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**The Impact of Constitutional Abeyance on the Assertiveness of the  
Federal Government**

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A thesis submitted to  
the Faculty of Graduate Studies and Research  
in partial fulfillment of  
the requirements for the degree of  
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## ABSTRACT

This doctoral dissertation deals with intergovernmental relations in Canada. It seeks to explain a pattern that the author has observed in the federal government's approach to its relations with the provincial and territorial governments. The pattern is characterized by a noticeable reluctance on the part of the federal government to assert its valid constitutional powers, even when the courts uphold the constitutionality of those powers. The dissertation hypothesizes that federal reticence stems from serious omissions in the constitution of Canada. Those omissions left Canada institutionally incomplete. They were a result of a major constitutional abeyance, in Michael Foley's terminology, having to do with the founders' ambivalent feelings about Canadian sovereignty and nationhood. Because of that abeyance and the particular constitutional exclusions that flowed from it, the federal government routinely backs away from a leadership role even when the issue in question appears to fall squarely within its jurisdiction. The author's theoretical framework, integrating historical institutionalism and the theory of constitutional abeyances, is tested by an analysis of the federal government stance on internal trade barriers, environmental policy, and the federal spending power. The theory was upheld in the first two cases but is not able, with the method and approach used in this dissertation, to satisfactorily explain the federal position on its spending power.

## ACKNOWLEDGEMENTS

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## Chapter 1: Introduction

The subject of this doctoral dissertation is the federal government's approach to intergovernmental policy-making. More specifically, it deals with the views of Canada's founders on Canadian sovereignty and their effects on the federal approach to intergovernmental relations and public policy-making. The precise question to be addressed is this: what explains the reluctance of the federal government to fully use its valid constitutional powers in a number of vital policy areas, sometimes even when the courts confirm the constitutionality of those powers?

The thesis hypothesizes that federal government reticence stems from serious omissions in the constitution that the founders crafted, omissions that are related to a major constitutional abeyance, in Michael Foley's terminology, having to do with the very idea of Canadian sovereignty. Because of that abeyance and the particular constitutional exclusions that resulted, the federal government routinely backs away from a leadership role even when the issue in question appears to fall squarely within its jurisdiction. In recent years, those constitutional omissions have led to the development of a type of élite accommodation which political scientists have labeled, "collaborative federalism." This is not meant to imply that there have not been periods of confident federal activism. Nor does it mean that there have not been politicians who have favoured a strong central government. Rather, it suggests that the federal impulse towards deference is a constant theme in Canadian political history.

In brief, I have two main tasks: to demonstrate that the federal government has deferred to the provinces in a number of policy areas and to determine if this deference can be explained by the theoretical framework I have constructed.

### Research Design

The dissertation's research design follows a format outlined by Norman Blaikie in Designing Social Research. Here, he sets out the role of theory, stating: "In the context of research design, a theory is an answer to a 'why' question; it is an explanation of a pattern or regularity that has been observed, the cause or reason for which needs to be understood."<sup>1</sup> I will try to demonstrate that the federal government has exhibited a pattern of backing off, withdrawing, hesitating, deferring, and generally refusing to assume a leadership role in policy areas. The theoretical framework, bringing together the theory of constitutional abeyances and historical institutionalism, will offer an explanation for the observed pattern.

Also following Blaikie, the dissertation employs the deductive research strategy, which is to be used "for pursuing the objective of explanation."<sup>2</sup> This strategy "begins with an observed regularity that needs to be explained; a tentative theory is acquired or constructed...then tested by collecting appropriate data."<sup>3</sup>

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<sup>1</sup> N. Blaikie, Designing Social Research: The Logic of Anticipation, (Cambridge, UK: Polity Press, 2000), p. 143.

<sup>2</sup> Ibid., p. 126.

<sup>3</sup> Ibid., p. 100.

King, Keohane and Verba agree with Blaikie about the purpose of a theory but stress that the researcher should select theories that could be shown to be wrong; that is, theories “that are vulnerable to falsification.”<sup>4</sup> The data collected could uphold a theory, or show it to be inadequate, or show some aspect of the theory to be inaccurate. In the case of the latter, the authors write, “we may choose to retain the theory but add an exception.”<sup>5</sup> This thesis accepts that its theory could be shown to be inadequate in some way, and it takes seriously the admonition that scholars make every effort to avoid trying to make the facts fit the chosen theory.

Methodologically, the thesis relies on a literature review and analysis. Historical documents, court decisions, newspapers, and, of course, secondary sources figure prominently in the dissertation. This process was supplemented by relatively brief informal interviews to obtain additional background information.

The thesis also makes use of the case study. Described as “a mode of organizing data,” the case study enables the researcher to undertake a detailed examination of a single, particular event or phenomenon. A case study, Blaikie asserts, “is not just a narrative account of an event or a series of related events; it must also involve analysis against an appropriate theoretical

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<sup>4</sup> G. King, R. Keohane, S. Verba, Designing Social Inquiry: Scientific Inference in Qualitative Research, (Princeton, NJ: Princeton University Press, 1994), p. 101.

<sup>5</sup> Ibid., p. 104.

framework, or in support of theoretical conclusions.”<sup>6</sup> Drawing on the work of J.C. Mitchell, Blaikie further states: “A case study documents a particular phenomenon or set of events ‘which has been assembled with the explicit end in view of drawing theoretical conclusions from it.’”<sup>7</sup> In this dissertation, three case studies will be used to test the theoretical framework explained in the next chapter.

### Dissertation Overview

The rest of this introductory chapter discusses the meaning of federalism, pointing to some of the conceptualizations developed by various authors. It pays particular attention to the categorization proposed by Rocher and Smith. Toward the end of the chapter, I present my views on Canadian federalism. The second chapter explains the theory to be tested. It combines historical institutionalism and the theory of constitutional abeyances. Like Carolyn Tuohy, I am inclined to look early to institutions for explanations,<sup>8</sup> and few institutions carry as much political weight as a country's constitution. After explaining the theoretical framework, the chapter discusses the extent to which the idea of Canadian sovereignty was held in abeyance constitutionally, and relates that abeyance to certain constitutional omissions. Chapter 3 reviews some of the literature on the founding of Canada by authors who, like me, were intrigued by the odd way the Canadian state was created. Chapter 4

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<sup>6</sup> Ibid., p. 217.

<sup>7</sup> Ibid.

<sup>8</sup> C. Tuohy, Policy and Politics in Canada: Institutionalized Ambivalence, (Philadelphia, PA: Temple University Press, 1992), p. xvii.

begins the case studies. They are the economic union and the Agreement on Internal Trade, (chapter 4); environmental policy and the Canada-Wide Accord on Environmental Harmonization, (chapter 5); and the federal spending power, (chapter 6). The case chapters are structured similarly. Each provides historical context; discusses judicial decisions; analyzes agreements entered into; and shows how Ottawa has not used what appear to be its legitimate constitutional powers, preferring to devolve decision-making authority to a confederal arrangement, thereby waiving its right to play a leadership role; each concludes with an assessment of the applicability of the theory. The final chapter summarizes the discussion, reviews the findings, makes some comments on the theoretical framework that I used, and points to several areas where additional research might prove fruitful.

### *The Meaning and Types of Federalism*

Federalism is a system of governance characterized by a constitutionally protected division of law-making powers between a central government and constituent governments, applied on a territorial basis. That said, several other points ought to be made.

The first is that federalism is a type of mechanism for unification. Colonies and states enter into a federal arrangement in order to come together. They do not do so in order to maintain their previous independence. They recognize that, because federalism is above all a means for effecting a union of some sort, they will have to surrender at least some of their autonomy

and powers to a central authority. They rightly expect to receive something, e.g., protection, financial aid, in return.

In this regard, Louis-Philippe Pigeon, writing when he was a law professor and advisor to the Premier of Québec, Jean Lesage, and before he became a Justice of the Supreme Court of Canada, identified what he considered to be the various views of the purposes of a federal arrangement.

He wrote:<sup>9</sup>

In the eyes of some men, a federal state is an instrument of unification, in other words, a means of bringing about the gradual disappearance of the segmental differences opposed to complete political unity. In the eyes of others, federation of itself implies this complete political unity, the component states or provinces being looked upon as mere administrative entities whose functions should be restricted to the application of general policies defined by the central authority. In the eyes of autonomists, federation implies a division of political authority so that the component states or provinces are free to define their general policy in their own sphere of activity, without being obliged to conform with any pattern set down by the central authority.

Pigeon's list is incomplete for it can be added that, in the eyes of some, a federal state is first and foremost "an instrument of unification" but also one that, for a number of reasons, may place a high value on protecting the self-government powers of the constituent units. In other words, those who see federalism as primarily a means of effecting union do not necessarily want "the gradual disappearance" of the polity's diversity or the disempowerment of the constituent units, as Pigeon suggests.

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<sup>9</sup> L.-P. Pigeon, "The Meaning of Provincial Autonomy," in W.R. Lederman, (ed.), The Courts and the Canadian Constitution, (Toronto, ON: McClelland and Stewart Limited, 1964), pp. 35-36.

In Canada, the provinces joined the nation voluntarily.<sup>10</sup> The first to join were the provinces of Canada (made up then of Ontario and Québec), New Brunswick, and Nova Scotia.<sup>11</sup> Prince Edward Island and Newfoundland and Labrador participated in the original discussions but chose not to join until 1873 and 1949 respectively.

A second point that should be made about federalism is that it “is not a fixed and exact thing,” as Jennifer Smith notes. She argues that, although “it can be defined under the Constitution in terms of levels of government, each armed with specified powers and responsibilities,” federalism has “a fluid, even elusive quality. For one reason, there is no one, perfect type against which all others can be measured. There is no standard. Instead there is a range of federal systems, each uniquely composed of a different package of features.”<sup>12</sup> F.R. Scott would concur with Smith. It was his view that Canadian federalism was never meant to conform to a preconceived notion of federalism.<sup>13</sup>

...the Canadian constitution was never expected to operate on strictly federal principles as the political scientist understands them; we adopted, for what seemed good reasons, a constitution leaning toward a strong central authority whose power might offset in some degree the centrifugal forces which are always present in the body politic.

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<sup>10</sup> Unless otherwise indicated, when I use the word, “nation” or “national,” I am referring to Canada.

<sup>11</sup> I am aware that some would argue that Nova Scotia did not join the nation voluntarily, given the deception that was used to bring the province into the new country. What I mean to suggest here is that, like the Newfoundland representatives, the leaders of each of the colonies had the option of walking away from the agreement.

<sup>12</sup> J. Smith, Federalism, (Vancouver, BC: UBC Press, 2004), p. 8.

<sup>13</sup> F.R. Scott, Essays on the Constitution: Aspects of Canadian Law and Politics, (Toronto, ON: University of Toronto Press, 1977), p. 298.

Scott cautions against being misled “by the word ‘federal,’ which has a meaning in political theory which it does not have in Canadian constitutional law.”<sup>14</sup> The definition of Canadian federalism should be based on what the Canadian constitution provides, not on some accepted meaning of federalism. In Scott’s view, “We should not say ‘A federal state requires such and such relationships between the governments, therefore we will find them in the Canadian constitution.’ We should say ‘This is what the Canadian constitution provides: what kind of federalism is it?’”<sup>15</sup>

A third point is made by Hueglin and Fenna. In their definition, they emphasize that “*sovereignty is shared and powers are divided between two or more levels of government each of which enjoys a direct relationship with the people.*”<sup>16</sup> [Emphasis in original]. A federal union is, therefore, unlike a confederal arrangement. The latter is a union of governments whereas the former is a union of both states and individuals. Thus, a confederal government cannot legislate for individuals. Canada was always intended to be a federal union. The citizens of Canada are not beyond the reach of the central government.

Federal states differ in their institutional configurations because they differ in the political values that they privilege and support, which is the fourth

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<sup>14</sup> ibid., p. 189.

<sup>15</sup> ibid., p. 177.

<sup>16</sup> T. Hueglin, A. Fenna, Comparative Federalism: A Systematic Inquiry, (Peterborough, ON: Broadview Press Ltd., 2006), pp. 32-33.

point that must be made here. In their discussion of the different visions of Canadian federalism, Rocher and Smith agree that federalism not only embraces certain institutional features (e.g., two levels of government) it also reflects a society's norms and values. Diversity, equality, efficiency, harmony, and democracy are among the values that a federal system may at any one point in time either privilege or undermine.<sup>17</sup> Thus, the Australian constitutional scholar, Cheryl Saunders, observes that a "national preoccupation with equity or equality" tends to be reflected in the assignment of power to the federal government or "in some other mechanisms designed to achieve the same result."<sup>18</sup> She states further that in the European Union, where perfecting the internal market (the efficiency value) is a key objective, there have been "pressures for uniformity or harmonization in different but related areas, including social policy, industrial relations, and the environment."<sup>19</sup>

Here in Canada, one of the important tasks of the federal government has long been to ensure that individuals receive relatively equal treatment regardless of where they live in the country. However, one can argue that, in recent years, the salience of the equality value has receded, while the desire

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<sup>17</sup> S. La Selva would add fraternity to this list. See his The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood, (Montreal and Kingston: McGill-Queen's University Press, 1996).

<sup>18</sup> C. Saunders, "Constitutional Arrangements of Federal Systems," Publius: The Journal of Federalism, Vol. 25, No. 2, Spring 1995, p. 70.

<sup>19</sup> ibid.

to accommodate diversity has heightened. This will become evident later in the discussion of the three policy areas.

A number of political scientists have set out the various images of federalism that exist in the country or that have dominated at one point or another throughout the country's history. J.R. Mallory, for instance, noting that "Canadian federalism is different things at different times" and is "also different things to different people," identified five forms of Canadian federalism.<sup>20</sup> They are, first, quasi-federalism, which reflects the dominance of the federal government during the years when Macdonald was Prime Minister. The second is classical federalism which refers to the attempts by the Judicial Committee of the Privy Council (JCPC) to implement a "watertight compartments" approach to Canadian federalism. In this approach, "...power is allocated to the central and provincial authorities so that each enjoys an exclusive jurisdiction...."<sup>21</sup> Thirdly, emergency federalism means the centralization of power that is necessitated by extraordinary circumstances. For Mallory, a major problem was that the JCPC seemed to include only war within the definition of emergency and not economic upheaval. Thus, federal efforts to deal with the Depression were thwarted by JCPC decisions. The fourth type is co-operative federalism which, for Mallory, describes the efforts of the federal and provincial governments to jointly develop a range of

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<sup>20</sup> J.R. Mallory, "The Five Faces of Federalism," in P.-A. Crepeau, C.B. MacPherson, (eds.), The Future of Canadian Federalism L'Avenir du fédéralisme canadien, (Toronto, Montreal: University of Toronto Press, Les Presses de l'université de Montréal, 1965), p. 3.

<sup>21</sup> Ibid., p. 7.

programs and policies during the 1960s, many of them made possible by the “high administrative skills and deeper purse of the federal government.” The result, says Mallory, “has been seriously to limit provincial autonomy. Provincial priorities are distorted by the inability of a province to forgo, for political reasons, a program which may inhibit financing its other obligations.”<sup>22</sup> Finally, Mallory uses the phrase, double-image federalism, to refer to the effort to accommodate provincial demands for more autonomy, especially those emanating from Québec, and at the same time ensure that the federal government has the necessary powers to manage the economy and promote equity across the country.

Mallory's discussion is not so much a description of the extant models of federalism as it is a tracing of the evolution of Canadian federalism. In that sense, it differs from the Rocher and Smith taxonomy set out below. Also, because it is somewhat dated, it does not fully capture some of the visions of federalism that are part of the discourse today, e.g., collaborative federalism (a.k.a., confederalism) and multinational federalism.

Banting detects four models of federalism, one being classical federalism under which “...each level of government works within its own jurisdiction, raises its own revenues, delivers its own programs, and remains separately accountable to its own electorate.”<sup>23</sup> A second model is shared-cost

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<sup>22</sup> Ibid., p. 11.

<sup>23</sup> K. Banting, “Open Federalism and Canada's Economic and Social Union: Back to the Future?” in K. Banting, et al., Open Federalism: Interpretations, Significance, (Kingston, ON: Queen's University Institute of Intergovernmental Relations, 2006), p. 79.

federalism. Here, the federal government supports provincial programs but with conditions. “The federal government decides when, what, and how to support provincial programs; and provincial governments decide whether to accept the money and the terms.”<sup>24</sup> Thirdly, joint-decision federalism. It requires the formal agreement of Ottawa and the subnational units before any action is possible. Finally, interprovincialism. In this model, the provincial governments agree among themselves without the participation of the federal government. Banting suggests that with the “weakening of the federal role in recent years” this model may assume greater prominence than it has in the past. Historically, Banting states, the dominant models have been classical federalism and shared-cost federalism. Noticeably absent from Banting's list are asymmetrical federalism and multinational federalism.

Rocher and Smith's categorization focuses on the models that are current at this time in Canada's history; that is, they are in use today or receive substantial scholarly and governmental attention. Therefore, it is this classification that is of interest to this dissertation.

One vision identified by Rocher and Smith - the equality of the provinces vision - can refer either to the equality of the provincial governments with the federal government or to the equality of the provinces with each other. The first interpretation - the equality of the federal and provincial governments - stresses provincial autonomy. It sees Ottawa and the provinces

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<sup>24</sup> ibid.

as being sovereign in their areas of jurisdiction and able to act independently of the other. Rocher and Smith write:<sup>25</sup>

Of primary importance is the latitude of each order of government to legislate in the jurisdictions granted by the constitution. Hence, actions by the central government must be limited to the areas granted to it by the constitution. Where this is not the case, the provinces must give their explicit consent to all federal intrusions into provincial jurisdiction. Moreover, because the very existence of the federal regime is perceived as the result of a contract between pre-existing states, the original contract...cannot be altered without obtaining the consent of all parties, i.e., all provinces.

The implications of this view are profound. As the authors point out, “In this view, the provincial premiers have as much right to represent citizens as does the Prime Minister of Canada.” The central government “is not in a position to speak for provincial interests.”<sup>26</sup> Thus, the federal government is just another government in the country. This model is similar to what Banting called joint-decision federalism.

The second interpretation - the equality of the provinces with each other - is expressed in two statements of the Calgary Declaration, a document accepted by all governments except that of Québec. One states: “All provinces, while diverse in their characteristics, have equality of status.” The second reads: “If any future constitutional amendment confers powers on one province, these powers must be available to all provinces.” While the first

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<sup>25</sup> F. Rocher, M. Smith, “The Four Dimensions of Canadian Federalism,” in F. Rocher, M. Smith, (eds.), *New Trends in Canadian Federalism*, 2<sup>nd</sup> edition, (Peterborough, ON: Broadview Press, Ltd., 2003), p. 23. Note Rocher and Smith’s use of the phrase, “order of government.” The use of this phrase is meant to convey the equality of status of the federal and provincial governments. “Level of government” is a phrase that some scholars do not use because it conveys a hierarchy, with the federal level at the top of the hierarchy and the provincial level below it. This dissertation prefers the phrase, “level of government,” because it does not accept that the federal and provincial levels have equality of status. It believes that the federal level should be dominant, as the country’s founders intended it to be.

<sup>26</sup> *ibid.*, p. 24.

interpretation denies the subordination of the provincial level of government to the federal, the second denies the special legal or constitutional status of any one province.

The first interpretation was given substantial impetus by the JCPC - an institution of central importance to this study - particularly when Lord Watson presided over it in the latter part of the nineteenth century. His provincialist interpretation of the constitution flew in the face of the clear intentions of the founders who set out to create a federation in which the provincial governments would be subordinate to the federal government. The federal government's declaratory power, its spending power, its trade and commerce power, and its peace, order and good government power - not to mention the powers of reservation and disallowance - are all examples of how the founders intended to create a federation with a dominant federal government.

Peter Russell points out that, "Between 1880 and 1896 the Judicial Committee decided eighteen cases involving twenty issues relating to the division of powers. Fifteen of these issues (75 per cent) it decided in favour of the provinces."<sup>27</sup> This trend continued throughout the JCPC's time as Canada's final court of appeal. Russell also points to the work of Murray Greenwood who, in a 1974 study, concluded that "every major centralist doctrine of the [Canadian Supreme] Court" had been repudiated by the JCPC.<sup>28</sup>

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<sup>27</sup> P. Russell, Constitutional Odyssey, 3rd edition, (Toronto, ON: University of Toronto Press, 2004), p. 42.

<sup>28</sup> F. M. Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s," UBC Law Review, Vol. 9, p. 267.

The first interpretation of the equality of the provinces vision was the theme of the 2004 speech by the Premier of Québec, Jean Charest, referred to earlier. In it, he advanced an argument very consistent with that advanced by the Judicial Committee. He stated:<sup>29</sup>

A federation is not hierarchical such as in a unitary state like France. In Canada, the provinces are not accountable to the federal government. Each government is accountable to its electorate in its own jurisdiction....The Québec government and other provincial governments are not subordinate to the government of Canada. And the federal government is not the supreme guardian of the common good.

The Premier went on to speak of a trend in Canadian federalism that he welcomes, namely, “a trend toward co-decision-making and co-management between the federal and provincial levels....”<sup>30</sup> He called for co-operation among governments, “And cooperating in a federal environment means working together on common issues....”<sup>31</sup>

One can detect a contradiction in Charest’s comments. In calling for cooperation, co-decision-making and co-management, practices that tend to blur the jurisdictional boundaries, Charest is rejecting the watertight compartments approach, which sees each level working strictly within its constitutional limits. But no sooner does Charest commend the co-management approach than he states, “...respecting the jurisdictions of

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<sup>29</sup> J. Charest, “Rediscovering the Spirit of Federalism,” the Symons Lecture delivered on the occasion of the 40<sup>th</sup> anniversary of the Confederation Centre of the Arts, Charlottetown, PEI, downloaded from [www.globeandmail.com](http://www.globeandmail.com) Nov. 9, 2004, p. 3.

<sup>30</sup> [Ibid.](#), p. 2.

<sup>31</sup> [Ibid.](#), p. 5.

governments is an essential condition to the success of this country.”<sup>32</sup> For Charest, “In a federation, each partner guards the common good within its own jurisdiction.”<sup>33</sup>

The Premier’s comments on international affairs deepen the contradiction. Not only does Charest propose greater provincial participation in international affairs, he wants the Québec government to be able to make binding international commitments. “A Québec jurisdiction at home remains a Québec jurisdiction in international relations.”<sup>34</sup> That international treaty-making, if not treaty-implementing, is clearly the exclusive constitutional responsibility of the federal government seems not to be an issue for the Premier.

A second vision discussed by Rocher and Smith is called asymmetrical federalism. It has its origins in the compact theory of Confederation, a controversial theory that “views Confederation as a pact between the two founding nations.”<sup>35</sup> Rocher and Smith state that this dualism was never “presented as a desire to deny the specific character or the multitude of interests in the rest of Canada.”<sup>36</sup>

Rather, dualism can be seen as the pursuit of a status that would allow a minority community to have the political and economic instruments likely to guarantee its development. The reasoning is relatively easy to

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<sup>32</sup> Ibid., p. 2.

<sup>33</sup> Ibid., p.3.

<sup>34</sup> Ibid., p. 5.

<sup>35</sup> F. Rocher, M. Smith, “The Four Dimensions of Canadian Federalism,” p. 28.

<sup>36</sup> Ibid., p. 31.

understand: the Québec government is the only one where francophones constitute a majority.

In practical terms, dualism requires a federal arrangement in which the province of Québec has constitutional powers that other provinces do not have; hence, the phrase, asymmetrical federalism.

It is not clear whether there exists a consensus on the precise meaning of asymmetrical federalism. Does it refer only to asymmetry that has been constitutionally sanctioned, or to *de facto* asymmetry, under which all provinces are non-constitutionally given jurisdiction over a policy area but only one makes use of this new power? An example here is parental benefits. The Québec government negotiated an agreement with the federal government to assume responsibility for parental benefits. Ottawa had offered to make such a bilateral agreement with each of the provinces but to date only Québec accepted the offer. In the view of this dissertation, asymmetry does not exist when all provinces are given the opportunity to take over a policy area. It exists only when one province or a minority of provinces is legislatively or constitutionally given powers that are not given to the others. This position is based on my belief in the equality of the provinces with each other. As long as all provinces are offered the same powers, this belief is not offended. It would be offended by a constitutionally entrenched granting of powers to a single province. It is one thing for a province to choose not to make use of a power devolved to it, but quite another for a province not to be given the power at all.

Another concern with asymmetrical federalism has to do with how it is expressed constitutionally. One can envisage two possibilities: a constitutional provision that stipulates the precise powers that will be accorded to one or a few provinces and that will not be accorded to the others, or a provision that makes a broad claim about the need for one or a few of the provinces to have additional powers to preserve their culture.

Rocher and Smith point to the work of Québec's Commission on the Political and Constitutional Future of Québec to show further why the asymmetrical configuration is seen as necessary. The Commission's report saw the Constitution Act, 1982 as establishing "a new Canadian identity," three dimensions of which "are irreconcilable with the effective recognition and political expression of the Québécois identity."<sup>37</sup> Those dimensions are:<sup>38</sup>

the equality of all citizens, which does not allow special constitutional recognition for the Québécois collectivity; the equality of cultures and of cultural origins in Canada, which would undermine Québécois aspirations for the French language and the cultural origins of francophones; and the equality of the provinces, which would forestall the granting of special status for Québec.

Asymmetrical federalism seems to be the option favoured by political scientists whose concern is with a country's national minorities, sometimes referred to as internal nations. They distinguish between territorial federalism and multinational federalism, arguing that the former, based on the U.S.

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<sup>37</sup> F. Rocher, M. Smith, "The Four Dimensions of Canadian Federalism," p. 32.

<sup>38</sup> Ibid.

model, does not adequately accommodate “plurinational societies,” in Ferran Requejo’s terminology. Requejo has argued that,<sup>39</sup>

the model of federal asymmetry is more able to integrate plurinationalism into the concept of citizenship and the liberal-democratic rules of the game. Or, put in negative terms, without asymmetrical mechanisms it would be very difficult to achieve *recognition* of the plurinationality of a state. [Emphasis in original.]

Requejo defines asymmetrical federalism as “the degree of heterogeneity that exists in the relations between each member state and the federation, and between the member states themselves.”<sup>40</sup> He makes the questionable contention that treating national minority communities the same as “mere regions” or as “federal subunits that are controlled by members of the national majority” is “intrinsically inegalitarian.”<sup>41</sup> Why it is so is not explained by Requejo.

Requejo, a Spanish scholar, suggests that the view of traditional liberalism that asymmetrical federalism is merely a step towards confederalism or independence is “an out-of-date attitude, at least in Western Europe.”<sup>42</sup> But he then says that, from the perspective of Catalan nationalism, the objective is no longer to achieve the “highest number of instrumental ‘state’ competences as possible....” Rather, “It is more important to achieve the highest possible level of democratic self-government (symbolic, institutional

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<sup>39</sup> F. Requejo, “Federalism in Plurinational Societies: Rethinking the Ties Between Catalonia, Spain, and the European Union,” in D. Karmis, W. Norman, (eds.), Theories of Federalism: A Reader, (New York, NY: Palgrave MacMillan, 2005), pp. 312-313.

<sup>40</sup> Ibid., p. 312.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., p. 313.

and functional/financial presence) in those areas that reinforce and develop Catalonia's national personality as far beyond its borders as possible."<sup>43</sup> It is difficult to understand how that process would not eventually lead to full constitutional sovereignty. Further, Requejo declares that any politics of national recognition "should include the presence of nationalities within the EU and other institutions and international decision-making processes (e.g. UNESCO)."<sup>44</sup> Depending on what he means by "presence," the proposal could mean the acquisition of the right to participate in international affairs, including the right to conclude and implement international treaties. Such a right is virtually the definition of a sovereign state. Requejo also proposes that Catalonia "have exclusive rights to collect taxes in its own territory, use them for its own government, and hand over a previously agreed amount to the central Spanish government and to the institutions of the European Union." As Requejo himself points out, "this is a central element of self-government...."<sup>45</sup> Given Requejo's conception of asymmetrical federalism, it is not clear why he would consider "out-of-date" liberalism's view that asymmetrical federalism is merely a step toward confederalism or independence!

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid., p. 316.

<sup>45</sup> Ibid., p. 317.

Kymlicka also favours the asymmetrical model, although he at least recognizes the possible effects of such a model on a country's unity. He writes:<sup>46</sup>

The more a federal system is genuinely multinational - that is, the more it recognizes and affirms the demand for self-government - the more it will strengthen the perception amongst national minorities that the federal system is *de facto* a confederal system. That is, the more successful a multinational federal system is in accommodating national minorities, the more it will strengthen the sense that these minorities are separate peoples with inherent rights of self-government, whose participation in the larger country is conditional and revocable.

Unlike this dissertation, Kymlicka's writings do not appear to be concerned about the impact on policy-making and policy effectiveness of federal willingness to transform a federal state into a confederal state.

Kymlicka supports asymmetrical federalism rather than a more provincialized federation because, under such an arrangement, the government of Québec would obtain powers not granted to the other provincial governments, thereby recognizing Québec as something more than a province. He quotes Philip Resnick: “[Québec nationalists] want to see Quebec recognized as a nation, not a mere province; this very symbolic demand cannot be finessed through some decentralizing formula applied to all provinces.”<sup>47</sup> That said, it would not be accurate in my view to suggest that the recognition of Québec as a nation or as a distinct society, constitutionally or otherwise, would lessen the nationalists' demands for more powers for the province.

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<sup>46</sup> W. Kymlicka, “Federalism, Nationalism, and Multiculturalism,” in D. Karmis, W. Norman, (eds.), Theories of Federalism: A Reader, p. 287.

<sup>47</sup> Ibid., p. 280.

Kiera Ladner has also discussed multinational federalism but her focus is on the kind of federalism that would best accommodate Aboriginal citizens. She has identified treaty federalism as the most appropriate model. “Treaty federalism, as distinct from provincial federalism, refers to the federal (nation-to-nation) relationships established in the treaties and the division of powers that emerged from these agreements.”<sup>48</sup> Because the jurisdictional particulars differ from treaty to treaty, Ladner refers to treaty federalism “as a constitutional order of asymmetrical federalism (asymmetrical because each treaty and each treaty relationship are different).”<sup>49</sup> She sees it as a way to organize the relationships between the Canadian state and the various Indigenous nations.

When Ladner uses the term, “asymmetrical federalism,” she clearly has something in mind that is not contemplated in the other meanings of the term. She uses the term to refer to relationships between sovereign nations, not between a central authority and a subnational unit that accepts that it is part of a sovereign state. It, therefore, might be more accurate to call the model, asymmetrical relationships, since the use of the word, federalism, implies a unity. The asymmetry, in Ladner's conception, is demonstrated in the different

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<sup>48</sup> K. Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalism,” in F. Rocher, M. Smith, (eds.), New Trends in Canadian Federalism, 2<sup>nd</sup> edition, (Peterborough, ON: Broadview Press, Ltd., 2003), p. 174.

<sup>49</sup> Ibid.

relationships that each sovereign Aboriginal nation would have with Canada.

This interpretation comes out in the following:<sup>50</sup>

From the outset of the “British invasion,” of North America, the policies and practices of the Crown, Parliament, and the British Imperial Indian Department recognized nationhood and required the negotiation of treaties to secure favourable trading relationships and acquire land, as demanded by international law. To that end, treaties were used to create and maintain trading, political, and military relations with the various Indigenous nations and to establish the terms for integrating the “other” into the American (read: Indigenous) and European economic systems....Similarly, between 1725 and 1761, the British, the Mikmaw, and their allies negotiated a series of non-land-cession treaties to establish peace, friendship, favourable trading relationships, and the laws that would govern their relationships....While the treaties recognized and affirmed the continuing sovereignty of the Mikmaw (subject to existing treaty promises), as well as the continuation of Mikmaw “hunting, fishing, shooting, and planting” in their territory, they also delineated the rights of the English in Mikmaw territory. This interpretation of the spirit and intent of the Mikmaw treaties is commonly referred to as “treaty federalism” or “treaty constitutionalism.”

Not all Aboriginal communities see the need for this degree of sovereignty.

The various land claims agreements, such as the Nisga'a agreement in British Columbia, demonstrate this. These asymmetrical arrangements acknowledge the legitimacy of the Canadian constitution.

