the success of this venture. Though some of them want to stay anonymous, we would like to point out all of them that did a tremendous job.

En bout de ligne, Federalism-e est un énorme projet qui implique beaucoup de gens. Nous souhaiterions remercier tout le monde, tout en soulignant que nous allons sûrement en oublier quelques uns d'une manière ou d'une autre. Pour débuter, nous offrons nos remerciements aux auteurs du recueil de cette année, qui ont encore une fois donné leur meilleur pour que ce projet soit possible. Notre superviseur de thèse, Dr. Chrsitian Leuprecht, et nos assistants techniques, Ryan Zade et Frédéric Drolet, méritent aussi plusieurs mercis. Sans leur vitale contribution, rien n'aurait pu se faire. Aussi, on ne peut laisser les éditeurs de côté. Ils ont travaillé dans l'ombre, mais ils étaient les éléments clés pour le succès de cette aventure. Si certains d'entre eux veulent garder l'anonymat, nous souhaiterions souligner la contribution exemplaire de certains – qui sont aussi moins gênés.

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… et autres qui réclament l'anonymat / and those who wish to remain anonymous.

We hope you enjoyed this edition and now share the goal of sparking further interest in the study of federalism. We, also, encourage all our readers and past writers to think about contributing to the 2009 edition of Federalism-e, either in the volume or on the future website interactive version. Thank you all once again…

Nous souhaitons que vous ayez aimé cette édition, et espérons que vous partagez maintenant notre but de susciter l'intérêt dans l'étude du fédéralisme. Nous encourageons aussi nos lecteurs et nos 32/TT1-./ Élève-officiédéain…

S32/TT1-.T ayez 8.0Thé Élève-officiédéain…