While provincialists in Canada frequently go to the JCPC's rulings to reinforce their stance, the proponents of the version of asymmetrical federalism that would give special status to Québec would not find support from the JCPC. This seems evident from Lord Watson's comment in the *Maritime Bank* case. He wrote: “The [British North America] Act places the constitutions of all provinces within the Dominion on the same level; and what

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<sup>50</sup> K. Ladner, C. Dick, “Out of the Fires of Hell: Globalization as a Solution to Globalization - An Indigenous Perspective,” *Canadian Journal of Law and Society*, Vol. 23, Nos. 1-2, 2008, p. 65.

is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.”<sup>51</sup>

The **third vision** outlined by Rocher and Smith is the nationalizing federalism vision. In this perspective, the basis of political identity is Canada itself, not a province and not one of Canada’s internal nations. It is a vision, say Rocher and Smith, which sees Canada as more than the sum of its parts. Since it privileges the federal level of government, it “tends also to be centralizing.” They identify three versions of the nationalizing vision: the view of the country’s founders; the view of the social democrats of the 1930s; and the Pierre Trudeau view, as expressed in the patriation and amendment of the constitution in 1982.

The view of the founders was expressed by Sir John A. Macdonald in an 1865 address in which he stated:<sup>52</sup>

Ever since the union was formed the difficulty of what is called “State Rights” has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their constitution that each state was a sovereignty in itself, and that all the powers incident to sovereignty belonged to each state, except those powers which, by the constitution, were conferred upon the general government and Congress. Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and

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<sup>51</sup> The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, [1892] A.C 437, at p. 442.

<sup>52</sup> Canada. Provincial Parliament. Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3<sup>rd</sup> Session, 8<sup>th</sup> Provincial Parliament of Canada, (Québec: Hunter, Rose and Co., Parliamentary Printers, February 6, 1865), p. 33.

local legislatures shall be conferred upon the general government and legislature.

He continued:<sup>53</sup>

We thereby strengthen the central parliament and make the Confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent.... There are numerous subjects which belong, of right, both to the local and the general parliaments. In all these cases it is provided, in order to prevent a conflict of authority, that where there is concurrent jurisdiction in the general and local parliaments...and that when the legislation of the one is averse to or contradictory of the legislation of the other, in all such cases the action of the general parliament must overrule, ex-necessitate, the action of the local legislature.

The preamble to section 91 of the Constitution Act, 1867 reiterates the founders' intention to create a strong central government. To be sure, there were varying degrees of enthusiasm for this view but, in the end, the Québec Resolutions, which first set out the kind of federalism that Canada was to have, were adopted.

The second version developed during the Great Depression. Among the prominent spokespersons for this version was legal scholar, F.R. Scott. He argued that Ottawa needed the necessary powers to be able to intervene in the economy and society to "alleviate some of the worst effects of the Great Depression and to get Canada back on the road to economic recovery."<sup>54</sup> As Scott succinctly put it, "provincial autonomy [means] national inactivity."<sup>55</sup> He

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<sup>53</sup> Ibid., pp. 41-42.

<sup>54</sup> F. Rocher, M. Smith, "The Four Dimensions of Canadian Federalism," p. 35.

<sup>55</sup> Quoted in B. Laskin, "Reflections on the Canadian Constitution After the First Century," in J. Peter Meekison, (ed.), Canadian Federalism: Myth or Reality, (Toronto, ON: Methuen Publications, 1968), p. 139.

was very critical of the JCPC which, as noted earlier, consistently favoured the provinces in its judgments. The Canadian Forum, a leftist publication, also reacted strongly to the JCPC's decisions. It referred to the JCPC as "The five old men of the Privy Council" and as "an alien hand," and accused it of thrusting Canada back to a position of "constitutional infantilism." It accused the Committee of destroying the federal government's trade and commerce power, treaty-making power, and peace, order and good government power.<sup>56</sup>

In a discussion of the reasons for the "disintegration of federal power," Scott placed most of the blame on the JCPC. He wrote:<sup>57</sup>

The courts have been most to blame for what has occurred, and here the decisive influence has been that of the Privy Council. Canada today has a constitution different from that which she plainly adopted in 1867 for the simple reason that the interpretation of sections 91 and 92 has not in the last resort rested with Canadians. Early judgments of the Canadian Supreme Court show that the Canadian judges had a true conception of the Confederation agreement. But the Privy Council has seen fit to force upon our judges views which they would not have arrived at themselves....The fact is that the Privy Council has been too handicapped by its ignorance of Canada to be able to give good judgments in Canadian constitutional law.

That the quality of the British Law Lords' decisions suffered from their distance from Canada is an assessment with which Alan Cairns would agree. In an influential 1971 paper in which an objective is to give "a more favourable evaluation of the Privy Council's conduct," Cairns states: "The critics [of the JCPC] were surely right in their assertions that absence of local prepossessions simply meant relative ignorance, insensitivity, and misunderstanding of the

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<sup>56</sup> Canadian Forum, Editorial, 1937, p. 3.

<sup>57</sup> F.R. Scott, Essays on the Constitution, p. 47.

Canadian scene, deficiencies which would be absent in Canadian judges.”<sup>58</sup>

Elaborating further, he writes:<sup>59</sup>

In brief, unless judges exist in a context which informs their understanding...they are deprived of the guidance necessary for effective decision-making. Most of the conditions required as supports for a first class court were only imperfectly realized in Canada prior to the abolition of appeals to the Privy Council. A shifting body of judges, domiciled in London, whose jurisdiction covered a large part of the habitable globe, existed in limbo. This isolation of the court not only reduced its sensitivity to Canadian conditions, but rendered it relatively free from professional and academic criticism.

This comment may appear to contradict his objective of giving the JCPC a more favourable evaluation. However, Cairns’s primary purpose is to offer an assessment of the quality of Canadian jurisprudence. In doing so, he is critical of both the comments of the critics and the JCPC’s performance.

Cairns concedes that the JCPC was biased in favour of the provinces. He writes: “...there can be no doubt that Watson and Haldane [long-serving presidents of the JCPC] consciously fostered the provinces in Canadian federalism, and by doing so helped to transform the highly centralized structure originally created in 1867.”<sup>60</sup> Elsewhere, he phrases it more boldly: “The defence of the Privy Council on grounds of its impartiality and neutrality is, however, difficult to sustain in view of the general provincial bias which ran through their decisions from the 1880s.”<sup>61</sup>

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<sup>58</sup> A. Cairns, “The Judicial Committee and Its Critics,” Canadian Journal of Political Science, 4: 3, September 1971, p. 328.

<sup>59</sup> Ibid., p. 331.

<sup>60</sup> Ibid., p. 313.

<sup>61</sup> Ibid., p. 319.

Cairns does insist, however, that the JCPC's judgments were in accord with the prevailing views and attitudes of the times. He argues that they had "widespread popular support" and, for evidence, he says that Premier Oliver Mowat of Ontario, who often went to London for the appeals, "was received as a hero on his return from his engagements with the federal government."<sup>62</sup> And he notes that Prime Minister Bennett, the initiator of the "New Deal" legislation which was struck down by the JCPC, was soundly beaten by MacKenzie King in the 1935 election. However, in 2004, DiGiacomo tested the argument that the JCPC's rulings were consistent with prevailing attitudes by looking at the views of several institutional actors on which level of government ought to have responsibility for labour policy.<sup>63</sup> It was found that the vast majority of Canadian judges, most of the provinces, organized labour, employer organizations, two of the three federal political parties, and some parts of the media supported federal control of labour policy. This degree of support stood in stark contrast with the decision of the JCPC in 1925 to strike down an eighteen-year-old federal labour relations law.

Of course, one case does not disprove Cairns's point but perhaps the reality is more complex than Cairns suggests.

Also noteworthy about Cairns's piece is what is not in it. First, Cairns apparently was not overly concerned that some JCPC appointees had been major figures in the British government, like Viscount Haldane, and that the

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<sup>62</sup> Ibid., p. 323.

<sup>63</sup> See G. DiGiacomo, "Support for a Centralist Vision of Labour Policy in Early Canada," Journal of Canadian Studies, Vol. 38, No. 3, Fall 2004.

president of the JCPC was simultaneously a member of the British Cabinet. Thus, it is difficult to see how political factors would not enter into the deliberations of the JCPC in a serious way. Secondly, Cairns's article is completely lacking in any discussion of the cases upon which the JCPC decided. Now, it is appropriate that, as a political scientist, Cairns would not concern himself with the details of individual judgments but rather with the broad political effects of those judgments. And it bears repeating that Cairns was not without his own criticisms of the JCPC. But had he reflected on only a handful of significant Judicial Committee rulings and considered the text of those rulings - including, say, the one that determined the peace, order and good government power to be only an emergency power; and perhaps the one that blanketly prohibited the federal government from regulating intraprovincial trade; and perhaps the ones whereby the Law Lords allowed Ottawa to be involved in the regulation of the sale of alcohol but not in the resolution of labour-management disputes - he may have displayed more tolerance toward the JCPC's critics like F.R. Scott.

In an oft-quoted passage, Cairns declares: "It is impossible to believe that a few elderly men in London deciding two or three constitutional cases a year precipitated, sustained, and caused the development of Canada in a federalist direction the country would otherwise not have taken."<sup>64</sup> Several points can be made in response. First, the age of the men is not relevant. Secondly, they were not just any group of elderly men. They were men who

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<sup>64</sup> A. Cairns, "The Judicial Committee and Its Critics," p. 319.

were charged with interpreting a country's constitution. Thirdly, the fact that they were situated in London was extremely important, as Cairns himself concedes. Fourthly, the number of constitutional cases also is not relevant. All such cases are deeply important; even one decision a decade could decide the future direction of a country. Fifthly, even if Cairns's argument that the constitution's centralization was not consistent with the political culture of the country is accurate, it ought to have been left up to a Canadian institution to determine the balance in federal and provincial powers. In this regard, some evidence suggests that, while they seemed inclined to support the intentions of the constitution's principal drafters, the justices of the Canadian Supreme Court were not mindless centralizers. For example, as we will see in Chapter 4, in *Citizens Insurance Company v. Parsons* the justices upheld an Ontario law pertaining to contracts but, in doing so, they did not gut the federal trade and commerce power, as the JCPC managed to do on appeal. Thus, one might suggest that a home-grown final court of appeal would have found a way to safeguard provincial autonomy without eviscerating federal authority. Cairns's piece does not consider this possibility.

The third wave of the nationalizing vision of Canadian federalism came with the election of Pierre Trudeau in 1968. "In this view, Canadian political identity overrode regional and national political identities."<sup>65</sup> It is strongly opposed to asymmetrical federalism or special status for Québec. Both the process of constitutional change and the substance of the Constitution Act,

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<sup>65</sup> F. Rocher, M. Smith, "The Four Dimensions of Canadian Federalism," p. 35.

1982 reflected the Trudeau version of the nationalizing vision. With regard to the process, Rocher and Smith write:<sup>66</sup>

At various points in the process of negotiating the constitutional amendment of 1982, the Trudeau government threatened to proceed with constitutional change unilaterally, without the consent of the provinces. In doing so, Trudeau appealed explicitly “over the heads” of the provincial leaders to the people. This strategy stressed the symbolic dimension of the federal government’s role as the sole government of all Canadians and the provinces as spoilers in the system.

Thus, “...the Trudeau government attempted to undercut the provincial governments and to solidify citizens’ loyalty to the national, i.e., federal level of government.”<sup>67</sup> With respect to the substance of the Constitution Act, 1982, the Charter of Rights and Freedoms was designed to “cement the attachment of Canadians to the federal level of government...All Canadians enjoyed these rights equally, thus strengthening national sentiment.”<sup>68</sup>

Rocher and Smith’s way of describing the nationalizing vision is noteworthy. They write: “Taken to its extreme, this centralizing dynamic permits the federal government to appropriate the authority to define a ‘national interest.’”<sup>69</sup> That a federal power to define the national interest could be described as “extreme” demonstrates how far the provincial autonomy advocates have taken their argument.

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<sup>66</sup> ibid., p. 36.

<sup>67</sup> ibid.

<sup>68</sup> ibid.

<sup>69</sup> F. Rocher, M. Smith, “Introduction,” in F. Rocher, M. Smith, (eds.), New Trends in Canadian Federalism, pp. 9-10.

This vision is analogous to what Banting called shared-cost federalism. As noted, under this model the federal government is clearly the dominant partner.

The **fourth vision** identified by Rocher and Smith is the rights-based vision, based on neither territory nor nation. Rather, "...the rights-bearers anchor their constitutional vision around individuals and groups as rights-bearers and envision the constitution as a mechanism for entrenching and protecting individuals' rights rather than national or territorial identities and interests."<sup>70</sup>

As with the nationalizing vision, Rocher and Smith see three versions of the rights-based vision. First, the Trudeau perspective has a significant rights dimension. It sees the Charter of Rights and Freedoms as adding a critically important aspect to the Canadian identity. "According to this view, all Canadians have become individual rights-bearers and constitutional proposals that would somehow threaten or minimize these 'equal rights' are seen as a threat to Canadian identity."<sup>71</sup>

A second version emphasizes the rights of certain communities in Canada, particularly women, Aboriginal people, and ethnocultural communities. These groups represent "the entry of non-territorial equality concerns into constitutional discourse."<sup>72</sup> Significantly, "They see the role of

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<sup>70</sup> F. Rocher, M. Smith, "The Four Dimensions of Canadian Federalism," p. 38.

<sup>71</sup> Ibid., p. 39.

<sup>72</sup> Ibid.

the federal level of government as very important because only the federal level of government can create a level playing field for equality-seeking groups throughout the whole country.”<sup>73</sup> For them, the protection of the Charter and their Charter rights is paramount.

The third version of the rights-based vision attaches collective rights to Canada’s internal nations or national communities such as the Aboriginal nations and the Francophone Québec nation. Here, Rocher and Smith point out that the nationalisms of Francophone Québécois and Aboriginal peoples can conflict with the aspirations of the rights-bearers.<sup>74</sup>

If nation is the primary political identity and if nationalisms are given pride of place in constitution-writing and in constitutional politics, then the other cleavages of Canadian society and the interests that they reflect and represent will tend to be suppressed in the name of the nation.

The authors cite the concern of the English-Canadian women’s movement with the Meech Lake Accord and the concern of women and ethnic minorities with the Canada clause of the Charlottetown Accord as examples of how the rights-based vision and nationalism can conflict. One may also cite the conflict between some Aboriginal Chiefs, mostly male, who favour a separate Charter of Rights for Aboriginal nations, and Aboriginal women, who support the existing Canadian Charter.

Given that the Constitution Act, 1867 provides Ottawa with sweeping powers, a visitor from another country would no doubt wonder how the several

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<sup>73</sup> ibid.

<sup>74</sup> ibid., p. 40.

visions of Canadian federalism ever emerged. The issue would seem to have been settled in favour of the nationalizing vision. Two factors may be said to account for the emergence of that vision's opposite, that is, the vision that gives equal status to the federal and provincial governments. Both factors have their roots in the decision of the Fathers of Confederation not to establish Canada as a sovereign nation. One was the rise of the provincial rights movement, led by the government of Ontario, and the other was the founders' decision to use the Judicial Committee of Britain's Privy Council as Canada's final court of appeal.

With respect to the rise of the provincial rights movement, few federal actions did more to anger the provincial governments than its use of the power of disallowance (s. 90 of the Constitution Act, 1867, read together with s. 56).<sup>75</sup> This was a veto power that gave Ottawa the right to nullify a provincial law. From 1867 to 1943, when it was last used, the power was exercised to disallow 112 statutes.<sup>76</sup> Not surprisingly, the 1887 provincial premiers' conference (which was not attended by two of the seven existing provinces) adopted a resolution calling for its abolition.

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<sup>75</sup> That the disallowance power angered the provinces seems clear. Garth Stevenson, however, concludes that, by and large, it was not used "excessively, arbitrarily, or unfairly." The problem, Stevenson suggests, is that it ended up involving the federal government in too many controversies, thus risking its popularity. See G. Stevenson, Ex Uno Plures: Federal-Provincial Relations in Canada 1867-1896, (Montreal and Kingston: McGill-Queen's University Press, 1993), pp. 251-252.

<sup>76</sup> G. La Forest, Disallowance and Reservation of Provincial Legislation, 2<sup>nd</sup> printing, (Ottawa, ON: Queen's Printer, 1965), p. 82.

The evidence suggests that the power of disallowance made its way into the constitution primarily because of Macdonald's attachment to the British model.<sup>77</sup> Robert Vipond explains:<sup>78</sup>

Expressed in the language of sovereignty, Macdonald argued that the relation between Ottawa and the provinces would replicate the relation between the sovereign imperial Parliament and the colonial legislatures....The extent of provincial autonomy or liberty would depend on the judgment of the federal government just as the extent of colonial freedom depended on the judgment of the imperial authorities....But there could be no mistake, according to Macdonald, that in the final analysis the federal government was sovereign over the provinces just as the imperial Parliament was sovereign over Canada. Thus, it is no coincidence that much of the apparatus of imperial supervision - the vetoes of reservation and disallowance and the office of lieutenant-governor, for example - found their way into the Canadian constitution as tools of federal supervision.

The argument is supported by Mallory, who pointed out that, until the enactment of the Statute of Westminster, one of the most important grounds for the federal use of the disallowance power (but not the only one) was whether the provincial legislation "ran counter to some broad *imperial* interest, such as the treaty obligations of the British Empire as a whole" [Emphasis added]. He wrote further:<sup>79</sup>

For example, between 1896 and 1913, out of a total of twenty-nine disallowances no less than nineteen were applied to British Columbia

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<sup>77</sup> Interestingly, while the Australian constitution, like the Canadian, has a clause pertaining to the disallowance of Australian legislation by the Queen, a power which was never used, there is no disallowance power for the Australian federal government vis-à-vis the states.

<sup>78</sup> R. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, (Albany, NY: State University of New York Press, 1991), pp. 24-25.

<sup>79</sup> J.R. Mallory, Social Credit and the Federal Power in Canada, (Toronto, ON: University of Toronto Press, 1954), p. 21. Note that the time period used by Mallory encompasses Laurier's time in office. For Armstrong, because of the frequency with which Laurier used the power of disallowance, "The depth of Laurier's devotion to local autonomy might thus be questioned." See C. Armstrong, The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942, (Toronto, ON: University of Toronto Press, 1981), p. 67.

legislation which discriminated against orientals. While a good many of these statutes were *ultra vires* and all of them were manifestly unjust, the reason for disallowance in most cases was that they were in conflict with the Anglo-Japanese Treaty.

The fact that the founders did not set up a Canadian supreme court undoubtedly reinforced the argument in support of a federal power of disallowance. Which brings us to a second factor contributing to the development of federal-provincial conflict. Alluded to earlier, it has to do with the JCPC's view of Canadian federalism which was set out most notably in *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*. Writing on behalf of the Judicial Committee, Lord Watson stated:<sup>80</sup>

The object of the [British North America] Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

Referring specifically to the province of New Brunswick to make a general point, Watson

stated: "It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution....It possesses powers, not of administration merely, but of legislation..."<sup>81</sup>

This interpretation echoed the comments of Lord Fitzgerald in *Hodge v.*

*R.*:<sup>82</sup>

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<sup>80</sup> The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, [1892] A.C. 437, at pp. 441-442.

<sup>81</sup> *Ibid.*, pp. 442-443.

<sup>82</sup> *Hodge v. R.*, [1883] 9 A.C. 117, at p. 132.

When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances....

The Law Lords also clarified the position of the Lieutenant-Governors in the provinces' favour. Lord Watson determined that "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."<sup>83</sup>

David Smith sees enormous significance in the *Maritime Bank* decision. In a 1991 paper and again in a 1995 volume, Smith advances the argument that Canada's long-lasting links with the British Crown precluded the development of the kind of centralization that emerged in U.S. federalism. Like this dissertation, Smith acknowledges the important role of the JCPC. He notes that in the *Maritime Bank* case the Privy Council "pronounced in sweeping terms a provincial status equal to that of the central authority."<sup>84</sup> It is no exaggeration to say, Smith writes, "that the discovery of the Crown in the provinces empowered rather than restrained their governments, and that the

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<sup>83</sup> The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, [1892] A.C. 437, at p. 443.

<sup>84</sup> D. Smith, *The Invisible Crown: The First Principle of Canadian Government*, (Toronto, ON: University of Toronto Press, 1995), p. 29. Smith goes on to say that the implications of this decision for Canadian federalism have largely gone unstudied by Canadian social scientists. See also D. Smith, "Empire, Crown and Canadian Federalism," *Canadian Journal of Political Science*, 24: 3, September 1991.

effect of that judicial revelation on the central government has been, except in periods of emergency, the opposite.”<sup>85</sup>

Significantly, Lord Watson’s comments in support of provincial autonomy were not fully shared by the Supreme Court. In an 1879 decision that was not appealed to the JCPC, the Court, by a margin of 3-2, determined that Queen’s Counsel appointments made by the Lieutenant-Governor of Nova Scotia did not have the same rank and status as those made by the Governor-General.

Writing for the majority, Justice Gwynne stated: “Nothing can be plainer, as it seems to me, than that the several provinces are subordinated to the Dominion Government....”<sup>86</sup> Further, the Lieutenant-Governor “is not an officer appointed by Her Majesty,” and does not in any manner personally represent her. Rather, he is “an officer of the Dominion Government, appointed by the Governor-General, acting under the advice of a council....”<sup>87</sup> Justice Henri Elzéar Taschereau agreed: “[T]he Lieutenant Governors...are officers of the Dominion Government...they are not Her Majesty’s representatives....”<sup>88</sup> Vipond writes that this decision so alarmed Premier Mowat that he engaged the courts for almost twenty years to ensure the defeat of the doctrine expressed in the case.

The Supreme Court of Canada also differed with the Judicial Committee on the issue raised in the *Bonanza Creek* case. The company, Bonanza Creek

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<sup>85</sup> Ibid., pp. 29-30.

<sup>86</sup> *Lenoir v. Ritchie*, [1879] 3 S.C.R. 575, at p. 635.

<sup>87</sup> Ibid., p. 634.

<sup>88</sup> Ibid., p. 623.

Mining, was incorporated in Ontario but then proceeded to carry on its mining operation in the Yukon Territory, as well as Ontario. In a 3-2 decision, the Court held that provincial incorporation did not entitle the firm to do business outside of Ontario. Quoting himself from a previous decision, Chief Justice Charles Fitzpatrick wrote:<sup>89</sup>

The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations of the territorial area over which the incorporating legislature has jurisdiction.

This judgment was overturned by the JCPC. In doing so, it diminished the federal trade and commerce power, since only provincial incorporation is required for a company to do business. At first glance, it is not clear what vital provincial autonomy objective was served by not requiring federal incorporation of companies that wish to do business in more than one province. But the reason why the provinces, particularly Ontario, were pleased with the decision has to do with revenues. As the Deputy Attorney-General of Ontario, Edward Bayly pointed out: “The result in money in the Companies Reference and the Bonanza Case between an unfavourable and favourable judgment to this Province alone would be the difference between the annual average income and almost no income at all, which for Ontario amounts to \$250,000 or more per annum.”<sup>90</sup>

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<sup>89</sup> The Bonanza Creek Gold Mining Co. v. The King, [1915] 21 D.L.R. 123, at p. 124.

<sup>90</sup> See C. Armstrong, The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942, p. 107.

The vision of federalism expressed by the JCPC in the *Maritime Bank* and *Hodge* judgments was concretized in numerous subsequent rulings. This vision gave a powerful boost to the provincial rights movement which, to a substantial degree, was a result of federal use of the disallowance power, which, in turn, was a manifestation of Macdonald's fidelity to the British model. Supported by a foreign judicial institution, provincial politicians were able to ensure that the kind of centralized federalism expressed in the Constitution Act, 1867 would not take hold in this country.

### Collaborative Federalism

The concept of collaborative federalism, discussed at length by David Cameron and Richard Simeon, is very similar to Banting's joint-decision federalism and to Rocher and Smith's equality of the provinces vision (i.e., the equality of the provincial level of government with the federal). The three, in turn, resemble the concept of confederalism. Collaborative federalism is defined by Cameron and Simeon as:<sup>91</sup>

the process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behaviour through the exercise of its spending power, but by some or all of the 11 [sic] governments and territories acting collectively.

In addition, and this is the key point, the governance of Canada is seen by the proponents of collaborative federalism "as a partnership between two equal, autonomous and interdependent orders of government that jointly decide

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<sup>91</sup> D. Cameron, R. Simeon, "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism," Publius: The Journal of Federalism, 32: 2, Spring 2002, p. 54.

national policy.”<sup>92</sup> While the federal and provincial governments have always worked together to formulate policies and establish programs, collaborative federalism is distinguished by the apparent willingness of the federal government to accept a diminished role for itself in national policy-making and to acknowledge that it is but one of fourteen governments in the country.

On its face, collaborative federalism seems like a concept that one would have a hard time opposing. After all, who could be against co-operation? The problem arises when co-operation becomes collusion; that is, when governments collude to achieve their own interests rather than citizen interests, or, as Gerald Baier put it, “when governments co-operate too well.”<sup>93</sup>

Martin Painter used the figure below<sup>94</sup> to illustrate the negative and positive features of collaborative federalism and its opposite, competitive federalism. The latter occurs when governments keep their distance from each other and provide separate bundles of services as they compete for public support. Collaborative federalism is practiced when governments co-operate in the provision of public services, “with the provincial governments seeking a

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<sup>92</sup> Ibid., p. 49.

<sup>93</sup> G. Baier, “Judicial Review and Canadian Federalism,” in H. Bakvis, G. Skogstad, (eds.), Canadian Federalism: Performance, Effectiveness, and Legitimacy, (Don Mills, ON: Oxford University Press, 2002), p. 35.

<sup>94</sup> M. Painter, “Intergovernmental Relations in Canada: An Institutional Analysis,” Canadian Journal of Political Science, 24: 2, June 1991, p. 270.

close involvement in spheres of federal policy that are perceived to intrude on provincial jurisdiction.”<sup>95</sup>

Mode	Negative Features	Positive Features
Competition	Confrontation	Responsiveness
Collaboration	Collusion	Co-ordination

Competitive federalism, it is argued, leads to confrontation and deadlock, to federal intervention in provincial affairs, and to contradictory policies. Collaborative federalism “produces better co-ordinated outcomes that achieve a more satisfactory balance of provincial and federal perspectives.”<sup>96</sup> While collaboration is said to also produce barriers to public access, to provincial vetoes and to cartel-like behaviour, competition is said to yield more diverse, more responsive policies. “[S]o long as the competitive dynamic operates, governments will remain answerable to their own electorates rather than merely to each other in the deals that they strike.”<sup>97</sup>

Painter acknowledged that Canadian intergovernmental relations have been spared the worst excesses of collaboration and competition, but he concludes that collaborative federalism is a flawed model and argues against two possible institutional reforms that are advanced by advocates of collaborative federalism. One, a re-designed Senate modeled on the German Bundesrat - with members appointed by the provincial governments - “would

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<sup>95</sup> ibid., p. p. 269.

<sup>96</sup> ibid., p. 270.

<sup>97</sup> ibid.

clearly ‘hobble Ottawa’ in spheres of action where the constitution has assigned it the capacity to act unilaterally.”<sup>98</sup> Secondly, permanent first ministers’ conferences “would afford additional temptations for political executives to engage in collusive forms of collaboration.”<sup>99</sup>

The policy areas where the federal government is practicing collaborative federalism and, in so doing, is accepting an attenuated role for itself include labour force training policy, environmental policy, internal trade, parental benefits policy, and securities regulation. These are among the areas in which Ottawa chose to reach agreements with the provinces, and thereby, seems to have assented to a secondary role for itself.<sup>100</sup>

The claim that the federal government, by accepting collaborative federalism (or the equality of the provinces with the federal government vision), has embarked on a process of jurisdictional self-contraction runs counter to the provinces’ characterization of the federal government as an intrusive, interventionist, self-aggrandizing force, bent on unilateralism even in areas of provincial jurisdiction. While it is true that Ottawa has acted

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<sup>98</sup> ibid., p. 286.

<sup>99</sup> ibid., p. 287.

<sup>100</sup> In 2009, Ottawa finally decided to establish a single national securities regulator. But while virtually every constitutional scholar in the country would probably agree that securities regulation is a federal responsibility, the Harper government still could not bring itself to confront Alberta and Québec over the issue. Thus, in October 2009, Ottawa referred the issue to the Supreme Court of Canada for a determination on the constitutionality of federal legislation creating a national securities regulator. However, according to the Justice Canada news release announcing the reference, “The Government is also continuing to work with its provincial and territorial partners to develop federal legislation that would allow voluntary provincial and territorial participation....” The conclusion to be drawn from this statement is that, even if Ottawa wins the Court reference, it will still allow subnational governments to opt out of the national system. (See Canada. Department of Justice. Government of Canada Intends to Seek Opinion of Supreme Court of Canada on Constitutionality of Proposed Canadian Securities Legislation, News Release, October 16, 2009).

unilaterally on occasion, and while it is true that Ottawa has intruded into provincial jurisdiction, notably in social policy fields like post-secondary education and health care, this dissertation will try to demonstrate that, in recent years, Ottawa has diminished itself in at least three critically important areas in favour of provincial autonomy.

The opposite of collaborative federalism is classical federalism, sometimes called co-ordinate federalism. Banting explains that in this model there is little entanglement between levels of government; the model involves “independent decisions by both levels of government, with limited efforts to secure the formal coordination of policies and programs across levels of government.”<sup>101</sup> In a sense, this type is similar to competitive federalism; the chief difference appears to be the greater sensitivity of the classical model to jurisdictional concerns.

Prime Minister Harper's “open federalism” is reminiscent of the classical model. Certainly, his pledge to legislatively restrain the federal spending power, his dismantling of the federal-provincial child care agreements in favour of tax incentives, his rhetoric about respecting provincial jurisdiction, and his general preference for a smaller federal state suggest a bias toward classical federalism. However, open federalism also appears to have a collaborative dimension. It is demonstrated by this comment in the Conservative Party's 2006 election platform, Stand Up for Canada:

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<sup>101</sup> K. Banting, “Open Federalism...,” p. 79.

A Conservative government will support the creation of practical intergovernmental mechanisms to facilitate provincial involvement in areas of federal jurisdiction where provincial jurisdiction is affected, and enshrine these practices in a Charter of Open Federalism.

The Harper government has shown an inclination not only to work with the provinces but also to let them take the lead on some policy issues, e.g., the environment. If there is a difference between open federalism and the Chrétien government's collaborative federalism, it lies in the firmer ideological commitment on the part of the Harper government to provincial power.<sup>102</sup>

Federal restraint in its use of its valid constitutional powers raises a number of questions. For instance, what is the effect on the relationship between Ottawa and Canadian citizens? In collaborative federalism, relations between the government of the country and citizens are mediated by provinces and territories. What would be the impact on citizens' positive sense of attachment to Canada? This issue of the government-citizen relationship is the concern of Mettler and Milstein's recent paper. They note that political scientists have neglected the impact of state-building processes and the creation of specific policies on the lives of individuals and the ways in which they relate to government.<sup>103</sup> They suggest that the relationship between government and citizens may shape "the formation of civic identities, attitudes about government, and political interests or preferences,

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<sup>102</sup> The events of December 2008 and January 2009 confirm this conclusion. Faced with a major economic crisis, the Harper government was dragged, kicking and screaming, into action. Embarrassed by what other advanced governments were doing and certain to go down to defeat in the House of Commons, the Harper government finally assumed the leadership mantle.

<sup>103</sup> S. Mettler, A. Milstein, "American Political Development from Citizens' Perspective: Tracking Federal Government's Presence in Individual Lives over Time," Studies in American Political Development, 21, Spring 2007.

as well as rates of participation in politics.”<sup>104</sup> They write further: “The form taken by governing arrangements across time is likely to shape citizens’ attitudes about and levels of support for government generally and for particular policies. Perhaps most significant, distinct regimes may mobilize citizens to participate to varying degrees, in different ways, and for diverse purposes.”<sup>105</sup> Very much a preliminary effort, the paper concludes with a number of areas for further investigation. It suggests, for instance, that there may be a link between the coverage and benefit levels of government programs and the levels of political participation. “Citizens’ experiences as beneficiaries might affect their trust and confidence in government, their perceptions of their own political efficacy, and the extent to which government is responsive to them.”<sup>106</sup>

Secondly, with Johanne Poirier we ask: what is the effect of reliance on IGAs on citizen respect for the constitutional order? Poirier suggests that IGAs enable governments to decide on “who does what” regardless of “who is constitutionally competent to do what.” This can lead to “a marginalization of sections 91 to 95 of the *Constitution Act, 1867*.”<sup>107</sup> A good illustration of this point is provided by the case of labour force training. Nowhere in the constitution does it say that provinces are responsible for worker training, and

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<sup>104</sup> Ibid., p. 128.

<sup>105</sup> Ibid., p. 110.

<sup>106</sup> Ibid., p. 130.

<sup>107</sup> J. Poirier, “Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics,” in J. Peter Meekison, H. Telford, H. Lazar, (eds.), Canada: The State of the Federation, 2002: Reconsidering the Institutions of Canadian Federalism, (Montreal and Kingston: McGill-Queen’s University Press, 2004), p. 453.

yet, within the Labour Market Development Agreements negotiated by Ottawa with each province and territory, there is a clause that declares Ottawa's recognition of provincial jurisdiction over worker training. But when Ottawa agreed to the insertion of this provision it acted too hastily because, in December 2008, the Supreme Court, in a decision on the Employment Insurance program, ruled that federal training programs were a valid exercise of the federal unemployment insurance power.<sup>108</sup>

Thirdly, is Ottawa's reliance on intergovernmental agreements (IGAs) rather than the application of its own policy-making authority conducive to democratic decision-making? A number of political scientists, such as Richard Simeon, David Cameron, Roger Gibbins, and Jennifer Smith, (as well as G. DiGiacomo), have pointed to the democratic deficiencies of intergovernmental agreements.

Fourthly, what is the impact of federal deference on policy-making? It is arguable that it has been substantial. In a number of policy areas, most notably internal trade and the environment, federal willingness to let the provinces lead has resulted in abysmal national performance.

While the time period for the thesis mainly covers the post-Trudeau years, the issue in question, that is, the apparent reluctance of the federal government to assert itself, seems to go back much further in history. F.R. Scott, in a paper originally published in 1931, attributed the diminution of federal power to "the attitude of the leaders of the Dominion parties of recent

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<sup>108</sup> Confédération des syndicats nationaux v. Canada (Attorney General), [2008] SCC 68.

years. They seem to have wished to hand over as much as possible to the local legislatures.”<sup>109</sup> Scott may have had in mind the federal government’s decision in the mid-1920s to defend the constitutionality of its labour relations legislation on a case it was bound to lose. The case involved workers of a municipal organization. If the case had involved workers in, say, the coal industry, the decision of the Judicial Committee may have been very different.<sup>110</sup>

### *The Meaning of Sovereignty*

A concept that needs clarification before continuing is sovereignty. This thesis subscribes to the definition offered by Stephen Krasner. He refers to sovereignty “as a set of attributes” of statehood that includes “a territory, a population, an effective domestic hierarchy of control, de jure constitutional independence, the de facto absence of external authority, international recognition, and the ability to regulate transborder flows.”<sup>111</sup>

In his exploration of the meaning of sovereignty, Alan James focuses on the issue of constitutional independence. In his view, sovereignty means that a state’s constitution is “not part of a larger constitutional arrangement.” He writes:<sup>112</sup>

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<sup>109</sup> F.R. Scott, Essays on the Constitution, p. 47.

<sup>110</sup> The case is Toronto Electric Commissioners v. Snider, discussed more fully in Chapter 4.

<sup>111</sup> S. Krasner, “Problematic Sovereignty,” in S. Krasner, (ed.), Problematic Sovereignty: Contested Rules and Political Possibilities, (New York, NY: Columbia University Press, 2001), p. 6.

<sup>112</sup> A. James, Sovereign Statehood: The Basis of International Society, (London, UK: Allen & Unwin Publishers Ltd., 1986), p. 24.

A sovereign state may have all sorts of links with other such states and with international bodies, but the one sort of link which, by definition, it cannot have is a constitutional one. For sovereignty, in the sense here discussed, consists of being constitutionally apart, of not being contained, however loosely, within a wider constitutional scheme.

Once the constitutional connection has been severed, the territory concerned becomes sovereign.

Sovereignty is to be distinguished from political independence (or autonomy), which is here taken to mean a state's freedom of effective action or the extent to which a state can base its decision-making on internal calculations and priorities, regardless of the formal legal rules. To illustrate the difference, James points to a comment by a former French Interior Minister.<sup>113</sup>

France's Minister of the Interior, for example, has said in answer to the question whether his country must remain independent that 'A main aim of this government is the idea of sovereignty. Note that I do not say "independence."' He then went on to speak of the way in which all countries were growing more involved with each other and how some problems required a world-wide approach, but distinguished these from 'a nation's own sovereignty'.

For James, a nation's sovereignty is not affected by its degree of independence or dependence in the world.

It appears that many writers, including contemporary writers and those who lived during the Confederation years, sometimes used the word 'independence' to mean a country with both constitutional independence and political independence. That meaning will be evident from the context in

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<sup>113</sup> ibid., pp. 190-191.

which it is conveyed. However, I have tried to be precise in the use of both terms.

In any event, as we shall observe later, Canada did not become a sovereign country in 1867. More importantly, it appears that the founders did not intend it to become a sovereign country in 1867.

### *The Author's Perspective on Federalism*

My conception of federalism consists mainly of these four features. First, I subscribe to what Rocher and Smith have called the nationalizing vision of federalism and the equality of the provinces vision, i.e., the equality of the provinces with each other. Secondly, I am convinced that it is in Canada's interest to have provinces with a substantial range of autonomy, as well as adequate taxing powers to make that autonomy meaningful. This does not mean, however, that provincial autonomy should reach the point where it threatens federal dominance. Thirdly, I believe that in general a federal arrangement is superior to a confederal arrangement. More precisely, I do not agree that the delivery of federal government policy must always be done through the provinces, or that national policy must always be formulated jointly by the federal level of government and the provincial governments. Finally, contrary to the view of Premier Charest, the perspective of the dissertation is that the federal government does have the right (and obligation) to determine the national interest. This does not imply that it ought to do so in isolation from the provinces or civil society or the public. It does mean that

the definition of the national interest is legitimately and ultimately a federal responsibility.

These general features of my preferred federal arrangement for Canada are based on four principles: democracy, equality, efficiency, and diversity.

A federal arrangement is valued because it supports democracy. It does so by diffusing political power. Thus, absolutist government is more difficult to achieve in a polity with multiple levels of governance. Federalism enables one level to act as a counterweight to another and, if there is a degree of competition among governments, citizens experience more responsive government. Weinstock makes the additional point that federalism “increases the number of political levers available to citizens, and thus increases the likelihood of the development of active citizenship...”<sup>114</sup> Related to this point is Weinstock’s observation that democracy is advanced under federalism because it situates “certain political decisions at a level that is cognitively more accessible to the average citizen.”<sup>115</sup> This argument, however, should not be exaggerated as sub-national governments, too, can be difficult to access, particularly those like the governments of, say, Ontario, Québec, California, Bavaria, and New York, that have seen huge growth in their public bureaucracies. Indeed, LaSelva notes that, for communitarians, “The problem with federalism...is not that it fails to secure justice, but that the provinces

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<sup>114</sup> D. Weinstock, “Towards a Normative Theory of Federalism,” in International Social Science Journal, Vol. LIII, No. 167, 2001, p. 76.

<sup>115</sup> Ibid., p. 77.

have become too large.”<sup>116</sup> Still, most Canadian provinces have small populations and most are long distances from Ottawa. Thus, the local and provincial governments may perhaps be more easily accessed. As well, more centres of power mean more citizens actively working those centres.

For these reasons and because, in federalism, there can be an unmediated relationship between citizens and the central government, I am of the view that federalism is superior to unitary government and to collaborative federalism (or confederalism) on the democracy dimension.

A second principle that shapes my conception of federalism is equality. A federal arrangement characterized by a dominant central government is valued because it is better able to ensure that citizens are treated equally regardless of their province of residence. For the author, it is unacceptable that the residents of one province have available to them the latest cancer-fighting drugs while the residents of another do not. Consider, also, pay equity. A couple of provinces have progressive pay equity legislation, others provide some legislative support to pay equity, while others give no legislative protection for the principle of equal pay for work of equal value. As a result, the degree of protection that a woman at work receives is dependent on where she works. The inequity is obvious. Why should a woman in one province have to settle for inferior protection simply because she works in the “wrong” part of the country? For the author, equality trumps provincial autonomy.

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<sup>116</sup> S. LaSelva, The Moral Foundations of Canadian Federalism, p. 71.

A third principle is efficiency. Governments are obliged not only to advance the national interest but also to formulate and execute policies as efficiently as possible. A federal system is more likely than collaborative federalism or a confederal arrangement to provide efficient government. Collaborative federalism requires lengthy decision-making processes but, more importantly, it frequently produces lowest-common-denominator decisions. Unable to reach agreement on difficult issues, governments settle for vague agreements that require little commitment on the part of the participants. As we will argue later, the Agreement on Internal Trade and the Canada-Wide Accord on Environmental Harmonization, in particular, were victims of confederal decision-making.

Finally, I support federalism because it is better able to accommodate the country's diversity than a unitary system. However, a word must be said on the notion of diversity. Undoubtedly, the country is big and diverse and, undoubtedly, the Francophone population in Canada and First Nations citizens, among others, have legitimate concerns, needs, and interests that must be accommodated. Federalism, therefore, is highly desirable for Canada. But the degree of the country's diversity has been vastly exaggerated, sometimes for political reasons. Contrary to Rocher and Smith, I do not believe that Canada is a country of "profound diversity." At the same time, the commonalities among Canadians have been seriously downplayed. Consider, for example, the issue of Québec's civil law tradition. This is often cited as one of the differences

that separate Québec from the other provinces and make it distinct. But the comment of Pierre Trudeau on the civil law tradition is highly instructive:<sup>117</sup>

Much is made of the fact, for example, that the civil law is the law in Quebec, whereas common law applies in other provinces. Yet, however important the Civil Code may be, in reality *it occupies a very small place in the total picture of provincial laws by which we in Quebec are governed*. Just like the other provinces, Quebec has enacted a vast number of statutory laws; they apply to all aspects of our collective lives and are the product of a juridical culture *far more closely related to that of the other provinces* than to the laws of New France or the Napoleonic Code. [Emphasis added.]

While federalism is to be preferred because of its capacity to accommodate diversity, I do not agree that Canada is so diverse that it needs further provincialization.

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<sup>117</sup> See P.E. Trudeau, Against the Current: Selected Writings 1939-1996, edited by Gérard Pelletier, (Toronto, ON: McClelland & Stewart Inc., 1996), pp. 266-267.

## Chapter 2: Theoretical Framework

The objectives of this chapter are to set out the dissertation's theoretical framework and to show how the founders of the country held the idea of Canadian sovereignty in abeyance. It also advances an explanation for why they did so. Toward the end of the chapter, I compare the founding of Canada with that of Australia on four dimensions to show how limited were the self-government aspirations of the founders.

The theoretical framework has been constructed with two theories, historical institutionalism and the theory of constitutional abeyances. The former emphasizes the importance of institutions in politics and policy-making, and reminds us of the powerful force of history; the latter requires a careful study of the debates among the drafters about the constitution in order to uncover the delicate issues.

### Historical Institutionalism

Historical institutionalism (HI) is one of three types of neo-institutionalism, the other two being sociological institutionalism and rational choice institutionalism. The basic argument of neo-institutionalist theory in general is that “institutions shape action.”<sup>118</sup> They influence the strategies that actors adopt and help to determine the goals that they will pursue. The aim of a neo-institutionalist analysis is “not to describe institutions and how they work but rather to explain political outcomes and make attempts towards

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<sup>118</sup> A. Lecours, “New Institutionalism: Issues and Questions,” in A. Lecours, (ed.), New Institutionalism: Theory and Analysis, (Toronto, ON: University of Toronto Press, 2005), p. 8.

generalization.”<sup>119</sup> It, thus, differs from the ‘old institutionalism,’ which concerned itself mostly with compiling thick descriptions of governmental structures and the nature of their functioning.

Carolyn Tuohy points out that the way in which institutions are structured “will affect the way certain ideas are (or are not) brought to bear and certain interests are (or are not) channelled into the policy process.”<sup>120</sup> In this regard, it is important to stress that institutions not only shape and channel interests, they also possess and defend certain interests, as March and Olsen point out:<sup>121</sup>

The bureaucratic agency, the legislative committee, and the appellate court are arenas for contending social forces, but they are also collections of standard operating procedures and structures that define and defend interests. They are political actors in their own right.

How do neo-institutionalists define institutions? In a nutshell, very broadly. Peter Hall, for instance, refers to institutions as “the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy.”<sup>122</sup> John Ikenberry’s definition has three distinct levels that “range from specific characteristics of government institutions, to the more overarching structures

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<sup>119</sup> Ibid., p. 14.

<sup>120</sup> C. Tuohy, “Social Policy: Two Worlds,” in M.M. Atkinson, (ed.), Governing Canada: Institutions and Public Policy, (Toronto, ON: Harcourt Brace & Company, 1993), p. 276.

<sup>121</sup> J. March, J. Olsen, “The New Institutionalism: Organizational Factors in Political Life,” American Political Science Review, Vol. 78, No. 3, 1984, p. 738.

<sup>122</sup> Peter Hall, Governing the Economy: The Politics of State Intervention in Britain and France, (Cambridge, UK: Polity Press, 1986), p. 19.

of state, to the nation's normative social order."<sup>123</sup> Robert Keohane describes institutions as "persistent and connected sets of rules (formal and informal) that prescribe behavior roles, constrain activity, and shape expectations."<sup>124</sup> Similarly, Douglass North says that institutions "are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."<sup>125</sup>

Paul Pierson includes not only formal institutions, such as constitutional arrangements, but also legally enforceable public policies. He explains:<sup>126</sup>

While policies are generally more easily altered than the constitutive rules of formal institutions, they are nevertheless extremely prominent constraining features of the political environment. Policies, grounded in law and backed by the coercive power of the state, signal to actors what has to be done, what cannot be done, and establish many of the rewards and penalties associated with particular activities.

An example of a study that uses public policy as the primary institution of interest is Kathleen Thelen's study of vocational training regimes in four advanced democracies. She argues that vocational training regimes originated as political settlements among independent artisans, skilled industrial workers, and employers in skill-intensive industries. However, these political settlements were substantially influenced by state policy. In the four countries

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<sup>123</sup> Quoted in K. Thelen, S. Steinmo, "Historical Institutionalism in Comparative Politics," in S. Steinmo, K. Thelen, F. Longstreth, (eds.), Structuring Politics: Historical Institutionalism in Comparative Analysis, (Cambridge, UK: Cambridge University Press, 1992), p. 2.

<sup>124</sup> Quoted in M. Howlett, M. Ramesh, Studying Public Policy, (Don Mills, ON: Oxford University Press, 1995), p. 26.

<sup>125</sup> D.C. North, Institutions, Institutional Change and Economic Performance, (Cambridge, UK: Cambridge University Press, 1990), p. 3.

<sup>126</sup> P. Pierson, Politics in Time: History, Institutions, and Social Analysis, (Princeton, NJ: Princeton University Press, 2004), pp. 34-35.

she studied, it was state policy that established the power of key actors, that influenced the kinds of coalitions that were likely to come together, and that shaped the landscape in which institutions were constructed.<sup>127</sup> Thelen explains:<sup>128</sup>

State policy entrenched and stabilized the artisanate as a corporate sector in Germany, while it actively disorganized traditional craftsmen in Britain, Japan, and the United States. In all cases, the state established broad “regulatory regimes” (liberal in the United States and United Kingdom, state-centered in Japan, corporate-centered in Germany) that became the focal points and that influenced how interests were articulated and how debates were framed.

Clearly, neo-institutionalists define institutions in sweeping terms. Indeed, the stretching of the concept has not gone unnoticed by historical institutionalists. Sven Steinmo has argued that some definitions of institutions are “so vague that they leave nothing out.”<sup>129</sup> However, in practice, HI analysts have acted with restraint: in a recent survey of HI literature, Evan Lieberman points to party systems, constitutions, corporatist structures, and financial organizations as examples of institutions “typically employed in HI analysis.”<sup>130</sup>

This dissertation, too, will act with restraint. Institutions herein refer to the rules of the game established by Canada's constitution and the judiciary.

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<sup>127</sup> K. Thelen, How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan, (Cambridge, UK: Cambridge University Press, 2004), p. 31.

<sup>128</sup> Ibid., p. 32.

<sup>129</sup> S. Steinmo, Taxation and Democracy: Swedish, British, and American Approaches to Financing the Modern State, (New Haven, CT: Yale University Press, 1993), p. 12.

<sup>130</sup> E. Lieberman, “Causal Inference in Historical Institutional Analysis,” Comparative Political Studies, Vol. 34, No. 9, November 2001, p. 1013. It should be noted, however, that, in an electronic communication to the author (September 11, 2006), Professor Lieberman acknowledged that “not very many HI scholars have looked closely at constitutions.”

Particularly reassuring has been Thelen and Steinmo's inclusion of "the relations among various branches of government" within the definition of institution.<sup>131</sup> Paul Pierson has pointed to the paucity of research into executive-judicial relations, a sentiment borne out in Peters' discussion of institutional theory and political executives. Noting that the environment of an institution is composed of other institutions, Peters makes reference to the relationships of political executives with legislatures, the media, the public bureaucracy, political parties and the electoral system, and interest groups, but he does not include the judiciary.<sup>132</sup> In showing how the JCPC shapes the actions of the executive branch of the government of Canada, I try to make a modest contribution to a greater understanding of this relationship.

An example of a study that uses a constitution in a neo-institutionalist analysis is Luc Juillet's discussion of the failure of the U.S. government in 1980 to amend an international treaty, the U.S.-Canada Migratory Birds Convention. The proposed amendment was intended to allow a subsistence harvest of waterfowl by aboriginal people living in the north. In his discussion, Juillet makes use of the concept of the veto point, a concept that occupies "a significant place in new institutionalism." In Juillet's definition, veto points (or veto players) are,<sup>133</sup>

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<sup>131</sup> K. Thelen, S. Steinmo, "Historical Institutionalism in Comparative Politics," p. 2.

<sup>132</sup> B. Guy Peters, "Institutional Theory and the Study of Political Executives," in J. Pierre, B. Guy Peters, G. Stoker, (eds.), Debating Institutionalism, (Manchester, UK: Manchester University Press, 2008).

<sup>133</sup> L. Juillet, "National Institutional Veto Points and Continental Policy Change: Failing to Amend the U.S.-Canada Migratory Birds Convention," in A. Lecours, (ed.), New Institutionalism: Theory and Analysis, p. 277. The veto player concept was discussed by George Tsebelis in Veto Players: How Political Institutions Work, (New York: Russell Sage Foundation, 2002). In order for there to be a change

the set of actors whose formal approval for the adoption of public policy is made necessary by the institutional context. Veto points are generally determined by the constitution or other structural features of the political system, such as the party system.

While the federal government in the United States supported the amendment, its constitution requires Senate approval of international treaties and it was unable to overcome the intense lobbying of the Senate by conservation groups.

As Juillet observes,<sup>134</sup>

...in the context of more open and fragmented institutions, the U.S. Senate became the focal point for opponents of the amendment - on both sides of the border. This veto point was used to great effect by opponents to delay the approval of the protocol, eventually leading to its abandonment.

In other words, the U.S. constitution provided actors with a veto point and they used it effectively to defeat the proposed amendment to the Convention.

It is important to point out that, among HI analysts, there is general acceptance that policy outcomes are not totally attributable to institutions.

Thelen and Steinmo make this clear in their elaboration of the theory:<sup>135</sup>

[!]Institutions constrain and refract politics but they are never the sole “cause” of outcomes. Institutional analyses do not deny the broad political forces that animate various theories of politics: class structure in Marxism, group dynamics in pluralism. Instead, they point to the ways that institutions structure these battles and in so doing, influence their outcomes.

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in the status quo, all veto players must agree to the change. Clearly, the larger the number of veto players, the greater the policy stability.

<sup>134</sup> ibid., p. 290.

<sup>135</sup> K. Thelen, S. Steinmo, “Historical Institutionalism in Comparative Politics,” in S. Steinmo, K. Thelen, F. Longstreth, (eds.), Structuring Politics: Historical Institutionalism in Comparative Analysis, (New York, NY: Cambridge University Press, 1995), p. 3.

For instance, in his discussion on taxation policy in Brazil and South Africa, Lieberman identifies economic structure and the international economic environment, in addition to historically rooted institutions, as being the three key factors responsible for taxation structure in the two countries. The latter mediate the pressures emanating from the economic structure and the international economic environment “into specific sets of class configurations and coalitions that lead to distinctive types of tax states.”<sup>136</sup>

The ‘historical’ part of HI refers to the contention of HI theorists that “once constructed at a moment in history, institutions typically endure for significant periods of time, influencing political dynamics and associated outcomes in subsequent periods.”<sup>137</sup> HI theory, writes Guy Peters, stresses,<sup>138</sup>

the role of institutional choices made early in the development of policy areas, or even of political systems. The argument is that these initial choices (structural as well as normative) will have a pervasive effect on subsequent policy choices...have an enduring impact....

Similarly, Robert Putnam writes:<sup>139</sup>

Whatever other factors may affect their form, institutions have inertia and “robustness.” They therefore embody historical trajectories and turning points. History matters because it is “path dependent”: what comes first (even if it was in some sense “accidental”) conditions what comes later.

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<sup>136</sup> E. Lieberman, Race and Regionalism in the Politics of Taxation in Brazil and South Africa, (Cambridge, UK: Cambridge University Press, 2003), p. 10.

<sup>137</sup> E. Lieberman, “Causal Inference in Historical Institutional Analysis,” p. 1013.

<sup>138</sup> Quoted in S. Reich, “The Four Faces of Institutionalism: Public Policy and a Pluralistic Perspective,” Governance: An International Journal of Policy and Administration, Vol. 13, No. 4, October 2000, p. 504.

<sup>139</sup> R. Putnam, Making Democracy Work: Civic Traditions in Modern Italy, (Princeton, NJ: Princeton University Press, 1993), p. 8.

The concept of path dependency that Putnam alludes to is central to HI.

Essentially, it means that what came before determines what comes next.

Margaret Levi offers a more precise definition:<sup>140</sup>

Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and smaller branches. Although it is possible to turn around or to clamber from one to the other - and essential if the chosen branch dies - the branch on which a climber begins is the one she tends to follow.

Given that the dissertation's independent variable is the judiciary, i.e., the JCPC, which is guided by the doctrine of *stare decisis* or precedent, it is not surprising that path dependence would be a central concept herein. The doctrine - and it is a doctrine not a rule of law - refers to the influence of previous decisions on the court's deliberations on a current case. That influence can be weak or powerful, depending on the attitude of the judges to the doctrine. It appears that, in the case of the JCPC, the influence was relatively strong during the years when it was Canada's final court of appeal.

The judiciary, it must be stressed, is a veto player, defined by Tsebelis as an individual or collective actor "whose agreement is necessary for a change of the status quo."<sup>141</sup> The probability that a course of action will unfold is dependent on what the courts have to say about it. Path dependence is

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<sup>140</sup> Quoted in P. Pierson, Politics in Time, p. 20.

<sup>141</sup> G. Tsebelis, Veto Players: How Political Institutions Work, p. 19.

reinforced when the courts sanction a course of action or rule out certain alternatives.

Path dependence happens not only because the judiciary is a veto player and because of the influence of precedent. Pierson asserts that the crucial path dependent process is positive feedback (or self-reinforcement) and in his work he discusses how this process occurs. One way has to do with the self-reinforcing nature of norms and values. To illustrate his point, Pierson employs a metaphor: “Every time we shake hands, the strength of that norm is reinforced.” Conversely, we can say that every time we do *not* shake hands, *that* norm is reinforced. Political values are especially difficult to change. “Once established, basic outlooks on politics, ranging from ideologies to understandings of particular aspects of governments or orientations toward political groups or parties, are generally tenacious.”<sup>142</sup>

A second way by which positive feedback strengthens path dependence is based on the stimulation of interest group activity. A policy or initiative will result in the creation of new groups or in the mobilization of existing groups around the new policy or initiative. Some will support it, others will call for its repeal or for changes, although the latter will be in a difficult position if they have to face the combined resources of a government and an array of supportive interest groups. Not infrequently, governments will provide resources for groups to enable them to take advantage of the new initiative, or, indeed, to implement it. This will reinforce the durability of the policy or

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<sup>142</sup> P. Pierson, Politics in Time, pp. 39-40.

initiative. Pierson notes that high start-up costs tend to discourage the establishment of new groups and to strengthen the position of established groups, unless their performance is very poor.

In addition to the support of interest groups, a government policy can expect to receive the support of those who actually and directly benefit from the policy. "Actors may have powerful incentives to stick with a current option because they receive a continuing stream of benefits from investments already made in that option." On the other hand, considerable investments would have to be made in some "theoretically superior alternative" before the same level of benefits could be generated.<sup>143</sup>

Thirdly, path dependence is buttressed not only by the stimulus to interest groups and beneficiaries but also by the stimulus to the bureaucracy. A policy, program or decision will result in the creation or expansion of the bureaucracy. It may hire new employees, develop a hierarchy of management, set up new offices, establish procedures, invest in the acquisition of specialized skills, develop interdepartmental relationships, acquire an identity. Over time, the bureaucracy is likely to become wedded to the policy.

In general, then, political actors, whether individuals, groups, or the public service, "make important commitments in response to certain types of government action. These commitments, in turn, may vastly increase the disruption caused by new policies, effectively 'locking in' previous decisions."<sup>144</sup>

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<sup>143</sup> ibid., p. 35n.

<sup>144</sup> P. Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change," World Politics, 45, July 1993, p. 608.

Pierson stresses that the analyst must take note of the timing of political events. When an event occurs may be as important as the event itself. An “event that happens ‘too late’ may have no effect, although it might have been of great consequence if the timing had been different.”<sup>145</sup> Again Pierson uses a metaphor, borrowed from Raymond Aron, to make his point: “A man takes the same walk every day. On one occasion, a heavy tile becomes dislodged from a building along his route. Depending upon the particular timing of these two streams of activity (strolling man, falling tile), the observed outcome will be radically different.”<sup>146</sup> As we will see in chapter four, the timing of a number of Supreme Court of Canada decisions turned out to be crucial.

Peters, Pierre and King argue that HI is very good at describing institutional persistence but is weak in explaining how a policy, program or decision was initiated. They urge HI analysts to try to uncover how inevitable a particular political choice was.<sup>147</sup> What ideas were at issue and what values were in conflict during the initial phases are also among the questions that HI users should address. They agree that the use of the concept of critical junctures (see below) would address their concern to some extent, but they urge greater attention to “counterfactuals”: what might have happened if different choices were made. As we will see later, the dissertation does not

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<sup>145</sup> P. Pierson, Politics in Time, p. 44.

<sup>146</sup> Ibid., p. 57.

<sup>147</sup> B. Guy Peters, J. Pierre, D. King, “The Politics of Path Dependency: Political Conflict in Historical Institutionalism,” The Journal of Politics, Vol. 67, No. 4, November 2005, pp. 1282-1283.

focus on specific counterfactual questions but it does take some time in discussing why there is no declaration of sovereignty in the constitution and why the JCPC served as Canada's final court of appeal. Explaining why the Judicial Committee adopted the approach to Canadian federalism that it did is much more problematic but I do offer a possible explanation.

Peters, Pierre and King contend that HI pays insufficient attention to the role of agency in decision-making. To be effective, they write, "a theory should be capable of linking outcomes with actors...." Otherwise, it "simply anthropomorphizes institutions and also assumes homogeneity within the institution."<sup>148</sup> To the extent possible, therefore, I identify the roles played by the various actors within the political institutions that are the focus herein.

For some HI analysts, the concept of critical junctures is central to HI. In John Hogan's view, critical junctures are characterized by the adoption of a particular institutional arrangement. They "establish pathways that funnel units in particular directions."<sup>149</sup> A critical juncture, Hogan argues, is identified by two requirements. One is that the critical juncture must come from an important social cleavage the tensions from which generate a mandate for change. The manifestations of a social cleavage range from violent wars and revolutions to economic crises and electoral landslides to class differences and urban-rural disputes. The second requirement is that the critical juncture must produce change that is significant, that occurs relatively swiftly, and that

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<sup>148</sup> Ibid., pp. 1284-1285.

<sup>149</sup> J. Hogan, "Remoulding the Critical Junctures Approach," Canadian Journal of Political Science, 39: 3, September 2006, p. 660.

affects a sizable segment of the population or an important sector of the population. The critical juncture featured in this thesis, namely, the era of Confederation, would seem to satisfy Hogan's criteria.

In Capoccia and Kelemen's understanding, critical junctures are "*relatively* short periods of time during which there is a *substantially* heightened probability that agents' choices will affect the outcome of interest."<sup>150</sup> [Emphasis in original.] They are choice points, windows of opportunity - rare in their frequency and qualitatively different from normal circumstances - when a particular political option is chosen from among two or more alternatives. It is during these occasions when the power of agency becomes especially significant because, as Mahoney writes, "willful actors" are able to shape outcomes in a way that normal circumstances would not permit.<sup>151</sup> Unlike Hogan, Capoccia and Kelemen do not suggest that a critical juncture always leads to significant institutional change. It may lead to wide-ranging change, and it is likely that it will, but it is not automatic or inevitable. Actors may select from among the options available to them "the restoration of the pre-critical juncture status quo." Whatever the nature of the choice made, a critical juncture is the starting-point for a path dependent process.

### *The Law Endures*

In his work on the shaping power of American labour law, specifically judge-made law, the legal historian, William Forbath, offered some reflections

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<sup>150</sup> G. Capoccia, R.D. Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism," World Politics, Vol. 59, April 2007, p. 348.

<sup>151</sup> See ibid., p. 347.

that are pertinent to this discussion. He prefaces his book by pointing out that scholars in the U.S. have ignored the impact of the law and the courts on the goals, strategies and overall effectiveness of American labour unions. For them, the law made no big difference in labour history. Judge-made law was a reflection of fundamental social conflicts; it was, they said, “derivative.” As Forbath found,<sup>152</sup>

Among historians and social and political scientists as with law professors, scholarship about law and society has emphasized the ways that the interests of social groups shape the law; it has slighted the ways that law shapes the very interests that play upon it.

In words that sound eerily similar to those written by Alan Cairns in another context, Forbath summed up the view of traditional labour historians as being, “What happened would have happened, whatever the courts had done.”<sup>153</sup>

But, as Forbath goes on to show, American labour law was anything but derivative. As interpreted by judges, it was decisive in fashioning the labour movement's strategies and capacity for collective action. The argument that American unions have not been as effective as others in Canada and Europe because U.S. workers are more conservative and individualistic has little merit. American unionism is relatively weak, Forbath demonstrates, because of the impact of judge-made law. He writes: “Nowhere else among industrial nations did the judiciary hold such sway over labor relations as in nineteenth- and

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<sup>152</sup> W. Forbath, Law and the Shaping of the American Labor Movement, (Cambridge, MA: Harvard University Press, 1991), p. x.

<sup>153</sup> Ibid.

early-twentieth-century America. Nowhere else did trade unionists contend so constantly with judge-made law.”<sup>154</sup>

In those years, the judges were stunningly harsh. The efforts of union leaders to implant the principle, “labour is not a commodity,” were continually and heavy-handedly rebuffed by the courts through the repeated use of injunctions prohibiting union activity. Even suggesting that someone boycott a company because of its labour practices could result in a jail sentence.

Since the period covered by Forbath, 1880-1930, legislation and court decisions have frequently been more favourable to organized labour. But, as Forbath argues, American labour unions never recovered from the court decisions rendered in those years. “The old common law concepts rule from the grave,” Forbath declares. Labour remains a commodity and labour protest continues to be denied constitutional protection. So, Forbath concludes with a warning:<sup>155</sup>

In the past, the institutional framework and policies of labor law played a substantial part in shaping the character of the labor movement. We deceive ourselves if we attribute too much of that character to “deeper” forces. Thus the imagining and scrutinizing of possible new institutions and new laws should be done with all the canniness labor and its friends can muster; for these institutions and laws may go a long way toward shaping the identity and the capacities for collective action of the labor movement of the future.

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<sup>154</sup> Ibid., p. 6.

<sup>155</sup> Ibid., pp. 172-173.

The point of this short discussion on Forbath's book is simply to emphasize the shaping influence of judicial decisions.<sup>156</sup> It was not the “deeper forces” that framed the goals and strategies of organized labour in the U.S. but rather the courts. Thus, the Cairns thesis, discussed in chapter one (pages 21-24), that the JCPC's decisions did not take Canada in a direction it would not otherwise have gone must be treated very cautiously. The effects on labour of the court decisions made in the period covered by Forbath endure, despite the favourable legislation and court decisions of the New Deal and afterwards.

The objective of the foregoing has been to present a theory that emphasizes the role of institutions in political outcomes. Although it is acknowledged that they are never the sole determinant, institutions do play a decisive part in political decisions and policy formation. What we shall need to examine herein is the part played by Canada's political institutions, especially its judicial structures, in shaping the actions of the federal executive in the three policy areas mentioned earlier.

### Constitutional Abeyance Theory

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<sup>156</sup> Victoria Hattam makes an argument similar to Forbath's. The first sentence in her volume's Preface captures its thesis: “This book defends the claim that a strong judiciary created a politically weak labor movement in the United States.” See V. Hattam, Labor Visions and State Power: The Origins of Business Unionism in the United States, (Princeton, NJ: Princeton University Press, 1993), p. ix. Hattam argues that organized labour in the U.S. did not always embrace conservative business unionism. Like its West European counterparts, American labour had a radical agenda. But unlike its West European counterparts, American labour had to contend with particularly repressive courts.

In the United States...courts were the principal institution for containing workers' collective action under the common law doctrine of criminal conspiracy...The unusual power of judicial interpretation and review in the United States repeatedly undermined the rewards of political organization as hard-won legislative victories were continually eroded by the courts. (p. 11)

Having set out the thesis's view regarding the central importance of institutions, we can now turn to the second pillar of our theory, and for that we turn to the contribution of Michael Foley.

Foley opens his volume, The Silence of Constitutions, by discussing the distinction that is made between a written and an unwritten constitution. The former is defined as "a formal and codified document embodying the rules and relationships of government," while the latter is "understood to be an informal collection of rules, customs and traditions that pertain to the accepted organization of authority...."<sup>157</sup> The countries that are typically used as examples of these two types are the U.S. and Britain respectively.

Foley agrees with those constitutional scholars who dismiss the distinction "as being antiquarian and analytically flawed." For one thing, as Leslie Wolf-Phillips notes, "no constitution will be completely 'written' or completely 'unwritten', completely 'codified' or completely 'uncodified'."<sup>158</sup> Also, "the British constitution's mark of distinction is not that it is unwritten, but that it is 'unassembled' or 'uncodified'." It is, says Foley, "merely the element of disaggregation" that sets the British constitution off from others.<sup>159</sup>

Foley is concerned, however, that, in dismissing the written-unwritten criterion, analysts and scholars will overlook those features, within both written and unwritten constitutions, that are held in abeyance. By abeyances, Foley

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<sup>157</sup> M. Foley, The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government, (London, UK: Routledge, 1989), p. 3.

<sup>158</sup> Cited in ibid., pp. 6-7.

<sup>159</sup> Ibid., p. 6.

means those constitutional and political issues that receive “studied inattention.” Abeyances<sup>160</sup>

may include contradictions, tensions, anomalies, and inequities, but the fragility and, at times, total illogicality of such packages are kept intact through a convention of non-exposure, of strategic oversight, and of complicity in delusion....

Constitutional abeyances remain unwritten and unspoken because, were they to see the light of day, they could become sources of conflict or worse.

Foley writes:<sup>161</sup>

When constitutional abeyances become the subject of heightened interest and subsequent conflict, they are not merely accompanied by an intense constitutional crisis, they are themselves the essence of that crisis. Such a crisis marks an interruption in the continuity of implicit truce and, as a result, throws everything into further flux and reveals the disarray that abeyances had previously prevented.

Foley explains further that abeyances are the continuing flaws, the half-answers and the partial truths that he says are “endemic in the sub-structure of constitutional forms.” They are obscure understandings, and they stay undefined and unclarified because to attempt to define and clarify would be to threaten the constitution itself.<sup>162</sup> Through various forms of evasion and obfuscation, the unsettled questions, “the gaps and fissures” are kept in a state of irresolution. And by remaining obscure, they are able to accommodate conflicting interpretations.

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<sup>160</sup> ibid., p. 9.

<sup>161</sup> ibid., p. 10.

<sup>162</sup> ibid., p. 9.

Foley states that constitutions can be divided into two types on the basis of his theory of abeyance. There are those that can be designated as “settled unsettlements” and those that can be said to be “unsettled unsettlements.” While all constitutions are unfinished and unsettled, there are some, like those of the U.S. and Britain, whose abeyances and anomalies are acknowledged and where political actors choose to ‘work around’ the gaps and contradictions; these would be called settled unsettlements.

Foley’s methodology is to review two constitutional crises, one in the U.S. and one in England, and to deduce from them the “internal contradictions and inner ambiguities” that produced them. In both cases, the contradictions had to do with the question of who governs.

Using the same methodology, we can deduce, from the constitutional turmoil of the early 1980s pertaining to the patriation of the Canadian constitution, that the abeyance we are focusing on, namely, the constitution’s contradictory attitude toward Canadian sovereignty - under which a new state was erected but without full self-governing powers - was the basis of that crisis.

The importance of history in the British and American constitutions, Foley writes, lies “in its conditioning of those social attitudes capable of sustaining abeyances.”<sup>163</sup> In Canada’s case, historical conditioning enabled the country to ignore its lack of sovereign status by fostering the view that Canada was ‘practically sovereign’, that it functioned as a sovereign country despite its

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<sup>163</sup> Ibid., p. 128.

inability to amend its own constitution and to be the final judge of its legal disputes, and that the lack of constitutional sovereignty did not have serious policy or political consequences. These were among the devices by which Canadians could keep their own embarrassing lack of sovereignty in abeyance.

The point that Foley makes in his chapter on England is that the Stuart constitution, though unwritten, was far from being a constitution “intrinsicly predestined to collapse.”<sup>164</sup> On the contrary, its ambiguity and imprecision were “in actuality the hallmarks of its strength” that allowed it to accommodate seemingly incompatible positions. The bases of the Stuart constitution were custom, precedent, and the law and its successful functioning depended “upon positions not being pressed beyond the bounds of what was tacitly and intuitively accepted.”<sup>165</sup> However, this is not to suggest that the Stuart constitution was overly fragile, for, as Foley points out:<sup>166</sup>

Even in the absence of anything resembling a conclusive constitutional settlement and even in the presence of profound social divisions, there existed an elaborate and arguably sophisticated constitutional culture; a culture distinguished by hardened forms of usage and by recurrent patterns of obligation set within a matrix of shared convictions on the right ways of conducting government.

In other words, the durability of the constitution lay in its reflection of popular usage, accepted patterns of obligation, and common belief systems.

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<sup>164</sup> ibid., pp. 31-32. Scholars sometimes have viewed the Stuart constitution this way because, “The ingredients for systemic conflict were in abundance.” ibid., p. 16. One such ingredient was the tension between the lawful powers of the monarch and subjects’ rights. Another was its ambivalence regarding precedents and prerogatives. Yet another was “its indeterminate lines of final authority.” ibid.

<sup>165</sup> ibid., p. 32

<sup>166</sup> ibid., p. 16.

The crisis that led to the English civil war and the end of the Stuart constitution was a result of a conflict between the rights of Parliament and the prerogatives of the King. It was, in other words, about “contested sovereignty.” Foley suggests that the struggle became a crisis because of the inability of the Stuart Kings, particularly Charles I, to work with the obscurities, ambiguities, abeyances, and anomalies of the English constitution. “It was the threat of innovative clarity that posed the greatest danger.”<sup>167</sup> With careful handling, Foley writes, the constitution’s “obscurities could be made to work and even flourish - so long as they are kept obscure and the idea of winners and losers, victories and defeats, advances and retreats remain as muddled as before.”<sup>168</sup>

At first glance, the U.S. constitution seems an unlikely example of a constitution with important issues left in abeyance. It has, as Foley points out, the reputation of being a document “in which such major issues as institutional powers, legal rights, and even sovereignty have not had to be suspended or held in abeyance, but have been conclusively resolved through the format of legal stipulation.”<sup>169</sup> It has become an object of veneration by Americans to such an extent that it “assumes the identity of the nation itself,” which accounts in part for “the instinctive, widespread reluctance to tamper” with

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<sup>167</sup> ibid., p. 34.

<sup>168</sup> ibid.

<sup>169</sup> ibid., p. 35.

it.<sup>170</sup> “The net result is to confer upon the constitution a reputation for absolute political resolution and legal integrity...[T]he American constitution is celebrated as a model of a fully developed, clarified, and established authority....”<sup>171</sup>

Foley argues, however, that the U.S. constitution contains its own set of contradictions and disjunctions. He writes:<sup>172</sup>

Contrary to its reputation for being written and therefore coherent in structure and purpose, the American constitution is in reality as notorious as the Stuart constitution for its flaws, anomalies, disjointedness and for those elements that remain unexpressed and indefinable.

Interestingly, Foley sees federalism itself as a form of constitutional abeyance “as it embodies a constantly changing conception of the ambiguity implicit in the coexistence of national integration and political decentralization.”<sup>173</sup>

A huge gap in the American constitution was revealed during the “imperial presidency” episode in the early 1970s when President Richard Nixon used the tactic of impoundment - i.e., the practice of not spending funds authorized by Congress - on an unprecedented scale. The ensuing struggle between the President and Congress “revealed the full extent of the anomalies, inconsistencies, and margins of indeterminacy within the constitution, and the result was a crisis in the conventional American

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<sup>170</sup> ibid., p. 37.

<sup>171</sup> ibid., p. 39.

<sup>172</sup> ibid., p. 79.

<sup>173</sup> ibid., p. 74.

conception of constitutionality.”<sup>174</sup> That is to say, the constitutional abeyance pertaining to presidential power, previously “obscured through the judicious use of negotiation and accommodation, and through the encouragement of a consensus,” was suddenly and thoroughly exposed during the Nixon Presidency. It was the destruction of constitutional obfuscation that, Foley argues, set off the intense constitutional crisis in America that endured well after Nixon left the White House.

Foley makes the important point that, in devising the executive branch of government, the American founding fathers were unable “to transcend their own epoch and to detach themselves from monarchical models elsewhere.”<sup>175</sup> Foley observes, in other words, that, while they rejected the idea of position based on blood, title or privilege, the executive they had in mind was designed in effect to reproduce the monarchy. Foley quotes George Reedy:<sup>176</sup>

when they sat down to write a constitution...*they were incapable of thinking of government in any terms other than monarchy....*Someone must have ultimate and final authority. Therefore, their conclusion, although not stated in these terms, was a solution which placed in office a monarch but limited the scope of the monarch’s activities. [Emphasis added.]

Foley also quotes the American historian, Arthur Schlesinger: “...there is reason to believe that the doctrine that crisis might require the executive to act outside the constitution in order to serve the constitution remained in the

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<sup>174</sup> ibid., p. 57.

<sup>175</sup> ibid., p. 69.

<sup>176</sup> ibid.

back of their minds.”<sup>177</sup> Describing this comment as “unduly cautious,” Foley emphasizes that “It would have been well nigh impossible for the Founding Fathers to expunge such thoughts from their minds.”<sup>178</sup> This is an important clarification because it negates the argument that a constitutional contradiction or anomaly or obscurity or gap cannot really qualify as an abeyance if the constitution’s drafters were not aware of other options or approaches.

Judicial institutions would seem to be ones that would value clarity and definition. And yet, the U.S. Supreme Court has perceived the abeyances in the constitution and shown a deep reluctance to deal with them in an explicit manner, especially the issue of executive prerogative. Indeed, Foley suggests that the “Court possesses a highly developed understanding of the properties of the constitution and of its need for protective abeyances.”<sup>179</sup> He quotes Justice Felix Frankfurter to affirm his point:<sup>180</sup>

A constitutional democracy like ours is perhaps the most difficult of man’s social arrangements to manage successfully....Clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

One technique that the Court uses to maintain abeyances is to classify sensitive and potentially disruptive constitutional questions as “political questions” and direct them back to the President and Congress. In so doing, the Court chooses

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<sup>177</sup> ibid., p. 70.

<sup>178</sup> ibid.

<sup>179</sup> ibid., p. 78.

<sup>180</sup> ibid.

to not make a formal constitutional pronouncement that would risk exposing a long-preserved constitutional abeyance.

Foley views abeyances in positive terms. Rather than being symptoms of pathology, constitutional abeyances may “denote an advanced constitutional culture adept at assimilating diverse and even conflicting principles of government within a political solidarity geared to manageable constitutional ambiguity.”<sup>181</sup> In other words, a constitution unable to accommodate incompatibilities and contradictions may turn out to be a constitution too rigid to maintain political stability. The result of extending constitutional claims to their logical conclusion, Foley argues,<sup>182</sup>

would be that, in the hopeless search for clarification, rationalization, and finality, the constitution’s abeyances would be breached and the sensitive core of the constitution’s deep-seated anomalies would be dangerously exposed. The incentives to work with the constitution’s inconsistencies, therefore, are supplemented by the deterrent effect of the explosive risk connected to the full revelation of those elements of the constitution that remain unresolved...

The conclusion that Foley draws is that the unwritten components of a constitution can be “its most fundamental properties” because they represent the “system of abeyances by which any constitution ultimately survives or perishes.”<sup>183</sup> What remains unwritten can be “just as much responsible for the operational character and restraining quality of a constitution as its more tangible and codified components.”<sup>184</sup>

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<sup>181</sup> Ibid., p. 60.

<sup>182</sup> Ibid., p. 77.

<sup>183</sup> Ibid., p. 81.

<sup>184</sup> Ibid., p. 82.

Clearly, the theory of constitutional abeyances is contrary to what is usually meant by constitutional development. That is to say, constitutional development is normally thought of as a process of constitutional clarification, of settling unresolved issues, of reducing gaps in understanding. Foley, however, suggests that constitutional development can mean the maintenance of gaps, the avoidance of 'hard' issues, and the tolerance of contradictions. The desirability of such a strategy is, of course, open to question. This dissertation, once it has determined the effect of a constitutional abeyance on the role of Canada's federal government in formulating public policy, will be able to make some comment on the merits of constitutional abeyance theory.

To sum up, constitutional abeyance refers to an issue that, constitutionally, is left imprecise because to attempt to define it in explicit terms is to risk severe constitutional upheaval. Characterized by ambiguity in meaning, abeyances have been described by Foley as "contradictions," "fundamental constitutional anomalies," "half-answers," "partial truths," "obscurities," "inconsistencies," and "gaping holes of constitutional unsettlement." If, then, an abeyance can be said to be (a) a contradiction or inconsistency or anomaly or partial truth or obscurity or gap in the constitution, that (b) if pressed for clarity has the potential to produce serious constitutional crisis, and that (c) endures for a substantial period of time since it tends to be avoided by political leaders or, when it is addressed, it is with the use of obfuscation tactics, e.g., vague terminology or mixed messaging,

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then we can conclude that the founders' failure to constitutionally assert Canada's full sovereignty qualifies as a constitutional abeyance.

In Canada, Foley's theory of constitutional abeyances has been applied by David M. Thomas in his book, Whistling Past the Graveyard. He interprets abeyances as "understandings: tacit, ambiguous, geared to order and tradition and deference; based upon fear of change and the resolve, consciously or unconsciously, to exclude fundamental dissent[.]"<sup>185</sup> Plainly, the abeyance of this dissertation fits this interpretation almost to the letter.

For Thomas, the central issue that has been held in abeyance since 1867 has been "the status and recognition of Quebec as something other than a province."<sup>186</sup> He contends further that, despite legal and fiscal measures to recognize the differences between Québec and English Canada, Canadians have avoided constitutionalizing those differences.

Stressing that Confederation was "a patchwork quilt of élite agreement," Thomas identifies a range of issues that the founders of the country bequeathed to later generations. He writes:<sup>187</sup>

It bears repeating that the 1867 arrangement did not deal directly with Quebec's claim to distinct status and powers. *It did not proclaim that*

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<sup>185</sup> D. M. Thomas, Whistling Past the Graveyard, (Don Mills, ON: Oxford University Press, 1997), p. 2.

<sup>186</sup> Ibid., p. xvii.

<sup>187</sup> Ibid., p. 77. Political scientist, Roger Gibbins, agrees that the issue of Canadian sovereignty and independence was one of several issues that were subject to "almost unbroken silence" from the founders. See his "Constitutional Politics," in J. Bickerton, Alain-G. Gagnon, (eds.), Canadian Politics, 4<sup>th</sup> edition, (Toronto, ON: Broadview Press, Ltd., 2004), pp. 129-130. Similarly, David Smith remarks that the significance of Confederation for Canadians "*was obscured because the Act of Confederation failed to be specific about the new status it was establishing - a lacuna resulting from a belief in an indivisible Crown and the overriding status of British subject.*" [Emphasis added.] See D. Smith, The Invisible Crown: The First Principle of Canadian Government, pp. 14-15.

*Canada was an independent nation.* It did not contain a declaration that citizens had rights as individuals. It assumed away any problems with future amendments. It dodged the question of the rights of French speakers outside Quebec. It created an upper house that was a vehicle for patronage, not governance....It avoided any clear statement that provinces were - or were not - equal. It accepted the traditions of British responsible government without, perhaps, understanding fully what abeyances these traditions contained (particularly those surrounding the exercise of 'sovereign powers'). [Emphasis added.]

Every time Canada's sovereignty and the other issues were raised, Thomas writes, "it was to the growing realization that they were intractable, volatile, injurious to our constitutional health, and better left alone."<sup>188</sup> Determined to avoid the "no-go areas," Canadians have used "[u]narticulated understandings, elite consensus and accommodation, asymmetry, and political power and patronage" as substitutes for "constitutional clarity."<sup>189</sup>

To illustrate this point, Thomas points out that in 1925 federal Justice Minister, Ernest Lapointe, concluded that the constitution had to be patriated from Britain but was over-ruled by Cabinet which believed that such a step "was too dangerous an issue to raise, since it was likely to unite in opposition the imperialistic Ferguson with Taschereau, who considered that Britain could still provide significant protection for French-Canadian rights."<sup>190</sup>

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<sup>188</sup> D. Thomas, Whistling Past the Graveyard, pp. 76-77.

<sup>189</sup> Ibid., p. 77.

<sup>190</sup> Ibid., p. 118. In an address at the University of Toronto, reprinted in the Canada Law Journal in 1921, Québec Premier Taschereau rhetorically asked: "when so many conflicts of a racial, religious or ethnical nature are liable to arise, have we not all a greater sense of security from the fact that the decisions to be rendered will come from men who preside over the Privy Council, men remote from our local strifes and disputes, unprejudiced by their surroundings?" Quoted in J. Krikorian, "British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case *Nadan v. The King*," Canadian Journal of Political Science, Vol. 33, No. 2, June 2000, p. 298n.

Thomas supports the constitutional recognition of distinct society status for Québec and he ends his study by declaring that the time to confront this abeyance and lay it to rest has arrived. However, Thomas is not clear about what he means by laying it to rest. Confronting it and laying it to rest could mean constitutional recognition is accepted by the country, or it could mean rejection by the country. Either way, it would be a step that Foley, for one, would not take. In his view, constitutions do not solve, and cannot be expected to solve, “the basic underlying questions of authority and power.”<sup>191</sup> The attempt to have constitutions resolve those questions risks setting off a constitutional crisis. Foley writes:<sup>192</sup>

Abeyances are important, therefore, because of their capacity to deter the formation of conflicting positions in just those areas where the potential for conflict is most acute. So central are these abeyances, together with the social temperament required to sustain them, that when they become the subject of heightened interest and subsequent conflict, they are not merely accompanied by an intense constitutional crisis, they are themselves the essence of that crisis.

Of course, there are consequences to holding issues in abeyance; presumably, Thomas would suggest that not recognizing Québec’s distinct society status in the constitution has been inimical to the province’s development and, perhaps, to national unity.

In wanting an end to the abeyance he identifies, Thomas would probably get support from James Buchanan. In his review of Foley’s book, he is dismissive of the central thesis. His criticism is that Foley does not appreciate

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<sup>191</sup> *Ibid.*, p. 97.

<sup>192</sup> M. Foley, *The Silence of Constitutions*, p. xi.

the difference between constitutional fuzziness as an explanation of political stability in the past and constitutional fuzziness as a prescription to minimize political conflict in the future. Foley's argument, Buchanan writes, "suggests that conflicts are best avoided when neighbours pretend that fences exist while deliberately refraining from attempted construction, repair, and clarification."<sup>193</sup> The criticism has merit, but perhaps Buchanan is missing Foley's warning that all questions of political authority simply cannot be dealt with once and for all in a constitution. Perhaps it is appropriate or inevitable that some issues, for one reason or another, are left in abeyance. However, I am inclined to agree that forcing clarification of a long-held abeyance is sometimes necessary to allow other issues to be dealt with.

#### *Holding Canadian Sovereignty in Abeyance*

The essential objective of this dissertation is to demonstrate that there were consequences to the founders' failure to establish Canada as a sovereign nation. To do this, it is necessary first to show how Canada was not sovereign at Confederation. This can be done by pointing to three serious omissions in the 1867 Act.

One is the absence of any provision for the establishment of a Canadian final court of appeal. The Act does contain a clause empowering the federal government to set up such a court but the main framers of the constitution, Macdonald and Cartier, were opposed to the idea of a Canadian supreme court serving as the country's final court of appeal. In an 1864 address in Québec's

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<sup>193</sup> See J. Buchanan's review in Public Choice, 73: 1, 1992, p. 132.

Parliament House, Macdonald explained the founders' thinking on which judiciary should deal with regional disputes and grievances. He declared:<sup>194</sup>

The people of every section must feel that they are protected, and by no overstraining of central authority should such guarantees be overridden. Our constitution must be based on an Act of the Imperial Parliament, and any question as to overriding sectional matters determined by "Is it legal or not?" The judicial tribunals of Great Britain would settle any such difficulties should they occur.

What Macdonald seems to be saying here is that the founders did not have confidence in the capacity of the country's future judges to make decisions impartially. Nor evidently did he have confidence in the capacity of the founders to design judicial institutions to ensure impartiality. In addition, Macdonald must have known that the president of the JCPC was simultaneously also a member of the British Cabinet. It, therefore, was inevitable that, in deciding Canadian cases, the Law Lords would not only ask, is it legal, but also, what are the political effects. The JCPC's impartiality would depend on the case before it.

Cartier's views on a Canadian supreme court were not unlike Macdonald's: "I do hold, and the spirit of the conference at Quebec indicated, that the appeal to the judicial committee of Her Majesty's Privy Council must always exist, even if the court in question is established."<sup>195</sup> The decision not

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<sup>194</sup> G.P. Browne, (ed.), Documents on the Confederation of North America, (Toronto, ON: McClelland and Stewart Limited, 1969), p. 95.

<sup>195</sup> Quoted in F. MacKinnon, "The Establishment of The Supreme Court of Canada," in W.R. Lederman, (ed.), The Courts and the Canadian Constitution, (Toronto, ON: McClelland and Stewart Limited, 1964), p. 107n. For more on the Supreme Court, see J. Smith, "The Origins of Judicial Review in Canada," Canadian Journal of Political Science, 16: 1, March 1983; P. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, (Ottawa, ON: Queen's Printer, 1969); and B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians," in W.R. Lederman, (ed.), The Courts and the Canadian Constitution, (Toronto, ON: McClelland and Stewart Limited, 1964).

to make Canada's Supreme Court the country's final court of appeal was hugely significant.

Chapter one pointed out that the JCPC consistently favoured the provinces in its decisions. The approach to Canadian federalism that it articulated, most notably in the *Maritime Bank* case, was clearly provincialist in orientation. Why it adopted this position, especially since the founders crafted a highly centralist constitution, will probably never be known. However, based on a study by Jacqueline Krikorian of a 1926 case, it is possible to suggest that it saw itself as the defender of British government policy. As mentioned, the President of the Judicial Committee was simultaneously a senior member of the British Cabinet; thus, it would be hard to believe that political factors did not enter into the deliberations of the Committee members.<sup>196</sup>

One of the British government's policies that the JCPC might have wanted to defend through its rulings was the protection of minority rights. As Krikorian has shown, the British government strongly asserted that it had a right and an obligation to protect the interests of the Protestant minority in the Irish Free State and that, therefore, the right of appeal to the JCPC should be maintained. The British government may have seen the minority situations in both Canada and the Irish Free State as being comparable. Certainly,

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<sup>196</sup> The political function of the JCPC did not escape the notice of Henri Bourassa. In a House of Commons speech, Bourassa described the Committee as "a semi-political, semi-judicial body," adding, "they do not ignore that fact in England." See *House of Commons Debates*, June 30, 1931, p. 3217. Though he saw the tribunal as partly serving a political function, he did not favour the termination of appeals to the JCPC.

Québec's leaders wished to preserve JCPC jurisdiction for Canada because they believed that it would better protect their rights and interests than a Canadian court.

Krikorian shows in great detail how Britain's policy on Irish independence shaped the JCPC's decision in the 1926 Canadian case, *Nadan v. The King*, which ruled that federal legislation to terminate criminal appeals to the JCPC was invalid. If the legislation had been allowed, it might have been emulated by Irish politicians in order to further their independence goal. The British government was not willing to see this occur.

The problem, as Krikorian points out, is that it is “possible that the tribunal's 'political approach' to judicial decision making in the *Nadan* case was not an isolated incident.”<sup>197</sup> At this point, we can only wonder to what extent the JCPC's decisions on, for instance, the pogg power, the trade and commerce power, and the international treaty implementation power were based on imperial and not Canadian interests.

Aside from providing a possible explanation for the JCPC's provincialist orientation, the *Nadan* case, as discussed by Krikorian, is interesting for another reason. The study shows that the Canadian government conspired with the JCPC and the British government to impede Ireland's march to independence. Krikorian writes: “The Canadian government was aware of the tribunal's objectives in this matter and quietly succumbed to the politicization

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<sup>197</sup> J. Krikorian, “British Imperial Politics and Judicial Independence: The Judicial Committee's Decision in the Canadian Case, *Nadan v. The King*,” Canadian Journal of Political Science, Vol. 33, No. 2, June 2000, p. 331.

of its judicial process.”<sup>198</sup> The *Nadan* decision aroused an outpouring of nationalist sentiment in Canada, but the federal government of Mackenzie King was unmoved. It did not make the decision a campaign issue in the 1926 election nor did it vigorously protest the decision or the intentions of the JCPC and the British government during the 1926 Imperial Conference. While Ireland sought, and fully expected to have, the support of the Canadian government for its position that the former colonies had the right to end criminal appeals to the Judicial Committee, Canada in fact had little to say at the Conference and tacitly accepted the British argument. Krikorian states that the Canadian government saw the British position as an attempt to “reinforce the inferior status of the Irish Free State, not Canada.” But it is more than a little breathtaking that Canada would not object to the blatant politicization of the country's final court of appeal.

Also noteworthy are the views of the governments of Canada and Ireland on the British government's position that the JCPC protected the rights of the minorities in the two nations. They could not have been more different. While the Irish government regarded the claim as “offensive,”<sup>199</sup> the government of Canada, by its complicity in the JCPC judgment as well as by its longstanding acceptance of the JCPC's jurisdiction over Canada, apparently saw the British claim as legitimate. No doubt, the attitude of Québec's leaders on the JCPC was responsible for this federal acquiescence, but it is yet another example of

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<sup>198</sup> *Ibid.*, p. 294.

<sup>199</sup> *Ibid.*, p. 305.

the federal habit of deference to those jurisdictions, within Canada and outside of Canada, that challenge its authority.

International affairs is a second issue that did not receive adequate treatment in the founders' constitution. Indeed, it appears that there was very little discussion of an international affairs power during the Confederation debates. The framers were not unaware of the issue as evidenced by the reference to it in the thirtieth Resolution, which is perhaps the most striking illustration of the founders' submissive attitude toward Britain. The Resolution, a version of which became s. 132 of the Constitution Act, 1867, states:

The general government and parliament shall have all powers necessary or proper for performing the obligations of the federated provinces, as part of the British Empire, to foreign countries, arising under treaties between Great Britain and such countries.

Apparently, the founders could not see the day when Canada would be a totally self-governing, self-determining nation, able to negotiate, sign and implement international treaties on its own.

Canada's arrested constitutional development in the area of international treaty-making and treaty-implementing lasted well into the twentieth century. In a book published in 1922, W.P.M. Kennedy observed that, "As the law of nations now stands Canada is not a sovereign state."<sup>200</sup> To

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<sup>200</sup> W.P.M. Kennedy, The Constitution of Canada: An Introduction to Its Development and Law, (London, UK: Oxford University Press, 1922), p. 446.

demonstrate his point, Kennedy set out Canada's limited powers regarding commercial treaties. He wrote:<sup>201</sup>

Canada will be consulted by the imperial government when a general commercial treaty is under consideration in order that special concessions, if desired by Canada, may be secured. If Canada wishes to establish closer commercial relations with a foreign state, the imperial government will appoint Canadian plenipotentiaries to carry on negotiations, and they will sign jointly with an imperial representative any treaty which may arise out of the discussions. The interests of the empire at large must not be sacrificed and Canada must extend to the empire all concessions granted to a foreign power. The treaty must be ratified by the crown on the advice of the imperial ministry acting on the request of Canada.

Kennedy also noted the constraints on Canada with respect to political treaties. "As international law stands Canada cannot make an independent political agreement."<sup>202</sup> In addition, "The right of the imperial government to hold the place of ultimate interpreter of a political treaty has never been disputed by Canada...."<sup>203</sup>

It was in 1923, the year after Kennedy's book was published, that Canada for the first time negotiated a treaty entirely by and for herself. Called the *Halibut Fishery Treaty*, it was with the US. But in the very next year, 1924, Great Britain concluded the Treaty of Lausanne with Turkey on behalf of the British Empire.<sup>204</sup> In other words, for decades after Confederation, Canada had no international status and, thus, could not negotiate directly with a foreign country on any matter, political or

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<sup>201</sup> Ibid., pp. 349-350.

<sup>202</sup> Ibid., p. 351.

<sup>203</sup> Ibid.

<sup>204</sup> F.R. Scott, Essays on the Constitution, p. 160.

commercial. What is more important, however, is that Canada's leaders, from the time of Confederation until well into the twentieth century, appeared to have no desire to acquire international personality for the country and to give it the power to enter into, conclude and implement international treaties on its own.

On the question of constitutional amendment, the founders also had little to say. Paul Gérin-Lajoie agrees. In his classic study of constitutional amendment in Canada, he writes: "The possibility of providing for such an amending procedure in the Act itself does not appear to have ever been openly considered in the course of the pre-Confederation debates."<sup>205</sup> None of the Québec Resolutions makes mention of an amendment procedure. In one of the few references to the issue in the Confederation debates, Thomas D'Arcy McGee argued that the constitution "can only be amended by the authority that made it."<sup>206</sup>

F.R. Scott concludes that the founders accepted that constitutional amendments would be made as they had always been made: by the Imperial power upon request by a British North American legislature which, after Confederation, would be the Parliament of Canada. Thus, there was no need to insert an amendment procedure into the Constitution. Paul Gérin-Lajoie has a somewhat different take. He suggests that no amendment process was included in the Constitution because the provinces considered the Imperial

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<sup>205</sup> P. Gérin-Lajoie, Constitutional Amendment in Canada, (Toronto, ON: University of Toronto Press, 1950), p. 33.

<sup>206</sup> Canada. Provincial Parliament. Parliamentary Debates..., p. 146.

authority to be “the ultimate safeguard of the rights granted to the provinces and to minorities by the Constitution.”<sup>207</sup> In other words, the view of Gérin-Lajoie appears to be that some provincial representatives were more willing to place their trust in the Imperial power than in the people they were negotiating with, who would become the leaders of the very country that they were helping to establish. It is an astonishing conclusion to reach, but as we shall see later, it is corroborated on the issue of a supreme court.

In any event, the power to amend the Canadian constitution resided in the UK Parliament for many decades. It was not until 1982 that Canada patriated its Constitution and that Canada’s Constitution got its own amending formula.

As a result of these omissions, what the founders established in 1867 was a state with limited powers of self-government - not a colony but not a sovereign nation. A 1920 article commented on the effect of the founders’ work on national autonomy. The author quoted Edward Blake who in 1874 described Canadians as “four millions of *Britons* who are not free” [Emphasis added]. The author then wrote:<sup>208</sup>

There were still at that time very considerable limitations on Canadian self-government. In the field of foreign policy and international relations Canada was then all but voiceless. Even in regard to her domestic affairs her autonomy was far from complete. She had no power to amend her written constitution. Her legislation even in domestic matters was subject to the disallowance of the British government, and indeed the governor-general, in his instructions, was

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<sup>207</sup> P. Gérin-Lajoie, Constitutional Amendment in Canada, p. 38.

<sup>208</sup> W.S. Wallace, “The Growth of Canadian National Feeling,” Canadian Historical Review, Vol. 1, No. 2, June 1920, pp. 157-158.

specifically commanded to reserve certain classes of bills for the signification of the royal pleasure. Canada could not control the immigration entering her ports from the British Isles; she could not legislate with regard to Canadian shipping on the high seas; she could not control copyright within her own borders. The principle was not yet fully established that she could look after her own defence, or even the suppression of internal disorders. The force which put down the Riel Rebellion of 1870 was not a Canadian, but an imperial force. British troops still garrisoned Halifax, and the command of the military forces of Canada was still vested in an imperial general officer. Even in the executive and the judicial spheres restrictions remained. The governor-general had a prerogative which the Crown in England no longer enjoyed, the right of pardon; and for a final court of appeal Canadians had to go to the judicial committee of the Privy Council at Westminster.

Given this list, it comes as no surprise that James Mallory would draw the conclusion that, in fact, "The British North America Act of 1867 did not increase the powers of self-government of British North America..."<sup>209</sup> It merely widened the area covered by "a single colonial Parliament" and "subtly enhanced" the status of Canada by referring to the legislature as a Parliament.<sup>210</sup>

Yet the language that the founders used was often the language of sovereignty. Consider, for instance, the words of Macdonald himself:<sup>211</sup> in his view, he and his colleagues were "trying to form a great nation," "joining these five peoples into one nation...to take our position among the nations of the world." Cartier stated that, "Nous avons a faire en sorte que cinq colonies...forment une seule et grande nation...Le temps est venu pour nous de

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<sup>209</sup> J.R. Mallory, The Structure of Canadian Government, revised edition, (Toronto, ON: Gage Publishing Limited, 1984), p. 22.

<sup>210</sup> Ibid., p. 23.

<sup>211</sup> These quotations of the founders are from E. Forsey, Freedom and Order: Collected Essays, (Toronto, ON: McClelland and Stewart Limited, 1974), pp. 253-254.

former une grande nation...Lorsque nous serons unis...nous formerons une nationalité politique indépendante de l'origine nationale. »

Cartier's colleague, Hector Langevin, declared : « La mesure actuelle est destinée à nous faire prendre rang dans la grande famille des nations...former une puissante nation...Nous ne formerions qu'une seule nation....Je parle de nation grande et forte...une grande nation...une nationalité nouvelle...une grande et puissante nation. » Taché said that Confederation would create « une puissante nation une nation prospère...une nation indépendante.” Belleau similarly stated: “Tous les éléments qui sont nécessaires pour faire une nation puissante se trouvent dans les colonies réunies....La réunion de ces éléments ferait de la confédération une grande puissance parmi les autres nations du globe,...une peuple nouveau et puissant. »

These expressions of the founders belied the actual nature of the state they were creating. They certainly misrepresented the contents of the Act of Confederation. In Foley's language, they exercised the tactic of obfuscation. But some members of the Canadian Legislative Assembly were not fooled by the framers' rhetoric. In one of the few references to independence and sovereignty in the Confederation debates, Thomas Scatcherd told the Assembly:<sup>212</sup>

Now, the great measure before this House has been considered by some as designed to create a nation, by others as a means of increasing largely the material and commercial interests of the country. I cannot see that

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<sup>212</sup> Canada. Provincial Parliament. Parliamentary Debates..., p. 748.

the Federation of the provinces has anything of a national phase in it. For those who are dissatisfied with remaining as colonists of Great Britain, it may be very well to look forward to the creation of a nationality or state of national existence. When you speak of national existence, you speak of independence; and so long as we are colonists of Great Britain, we can have no national existence.

The letters of A.T. Galt suggest that full sovereignty for Canada may indeed have been on the minds of the founders. In a letter to the Governor-General, Sir John Young, in May 1869, *barely two years after Confederation*, Galt wrote: "I regard the Confederation of the British North American provinces as a measure which must ultimately lead to their separation from Great Britain."<sup>213</sup> In the same year, he wrote to Britain's Secretary of State for War, stating: "I therefore think the wisest policy will be to commence a discussion of our possible future as an independent country, so as to prepare for the time when the trial will have to be made."<sup>214</sup> Galt went so far as to advocate in 1870 the acquisition of an independent treaty power for Canada for commercial agreements.<sup>215</sup> Why would Galt make these comments so soon after Confederation? For how long had he been entertaining these views? Did he make similar comments to his colleagues during the Québec Conference? Galt may have realized how difficult it would be to create a country and then urge its citizens to direct their allegiance elsewhere. In any event, it suggests

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<sup>213</sup> See O.D. Skelton, Life and Times of Sir Alexander Tilloch Galt, (Toronto, ON: McClelland and Stewart Limited, 1966), p. 221.

<sup>214</sup> Ibid., p. 223.

<sup>215</sup> Ibid., p. 226.

that full sovereignty for Canada was an option of which the founders were aware.

To F.R. Scott, the founders did in fact have the clear intention of establishing a nation that was independent and equal in status to Britain, and he refers to the comments of a number of founders to support this view. For instance, he quotes George Brown: as a result of Confederation, “we would rise at once to the position of a great and powerful state.”<sup>216</sup> He alludes also to a speech by John A. Macdonald in which Macdonald declares that after Confederation the relationship between Canada and Britain will be “more a case of a healthy and cordial alliance.”<sup>217</sup> For Scott, Macdonald’s use of the word, “alliance,” is significant. “Allies can be equals, but colonies, provinces, and dominions are mere British possessions.”<sup>218</sup> While our evidence suggests otherwise, Scott believed that, for the founders, Confederation was supposed “to carry colonial development beyond the point of mere responsible government, and to end the era of subordination.”<sup>219</sup>

Two of the other founders mentioned by Scott are Langevin and Christopher Dunkin. Scott refers to a speech made by the former during which Langevin quoted from an article which pointed out how unfavourable was the

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<sup>216</sup> Quoted in F.R. Scott, Essays on the Constitution, p. 6. This comment by Brown does not specifically mention either independence or sovereignty, although it can be said to be in the language of independence.

<sup>217</sup> Quoted in ibid., p. 11.

<sup>218</sup> Ibid. Scott’s inclusion of “dominions,” the singular of which Canada was called for most of its young life, seems to undercut his own argument.

<sup>219</sup> Ibid., p. 8.

position of a Canadian by comparison with that of an American: the latter was free to become President, but “the British American could not reasonably aspire even to become the governor of his native province; and if he were to go to England, all the influence which he could command would probably not procure him a presentation to his sovereign.”<sup>220</sup> He then asked: “Does this not show that the position of a Canadian, or of any other inhabitant of the colonies, in England is a position of inferiority? We desire to remove that inferiority by adopting the plan of Confederation now submitted to the House.”<sup>221</sup>

Scott notes that one of the Canadian legislators, Christopher Dunkin, not a supporter of the union proposal, made the argument that Confederation would lead to independence,<sup>222</sup>

for disguise it how you may, the idea that underlies this plan is this, and nothing else - that we are to create here a something - kingdom, vice-royalty or principality - something that will soon stand in the same position towards the British Crown that Scotland and Ireland stood in before they were legislatively united with England; a something having no other tie to the Empire than the one tie of fealty to the British Crown....

Dunkin’s point, of course, is that Confederation will mean a political break from Britain, which he opposed. Interestingly, Macdonald addressed his

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<sup>220</sup> Quoted in ibid., p. 11.

<sup>221</sup> Quoted in ibid.

<sup>222</sup> Quoted in ibid., pp. 11-12.

concern, not by acknowledging the eventuality, but by pointing to the loyalty of British North Americans. His argument went as follows:<sup>223</sup>

One argument, but not a strong one, has been used against this Confederation, that it is an advance towards independence. Some are apprehensive that the very fact of our forming this union will hasten the time when we shall be severed from the mother country. I have no apprehension of that kind....Does anyone imagine that, when our population, instead of three and a half, will be seven millions, as it will be ere many years pass, we should be one whit more willing than now to sever the connection with England? Would not those seven millions be just as anxious to maintain their allegiance to the queen and their connection with the mother country as we are now?...Instead of looking upon us as a merely dependent colony, England will have in us a friendly nation - a subordinate but still a powerful people - to stand by her in North America in peace or in war.

Evidently, Macdonald saw no contradiction between his nation-building efforts and rhetoric and his acceptance of Canada's subordination to the Imperial power.

#### *Why the Founders Limited Their Self-Government Aims*

The question of why Confederation's advocates were so anxious to maintain the closest possible connection with Britain - indeed, to remain subordinate to Britain - has engaged a number of writers. One reason, noted earlier, is that there were thoughtful legislators like Christopher Dunkin who favoured not British North American federation but rather imperial federation to unite all of Britain's colonies. To have insisted on full sovereignty may have alienated too many of the founders. A second reason comes from Christopher

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<sup>223</sup> Canada. Provincial Parliament. Parliamentary Debates..., pp. 43-44. This was another of the few references in the Confederation debates to the issue of sovereignty for Canada. David Smith adds that "Only once during the Quebec Conference in 1864 did the drafters overtly confront the contradiction posed by the two principles their scheme sought to reconcile: the centrifugal principle of federalism and the centripetal principle of monarchy." See D. Smith, The Invisible Crown: The First Principle of Canadian Government, p. 29.

Moore. He suggests that the reason simply had to do with the 'pull', appeal and dominance of London. But he also notes the difficult position in which Canadians were placed:<sup>224</sup>

There was no debate about monarchy and Empire in the 1860s, because there were almost no voices arguing against them. Financially, economically, politically, culturally, militarily, London was the capital of the world in the mid-nineteenth century, even more than Washington and New York were in the late twentieth. Even Antoine-Aimé Dorion and George-Étienne Cartier could speak unselfconsciously of "home" when they spoke of England. Joseph Howe in his anti-confederate phase did his best to suggest Nova Scotians were choosing between "London under the dominion of John Bull" and "Ottawa under the dominion of Jack Frost," *but the confederation-makers assiduously avoided forcing such a choice.* [Emphasis added].

Here, Moore implies that the founders were, indeed, aware that sovereignty was an option but chose not to make it a clear one. He states that "the confederation-makers assiduously avoided forcing such a choice." In Foley's language, the confederation-makers seemed to want to hold the idea of Canadian sovereignty in abeyance.

A third reason was that in 1865 the British Parliament passed the Colonial Laws Validity Act. It nullified any colonial law that was inconsistent with enactments of the British Parliament insofar as it applied to the colony. In this way, Britain re-asserted its control over British North America and the other colonies. The Act did not become ineffective until the Statute of Westminster was accepted by Canada in 1931. Macdonald and his colleagues may have perceived the enactment as an indication of the imperial government's negative attitude toward sovereignty for Canada.

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<sup>224</sup> C. Moore, 1867: How the Fathers Made a Deal, (Toronto, ON: McClelland and Stewart Inc., 1997), p. 242.

Still, it is arguable that, given the widespread support in Britain among the public, the press and the political élite for a loosening of, if not a break in, the relationship between the Imperial power and Canada, given Britain's experience with the United States and its implacable opposition to American annexation of the colonies,<sup>225</sup> Canada's founders may have acquired more autonomy for their country had they bargained a little more aggressively. The adoption of the Act seems to have persuaded the founders that full sovereignty was not a realistic course of action and that pursuing it would create political turmoil and alienate some of their supporters.

A more compelling reason for the founders' failure to pursue full sovereignty is that they considered the connection with Britain to be the force that would keep Canada together. Reinforcing this argument was the preference of Québec's leaders for the maintenance of the Imperial link. They preferred this because they believed that Imperial institutions would be more protective of provincial rights, or at least the rights of the French minority in British North America, than anything the founders could come up with.

David Thomas agrees with this general argument. He shows that the founders, even as they said that they were creating a new nation, repeatedly used the language of loyalty to Britain. According to Thomas, they, particularly Macdonald, had a reason to do so. He writes:<sup>226</sup>

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<sup>225</sup> Ged Martin argues that Britain's "core motive" for supporting Confederation was that "the British did not wish their provinces to form part of the American republic." See G. Martin, Britain and the Origins of Canadian Confederation, 1837-1867, (London: UK, MacMillan Press Ltd., 1995), p. 191.

<sup>226</sup> D. Thomas, Whistling Past the Graveyard, p.54.

Loyalty to Britain, and to British principles, was Macdonald's best available antidote against distance, provincialism, economic pressures, and the different traditions and needs of Quebec.... Confederation in 1867 therefore represented a cautious political settlement that maintained the virtues of the British connection and which, given the political beliefs of its chief architect, avoided, wherever possible, tackling problems best left, in his view, well alone.

It appears, then, that loyalty to the Imperial power was to be the main tie that bound the disparate elements of British North America, and that, ***“Severing the Imperial tie would have meant tackling the fundamental problem of sovereignty rather than the division of sovereign powers. Canadians...were still to be loyal subjects and not a sovereign people.”***<sup>227</sup> [Emphasis added.]

While the obfuscation tactic may have served Macdonald's political purposes, Canadians, says Thomas, have paid a high price. He writes.<sup>228</sup>

The irony is that Macdonald's very Britishness, Cartier's and Quebec's acceptance of British institutions, and the success of a court-statist patronage approach sowed the seeds for one of our now most problematic questions, the lack of an overarching agreement on national identity and community.

He suggests further that loyalty to the imperial authority may, paradoxically, have undermined “the arsenal of federal powers” right from the start. It was not the only factor but it was clearly a contributing one. The author does not spell out what he means here specifically but he may have been thinking that the founders' decision to maintain the Judicial Committee as Canada's final court of appeal did result in a federal arsenal with far fewer powers.

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<sup>227</sup> ibid., p. 65.

<sup>228</sup> ibid., p. 70.

David Smith concurs with Thomas on the reason for continued Canadian subservience to Britain after Confederation, stating, "Internal harmony was achieved through an external appeal."<sup>229</sup> Writing in 1991, Smith suggested that federal initiatives "have yet to offer an alternative set of national norms to that once provided by imperial loyalty."<sup>230</sup>

With respect to Québec's preference for British institutions, recall Gérin-Lajoie's comments on constitutional amendments (pp. 70-71). It was demonstrated as well during the debate on the establishment of the Supreme Court in 1875. Gagnon and Montcalm report that French-Canadian politicians, already concerned about federal use of its powers of reservation and disallowance, opposed the setting up of the court "on the grounds that the inevitable English-Canadian majority on the Supreme Court would not sufficiently respect Quebec's distinct civil law tradition."<sup>231</sup> The authors do not make clear in the context that the JCPC - an all-English entity, based in another country an ocean away, whose members had very little knowledge of or experience with either the province's civil code or the federal system of government - would remain Canada's final appellate court.

The report of the Tremblay Commission elaborated somewhat on the province's reaction to the creation of the Supreme Court. It pointed out that a group of French-Canadian Members opposed the measure, and one Conservative

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<sup>229</sup> D. Smith, "Empire, Crown and Canadian Federalism," p. 469.

<sup>230</sup> Ibid., p. 470.

<sup>231</sup> A.-G. Gagnon, M.B. Montcalm, Quebec: Beyond the Quiet Revolution, (Scarborough, ON: Nelson, 1990), p. 138.

MP from Québec, Henri Thomas Taschereau, proposed an amendment under which cases having to do with provincial laws or with provincial legislative competence would be removed from the proposed court's jurisdiction.<sup>232</sup> The MP's amendment made no reference to the JCPC so, presumably, he was content to let it continue as Canada's final court of appeal.

Arthur Silver also mentions the Supreme Court issue, although he focuses on the reactions of the French Québec press. "One thing is certain," charged Le Courrier du Canada, "that the Supreme Court, as now organized, is going to move us toward legislative union and the destruction of our law codes."<sup>233</sup> Other papers are quoted by Silver as saying that the province's unique civil laws and "the destinies of its citizens" would be submitted "to judges who will be strangers, for the most part, to their language, customs, habits, and usages, to the origins and numerous commentators of their law codes, and to the practices of their courts."<sup>234</sup>

Mr. Taschereau was not the only Québec MP to suggest amendments to the Supreme Court Bill. Among the others was a Mr. Mousseau who proposed a lengthy amendment restricting the jurisdiction of the new Court to the federal sphere. Another Québec MP, a Mr. Ouimet, moved an amendment that would

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<sup>232</sup> Québec. Royal Commission of Inquiry on Constitutional Problems, Report, Volume 1, (Province of Québec, 1956), pp. 63-64.

<sup>233</sup> Quoted in A. Silver, The French-Canadian Idea of Confederation, 1864-1900, 2<sup>nd</sup> edition, (Toronto, ON: University of Toronto Press, 1997), p. 122.

<sup>234</sup> Quoted in ibid., p. 123.

“exclude from the appellate jurisdiction given to the Supreme Court of Canada all questions relating to property and civil rights and civil procedure.”<sup>235</sup>

It would appear, then, that, as in the case of constitutional amendment, Québec’s federal politicians had more confidence in the institutions of the imperial power than in the political leaders and institutions of their own, emerging country that they were helping to give birth to. Another Taschereau, Jean-Thomas, a highly respected lawyer and future justice of the Supreme Court of Canada, stated in an 1865 speech on the Confederation plan in the Legislative Assembly of the province of Canada, that “Lower Canadians will assuredly be less satisfied with the decisions of a Federal Court of Appeals than those of Her Majesty’s Privy Council.”<sup>236</sup>

This finding - that French Québec’s federal politicians actually *wanted* to keep British institutions - refutes Philip Resnick’s contention that, “Not surprisingly, there was little appetite in French Canada for schemes of imperial federation or, indeed, for the British Empire at large.”<sup>237</sup> French Québec’s leaders saw in the maintenance of the imperial connection a way to protect their culture even though it also meant continued colonial status for Lower Canada.<sup>238</sup>

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<sup>235</sup> House of Commons Debates, March 30, 1875, p. 969.

<sup>236</sup> Canada. Provincial Parliament. Parliamentary Debates..., pp. 896-897.

<sup>237</sup> P. Resnick, The European Roots of Canadian Identity, (Peterborough, ON: Broadview Press, Ltd., 2005), p. 27.

<sup>238</sup> Québec’s preference for British institutions was repeated by Rodolphe Lemieux, a Laurier cabinet minister, in 1907. At that time, he told a crowd in Aurora, Ontario: “Bear in mind that the British institutions which happily govern us are, when applied in their true spirit, the only safeguard of the French-Canadians as a race. We cling to them, because we feel that under them, and with them, our rights, our franchise, our liberties are secured to us.” See R. Lemieux, Progressive Policy of the Liberal

A fifth possible reason why the founders did not seek full sovereignty and speak frankly and fully about their limited objectives has to do with the colonies' political economy. To put it less delicately, it has to do with the influence of finance capital on the thinking of the founders and of the British government.

Speaking in the Legislature of Canada on the plan for Confederation, Antoine-Aimé Dorion contended that the plan was “concocted for bringing aid and relief to the unfortunate Grand Trunk [Railway]....”<sup>239</sup> His point was that the value of the shares and bonds held by the British capitalists who had invested in the Grand Trunk would be enhanced by Confederation, particularly by Québec Resolution 68. This Resolution called for the construction of an intercolonial railway from Rivière-du-Loup in Québec, through New Brunswick, to Truro, Nova Scotia. The influence of the Grand Trunk's investors was cited by Dorion as a “cause for this Confederation scheme” which was “not so well known, but far more powerful” than the demand for representation by population articulated by George Brown and his Canada West colleagues.<sup>240</sup>

The idea that business played a significant role in bringing about colonial union is not new. Indeed, R.T. Naylor wrote about it in a 1975 volume. Going back further, Gustavus Myers wrote History of Canadian Wealth in 1914 in which he showed the intimate links between the corporate sector, mainly

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Administration: Postal Reforms, Labour Legislation, speech delivered by the Hon. Rodolphe Lemieux, L.L.D., K.C., Postmaster General and Minister of Labour, at Aurora, 21<sup>st</sup> June, 1907, p. 3.

<sup>239</sup> Canada. Provincial Parliament. Parliamentary Debates..., p. 251.

<sup>240</sup> Ibid., p. 250.

railways, and prominent colonial politicians, including Cartier, Galt, Hincks, Ross, Taché, MacNab, Cauchon, and Holton, all associated with Confederation.<sup>241</sup> Macdonald, too, had close links with various corporations.

Myers did not attempt to show if and how businessmen lobbied the politicians on colonial union. However, the historian, Andrew Smith, did so in a recent volume in which the focus is on the influence of British businessmen in particular. His conclusion is that the part played by British finance capital was crucial in persuading the Colonial Office to favour the union of the British North American colonies. Smith shows as well that the financiers did not support full sovereignty for the colonies but, for reasons having to do with economic self-interest, preferred the continuation of the constitutional link between British North America and the imperial power. In putting forth their ideas, the British financiers had a supportive audience in the colonies, for “many of the Fathers of Confederation were personally involved in projects that were dependent on the continued inflow of British capital.”<sup>242</sup>

On the issue of what to do with the colonies, Britain's capitalists were divided. One part, the owners of industry, wanted Britain to shed its colonies and use the savings to provide tax relief for industry. Another segment, Britain's bankers and those engaged in the financial services sector, wanted Britain to maintain its links with its colonies because of their huge needs for

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<sup>241</sup> G. Myers, History of Canadian Wealth, (New York: Argosy Antiquarian Ltd., 1968). Cartier's biographer, Brian Young, wrote: “For eighteen years Cartier was a minister of the crown while at the same time acting as solicitor, fixer, and friend for the Grand Trunk Railway.” See George-Étienne Cartier: Montreal Bourgeois, (Kingston and Montreal: McGill-Queen's University Press, 1981), p. xii.

<sup>242</sup> A. Smith, British Businessmen and Canadian Confederation: Constitution-Making in an Era of Anglo-Globalization, ((Montreal and Kingston: McGill-Queen's University Press, 2008), p. 18.

capital and the safety of those investments. And because those financiers liked to invest in the colonies, British North America “enjoyed privileged access to London’s capital market.” Therefore, British investments in Canada, Nova Scotia, and New Brunswick were extensive.

One of the favourite investment targets of British financiers was the Grand Trunk Railway but it turned out to be a less than stellar performer. To resolve its problems, the Railway consistently turned to government for subsidies and, just as consistently, the Railway's requests were granted. This is not entirely unexpected, given the close ties between politicians and the Railway. To get the money for the subsidies, the government went to British financiers.

Partly because of the outbreak of the American Civil War, the value of British investments in the colonies fell precipitously in the early 1860s. Increasingly, British investors saw the solution to their problems to lie in significant political change. That is to say, they came to believe that a political union of the British North American colonies would work to their advantage. In early 1862, the investors, along with several British MPs and lawyer-lobbyists, formed the British North American Association (BNAA) to lobby for colonial union. By mid-summer, the Colonial Office of the British government came out in support of political union.

Smith argues that the campaign of the BNAA managed to successfully conflate the issue of the union of the colonies with British government support for the Grand Trunk to construct the intercolonial railway; hence, Resolution

68. The members of the BNAA also favoured limitations on democracy, a concept that they associated with political decentralization; thus, they favoured a strong central government and supported the undemocratic elements in the Confederation scheme, e.g., an unelected Senate. From the perspective of this dissertation, the most important item on the British financiers' agenda was their support for *limited* self-government. Smith explains the reasons for the financiers' dislike of independence:<sup>243</sup>

The British financiers who supported Confederation did so because they thought that the union of the colonies would solidify their connection to Britain. They did not see Confederation as some sort of stepping stone to Canadian independence....The financiers who supported Confederation valued the constitutional bond linking them to their fellow subjects in North America because colonial status made Canadian securities easier to sell to individual investors in Britain. Many British investors distinguished investments in self-governing colonies from those in sovereign countries such as the United States. Because the distinction was widespread, those who marketed Canadian investments in Britain had a compelling reason to dislike the proposal for colonial independence that had recently been advanced by Goldwin Smith.

Smith's evidence showing that British financiers made clear to the founders or to the British government that they preferred colonial union with limited self-government in order to preserve the link between Britain and the British North American colonies may not be conclusive but it is convincing. Smith points to the view of the Canadian News, a British publication specializing in business and political news from the colonies, that colonial federation would be the best way to preserve the political connection between British North America and the imperial power. He also shows that British investors and British business papers were pleased with the Confederation plan that the founders

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<sup>243</sup> ibid., p. 129.

worked out. Also, given that securities of colonies were easier to sell than securities of sovereign states, it would be surprising if the BNAA lobbyists did not let the founders and the British government know of their preference for limited self-government for British North America.

*The Dissertation's Theoretical Argument in Brief*

In summary, then, we have advanced as an explanation for the federal government's unwillingness to assert its constitutional powers a theoretical framework constructed with two theories, historical institutionalism and Michael Foley's theory of constitutional abeyances. It hypothesizes that a particular constitutional abeyance having to do with Canadian sovereignty left Canada incomplete, in terms of its political institutions, which, among other things, resulted in Canada remaining subject to the jurisdiction of an imperial judicial institution, the Judicial Committee of the Privy Council. That institution articulated a conception of Canadian federalism, known as coordinate federalism, which was at odds with the type of federalism envisaged by the founders. It made a series of judgments that set it and its successor institution, the Supreme Court of Canada, on a path from which deviation would have been very problematic. In the language of historical institutionalism, they became path dependent. As they are required to do in a political system characterized by democracy and the rule of law, the executive and legislative branches of the federal government fashioned their policies and approaches to intergovernmental relations to conform with the judiciary's decisions. Their decisions and non-decisions also became path dependent. The

judiciary's decisions defined the *direction* of the path and it clearly led away from federal assertiveness. As a result, the executive branch had little choice but to seek out a confederal relationship with the provinces - i.e., to practice collaborative federalism - on several issues rather than ask Parliament to enact the necessary legislation. In so doing, it opted to play a secondary role in the development and implementation of policy. Now, as we will see, path dependence has been so strong that, even when the courts, exhibiting a degree of institutional change, rendered decisions more favourable to Ottawa, the federal government still opted for collaborative federalism.

#### *Comparing Australia and Canada*

At this point, it would be useful to briefly look at the founding of another Commonwealth country, Australia, as a way to bring into relief the constitutional decisions of Canada's founders. The differences between the two countries, with respect to their creation, should not be exaggerated but they are substantial.

The first point of comparison that we can look at is the respective founders' views regarding the location of ultimate authority in a country. In Canada, it was seen to be the British crown. Indeed, a letter from George-Etienne Cartier, John Ross and A.T. Galt to the British Colonial Secretary in 1858 declared their belief that Confederation would not be derived from the people but from the Imperial Parliament. Thus, in Canada, the constitution was not drafted with the participation of the citizens nor was it approved by the people. In contrast, in Australia, a constitutional convention, comprised of

elected delegates from four of the colonies and MPs from a fifth, prepared a draft constitution. It, in turn, was approved by referenda in all of the Australian colonies.<sup>244</sup> Only then was it submitted to the Imperial Parliament. The Commonwealth of Australia Constitution Act came into effect on January 1, 1901.

It would seem that, on the matter of process, the anti-democratic tendencies<sup>245</sup> of the major players of Confederation conspired with their apparent inability or unwillingness to seek full sovereignty for Canada to make it very difficult for a sense of national identity to develop. Norman McL. Rogers made this point in a 1933 piece. He thought that “The manner in which federation had been accomplished, and the bitter opposition it aroused in certain sections of the dominion deprived the federal government of the support of any widespread feeling of patriotic attachment.”<sup>246</sup> The founders’ almost visceral dislike of American democracy and their excessive regard for

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<sup>244</sup> Even the press was allowed to observe the 1890 federation conference, unlike the constitutional conferences held in Canada and the United States. A press corps of over fifty, plus representatives of the overseas cable services, watched the thirteen delegates from the Australian colonies at the 1890 meeting.

<sup>245</sup> Samuel LaSelva quotes George-Étienne Cartier as saying that “purely democratic institutions could not be conducive to the peace and prosperity of nations.” See S. LaSelva, The Moral Foundations of Canadian Federalism, p. 41. Douglas Verney quotes Cartier as saying, “There must be a power of resistance to oppose the democratic element.” See D. Verney, Three Civilizations, Two Cultures, One State: Canada’s Political Traditions, (Durham, NC: Duke University Press, 1986), p. 130. John A. Macdonald himself was dismissive of the idea of holding a referendum on the Confederation agreement, equating it with a tactic that a despot or absolute monarch might use. Donald Creighton concludes that to Confederation’s leading advocates an election or a plebiscite on the agreement “was a dreadful republican heresy,” which would “violate all the principles of parliamentary government, without the slightest beneficial result.” See D. Creighton, Road to Confederation: The Emergence of Canada, 1863-1867, (Toronto, ON: Macmillan, 1964), pp. 189-190.

<sup>246</sup> N. McL. Rogers, “The Genesis of Provincial Rights,” Canadian Historical Review, Vol. XIV, 1933, p.20.

things British did not help the federal government overcome the country's deeply ingrained provincialism.

A second item for comparison concerns the judiciary of the two countries. Unlike Canada's, Australia's constitutional framers established a supreme court, which Australians call the High Court. Also unlike Canada's, Australia's constitutional drafters placed limits on what could be appealed to the JCPC.

Initially, the draft constitution approved by Australians and submitted to Britain did not allow appeals to the JCPC on matters involving the interpretation of the constitution or of a state constitution, unless another dominion in the British Empire was involved.<sup>247</sup> In the face of objections from British officials, the Australians agreed to a compromise clause. Clause 74 reads:

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

A judicial interpretation held that the intention of this clause 74 is to ensure that,<sup>248</sup>

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<sup>247</sup> It speaks volumes that, while the principles of Canada's British North America Act were worked out in Canada, the legal drafting was done in London by British government officials in consultation with the Canadians. In contrast, the Australians prepared an actual text of a statute "down to the last detail, and they apparently expected it to be accepted as it stood." See J.A. La Nauze, The Making of the Australian Constitution, (Kingsgrove, NSW: Melbourne University Press, 1972), p. 249.

<sup>248</sup> Quoted in R.D. Lumb, The Constitution of the Commonwealth of Australia, annotated, 4<sup>th</sup> edition, (Melbourne, AU: Butterworths Pty, Limited, 1986), p. 261.

on the purely Australian question of the distribution of the totality of government powers or their content, the High Court of Australia (the highest judicial organ created by the Australian people) was to be the final arbiter unless it voluntarily requested the intervention of the Privy Council.

Only once did the High Court certify that an appeal could go to the JCPC.

What this means, of course, is that Australia's constitution has been shaped in Australia by Australians. In Canada, the JCPC - in consistently deciding in favour of provincial autonomy - re-shaped the constitution almost without any regard to the founders' intentions. While it moved much later than Canada to abolish all appeals to the JCPC, on the crucial matter of constitutional interpretation, it showed itself considerably more eager than Canada to embrace full sovereignty.

It is worth noting here that the Australian constitution provides that the justices of the High Court are to be appointed by the Governor-General in Council. It was not until 1978 that the Commonwealth (a.k.a. federal) government agreed to consult the states on the appointment of the justices. That principle of consultation was included in the 1979 High Court of Australia Act.

A third point of comparison has to do with the question of constitutional amendment. As we have seen, in Canada, the 1867 constitutional drafters did not spend a great deal of time discussing the issue and they did not include in the document provision for altering the constitution. Again in contrast, the Australian constitution makers did discuss the issue at length and did insert a procedure for amending their constitution. The procedure requires that a bill

to amend the constitution that has received approval by both Houses of Parliament be approved by Australians in a referendum before it becomes law. “Normally, approval in a referendum requires the support of a majority of voters nationally and of a majority of voters in a majority of the states.”<sup>249</sup> Amending the constitution has proven to be very difficult in Australia; indeed, it has been said that, “constitutionally speaking, Australia is the frozen continent.”<sup>250</sup>

Our final point of comparison is the international affairs power. As we have seen, Canada’s founders paid very little attention to this issue. They seemed unable to envisage a Canada with international personality and therefore empowered the federal government to implement only those treaties signed by the British Empire. The Australians, however, were bolder and more prescient. Section 51 of their constitution identifies the powers of the Parliament and, among them, is external affairs. The section opens as follows: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:---” Thirty-nine sub-sections are listed, including ss. xxix External Affairs. The High Court has on several occasions interpreted this power very broadly, giving the Commonwealth government the power to not only conclude but also

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<sup>249</sup> C. Saunders, “Commonwealth of Australia,” p. 41.

<sup>250</sup> G. Sawyer, Australian Federalism in the Courts, (Melbourne, AU: Melbourne University Press, 1967), p. 208. While changes in the constitution through the amendment process have been rare in Australia, it has been altered frequently by judgments of the High Court. It was through those judgments that Australia developed a centralized federation even though the founders intended a somewhat more decentralized federation. Indeed, they rejected the model of the Canadian constitution because they considered it too centralizing.

implement all international treaties, including those whose subject-matter comes under state jurisdiction.

It has been pointed out that Australia's constitutional framers were drawn more to the U.S. constitution than the Canadian, and that they were admirers of the nationalists, particularly Mazzini and Garibaldi, who united Italy. Canada's constitutional drafters were extremely put off by the U.S. model of democracy and spoke little of the constitutions of countries other than Britain and the U.S. (although Macdonald was influenced by the New Zealand constitution of 1852).<sup>251</sup> That the Australian constitution has a more nationalistic tone and reflects a deeper desire for sovereignty, therefore, is not surprising.

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<sup>251</sup> G. Stevenson, Ex Uno Plures: Federal-Provincial Relations in Canada, 1867-1896, (Montreal and Kingston: McGill-Queen's University Press, 1993), p. 15.

### Chapter 3: Literature Review

The concern of this chapter is with the comments, assessments and interpretations of some scholars on the Confederation settlement, as well as on Canada's political development, the objective being to find out what they had to say about the constitutional abeyance and associated constitutional omissions that we have identified and discussed.

We begin with Robert Vipond and his book on the legal and political thought of the Ontario provincial rights movement between 1867 and 1900. It is of interest because of what he has to say about the reluctance of Confederation's advocates to fully "air" their objectives and the details of their plan. He argues that Macdonald, Cartier and Brown were disinclined to explain and clarify their scheme and, instead, went out of their way to exaggerate the colonies' commonalities. The thought is consistent with Foley's constitutional abeyance theory. Vipond writes:<sup>252</sup>

Given the imperative to maintain the unity of the coalition, it was crucial to confine the discussion as much as possible to the most general level where agreement could be assured, rather than descending to a detailed examination of the proposals, where disagreement almost certainly would have surfaced.

Could their plan then withstand the fallout from those disagreements? Vipond clearly thinks not and probably would agree that the idea of Canadian sovereignty was among the issues that could not be examined in the clear light of day lest such an illumination imperil their very fragile work.

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<sup>252</sup> R. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, p. 21.

Vipond discusses at some length the federal powers of reservation and disallowance and the efforts of prominent Ontario politicians, including Oliver Mowat and Edward Blake, to render them meaningless.

The power of reservation is the power of the provincial lieutenant-governors to withhold assent to a bill until after it was reviewed by federal officials. Like the federal power of disallowance, it was inserted into the constitution largely because of Macdonald's likening of the federal-provincial relationship to the imperial-federal relationship. Both powers were denounced by provincial premiers as affronts to responsible government. Because its use had caused Macdonald and the federal government political embarrassment, even Macdonald lost his enthusiasm for the reservation power and it was used very infrequently.

Vipond describes the provincial autonomists' discrediting of the power of reservation as part of their overall effort "to neutralize the lieutenant-governor as a federal officer." Another critically important part was "to conscript the position for the cause of provincial autonomy by showing that the lieutenant-governor was as much a representative of the queen for all purposes provincial as the governor-general was for all purposes federal, and equally entitled, therefore, to exercise the 'royal prerogative.'"<sup>253</sup> In this part, the provincialists were also very successful, as the discussion of the *Maritime Bank* case on page 29 herein explains. As already argued, this decision not only gave the provinces a status equal to that of the federal government it also

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<sup>253</sup> ibid., p. 63. The term, "royal prerogative," refers to the discretionary powers that are inherent in the Crown.

strengthened the powers of the political executive in each of the provinces since, as David Smith argues, they were able to acquire the prerogative powers of the now-bifurcated Crown.

The outcome of these controversies over the powers of reservation and disallowance and the position and status of the lieutenant-governor was, according to Vipond, to transform “provincial legislatures from what Macdonald called ‘nominally’ responsible governments into fully self-governing and sovereign parliaments...” thus paving “the way for the modern practice of executive federalism.”<sup>254</sup> Vipond emphasizes that “The dynamic of executive federalism in Canada follows, more specifically, from the fact that *both* federal and provincial governments come as genuinely parliamentary governments, fully loaded as it were. This means they can negotiate as formal equals, as if distinct international actors.”<sup>255</sup> [Emphasis in original].

In this discussion, Vipond makes the link between the constitutional abeyance regarding Canadian sovereignty and the exercise of collaborative federalism which, as will be demonstrated later, is a reflection of federal government willingness to diminish its own authority.

Vipond makes the interesting observation that the text of the Confederation proposal “seemed to contradict the very federal principles that it was meant to embody.”<sup>256</sup> He then lists a number of the more invasive

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<sup>254</sup> ibid., p. 73.

<sup>255</sup> ibid. The phrase, “distinct international actors,” assumes greater significance in Chapter 4’s discussion of the Agreement on Internal Trade.

<sup>256</sup> ibid., p. 22.

federal powers, including the POGG power, the taxation powers, the declaratory power, and the power of disallowance. It is arguable that there really is no contradiction. Canada does have a federal arrangement and was intended to have a federal arrangement, but it was never meant to be a “pure federalism.” To use an analogy, one can be a supporter and defender of human rights and still acknowledge the need for limits on those rights.

Philip Resnick focused his most recent work on the impact of Canadians’ loyalty to the Imperial authority. In a short volume entitled, The European Roots of Canadian Identity, Resnick poses the question: what, if anything, makes Canadians different from Americans? His answer in brief is that “Canadians remain a good deal more European in their sensibilities....”<sup>257</sup>

The issue and the argument are not particularly new. What is interesting from the perspective of this paper is Resnick’s view of the effect of the growing Canadian self-consciousness that emerged in the aftermath of the Second World War. He points out that Canada’s enhanced sense of itself coincided with the dramatic weakening of British power and growing immigration to Canada from countries other than the UK. It was facilitated by federal government moves in a nationalistic direction. In rapid succession, Resnick writes, federal governments adopted a Canadian Citizenship Act; ended appeals to the JCPC; replaced British-born governors-general with those who were Canadian-born; established a Canada Council for the Arts; dropped the

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<sup>257</sup> P. Resnick, The European Roots of Canadian Identity, p. 19.

term, Dominion, from federal government institutions; and adopted a new flag to replace the red ensign.

Resnick suggests that such measures ought to have drawn English-Canadians and French Québécois closer together. “After all, it was the Ligue Nationaliste Canadienne of the 1900s, with figures like Henri Bourassa at its helm, which had agitated for a purely Canadian definition of identity, a pan-Canadian definition, freed of British moorings.”<sup>258</sup>

But, as we noted earlier, Resnick may have misread Québec’s attitude toward the imperial link. So, really, it comes as no surprise that a stronger unity was not the effect. What happened in fact is that, as English-Canadian nationalism heightened, a new French Québec nationalism, rejecting the conservative nationalism of the Church, of Duplessis and his predecessors, started to assert itself, and it took the form of a Quiet Revolution. Quiet it may have been but it was profound and accommodating both nationalisms has proven to be immensely challenging.

Resnick’s general line of argument seems to validate in a sense the contention that Macdonald’s strategy was to use the Imperial tie to unite Canadians. But, as it turned out, the strategy had a very limited shelf life. As it frayed, English-Canadians and French Québécois started down different paths. One lesson, perhaps, is not that the British connection ought to have been preserved but that it should never been used for national unity purposes in the first place. It is at least arguable that a wiser, more durable strategy

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<sup>258</sup> ibid., p. 32.

would have been to try to cultivate Canadians' latent sense of nationalism, or at least, to provide the necessary, home-grown, political institutions and allow them to develop in accord with the realities of their own political culture, free of domination from an external source.

Douglas Verney's much larger volume deals with a similar theme as Resnick's. He poses these questions: How was it that some writers, particularly foreigners, were persuaded that Canada was, after all, very similar to the United States? At the same time, other authors, especially Canadians, were equally convinced that Canada was very different from its neighbour.

Although the book came out three years before Michael Foley's, it uses 'Foleyan' language in its framing of the problems of Canada's political development. For instance, he refers to Canadians' "disinclination to press arguments to their logical conclusion."<sup>259</sup> Also: "But Canada survived because of a gentlemen's agreement to live and let live, to pursue arguments but never to their logical conclusion...."<sup>260</sup> And again: Canada "seemed almost to thrive on the contradictions underlying so much of its conflict. These contradictions appeared capable of continuing indefinitely, being submerged and then reemerging, with one part or another of the contradiction dominant."<sup>261</sup>

Like Resnick, Verney traces Canada's political evolution, albeit more comprehensively. He discusses Canadian federalism at length, observing that

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<sup>259</sup> D. Verney, Three Civilizations, Two Cultures, One State: Canada's Political Traditions, (Durham, NC: Duke University Press, 1986), p. 55.

<sup>260</sup> Ibid., p. 337.

<sup>261</sup> Ibid., p. 333.

the federalism inaugurated at Confederation was Imperial federalism because of the continuing reliance on three British umpires: the governor-general, the Westminster Parliament, and the Judicial Committee of the Privy Council.

Verney believes that Canadians have always been aware of the contradiction between parliamentary supremacy and federalism, a contradiction which exists because<sup>262</sup>

Parliamentary supremacy, as understood in the United Kingdom, meant the *subordination* of regional legislatures to the national Parliament. For this reason, Parliament at Westminster never allowed federalism to be adopted for the United Kingdom: Ireland, Scotland, and Wales stood in a subordinate relationship to Westminster.” {Emphasis in original.]

Historically, says Verney, the way that Canadians got around the contradiction was to rely on the Imperial link; “the imperial government preserved Canada’s federal system by serving as umpire.”<sup>263</sup>

Like Resnick, Verney believes that there were consequences to the withering away of the British connection. When the three umpires were discarded, the vacuum was filled by “the pseudofederalism of majority rule.” Verney is not precise on what he means by this but it appears to refer to a federalism with a dominant central government. What he wants to see replace this pseudofederalism is a “constitutional federalism,” characterized by, among other things, an upper house with members elected by provincial governments and by a Cabinet that is responsible to both houses, not only the House of Commons.

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<sup>262</sup> *ibid.*, p. 123.

<sup>263</sup> *ibid.*, p. 121.

Verney confirms the proposition that, in the view of the founders, British institutions should remain involved in Canadian political life because they would unite Canadians. However, the consequences that Verney sees of the diminution of the connection are very different from those that Resnick sees. Where one sees the development of competing nationalisms, the other sees and laments the emergence of central government dominance.

Interestingly, Verney argues that Canada is not governed by executive federalism since the chairperson is not determined by all first ministers; the secretariat is not comprised of both federal and provincial officials but is an arm of the federal government; the agenda is biased in favour of Ottawa; and decisions are not taken formally. Since Verney wrote his book, all of his criteria have been implemented in a number of settings, indicating that, at least by Verney's standards, Canada is indeed governed to a considerable extent by executive federalism. This would appear to weaken his argument about the emergence of central government dominance.

As with Resnick and Verney, David Smith, whose work was alluded to earlier, is interested in the impact of the British connection on Canada. In his view, the crown, understudied by Canadian political scientists, has shaped the operation of Canada's major political institutions, including its form of federalism. He writes: "Arguably, its [Canada's] imperial provenance is the root of modern Canada's distinctiveness and, most particularly for the present argument, the basic explanation for the nature of relations that currently exist

between federal and provincial governments.”<sup>264</sup> This is because, when the *Maritime Bank* decision ruled that the provincial lieutenant-governors were equal in status to the governor-general - that is, that the lieutenant-governors were as much representatives of the Crown as the governor-general - the crown’s prerogatives became available to the provinces. Smith writes:<sup>265</sup>

The Crown endowed the provinces with unlimited potential for action, a reservoir of power which, when exercised in the absence of a common national denominator, heightened the distinctive characteristics of each evident since its founding. In turn, the contrasting development that ensued further exaggerated provincial distinctions.

Smith emphasizes that it was the provincial executives, not the provincial legislatures, that benefited from the *Maritime Bank* decision. Thus, provincial premiers acquired enormous decision-making latitude. Indeed, Smith concludes:<sup>266</sup>

Had the provinces only had legislative authority over certain matters in s. 92 of the Constitution Act, but not royal prerogative in those same areas, their ability to develop social policies that involved extensive administrative regulation would have been severely hampered.

For Smith, then, the crown, rather than act as a national integrative force has accelerated regional divisions.

Among the crown prerogatives that have devolved to the political executives, i.e., the prime minister and premiers, are the power to appoint attorneys general, who lay charges and enforce the criminal law, as well as the

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<sup>264</sup> D. Smith, “Empire, Crown and Canadian Federalism,” p. 451.

<sup>265</sup> Ibid., p. 461.

<sup>266</sup> D. Smith, “Bagehot, the Crown and the Canadian Constitution,” Canadian Journal of Political Science, 28: 4, December 1995, p. 635.

power to dissolve and convoke the legislatures. First ministers also have a privileged position in the formulation of the government's budget.

As mentioned, Smith acknowledges the part played by the Judicial Committee in creating Canada's federalism. But, curiously, he takes what we might call an Alan Cairns approach in his assessment. He suggests that even if the JCPC, in the totality of its opinions, had favoured federal power rather than provincial autonomy, it would not have been enough to "check the centrifugal force of Canada's society and economy." The JCPC reinforced but did not launch "the direction of Canada's federal evolution."<sup>267</sup>

Given Smith's views on the significance of the *Maritime Bank* decision, this conclusion is unexpected. A central pillar of his argument seems to be that the decision gave the provinces a status that they did not possess previously. It 'officially' made them, he seems to be saying, equal to the federal government and it gave their political executives substantial prerogative power to take the provinces in distinctive directions. If the Law Lords in Britain did not give birth to Canada's provincialism, they certainly were an attentive mid-wife!

Frederick Vaughan, in a volume that discusses Canada's apparent transformation from constitutional monarchy to republican democracy, displays little doubt about the intentions of the founders. In his assessment of the Confederation debates and the comments of the founders, he says that Confederation was never intended to make Canada a sovereign country. "[O]n

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<sup>267</sup> D. Smith, "Empire, Crown and Canadian Federalism," p. 467.

the contrary, it would lead to stronger, closer ties, which would help British North America resist the magnetic forces of American republicanism.”<sup>268</sup>

Vaughan states further:<sup>269</sup>

There can be no doubt that they wanted their new nation to remain subordinate and dependent. They neither wished nor requested absolute control or jurisdiction even over domestic matters, since they desired the imperial right of disallowance to be continued....The leading men of British North America, however, wanted no part of such independence and insisted on continued formal attachment to the mother country.

To stress his point, Vaughan observes what was pointed out earlier herein, namely, that “...the Fathers of Confederation never thought that they should have jurisdiction over external affairs, such as treaties with other nations.”<sup>270</sup> He quotes Thomas D’Arcy McGee as saying in an 1864 speech: “There [i.e., in the British Crown], for us, the sovereign power of peace and war, life and death, receiving and sending ambassadors, still resides.” And there, Vaughan adds, “the framers of the constitution desired it to remain.”<sup>271</sup>

Vaughan spends very little time discussing the limited self-government objectives of the founders. Nor does he venture into a discussion of the consequences of the attitude he says were held by the country’s founders, beyond wondering if perhaps the founders erred “by not comprehending sufficiently that the attachment to the British Crown meant that the point of

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<sup>268</sup> F. Vaughan, The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic, (Montreal and Kingston: McGill-Queen’s University Press, 2003), p. 67.

<sup>269</sup> Ibid., pp. 67-68.

<sup>270</sup> Ibid., p. 67.

<sup>271</sup> Ibid.

national coalescence resided externally to the nation's borders, across thousands of miles of ocean," and that "the affectionate attachment to the British monarchy would become increasingly tenuous with time...."<sup>272</sup>

Vaughan has no doubt that the founders intended to create a federal government that would dominate the provinces. For Vaughan, one of the "striking features" of the Québec Resolution dealing with federal powers is "the depth to which the delegates were willing to allow Parliament to penetrate into the legislative life of the provinces of the new nation."<sup>273</sup>

Vaughan stresses this point to counteract the argument of Paul Romney, in particular, that the Québec Resolutions were consistent with the emergence of the provincial rights movement. On the status of the provincial lieutenant-governors, which so vexed the premiers, especially Premier Mowat of Ontario, Vaughan disputes the soundness of the JCPC decision in the *Maritime Bank* case by insisting that, contrary to that decision, the Québec Conference proceedings and the resolutions "unmistakeably imply that the lieutenant governor of a province was to be an agent of the federal government, *not* the representative of the Crown."<sup>274</sup> (Emphasis in original.) Further, Vaughan quotes George Brown as stating emphatically that the "principal duty of the lieutenant governor of a province was to bring the provincial governments 'into harmony

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<sup>272</sup> F. Vaughan, The Canadian Federalist Experiment, p. 5.

<sup>273</sup> Ibid., p. 59.

<sup>274</sup> Ibid., p. 62.

with the General Government.”<sup>275</sup> Not for the first time the JCPC turned the intent of the founders on its head.

Vaughan asserts that the way that the provincial powers were worded in the Québec Resolutions provides additional evidence that the founders intended to substantially restrict those powers. “Even provincial jurisdiction over education was restricted.”<sup>276</sup> That is, they were to ensure that the rights and privileges of the Protestant and Catholic minorities in both Canadas pertaining to denominational schools were not violated. Provincial powers over taxation were also restricted; they were confined to direct taxation and the imposition of duties on resource exports. Conversely, Vaughan writes, the Resolutions were crafted in such a way as to allow for the possible expansion of Ottawa's powers.

From Vaughan's work, we get additional confirmation that Canada's founders saw in the imperial connection a strong unifying force for their new nation and whence the enthusiasm for the maintenance of the connection came. Vaughan states:<sup>277</sup>

To the Canadian constitutional framers, monarchy was to be the unifying spirit that infused the several parts and bound them together into a general community without destroying those parts. It was to be the cementing force of the union, the centre of national coalescence.

Macdonald especially was confirmed in this view by Edward Freeman's History of Federal Government. Published in 1863, it was one of the few books on

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<sup>275</sup> ibid.

<sup>276</sup> ibid., p. 60.

<sup>277</sup> ibid., p. 97.

federalism at the time. The Cambridge historian wrote favourably of federalism but he was most enthusiastic about what he called “monarchic federation.” According to Vaughan, Freeman was not unaware of the centrifugal forces that were always associated with the federal form of government but argued that monarchic federation could overcome such forces. Macdonald, worried that there was an inherent tendency in federal systems to collapse, was reinforced in his belief that the British crown would keep the country together. Thomas D’Arcy McGee, too, was convinced and hence “sought to infuse the Canadian debate over Confederation with the Englishman’s enthusiasm for monarchic federation.”<sup>278</sup>

In Policy and Politics in Canada, Carolyn Tuohy does not dwell on the Confederation settlement and the debates that took place, but she does link Canada’s constitution and federal structures to the policy process. She argues that the policy process is distinguished by ambivalence, which comes from the tensions that arise from Canada’s relationship with the United States, from the relations between Anglophones and Francophones, and from the regionalized nature of the political community. On these fundamental issues, Canadians are pulled in competing directions.

The important point for Tuohy is that this ambivalence is institutionalized. “It is ‘built in’ to the structures of the state.”<sup>279</sup> It is played out most clearly in Canada’s federal structures. Tuohy writes:<sup>280</sup>

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<sup>278</sup> ibid., p. 98.

<sup>279</sup> C. Tuohy, Policy and Politics in Canada: Institutionalized Ambivalence, p. 5.

The existence of federal and provincial governments, as in other federal states, provides footholds for different partisan views, for different 'state traditions' and for different emphases on national and regional dimensions of political community.

However, unlike in other federal states, in Canada, the differences become contests that entail "ongoing and unresolved debates over the views of state and market, individual and collectivity, and nation and region, which the various federal and provincial contestants have espoused."<sup>281</sup>

After examining six policy arenas, Tuohy concludes that the ability of Canada's political system "to resolve conflict and to facilitate coherent policy development" is dependent on the country's structure of interests. These interests - pressure groups, political parties, etc. - have to play a mediating role to ensure that accommodations can be reached. They can either frustrate or facilitate the ability of Canada's political institutions to resolve conflict.

Tuohy's discussion of the institutionalization of ambivalence leaves a number of questions unaddressed. For instance, in a section on the institutionalization of ambivalence, she observes that the constitution has both written and unwritten elements and that it is marked by the competing influences of the British heritage and the North American cultural and economic environment. But surely there are more fundamental conflicts in the constitution, such as the fact that it establishes a new country but does not contain key clauses that would have made Canada fully sovereign. Tuohy emphasizes that Canadians are pulled in competing directions on vital issues

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<sup>280</sup> ibid., p. 6.

<sup>281</sup> ibid.,

but she makes no mention of the competing directions in which the founders were pulled.

However, Tuohy's work is of interest to this dissertation because of the linkages it draws between political institutions, i.e., the constitution and the structures of federalism, and public policy, and because of its focus on the role of mediating interests in federal-provincial conflict. In the cases examined later, we shall make note of the views and role, if any, of these interests, such as political parties and advocacy groups, in shaping and influencing the federal approach to intergovernmental policy-making and relations with the provinces.

Richard Simeon and Ian Robinson discuss the Confederation settlement in the first part of their study for the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission). From our perspective, what is interesting is their commentary on the development - or lack thereof - of a Canadian political community. Their view is that a sense of national identity did not take hold in the years after Confederation and they turn to the report of the Rowell-Sirois Commission (the Royal Commission on Dominion-Provincial Relations) for support for this view. The report states:<sup>282</sup>

...there had never been any large transfer of loyalty from the older communities to the new Dominion created for urgent common purposes. The achievement of Confederation and the spectacular activity of the Federal Government in the early years had merely overshadowed or, at most, temporarily subordinated the separate interests of the distinct regions and communities.

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<sup>282</sup> R. Simeon, I. Robinson, State, Society, and the Development of Canadian Federalism, a study for the Royal Commission on the Economic Union and Development Prospects for Canada, (Toronto, ON: University of Toronto Press, 1990), p. 53.

As a result, say Simeon and Robinson, most federal politicians came to Ottawa “[w]ithout an overriding sense of, and commitment to, the national community....” Rather, they were determined “to protect or extend the values and interests of their own provincial political communities.”<sup>283</sup>

Given our discussion thus far, it should really come as no surprise that a sense of attachment to the national community did not show itself after Confederation. Why would it? The leaders had, in speech after speech, declared their loyalty to the British crown and Empire. Why would Canadians identify themselves as Canadians first when the very people who were responsible for the Confederation settlement sent them mixed messages about Canadian sovereignty and citizenship? What is surprising is that any sense of attachment to the new country emerged at all.

Simeon and Robinson, quoting Carty and Ward, state that “From its inception, the leaders of the new federal government attempted to ‘develop and nourish a Canadian political community.’”<sup>284</sup> Again, in light of our discussion to this point, this comment does not seem completely accurate. Or, if they did make such an attempt, they were working with one hand tied behind their backs, given the constitutional abeyance that we have identified. In any event, while Simeon and Robinson refrain from offering a reflection on the first loyalty of the founders, Carty and Ward do reflect on it, albeit rather briefly. For instance, in a discussion of Canadian political citizenship, they

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<sup>283</sup> ibid., p. 54.

<sup>284</sup> ibid., p. 50.

write: "It may be that Macdonald's commitment to a British identity led him to reject the notion of a distinct Canadian citizenship."<sup>285</sup> Indeed, before 1947, there were no Canadian citizens as such, only British subjects who were resident in Canada; afterwards, until 1976, a Canadian citizen was simultaneously a British subject.

Carty and Ward seem to lend support to the argument of this dissertation regarding the sovereignty of Canada being held in constitutional abeyance when they write: "The general question of citizenship was so awkward a problem that those who drafted the confederation agreement largely avoided it. Thereafter, Canadian politicians generally dealt with the matter of political citizenship as expedience dictated."<sup>286</sup>

One can understand why. To have identified a thing called, Canadian citizenship, and then established conditions for acquiring it would have meant a step toward severing the link with Britain and placing Canada on an equal footing with Britain. This apparently was so sensitive an issue that the founders, as Carty and Ward point out, left it alone. In Michael Foley's language, they gave it "studied inattention."

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<sup>285</sup> R. Kenneth Carty, W. Peter Ward, "The Making of a Canadian Political Citizenship," in R. Kenneth Carty, W. Peter Ward, (eds.) National Politics and Community in Canada, (Vancouver, BC: University of British Columbia Press, 1986), p. 76. Carty and Ward are referring here to the fact that "Confederation made no change in the status of resident British subjects..." (p. 68). They also point out that "The naturalized, like the native born, became subjects of the British Crown, not citizens of the new Dominion" (p. 69). It is equally telling that it was not until 1920 that Parliament enacted the first uniform national franchise law since Confederation. Prior to that year, the provincial assemblies determined who could vote and on what terms. Thus, in leaving the issue to the provinces, Carty and Ward conclude, "Ottawa had abrogated its right to define membership in the national political community" (p. 72).

<sup>286</sup> Ibid., p. 67.

But there were consequences to this avoidance, as the authors observe, and they persist to this day:<sup>287</sup>

The absence of any standard of Canadianness, rooted either in long historical tradition or proclaimed in ringing declarations of nationhood, has increased the opportunity for parochial political elites to engage in province-building....In no small part the identities and loyalties so created have been set against those due the national community, and they have been mobilized by provincial governments in their jurisdictional and fiscal conflicts with the national government....This syndrome has characterized the long history of provincial variations in basic political rights. A distinctive Canadian citizenship might have constrained provincial politicians; its lack has proved costly to nation-builders in Ottawa who have sought to strengthen the entire community.

What Carty and Ward are doing here, however briefly, is highlighting the founders' failure to establish a sovereign Canada at the very creation of the country, to articulate a vision of a sovereign and independent Canada, and then to express that vision constitutionally, as a possible explanation for the absence of an active sense of attachment to Canada and an overarching sense of identity. Attempting to establish a new country while simultaneously proclaiming loyalty and never-ending attachment to another seems to have been an odd way to proceed and it appears to have placed federal governments in particular in a difficult position.

Peter Russell makes a point similar to that made by Carty and Ward. His book on Canada's constitutional struggles generally gives the Confederation settlement a fairly traditional treatment. He does not dwell on the founders' unwillingness to establish Canada's constitutional autonomy but he does point out that, "The political elites who put Confederation together were happy

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<sup>287</sup> ibid., p. 77.

colonials.”<sup>288</sup> That is to say, Canada as an autonomous nation, equal in status to Britain, with full powers to alter its own constitution, and with sovereignty residing in its citizens was a vision that seems to have had no appeal to the founders, although, through their rhetoric, they seemed to want to give the impression that they were creating a new and autonomous nation. Russell concludes:<sup>289</sup>

In 1867 there was no need to agree on the fundamental nature of the new Canadian nation because the final custodian of its Constitution was not the Canadian political community but the imperial Parliament. Imperial stewardship of Canada’s constitutional politics made it relatively easy to inaugurate Confederation. A new country could be founded without having to risk finding out if its politically active citizens agreed to the principles on which its Constitution was to be based. But if this was a gift, it was a tainted gift. The Confederation compromise was sheltered from the strain of a full public review in all sections of the country, but at the cost of not forming a political community with a clear sense of its constituent and controlling elements.

Russell, like Carty and Ward, is clear about the effect of the founders’ attachment to the Imperial power on the formation of a Canadian political community. But Canadians’ subdued sense of attachment may not have been the only effect. In subsequent discussions, we shall focus on the impact of the founders’ unwillingness to establish a fully sovereign Canada on the federal approach to intergovernmental policy-making and intergovernmental relations.

Intergovernmental relations in Canada from 1867 to 1896 were the focus of Garth Stevenson’s work, Ex Uno Plures. While Stevenson’s major effort, Unfulfilled Union, is silent on the idea of Canadian sovereignty, Ex Uno Plures

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<sup>288</sup> P. Russell, Constitutional Odyssey, p. 12.

<sup>289</sup> Ibid., p. 33.

devotes a chapter to the imperial connection. In it Stevenson recounts the interactions between the new country and Britain and concludes that there were few instances in which the latter deliberately sought to become involved in federal-provincial relations. He writes:<sup>290</sup>

Far more typically, it was Canadian governments, either federal or provincial, that sought imperial intervention because they expected it to promote their own objectives. Few if any Canadian politicians seemed to object to imperial intervention on principle; most found it convenient and tried to use it to their advantage.

Stevenson warns that Imperial influence during the period should not be over-rated, and he does not agree that the Imperial connection was meant to protect provincial interests. It is not clear why he would say this since, for example, the absence of an amending formula and a supreme court in the founders' constitution had to do with provincial faith in the imperial power. Also, the question arises here: would the list of powers still reserved to the British government (and identified on pages 69-71) after Confederation not suggest that British influence on Canada was, indeed, profound?

Stevenson devotes a chapter to the Judicial Committee and, since its work is of critical importance to this paper, his assessment of the Committee ought to be noted.<sup>291</sup> First, he points out that the Committee did not always favour the provinces. During the period he studied, 1867 to 1896, four provincial statutes were struck down while several important federal powers, e.g., over banking, the railways, the electoral process, were upheld.

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<sup>290</sup> G. Stevenson, *Ex Uno Plures*, p. 276.

<sup>291</sup> Unlike Alan Cairns, Stevenson actually considered several JCPC decisions, as well as some of those of the Supreme Court.

However, the decisions in which the provinces were victorious were more numerous and more important. Stevenson cites the JCPC's decisions in *Citizens' Insurance Co. v. Parsons*, which will be considered in the next chapter, *Bank of Toronto v. Lambe*, *Hodge v. The Queen*, the *Maritime Bank* case, and the *Local Prohibition reference*, as being among those that significantly eroded federal government powers.

Thirdly, for Stevenson it is difficult to uphold or reject the unflattering assessments of the Committee since so little is known about how it actually operated. That said, it appears that consistency was not a high priority for the Law Lords. The inconsistency in judgments may have been a result of the large number of Lords who sat on the Committee during the period in question.

Fourthly, while Lord Watson, one of the more prominent presidents of the Committee, may have considered the founders' work to be too centralizing, "There was clearly no generalized imperial conspiracy, on the bench or elsewhere, to divide or weaken the dominion."<sup>292</sup> Indeed, the Imperial government itself consistently favoured a strong central government for Canada, (albeit one still under its control in important areas).

Finally, Stevenson concludes:<sup>293</sup>

Canada was unique in the predominant role played by an external tribunal, the Judicial Committee, in interpreting its constitution. Had this not been the case it is probable that the dominion's powers would have been interpreted more broadly, and those of the provinces more narrowly.

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<sup>292</sup> *Ibid.*, p. 299.

<sup>293</sup> *Ibid.*, p. 300.

In making this measured comment, Stevenson is not going out on a limb. What is noteworthy is what he does not say. He does not conclude that federal powers would have been broadened to such an extent that the provincial governments would have been decimated.

The hero in Samuel LaSelva's volume on the moral content of Canadian federalism is George-Étienne Cartier. He refers frequently to Cartier's vision of a Canada with a new kind of nationality, which Cartier called a political nationality. Cartier, in LaSelva's assessment, played a role similar to that played by James Madison in the U.S. That is to say, he provided a middle ground between opposing forces which, in the Canadian context, consisted of those who, like Macdonald, wanted a centralized federation and those who preferred a confederal arrangement, such as Antoine-Aimé Dorion.

The Canada in Cartier's vision was a country of multiple identities and multiple allegiances and in which different ways of life flourished. But it was also a country whose people were united by a political nationality with which, in Cartier's obscure phrasing, "neither the national origin, nor the religion of any individual would interfere."<sup>294</sup> And, it was a country in which French and English had common "sympathies and interests" and "desired to live under the British Crown."<sup>295</sup> Beyond these few features, LaSelva does not offer a full explanation of what exactly "political nationality" meant.

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<sup>294</sup> S. LaSelva, The Moral Foundations of Canadian Federalism, p. 25.

<sup>295</sup> Quoted in ibid., p. 40.

Nor does LaSelva explain Cartier's acceptance of a constitution that left the country without full sovereignty. He does not discuss the question of how the new political nationality could be sustained in a country whose citizens were encouraged to direct their loyalty, and feel attachment, to another country. It was a question that Christopher Dunkin, Cartier's legislative colleague, who was utterly dismissive of the political nationality idea, felt impelled to ask: "Have we any class of people...whose feelings are going to be directed to...Ottawa, the centre of the new nationality that is to be created?"<sup>296</sup> Cartier's response, LaSelva writes, "was the idea that Confederation would bring into existence a new kind of nationality, which he called a political nationality."<sup>297</sup> The response hardly seems adequate, but LaSelva is willing to accept it.

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<sup>296</sup> Quoted in *ibid.*, p. 39. Dunkin opposed Confederation and favoured the federalization of the entire British Empire, although when Confederation seemed inevitable he became an ardent advocate of provincial rights. In his view, the Confederation scheme would simply produce a "federated colony." This recalls James Mallory's comment, quoted herein on page 63. With respect to the political nationality idea, Dunkin asked: "Is it a reminder that, in fact, we have no sort of nationality about us, but are unpleasantly cut up into a lot of struggling nationalities, as between ourselves?" He stated further: "Unlike the people of the United States, we are to have no foreign relations to look after or national affairs of any kind; and therefore our new nationality, if we could create it, could be nothing but a name." See Canada. Provincial Parliament. *Parliamentary Debates...*, p. 525. What Dunkin seems to be pointing out here is that, without the "tools" of full sovereignty, it would be very difficult to create the political nationality that Cartier advocated. The full Dunkin quotation that LaSelva refers to reads as follows:

We have a large class whose national feelings turn towards London, whose very heart is there; another large class whose sympathies centre here at Quebec, or in a sentimental way may have some reference to Paris; another large class whose memories are of the Emerald Isle; and yet another whose comparisons are rather with Washington. But have we any class of people who are attached, or whose feelings are going to be directed with any earnestness, to the city of Ottawa, the centre of the new nationality that is to be created? In the times to come, when men shall begin to feel strongly on those questions that appeal to national preferences, prejudices, and passions, all talk of your new nationality will sound but strangely.

Dunkin made these comments in the Canadian Legislative Assembly on February 27, 1865. (See J. Ajzenstat, et al., (eds.), *Canada's Founding Debates*, p. 348). Not for the first time, Dunkin showed himself to be, if not the most revolutionary, among the most prescient and penetrating of the Confederation participants.

<sup>297</sup> *ibid.*, p. 39.

LaSelva also goes easy on Cartier when he states that the “apparent failure of the Macdonaldian constitution...has been traced to the lack of attachment to Ottawa...”<sup>298</sup> LaSelva does not acknowledge in the context that the “Macdonaldian constitution” was largely crafted by Macdonald and his close collaborator, George-Étienne Cartier. LaSelva, therefore, might have devoted more attention to that “lack of attachment” and whence it came. If he had, he might have arrived at the conclusion that its cause had to do with the founders’ unwillingness to articulate a vision of a sovereign and independent Canada, to insert that vision into the country’s constitution, and then to call upon its citizens to direct their loyalty not to Britain, the British Crown and the British Empire but to the very country they were trying to establish. Because they did not give the Canadian sovereignty issue the attention and clarity it deserved, they left the country an incomplete constitution.

French-Canadian citizens in Québec seem to have been unconcerned about the founders’ lack of clarity on the question of Canadian sovereignty. Indeed, in their treatment of Confederation, Alain-G. Gagnon and Mary Beth Montcalm focus on the issue of autonomy for Québec. They point out that “The debate among French Canadians about the desirability of Confederation revolved around the adequacy of the independence it offered.”<sup>299</sup>

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<sup>298</sup> ibid.

<sup>299</sup> A.-G. Gagnon, M.B. Montcalm, Quebec: Beyond the Quiet Revolution, p. 136.

Arthur Silver agrees that the preoccupation of French Quebecers in the Confederation era was with Québec's autonomy. He quotes from La Minerve, Cartier's own newspaper: "If the plan seems to us to safeguard Lower Canada's special interests, its religion and its nationality, we'll give it our support; if not, we'll fight it with all our strength."<sup>300</sup>

The Québec Royal Commission of Inquiry on Constitutional Problems (the Tremblay Commission) did not have much to say about the founders' attitude toward sovereignty, but what it did say is reflective of the founders' apparent uncertainty about Canadian sovereignty. In a section on the causes of Confederation, the Commission's report states:<sup>301</sup>

The second classic cause - desire for freedom and independence - played, in the case of the union of the British North American colonies, a much less important part than it had played, a century earlier, in the formation of the United States. Union did not come from a movement of revolt against the mother country but there may, none the less, be discerned among the men who worked for it a conviction that the action they were contemplating would be an important step towards independence while inaugurating a great destiny for all the British provinces....[I]f grouped in a single whole covering a half of North America, they could hope for a magnificent future, in which they might acquire power that would earn them universal respect and, some day or other, might even open the road to complete independence.

In the Commission's interpretation of the founders' comments and constitutional actions, Confederation would inaugurate a "great destiny for all the British provinces," but it was, in reality, only a step on the road to

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<sup>300</sup> A.I. Silver, The French-Canadian Idea of Confederation, 1864-1900, 2<sup>nd</sup> edition, (Toronto, ON: University of Toronto Press, 1997), p. 33.

<sup>301</sup> Royal Commission of Inquiry on Constitutional Problems, Report, Volume 1, Province of Québec, 1956, p. 11.

*possible* independence. The report had no comment on the fact that Confederation did not itself mean sovereignty for Canada.

The last author whose views we take note of is the historian, Ged Martin. In a 1995 volume, Martin re-examined the material on Confederation with a view to assessing the influence of Britain. His essential argument is that between 1837 and 1867, the British, that is, the public and government officials, came to support the creation of a union of the British North American colonies. Though its role in bringing about the federation was not direct, Britain played “an active and necessary role” in creating the new state; that is to say, it provided the “context and support” necessary to make Confederation happen.

This conclusion is not startling. But Martin’s research has yielded important information for this dissertation. Contrary to the view that British opinion was inflexible on Canadian independence - that is, that Britain would never have allowed full sovereignty for Canada in 1867 - Martin suggests that it may not have been so unflinching after all. He writes that “By the mid-1860s, it would be impossible to deny that there was a rising sentiment in Britain which was at least reconciled to the likely ending of the political link.”<sup>302</sup> He goes further:<sup>303</sup>

George Brown in December 1864 was disturbed to encounter “in some quarters evident regret that we did not declare at once for independence.” Joseph Howe was equally dismayed to find in March 1867 that “the almost universal feeling appeared to be that *uniting the*

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<sup>302</sup> G. Martin, Britain and the Origins of Canadian Confederation, 1837-1867, p. 171.

<sup>303</sup> Ibid.

*Provinces was an easy mode of getting rid of them...and the sooner the responsibility of their relations with the Republic is shifted off the shoulders of John Bull the better.” [Emphasis in original.]*

Martin could have noted Alexander Galt’s impressions also. Writing to his wife

from London in January 1867, a despondent Galt stated:<sup>304</sup>

I am more than ever disappointed at the tone of feeling here as to the Colonies. I cannot shut my eyes to the fact that they want to get rid of us. They have a servile fear of the United States and would rather give us up than defend us, or incur the risk of war with that country....The connection between Canada and England is now one of sentiment, interest in both cases scarcely being in favour of it. Now the sentiment is becoming very weak here, and in Canada will not bear much longer the brunt of the ungenerous remarks continually made and the expression which I think will surely be brought out in the coming Debates, that she is a burden and weakness, of which they would gladly be rid.

As he complains of Britain’s attitude toward the emerging country, Galt here makes very evident Britain’s preoccupation with the United States.

The deep reticence about full sovereignty for Canada came, it is confirmed, from the Canadians not the British. The framers of the Canadian constitution did not “show the slightest sign either of seeking separation, or of recognizing its inevitability.”<sup>305</sup> It was an attitude that did not escape the notice of the British media. Martin quotes the Westminster Review: “The colonists advance with excessive timidity to whatever has the appearance of ultimate independence.”<sup>306</sup> The Edinburgh Review, commenting on Canada’s

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<sup>304</sup> O.D. Skelton, Life and Times of Sir Alexander Tilloch Galt, pp. 192-193.

<sup>305</sup> G. Martin, Britain and the Origins of Canadian Confederation, 1837-1867, p. 173.

<sup>306</sup> Ibid.

refusal to go out on her own, wrote: “Retainers who will neither give nor accept notice to quit our service must, it is assumed, be kept on our establishment.”<sup>307</sup>

Martin also makes the point that, while Britain insisted on its right to approve the framers’ final draft of the constitution, British officials “had abandoned any serious notion of an independent imperial contribution to the shaping of Confederation.”<sup>308</sup> This evidence, of course, does not show conclusively that Britain would have easily acceded to sovereignty for Canada. What it does do is enable us to suggest that, had Canada’s founders articulated a desire and a plan for sovereignty - or at least for considerably more self-government powers than they sought - and then approached the British with a more forceful negotiation strategy, Canada’s 1867 constitution may have contained several additional autonomy-enhancing provisions, including perhaps its own final court of appeal, an amending formula, and the right to conclude international treaties on its own.

In his volume on the influence of British finance capitalists on the views of the founders and of the British government, discussed in chapter two, Andrew Smith has high praise for Martin’s “path-breaking interpretation” of Confederation, but he points out that Martin does not support the thesis that British business was a significant driver of colonial federation. Indeed, Martin is more than a little dismissive of the argument. With sarcasm, he writes: “By and large, it may be said that historians who habitually emphasise economic

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<sup>307</sup> Ibid.

<sup>308</sup> Ibid., p. 274.

factors tend to portray unidentified capitalists whispering in the ears of British ministers in the mid-1860s, urging them to create a unified British North America.”<sup>309</sup> Perhaps, but in fairness, the comment by Antoine-Aimé Dorion quoted in chapter two regarding the influence of the Grand Trunk Railway cannot be ignored. It is one thing to dismiss the contentions of a contemporary historian but quite another to ignore the observation, made in the legislative assembly, of a respected and articulate politician and future Cabinet Minister. Further, the close links between Canada's politicians and economic interests in the pre- and post-Confederation years are well known and well documented. Instead of dismissing economic self-interest motivations, Martin might have factored them in to his analysis of Canadian Confederation.

From this brief literature review, it is possible to draw a couple of conclusions pertaining to the main argument of this dissertation. First, Canadian scholars are not unaware of the omission from the constitution of affirmations of Canadian sovereignty and of the provisions that would make such affirmations meaningful. Also, there is acknowledgement that the maintenance of the British connection was the founders' strategy to keep the country united.<sup>310</sup> As noted in chapter two, it was a strategy to which the French in Lower Canada, concerned about their cultural survival and autonomy, subscribed without reservation. There is recognition that these constitutional omissions have cost Canada something, that they have had an effect on

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<sup>309</sup> G. Martin, Britain and the Origins of Canadian Confederation, 1837-67, p. 238.

<sup>310</sup> It was also a strategy to keep British capital flowing into British North America, as we learned in chapter two.

Canadian citizens' sense of national identity. While it appears that no scholar has attempted to link the sovereignty-related omissions in the constitution with the federal approach to intergovernmental policy-making, aside perhaps from David Smith, there is recognition that the fraying of the tie with Britain left Canada without an adequate replacement.

Secondly, through the literature review we learned of evidence indicating that Britain may have been open to the idea of full Canadian sovereignty - or at least a Canada with greatly enhanced self-government power - had the founders insisted on it. In their perception, the British élite were more than a little disappointed that Canada did not present a more far-reaching plan for self-government. The reluctance to seek full sovereignty resided not in Britain but in this country. Britain's finance capitalists may have been in favour of limited self-government for Canada, but it is hard to believe that the British government would have listened to those capitalists rather than the founders, had the latter insisted on full sovereignty. This is especially so since, as noted in chapter two, Britain's industrial capitalists supported an end to Britain's colonial role and since leading British politicians like William Gladstone and Richard Cobden probably would have approved of full Canadian sovereignty.

From the perspective of this dissertation, the above points have huge significance because they suggest that the founders were aware of the sovereignty option for Canada but chose not to pursue it since they saw the imperial connection as being a unifying force for the country. As discussed, the

strategy had a limited shelf life, merely putting off the day when Canada would have to find within itself the sources of an enduring unity. We turn now to some of the consequences for Canadian federalism and for public policy of the founders' unwillingness to exploit the apparent British desire to be untangled from the British North American colonies.

## Chapter 4: The Agreement on Internal Trade (AIT)

The objectives of this dissertation can be expressed in two statements: to show that a certain pattern exists in the approach of the federal government toward intergovernmental policy-making, a pattern that sees Ottawa routinely backing off from a leadership role even in policy domains that seemingly fall under federal jurisdiction; and to see if the theory that we have constructed can provide an explanation for the observed pattern.

The objectives of this chapter also can be expressed in two statements: to verify that, in participating in the AIT negotiations and acceding to the result, the federal government refrained from asserting its trade and commerce power, as set out in section 91(2) of the Constitution Act, 1867; and to determine if the lack of federal assertiveness can be explained ultimately by our theoretical framework, consisting of historical institutionalism and constitutional abeyance theory.

That the federal government has exhibited diffident behaviour on the issue of internal trade barriers has been a contention of McGill University legal scholar, Armand de Mestral. In a forceful attack on the Agreement on Internal Trade (AIT), de Mestral declared:<sup>1</sup>

The text [of the AIT] is drafted in a style reminiscent of the Canada-US Free Trade Agreement, the North American Free Trade Agreement (NAFTA), or the GATT. The underlying assumption appears to be that the provinces are totally independent sovereign actors and that it is appropriate for them to make mutual concessions on interprovincial trade barriers comparable to concessions made by governments in the

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<sup>1</sup> A. de Mestral, "A Comment," in M. Trebilcock, D. Schwanen, (eds.), Getting There: An Assessment of the Agreement on Internal Trade, Policy Study 26, (Toronto, ON: C.D. Howe Institute, 1995), p. 97.

GATT or the NAFTA. I find this truly extraordinary, *and it is all the more extraordinary that the federal government should be aiding and abetting the process.* This, in my view, can only legitimate the view of the federal government's role that is widely held in nationalist circles in Quebec. It is a view that I consider to be in the broad sense unconstitutional. [Emphasis added].

Here, de Mestral makes two critically important points: first, that the subnational units were assumed to be "totally independent sovereign actors," and secondly, that, to his amazement, the federal government refused to avail itself of s. 91(2) or s. 121 of the constitution.

When asked to elaborate on this quotation, de Mestral suggested that, if the provinces were to take the federal government to court over internal trade barriers, "they would find judges [who] would rule that they have legislated in respect of interprovincial trade - something Parliament is competent to do but no federal government has the desire to get into the fray."<sup>2</sup> Here, de Mestral repeats that interprovincial trade barriers are an issue over which Ottawa has jurisdiction but that Ottawa, for some reason, has been reluctant to press its case on the issue.

While de Mestral is totally convinced of the federal government's jurisdiction over internal trade, the former Chief Justice of the Supreme Court, Bora Laskin, was less so. Writing in 1967, before he became Chief Justice, Laskin wrote: "I know of no federal system in which the constituent units have as extensive a regulatory authority as have the Provinces of Canada and in which the federal commerce power is as truncated as is that of the central

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<sup>2</sup> Electronic communication to the author, February 26, 2007.

government.”<sup>3</sup> In other words, the trade and commerce power may not be as potent as de Mestral believes it to be. What explains the difference in views? One of the tasks of this chapter is to explain that difference.

The chapter unfolds as follows: first, it provides some historical context, discussing what the founders thought on the role of Ottawa in interprovincial trade and how that was translated in the constitution. It also looks at what subsequent reports and subsequent federal governments had to say on the issue. Secondly, the chapter reviews several decisions of both the Supreme Court and the JCPC. The objective is not to offer an exhaustive legal commentary but to show the impact of the JCPC's trade and commerce decisions on the federal capacity to act in the area. The chapter then turns to the AIT and, among other things, outlines the political context in which it was negotiated, points out some reactions to the Agreement, and critiques the use of collaborative federalism to address internal trade barriers. Finally, the chapter draws some conclusions about the applicability of our theory. Again, the main point of the chapter is to analyze the way Ottawa deals with the issue of interprovincial trade barriers, not to provide an economic analysis of the AIT or to assess the extent to which internal trade is hindered by provincial regulations and policies.

### Historical Context

It is clear that the founders wanted to ensure the freest possible flow of commerce within the new country. George Brown, for example, told the

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<sup>3</sup> B. Laskin, “Reflections on the Canadian Constitution After the First Century,” in J. Peter Meekison, Canadian Federalism: Myth or Reality, (Toronto, ON: Methuen Publications, 1968), p. 139.

Canadian Legislative Assembly on February 8, 1865: "...I go heartily for the union, because it will throw down the barriers of trade, and give us the control of a market of four millions of people."<sup>4</sup> Amplifying on this view, Brown stated in the same speech:<sup>5</sup>

If a Canadian goes now to Nova Scotia or New Brunswick, or if a citizen of these provinces comes here, it is like going to a foreign country. The customs officer meets you at the frontier, arrests your progress, and levies his imposts on your effects. But the proposal now before us is to throw down all barriers between the provinces - to make a citizen of one, citizen of the whole; the proposal is, that our farmers and manufacturers and mechanics shall carry their wares unquestioned into every village of the Maritime Provinces; and that they shall with equal freedom bring their fish, and their coal, and their West India produce to our three millions of inhabitants. The proposal is, that the law courts, and the schools, and the professional and industrial walks of life, throughout all the provinces, shall be thrown equally open to us all.

Brown predicted that the results of the free trade that Confederation would bring about would adequately compensate for the decline in trade with the U.S. if the Americans were to abrogate the Reciprocity Treaty. He stated:<sup>6</sup>

...I am in favour of a union of these provinces, because it will enable us to meet, without alarm, the abrogation of the American Reciprocity Treaty, in case the United States should insist on its abolition....I have no hesitation in saying that if they do repeal it, should this union of British America go on, a fresh outlet for our commerce will be opened up to us quite as advantageous as the American trade has ever been.

For Brown, ensuring the free flow of commerce was to be a federal responsibility. Again in the same speech, he stated: "And finally, all matters of trade and commerce, banking and currency, and all questions common to

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<sup>4</sup> Canada. Provincial Parliament. Parliamentary Debates..., p. 99.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., p. 104.

the whole people, we have vested fully and unrestrictedly in the General Government.”<sup>7</sup> Cartier agreed: “Questions of commerce, of international communication and all matters of general interest, would be discussed and determined in the General Legislature.”<sup>8</sup>

Alexander T. Galt also made clear that trade and commerce were to be a federal concern. He stated:<sup>9</sup>

It was most important to see that no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union.

He stated further that the federal government “would have the regulation of all the trade and commerce of the country, for besides that these were subjects in reference to which no local interest could exist; it was desirable that they should be dealt with throughout the Confederation on the same principles.”<sup>10</sup>

In 1879, Charles Fisher, one of the framers of the Constitution Act, 1867, who became a justice of the New Brunswick Supreme Court, stated: “It was clearly the intention of the framers of the Act that Parliament should have power to regulate the trade between the several Provinces, and the internal

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<sup>7</sup> ibid., p. 108.

<sup>8</sup> ibid., p. 55.

<sup>9</sup> A.T. Galt, Speech on the Proposed Union of the British North American Provinces: Delivered at Sherbrooke, C.E., by the Hon. A.T. Galt, Minister of Finance, 23<sup>rd</sup> November 1864, (Montreal: Longmoore, 1864), p. 10.

<sup>10</sup> ibid.

trade of each Province as well as the foreign trade of the whole Dominion.”<sup>11</sup> Similarly, Louis Caron and Christopher Dunkin, judges with the Québec Superior Court, wrote that the federal trade and commerce power “is general, and without restriction, and must of necessity include as well the internal trade and commerce of each Province as that of the whole Dominion.”<sup>12</sup> The comment is significant because, as we saw previously, Dunkin was not a fan of union but was a strong supporter of provincial autonomy.

It would be difficult to find clearer statements of the founders’ intentions regarding the trade and commerce power.

As noted, two constitutional clauses in particular translated the founders’ views into law. Section 91(2) of the Constitution Act, 1867 sets out “The Regulation of Trade and Commerce” as being among the powers of the federal government. Section 121 ensures the unfettered movement of goods within Canada. It reads: “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”

Notwithstanding the founders’ intent to establish a Canadian economic union, internal trade barriers emerged as a concern by the time that the Royal Commission on Dominion-Provincial Relations (the Rowell-Sirois Commission) considered the state of interprovincial trade in the late 1930s. Pointing to “the stress of political pressures,” the Commission’s report warned that “The

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<sup>11</sup> Quoted in J. Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism, (Toronto, ON: University of Toronto Press, 2002), p. 26.

<sup>12</sup> Ibid., p. 27.

growing demand for provincial protectionism must not be under-rated.”<sup>13</sup> It pointed out that the Government of New Brunswick had proposed that it be allowed to impose tariffs against the rest of Canada or against individual provinces.<sup>14</sup> The report concluded that, while interprovincial discrimination in Canada may not yet be as bad as it is in the U.S., “it has already become serious, and American experience shows that it may become much worse.”<sup>15</sup> And this, even though Canada’s constitution “discountenanced barriers to interprovincial trade.”

The Commission referred to the submissions of a number of local boards of trade, as well as the submission of the Canadian Chamber of Commerce, which had complained of the emergence of impediments to the free flow of commerce. On the other hand, the British Columbia Chamber of Agriculture proposed that the trade and commerce power in agriculture be transferred to the provinces.

Six types of internal trade barrier were identified by the Commission. One had to do with taxation. For instance, BC imposed a tax on fuel oil, which served to protect the province’s coal industry. A second type was provincial legislation aimed at fixing prices, such as Manitoba’s fixing of the price of beer

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<sup>13</sup> Canada. Royal Commission on Dominion-Provincial Relations, Report, Book 2, (Ottawa, ON: King’s Printer, 1940), p. 63.

<sup>14</sup> The Commission report noted the comments of the counsel for the New Brunswick Government. He stated: “I had in mind the great advantage that would accrue to this province if it had been enabled to set up a tariff against the provinces of Ontario and Quebec.” And: “We could make agreements with the United States, we could make an agreement with Great Britain which would surely give us a better market than the markets of Ontario and Quebec.” See Commission report, p. 63n.

<sup>15</sup> Ibid., p. 64.

sold but not brewed in the province above that of beer brewed locally under authority of provincial legislation. A third consisted of inspection and grading laws that discriminated against goods made outside of the province. Special licensing provisions were a fourth type. A fifth consisted of provincial government procurement policies, and the sixth was “propaganda” that encourages the purchase of provincial products.

It should be stressed here that the Commissioners considered the elimination of provincial trade barriers to be ‘a good thing.’ Their belief was that “local protectionism” hampers national economic life and, therefore, tends to result in reduced incomes for the people. In general,<sup>16</sup>

There should...be complete freedom of trade and commerce throughout Canada; complete freedom of investment; complete freedom of movement and freedom from arbitrary restrictions (as distinct from a bona fide test of vocational qualifications) in the practice of a trade or profession; and complete freedom from discriminatory taxation.

How, then, did the Commissioners propose to deal with internal trade impediments? They did not recommend a specific course of action preferring instead to submit several options:

1. a constitutional prohibition against the enactment of legislation that would interfere with interprovincial trade and reliance on the courts to determine whether a provincial enactment is *ultra vires*;
2. use of the federal government’s power of disallowance to protect one province against discrimination by another. Alternatively, Parliament could be

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<sup>16</sup> ibid., p. 67.

given “a special head of legislative power” enabling it to pass legislation “to correct the discriminatory effects of provincial legislation”;

3. creation of a “Dominion-Provincial Conference” to which a government aggrieved by the actions of another could bring its complaint;
4. development of a kind of code of conduct and reliance on governments not to enact legislation that would create an internal trade barrier. This measure would necessitate the establishment of an impartial tribunal before which a province could defend its actions;
5. interprovincial bargaining to deal with protectionist measures;
6. negotiation of formal agreements between two or more provinces regarding the use of protectionist measures; as we will see, this option was recently taken up by Alberta and British Columbia and by Ontario and Québec.

Probably out of a desire not to offend provincial sensibilities, the Commission was reluctant to take a position in support of a recommendation that would be consistent with the express wishes and intentions of the constitution’s framers. Moreover, among the options were some that, if implemented, would have undermined the role of the federal government in securing the economic union. Thus, in adopting the stance they did, the Commissioners portrayed Canada’s provinces as, if not “totally independent sovereign actors,” then actors with a degree of trade and commerce power not envisaged by the country’s founders.

Noticeably absent from the Commission’s list of options was one that would have the federal government enforce, through federal legislation or

through the courts or through federal cajoling, the existing provisions of the constitution, namely sections 91(2) and 121. This is likely because, by the time the Commission had been formed, the JCPC had issued its interpretation of s. 91(2). As a result, while the constitution,<sup>17</sup>

discountenanced barriers to interprovincial trade [it] did not preclude them altogether and, under the stress of political pressure, various expedients have recently been devised which, in one way or another, afford some degree of provincial protectionism.

So, for example, “Certain taxes which in 1867 would have been considered essentially indirect at least by economists, and within the exclusive power of the Dominion, can now be so framed as to be deemed direct by the courts and, therefore, within the jurisdiction of the province.”<sup>18</sup> More will be said later on the court’s impact on interprovincial trade barriers. Suffice it to say at this point that the courts - that is, the JCPC - played a significant part in legitimizing provincial protectionism and that the Rowell-Sirois Commission felt impelled to include an option calling for a constitutional prohibition against such barriers.

By the 1960s, internal trade became part of the national unity discourse. Initially, concerns about internal trade barriers emerged from the provinces. In 1968, Québec proposed that the free mobility of persons and goods be entrenched in the constitution.<sup>19</sup> In 1979, a report from the Ontario Advisory

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<sup>17</sup> Ibid., p. 62.

<sup>18</sup> Ibid., p. 63.

<sup>19</sup> See R. Howse, Economic Union, Social Justice, and Constitutional Reform: Towards a High but Level Playing Field, Study No. 9, Background Studies of the York University Constitutional Reform Project, (Toronto, ON: York University Centre for Public Law and Public Policy, 1992), p. 62.

Committee on Confederation argued that the federal government “must act as the protector and guarantor of the Canadian national market....”<sup>20</sup> It recommended that “serious consideration” be given “to entrenching a ‘freedom of movement of people, capital, goods, and information’ provision in the constitution.”<sup>21</sup>

The 1979 Task Force on Canadian Unity (the P  pin-Robarts Task Force) also commented on internal trade. Although the report is generally considered to be supportive of provincial autonomy generally and special status for Qu  bec specifically, it is critical of provinces for erecting a multitude of interprovincial trade barriers, arguing that “these provincial barriers contradict the spirit of economic union and should be prevented as far as possible....”<sup>22</sup> It recommended that section 121 of the constitution be “clarified in order to guarantee more effectively free trade between the provinces for all produce and manufactured goods, and be extended to include services.”<sup>23</sup> It also recommended that interprovincial barriers to the movement of capital be constitutionally prohibited. Impediments to the mobility of professionals and tradespeople should be reduced through interprovincial cooperation, a proposal

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<sup>20</sup> Ontario. Ontario Advisory Committee on Confederation, Second Report of the Advisory Committee on Confederation: “The Federal-Provincial Distribution of Powers,” (Toronto, ON: March 1979), p. 13.

<sup>21</sup> Ibid., p. 15.

<sup>22</sup> Canada. The Task Force on Canadian Unity, A Future Together: Observations and Recommendations, (Hull, QC: Supply and Services Canada, 1979), p. 71.

<sup>23</sup> Ibid., p. 123.

that would obviously minimize the role of the federal government in promoting the economic union.

During the federal-provincial constitutional negotiations that preceded patriation in 1982, Ottawa endeavoured to make the case for enhanced economic mobility in Canada. It argued that s. 121 did not adequately safeguard the economic union and that court decisions had rendered s. 91(2) ineffective in preventing the rise of provincial protectionism. It clearly perceived that its power to secure the economic union was weak. It, therefore, proposed a three-pronged constitutional methodology to ensure economic mobility in the country. One was the constitutional entrenching of citizens' mobility rights. A second was a broadening of s. 121 to limit governments' powers "to impede economic mobility." A third was a broadening of federal trade and commerce powers to encompass "all matters that are necessary for economic integration."<sup>24</sup> As it turned out, Ottawa was unable to convince the provinces and could get agreement only on citizens' mobility rights, which now comprise s. 6 of the Canadian Charter of Rights and Freedoms.

In 1983, the Trudeau government established the Royal Commission on the Economic Union and Development Prospects for Canada, under the chairmanship of Donald Macdonald. As its title suggests, it was mandated to look closely into the state of the economic union. The Commission's report

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<sup>24</sup> J. Chrétien, Securing the Canadian Economic Union in the Constitution, discussion paper published by the Government of Canada, (Hull, QC: Supply and Services Canada, 1980), p. 29.

stressed that the concept of economic union has a political dimension, stating:<sup>25</sup>

The objective of building a Canadian economic union has meaning because we are first a national political community. Threats to the economic union are threats to the national community because they erode the ties of affinity and interest that bind Canadians together.

Elaborating further, the report says:<sup>26</sup>

Political opposition to [economic] fragmentation has several dimensions. It is derived, in part, from a sense of common citizenship....A political view argues that building economic linkages among Canadians is of value in itself, and that it increases personal contacts and relationships among Canadians which contribute to a sense of shared identity and common citizenship.

For the Commissioners, the Canadian economic union is related to perceptions of political identity and political community and citizens' sense of attachment to that community. Thus, "barriers which may be trivial in economic terms may be politically significant if they offend against our sense of Canadian citizenship."<sup>27</sup> However, the Commissioners were quick to add that federalism allows for a diversity of preferences and an attempt to eradicate all internal trade barriers would probably mean the end of Canadian federalism.

Like the Rowell-Sirois Commission, the Macdonald Commission found that the direct economic costs of the existing internal trade barriers "appear to

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<sup>25</sup> Canada. Royal Commission on the Economic Union and Development Prospects for Canada, Report, Vol. 2, (Ottawa, ON: Minister of Supply and Services, 1985), p. 100.

<sup>26</sup> Ibid., p. 113. In his discussion of the economic union, Robert Howse also mentions the political dimension. Like the Macdonald Commission, he refers to citizenship. But his political dimension also embraces individual autonomy and the enhancement of individual opportunity through economic mobility. See R. Howse, Economic Union, Social Justice, and Constitutional Reform, p. 15.

<sup>27</sup> Canada. Royal Commission on the Economic Union and Development Prospects for Canada, Report, p. 114.

be small.”<sup>28</sup> The economic union, the Commission found, “generally functions effectively. Goods, capital, services and people move relatively freely within the Canadian common market.”<sup>29</sup> Doubtless, this is due for the most part to the fact that key trade and commerce powers - currency, credit and interprovincial transportation - are firmly in the hands of the federal government.

However, the Commission found as well that there were significant barriers to trade which should be addressed. For example, it found agricultural supply management policies that restricted the quantities of poultry, eggs, and dairy products that could be shipped from one province to another; discriminatory government purchasing policies that favoured local manufacturers or suppliers of goods and services; barriers to the free movement of workers in the form of occupational qualifications and provincial regulation of the professions; differing provincial labour laws; and a range of subsidies that favoured some sectors over others.<sup>30</sup>

In the Commission's assessment, the country's constitutional framework does provide the essential guarantees of an economic union but it has “some

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<sup>28</sup> On the other hand, during the House of Commons debate on the Chrétien government's Agreement on Internal Trade Implementation Act, MPs cited statistics indicating that barriers to trade are not costless. For example, the Hon. Raymond Chan referred to a study by the Canadian Manufacturers' Association which estimated that trade barriers cost Canadians about \$7 billion annually in direct job and income loss. (House of Commons, Debates, May 15, 1995; p. 12624). Reform Party MP, Ed Harper, cited a Canadian Chamber of Commerce study which estimated that internal trade barriers cost every Canadian family at least \$1,000 a year. He also referred to estimates by the Fraser Institute that removing internal trade barriers would add 2 to 6 per cent to the GDP. (House of Commons, Debates, May 15, 1995; p. 12629).

<sup>29</sup> Canada. Royal Commission on the Economic Union and Development Prospects for Canada, Report, p. 135.

<sup>30</sup> See H. Bakvis, G. Baier, D. Brown, Contested Federalism: Certainty and Ambiguity in the Canadian Federation, (Don Mills, ON: Oxford University Press Canada, 2009), p. 189.

important gaps and ambiguities which have permitted a wide variety of impediments to grow up.”<sup>31</sup> These findings, plus the political rationale for the elimination of barriers, led the Commission to propose recommendations intended to reduce if not eliminate those impediments.

One recommendation proposed a constitutional strengthening of s. 121 if future judicial interpretations do not provide for a broad reading of the section. The Commission pointed out that s. 121 applies only to trade in goods and not to capital and labour; also, “it is uncertain whether it would apply to services and non-tariff barriers.”<sup>32</sup> Hence, the need for a constitutional amendment.

The other proposal is not unlike one of the options submitted by the Rowell-Sirois Commission. The Macdonald Commission advocated the development of a “Code of Economic Conduct,” which would “identify the policies and practices that are, and are not, acceptable in the Canadian economic union.”<sup>33</sup> The Code would be created and implemented by a federal-provincial Council of Ministers for Economic Development, which would be assisted by a Federal-Provincial Commission on the Canadian Economic Union. Significantly, the Macdonald Commission suggested that the process for

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<sup>31</sup> ibid., p. 116.

<sup>32</sup> ibid., p. 114.

<sup>33</sup> ibid., p. 137.

developing the Code should “parallel the working methods of the General Agreement on Tariffs and Trade.”<sup>34</sup>

Perhaps the main recommendation of the Macdonald Commission, although it was not stated as such, has to do with the pre-eminent role that it said the federal government should play. This role involves “safeguarding the economic union,” but it did not say how Ottawa was to do this. In its view, the “development of the federal power over interprovincial trade and commerce could help to ensure the effective operation of the economic union,”<sup>35</sup> although, again, it did not say how the “development of the federal power” was to be accomplished. Consistent with its comments on the political value of removing internal trade barriers, the Commission’s report stated: “[The federal government’s] role as the national government means that its primary focus must be on the health of the whole, and that it must continually foster the development of positive linkages of all kinds among Canadians.”<sup>36</sup>

While the Commissioners saw the importance of the political aspects of economic union, and while they acknowledged the central role of the federal government in securing the economic union, they, nevertheless, shied away from advocating assertive federal action and seemed to suggest, through their advocacy of a Code of Economic Conduct, that interprovincial trade barriers were a joint concern, to be addressed jointly. Suggesting, too, that the Code

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<sup>34</sup> Ibid., p. 139.

<sup>35</sup> Ibid., p. 140.

<sup>36</sup> Ibid.

could be developed in a way similar to the process that produced the General Agreement on Tariffs and Trade seems to have been based on this perception.

By the time that the Macdonald Commission reported, a new government, headed by Brian Mulroney, was in office in Ottawa. Having pledged to try to get Québec to sign the Constitution Act, 1982, he made two attempts at constitutional reform, neither of which was successful. The first attempt, the 1987 Meech Lake Constitutional Accord, concentrated on meeting Québec's conditions and did not deal with the economic union. The second effort, the Charlottetown Constitutional Accord, was signed in 1992 and it did address the issue.

In 1986, First Ministers resumed discussions on internal free trade. Like the Trudeau government, the Mulroney administration was uncertain about the applicability of the interprovincial trade power. In 1991, the Mulroney government issued a discussion paper entitled, Shaping Canada's Future Together: Proposals. It proposed that the constitution be amended to give Parliament "a new power to make laws for the efficient functioning of the economic union."<sup>37</sup> However, in a statement that the country's founders may have disputed, the paper says that "the management of the economic union is an area of shared responsibility." Thus, even though it proposed giving itself a "new" power, Ottawa also proposed that federal legislation under the new power "could not be enacted without the approval of at least seven of the provinces representing 50 per cent of the population." In addition, three

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<sup>37</sup> Canada. Shaping Canada's Future Together: Proposals, (Supply and Services Canada, 1991), pp. 30-31.

provinces could opt out of the federal law for three years if 60 per cent of the members of the provincial legislature supported opting out.<sup>38</sup>

The discussion paper also recommended a broadening of s. 121, proposing that it be<sup>39</sup>

modernized to enhance the mobility of persons, capital, services and goods within Canada by prohibiting any laws, programs or practices of the federal or provincial governments that constitute barriers or restrictions to such mobility. This would provide all Canadians with the right to pursue the livelihood of their choice and economic opportunities wherever they choose to do so in Canada.

But even these modest attempts at promoting the economic union were too much for the provinces to take. Reform of s. 121 was dropped and the Accord deals with economic union in only the most general of terms. With respect to the federal-provincial negotiations on s. 121, Peter Russell wrote: “In the multilateral meetings the provincial premiers pressed for so many exemptions that they might have ended up with a clause that weakened rather than strengthened the existing constitutional protection of internal free trade.”<sup>40</sup>

### Judicial Decisions

In the preceding discussion, we learned that internal trade barriers had developed to the point where they had become a matter of some concern to the federal government (and probably to some provincial governments). Both

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<sup>38</sup> In a 1998 piece, Janine Brodie and Malinda Smith state that the proposals in this discussion paper would have provided for “a stronger role for the federal government.” See “Regulating the Economic Union,” in L. Pal, (ed.), How Ottawa Spends 1998-99: Balancing Act: The Post-Deficit Mandate, (Don Mills, ON: Oxford University Press, 1998), p. 85. It is difficult to understand how they could draw this conclusion. By saying that the economic union was a shared responsibility and then circumscribing its own, “new” power to manage the economic union, Ottawa was surely diminishing its own capacity to regulate.

<sup>39</sup> Canada. Shaping Canada’s Future Together, p. 30.

<sup>40</sup> P. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People, p. 200.

Liberal and Progressive Conservative administrations made the economic union part of their constitutional reform ambitions, but they had very limited success; enshrining mobility rights of citizens in the Canadian Charter of Rights and Freedoms was the best they could do to further secure the economic union.

Very early in the life of Canada the courts were asked to make decisions about the economic union. In what follows, we trace the evolution of judicial thinking on the federal trade and commerce power in order to ascertain the scope of the power and the extent to which the Supreme Court of Canada adhered to the JCPC's understanding of s. 91(2).

The first case of interest is *Severn v. The Queen*. It is noteworthy because it represents the first time that the Supreme Court of Canada commented on s. 91(2). By a four to two majority, (with the two justices from Québec, T. Fournier and J.-T. Taschereau, among the majority), the Court held that an Ontario law requiring brewers and distillers, who were already required to obtain a federal license, to purchase for \$50 a provincial license before selling liquor by wholesale was *ultra vires* and, therefore, invalid. The law was deemed invalid because it interfered with trade and commerce and because it imposed an indirect tax, which, under the constitution, could only be levied by the federal jurisdiction.

The Court accorded s. 91(2) a very broad interpretation. Even one of the dissenting justices accepted a wide reading of the section. Justice Strong wrote:<sup>41</sup>

That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the British North America Act, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit.

In arriving at their decision, the justices seemed careful to refer to the intentions of the framers. Chief Justice Richards, for instance, wrote that the authority claimed under the Ontario law was “so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the British North America Act,” that he could not come to any other conclusion than that it was *ultra vires*.<sup>42</sup> The decision was not appealed.

The Supreme Court again upheld the federal trade and commerce power two years later in 1880 in *City of Fredericton v. The Queen*, and, again, the justices interpreted s. 91(2) very broadly. By a four to one majority, with the Québec judges again among the majority, the Court upheld a federal law establishing a nation-wide system for prohibiting the sale of intoxicating liquors, based upon local preference. Writing for the majority, Chief Justice Ritchie declared that “...the [federal] right to regulate trade and commerce is not to be overridden by any local legislation in reference to any subject over which power is given to the Local Legislature.”<sup>43</sup> He declared further: I think

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<sup>41</sup> *Severn v. The Queen*, [1878], 2 S.C.R. 70, at p. 104.

<sup>42</sup> *Ibid.*, p. 95.

<sup>43</sup> *City of Fredericton v. The Queen*, [1880], 3 S.C.R. 505, at pp. 540-541.

it equally clear, that the Local Legislatures have not the power to prohibit the Dominion Parliament having, not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce....<sup>44</sup> Justice Henri-Elzéar Taschereau agreed:<sup>45</sup>

It may, it is true, interfere with some of the powers of the Provincial Legislatures, but sect. 91 of the [B.N.A.] Act clearly enacts that, ***notwithstanding anything*** in this Act, ***notwithstanding*** that the control over local matters, over property and civil rights, over tavern licenses for the purpose of raising revenue, is given to the Provincial Legislatures, the ***exclusive*** legislative authority of the Dominion extends to the regulation of trade and commerce, and this Court has repeatedly held, that the Dominion Parliament has the right to legislate on all matters left under its control by the Constitution, though, in doing so it may interfere with some of the powers left to the Local Legislatures. [Emphasis in original].

As in the *Severn* case, the decision in *Fredericton* was not appealed to the JCPC.

The third case that is of interest in *The Citizens Insurance Company v. William Parsons*. Here, the Supreme Court ruled in favour of Ontario. By a narrow, three to two margin, the justices upheld an Ontario law imposing statutory conditions on insurance policies. In so doing, the Court seemed to retreat somewhat from its previous decisions on the trade and commerce power.

This time, the decision was appealed to the JCPC which, in 1881, confirmed the Supreme Court's judgment. The case is significant because it was the first in a string of decisions from the JCPC that set limits on the

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<sup>44</sup> ibid., p. 542.

<sup>45</sup> ibid., p. 558.

federal government's authority to regulate trade and commerce in the country. The Judicial Committee ruled that the federal government has the authority to regulate in the areas of interprovincial trade and international trade, (the so-called first branch or limb), but it may also provide for the "general regulation of trade affecting the whole dominion," (the so-called second branch or limb, which was rarely invoked or referred to until the 1970s).<sup>46</sup> The JCPC ruling undermined the interprovincial aspect of the first branch when it declared that the federal power "does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province...."<sup>47</sup> Intraprovincial contracts did not fall under s. 91(2), even if the impact of those contracts was felt beyond the borders of a province.

The consensus among legal scholars and political scientists is that this case and other JCPC decisions that followed severely circumscribed the federal authority. Christopher Gilbert, for instance, wrote:<sup>48</sup>

From *Parsons* to the end of the Privy Council's jurisdiction over Canadian appeals, the Board maintained an almost unrelieved record of interpreting both limbs of the *Parsons* definition of s. 91(2) very restrictively. So strong did this tendency become that it became unclear whether any situation would ever invoke the second limb of *Parsons*.

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<sup>46</sup> According to Patrick Monahan, "In the dozens of cases in which the Privy Council subsequently considered the trade and commerce power, it essentially ignored the second branch entirely and analyzed the issues exclusively in terms of the first branch." See P. Monahan, *Constitutional Law*, 3<sup>rd</sup> edition, (Toronto, ON: Irwin Law Inc., 2006), p. 246. James MacPherson found that between 1881 and 1980 the courts invoked the power only twice. See J. MacPherson, "Economic Regulation and the British North America Act," *Canadian Business Law Journal*, Vol. 5, 1980-81, p. 175n.

<sup>47</sup> *The Citizens Insurance Company of Canada v. William Parsons*, [1881], 1 A.C. 96, at p. 113.

<sup>48</sup> C. Gilbert, *Australian and Canadian Federalism 1867-1984: A Study of Judicial Techniques*, (Carlton, Victoria: Melbourne University Press, 1986), p. 58.

Similarly, Douglas Brown concludes:<sup>49</sup>

The trade and commerce power...has been interpreted narrowly - especially in judgments, beginning with the 1881 *Parsons* case - by the Judicial Committee of the Privy Council....That judgment set the stage for a clear distinction between interprovincial and intra-provincial trade, emphasizing federal jurisdiction over “flow” of trade only.

Note Brown’s point that, in the JCPC’s interpretation of s. 91(2), trade issues that were within a province’s borders were beyond the reach of the federal power. Note also his observation that, for the JCPC, the federal concern must only be with the “flow” of trade.

F.R. Scott acknowledged that ordinary contracts were rightly a matter for provincial not federal regulation. His problem was with the blanket prohibition against federal regulation of an intra-provincial trade and business, “regardless of the size it might assume or the degree of dependence of the whole economy upon it,” unless it is expressly mentioned in s. 91, such as banking.<sup>50</sup> “Hence even so major a trade as that in wheat has had to have its legal base in federal law bolstered by the clumsy device of declaring all grain elevators in the prairies to be works for the general advantage of Canada.”<sup>51</sup>

This brings us to the difference between the Supreme Court of Canada’s judgment and that of the JCPC. While both affirmed the validity of the Ontario law, they presented very different assessments of the impact on the federal trade and commerce power. The JCPC took the opportunity to set limits on

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<sup>49</sup> D. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada*, (Montreal and Kingston: McGill-Queen’s University Press, 2002), p. 77.

<sup>50</sup> F.R. Scott, *Essays on the Constitution*, p. 266.

<sup>51</sup> *Ibid.* This “clumsy device” is the federal declaratory power, s. 92(10)(c).

the federal trade and commerce power, limits that became narrower as a result of other JCPC decisions that built on the *Parsons* case. On the other hand, the Supreme Court ruling was careful to keep the trade and commerce power intact. This comes out in the comments of Chief Justice Ritchie, writing for the majority:<sup>52</sup>

No one can dispute the general power of parliament to legislate as to “trade and commerce,” and that where, over matters with which local legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin v. Langlois* (1), that the property and civil rights referred to, were not all property and all civil rights, but that the terms “property and civil rights” must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion parliament, and that the power of the local legislatures was to be subject to the general and special legislative powers of the Dominion parliament....

For the Chief Justice, the law was simply about regulating a contract of indemnity. It was not about “a regulation of trade and commerce.”<sup>53</sup> As John Saywell writes in The Lawmakers, “Even including *Parsons*, the federal power over trade and commerce was interpreted [by the Supreme Court of Canada] sufficiently broadly to include internal trade, while property and civil rights were bounded by the federal enumerations and...by the residual clause.”<sup>54</sup>

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<sup>52</sup> The Citizens Insurance Company v. Parsons, [1880], 4 S.C.R. 215, at p. 242.

<sup>53</sup> Ibid., p. 243.

<sup>54</sup> J. Saywell, The Lawmakers: Judicial Power and the Shaping of Canadian Federalism, p. 56.

In 1896, the courts once again ruled on the federal trade and commerce power. In what has become known as the *Local Prohibition* case, the Law Lords confirmed their restrictive interpretation of s. 91(2). They reversed a Supreme Court decision and held that an Ontario law prohibiting liquor sales was constitutional. It also repudiated the Supreme Court judgment that the Canada Temperance Act was a legitimate exercise of s. 91(2).

In 1916, in the *Insurance Reference*, the Privy Council struck down federal legislation requiring federal licences for all insurance companies whose business was not confined to a single province.<sup>55</sup> Even though an enterprise might engage in Canada-wide business activities, the federal government, as a result of the JCPC decision, could not invoke its trade and commerce power to regulate those activities; in this case, it could not establish a licencing regime for the insurance industry. The fact that an industry or trade was active from one end of the country to the other was not enough to provide the federal government with the necessary regulatory authority.

Similar decisions came in 1916 and 1937. In *Bonanza Creek Gold Mining v. The King*, the JCPC ruled that companies established in one province could operate in any other province if granted permission by the other province.<sup>56</sup> It would seem that the incorporation of companies wanting to do business in more than one province ought to be a federal concern.<sup>57</sup> But the JCPC did not

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<sup>55</sup> Attorney-General for Canada v. Attorney-General for Alberta, (*Insurance*), [1916], 1 A.C. 588.

<sup>56</sup> *Bonanza Creek Gold Mining v. The King*, [1916], 1 A.C. 566.

<sup>57</sup> Interestingly, the 2007 free trade agreement between Alberta and British Columbia, known as the Trade, Investment, and Labour Mobility Agreement (TILMA), eliminates duplicate business registration

think so and, as noted earlier, seemed to want to restrict the meaning of the federal trade and commerce power to the actual movement - the flow - of goods from one province to another. It confirmed its stance in the 1937 *Natural Products Marketing Reference* in which the JCPC held that a federal law providing for the setting up of marketing schemes for natural products whose principal market was outside of the province of production, or some part of which was intended for export, was invalid.<sup>58</sup> Peter Hogg writes that the “Privy Council through Lord Atkin held that the entire statute was invalid because it included within its purview some transactions which could be completed within the province. That was a matter within property and civil rights in the province.”<sup>59</sup> This case clearly demonstrated how the JCPC’s total prohibition of federal regulation of intraprovincial trade affected Ottawa’s capacity to regulate interprovincial trade.

The JCPC under Viscount Haldane weakened s. 91(2) even further. In the *Board of Commerce* case, the Privy Council determined that the federal power to regulate trade and commerce was valid only as an ancillary power; that is, only when it supplemented another federal power. This view of the power was set out again in the decision on *Toronto Electric Commissioners v. Snider*, which struck down an eighteen-year-old federal labour relations law

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and reporting requirements so that businesses registered in one province are automatically recognized in the other.

<sup>58</sup> Attorney-General for British Columbia v. Attorney-General for Canada (Natural Products Marketing Reference), [1937], 1 A.C. 377.

<sup>59</sup> P. Hogg, *Constitutional Law of Canada*, Vol. 1, 5<sup>th</sup> edition, loose-leaf edition, (Toronto, ON: Carswell, 2006), p. 20-5.

and held that labour was a provincial responsibility. Although the ancillary interpretation was later repudiated by the Privy Council itself, it came too late for Canadians, particularly but not only for those on the left, who saw the need for a national labour code.<sup>60</sup>

The story of the *Toronto Electric Commissioners* case is revealing. In 1923, the members of the Canadian Electrical Trades Union became involved in a dispute over wages and working conditions with the Toronto Electric Commission (TEC), which was responsible for the city's electric power transmission and distribution. The union, as was its right under the federal Industrial Disputes Investigation Act (IDIA), applied for the establishment of a Board of Conciliation and Investigation. The TEC refused to recognize the authority of the Board and sought an injunction from the Supreme Court of Ontario to stop the Board from proceeding on the grounds that the federal Act was unconstitutional. Justice Orde of the High Court Division of the Supreme Court of Ontario granted the injunction, arguing that the IDIA interfered with the civil rights of employers and employees, as well as with the operation of a

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<sup>60</sup> Many labour law scholars in Europe see the need for labour issues to be regulated by the European Union-level institutions rather than by the member states. Presently, those institutions are excluded from regulating on labour relations issues, e.g., collective bargaining. The labour issues for which they do have responsibility include worker health and safety, working conditions, and equal treatment. However, according to R. Blanpain et al., the “absurdly complex voting system” makes it extremely difficult to adopt Europe-wide decisions on these issues. As a result, “the ESM [European Social Model] is extremely weak.” Because the EU does not have full regulatory authority on labour and because of the complex voting system at the EU-level, “the EU lacks the essential competences, which are needed to organize and establish a full-fledged ESM.” See R. Blanpain et al., The Global Workplace: International and Comparative Employment Law - Cases and Materials, (Cambridge, UK: Cambridge University Press, 2007), pp. 285-286. Another legal scholar, Philip Syrpis, has written on how the European Court of Justice appears to regard differences in labour laws among the member states of the European Union as being inherently problematic and, in its case law, has attempted to minimize those differences. Syrpis himself calls for greater tolerance of regulatory diversity. See P. Syrpis, EU Intervention in Domestic Labour Law, (Oxford, UK: Oxford University Press, 2007).

municipal institution, and that both issues were the responsibility of the provincial government.

The TEC then applied for a permanent injunction. This time, the case was heard by Justice Herbert Mowat. He refused to grant the injunction and referred the matter to the Appellate Division of the Supreme Court of Ontario. In a four-to-one decision, the justices ruled that the IDIA did indeed fall within the jurisdiction of the federal government. They determined that, in its “pith and substance,” the federal Act was not about civil rights or municipal institutions but about providing machinery to investigate industrial disputes, disputes which could affect the national interest. Justice Ferguson, writing for the majority, stated: “It cannot be disputed that to deprive the city of Toronto of electric power on which it depends for light, heat and power is to disturb and hinder the national trade and commerce and to endanger public peace, order and safety.”<sup>61</sup>

Bypassing the Supreme Court, the TEC brought the case before the JCPC, which reversed the Supreme Court of Ontario decision and held that the Act was *ultra vires* of the Parliament of Canada.

As F.R. Scott noted, the case was very similar to a 1911 case involving the Montreal Street Railway Company and its workers. As with the *Snider* case, the workers were engaged in a dispute with the company and had requested the establishment of a Board of Conciliation. And as in the *Snider* case, the

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<sup>61</sup> See “Judgment of the First Appellate Division of the Supreme Court of Ontario,” in Canada, Department of Labour, Judicial Proceedings respecting Constitutional Validity of The Industrial Disputes Investigation Act, 1907 and Amendments of 1910, 1918 and 1920, (Ottawa, ON: F.A. Acland, Printer to the King’s Most Excellent Majesty, 1925), p. 21.

company sought and obtained an injunction from a judge and the Board was ordered to stop doing its work. The company then sought a prohibition order to permanently prevent the Board from proceeding. However, Justice Lafontaine of the Québec Superior Court dismissed the request and upheld the constitutionality of the federal IDIA. The company appealed his decision to the Québec Court of Review. The three judges on the Court ruled that the Act “is constitutional and *intra vires* of the Dominion Parliament, and its enactment is within the legislative powers of the Dominion Parliament.”<sup>62</sup>

As a result of the two cases, a total of twelve Canadian judges considered the constitutionality of the federal IDIA. Ten upheld the validity of the Act, (including four from Québec), and only two thought it *ultra vires*. What is interesting and significant about these two cases is that judges of two *provincial* courts upheld the constitutionality of a federal law. For the Supreme Court of Ontario, the province that gave Canada Oliver Mowat, national trade and commerce was legitimate grounds for the enactment of a federal labour relations law, *even if the law applied to a municipal organization*.

The *Snider* decision is interesting, too, because, like the JCPC ruling in the *Citizens Insurance* case, it is an example of the Judicial Committee going to the extreme in its determinations. In the latter case, it issued a blanket prohibition against federal regulation of intraprovincial trade or business,

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<sup>62</sup> While the Court of Review affirmed the constitutionality of the IDIA, it reversed Justice Lafontaine’s decision on a technicality. It found that at the time of the application for a board of conciliation no dispute within the meaning of the Act existed between the workers and the company. It, therefore, ordered the Board to stop its proceedings.

regardless of the size of the trade or business. In the *Snider* case, it determined that labour was not a federal matter unless the trade, business or industry was specifically identified in the constitution as being under federal jurisdiction, again regardless of the size of the organization. A reasonable alternative would have been to provide for provincial regulation of labour for organizations confined to a province but to allow for federal regulation when an organization creates a subsidiary in another province, or when it exports most of its output outside one province, or imports most of its inputs from outside of the province. This arrangement would protect provincial diversity while ensuring federal authority over organizations that take on significant dimensions.<sup>63</sup> It also might have facilitated the growth of strong, dynamic national labour unions.<sup>64</sup>

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<sup>63</sup> Advocates of a national labour code argue that provincial control of labour will produce a race to the bottom in labour legislation. Legal scholar and former member of the Canada Industrial Relations Board, Véronique Marleau, shares this concern. She has recently written:

The fully decentralized Canadian labour relations setting is particularly problematic in this respect.

...

A fully decentralized framework favours the development of a regulatory race to the bottom because there is no countervailing force capable of offsetting the tendency of jurisdictions to compete for investments and jobs by bringing existing protections to the lowest common denominator. Canadian developments in labour regulation and practice over the last ten years in the various political jurisdictions confirm this prognostic, by showing that the risks of dismantling and regulating downward are real in the absence of a central regulating authority and broad-based bargaining structures.

See V. Marleau, "Globalization, Decentralization and the Role of Subsidiarity in the Labour Setting: *In Memory of Marco Biagi*," in J.R. Craig, M. Lynk, (eds.), Globalization and the Future of Labour Law, (Cambridge, UK: Cambridge University Press, 2006), pp. 119-120. I might add here that, at a December 2008 round-table of senior executives from unions and employers, which I attended, the head of one of Canada's largest unions exclaimed out of exasperation, "Why do we need so many labour codes in this country?" This individual then described the devolution of labour market training as "a catastrophically stupid decision!"

<sup>64</sup> Yet another alternative that the JCPC may have considered would have been to uphold federal jurisdiction over labour relations issues, e.g., collective bargaining, dispute resolution, but to provide for provincial jurisdiction over labour standards and occupational health and safety.

There is general agreement among legal scholars that the Supreme Court of Canada has revived the federal trade and commerce power. Peter Hogg, for instance, writes that, "Since the abolition of appeals to the Privy Council, there has been a resurgence of the trade and commerce power."<sup>65</sup> But the resurgence took some time to become full-blown. Indeed, legal scholar, James MacPherson, in a 1980 paper analyzing a number of Supreme Court decisions rendered in the 1976-1980 period that failed to uphold the federal trade and commerce power, concluded that "the constitutional bases for federal economic legislation have never been shakier."<sup>66</sup> Not since the Depression, MacPherson wrote, "have federal economic laws been treated so harshly by the highest court."<sup>67</sup> Peter Hogg, who wrote a commentary on the MacPherson paper, supported his conclusion, arguing that the Supreme Court's decisions in *Dominion Stores Ltd. v. The Queen* and *Labatt Breweries v. A.-G. Canada* "seem to indicate a deliberate return to pre-1949 doctrine."<sup>68</sup>

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<sup>65</sup> P. Hogg, Constitutional Law of Canada, student edition, (Scarborough, ON: Thomson Canada Limited, 2003), p. 497.

<sup>66</sup> J. MacPherson, "Economic Regulation and the British North America Act," Canadian Business Law Journal, Vol. 5, 1980-81, p. 174.

<sup>67</sup> Ibid., p. 217.

<sup>68</sup> P. Hogg, "Comment on James C. MacPherson's Paper on Economic Regulation and the British North America Act," Canadian Business Law Journal, Vol. 5, 1980-81, p. 223. Hogg was critical of the Supreme Court justices for citing "the old Privy Council cases" on trade and commerce rather than some of its own earlier decisions which were more favourable to the federal power. Similarly, MacPherson described the interprovincial branch of the trade and commerce power as being "shrouded in the mists of early, narrow Privy Council decisions." Clearly, as late as 1980 the old Privy Council rulings exerted a powerful influence.

It was not until the late 1980s that the Supreme Court moved decisively away from the JCPC's trade and commerce rulings. Robert Howse summarizes the course of judicial treatment of the trade and commerce power as follows:<sup>69</sup>

...the legacy of the Privy Council era of jurisprudence was to establish most areas of economic and social regulation as matters of provincial jurisdiction, including the regulation of any single industry or trade, the intraprovincial environment, labour relations, and so forth.... Thus, the federal government was seen as having very little scope to enact national legislation where divergent provincial regulatory approaches undermined the Canadian economic union. Over the past few years, however, decisions of the Supreme Court have indicated the emergence of a very different, broader view of the federal general powers, as well as an explicit recognition of the importance of federal legislative activity to the securing of the Canadian economic union through harmonization.

Michael Trebilcock agrees with Howse on the Supreme Court's emerging stance on the trade and commerce power. He states:<sup>70</sup>

However, two cases dealt with by the Court in the early 1990s, *Morguard Investments Ltd. v. De Savoye* and *Hunt v. T&N PLC*, significantly expanded the scope of federal legislative jurisdiction to address matters which affect the economic union and promote positive integration.

Eugénie Brouillet concurs with the foregoing, although her perspective is very different. She laments the revival of the federal trade and commerce power and worries that, as a result of the Court's decision in *General Motors of Canada Ltd. v. City National Leasing*,<sup>71</sup> which dealt with the second branch of

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<sup>69</sup> R. Howse, Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government, Commentary series, The Canadian Union Papers, C.D. Howe Institute, No. 81, June 1996, pp. 10-11.

<sup>70</sup> M. Trebilcock, "The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy," Canadian Bar Review, Vol. 80, 2001, p. 567. Positive integration refers to measures taken by governments to harmonize divergent laws or practices or to provide for the mutual recognition of different standards or requirements. It is distinguished from negative economic integration in that the latter refers to prohibiting or constraining measures adopted by one jurisdiction that discriminate against another jurisdiction. See P. Monahan, Constitutional Law, 3<sup>rd</sup> edition, pp. 307-308.

<sup>71</sup> *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641.

the federal trade and commerce power, “there will be no effective limits to that head of federal power.”<sup>72</sup> Claiming that the Supreme Court decision in this case was “un revirement jurisprudentiel spectaculaire,” Brouillet writes:<sup>73</sup>

Cet arrêt de la Cour suprême a eu pour effet de consacrer la compétence fédérale de réglementer, suivant certaines conditions, le commerce intraprovincial, domaine qui pendant plus d’un siècle était considéré comme relevant de la compétence exclusive des provinces en vertu du paragraphe 92(13) de la loi de 1867.

In the *General Motors of Canada Ltd. v. City National Leasing* case, the Supreme Court ruled that federal legislation impinging on intraprovincial trade would be constitutional if these five conditions were met: first, the legislation must be part of a general regulatory scheme; secondly, the scheme must be monitored by a federal regulatory agency; thirdly, the legislation must be concerned with trade and commerce generally, not focused on a particular industry; fourthly, the legislation should be constitutionally beyond the provincial power to enact; and fifthly, the absence of one or more provinces from the legislative scheme would jeopardize the scheme nationally. With these criteria for constitutionality, one could easily envision federal legislation on internal trade. Combined with the first branch of the federal trade and commerce power - namely, the regulation of international and interprovincial trade - the rejuvenated second branch would seem to give Ottawa considerable constitutional authority to act legislatively on internal trade barriers without

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<sup>72</sup> E. Brouillet, “The Federal Principle and the 2005 Balance of Powers in Canada,” Supreme Court Law Review, Vol. 34, 2006, pp. 323-324.

<sup>73</sup> E. Brouillet, La négation de la nation, (Sillery, PQ : Les éditions du Septentrion, 2006), pp. 302-303.

the formal agreement of the provinces. Patrick Monahan, Dean of the Osgoode Hall Law School, suggests that the Supreme Court's decision in this case reinforces the federal government's constitutional basis for the establishment of a national securities commission to regulate the securities market in Canada.<sup>74</sup>

So, what has occurred since 1949 is that, because of case law, the two branches of s. 91(2) that were initially set out by the JCPC in *Parsons* have been strengthened; (again, the two branches being, first, the federal power to regulate in the areas of international and interprovincial trade and, secondly, the federal power to provide for the general regulation of trade affecting the whole country). The activation of the latter power, as Brouillet observes, means that the federal government, under certain circumstances, can regulate in the area of intraprovincial trade, that is, trade or business activity occurring within a province's borders.

With respect to s. 121, the constitution's free trade clause, judicial review has not been as thoroughgoing as for s. 91(2). As a result, it is still unclear whether it refers only to free trade in goods and not services or capital. Still, the potential for a judicial broadening of the clause is significant. Howse points out that, in *Reference Re Agricultural Products Marketing Act*, four of the nine judges suggested that a regulatory scheme that interfered with the interprovincial movement of goods "in a particularly onerous fashion" could be prohibited by the courts under s. 121, "even in the

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<sup>74</sup> P. Monahan, Constitutional Law, p. 297.

absence of customs duties, or other financial charges being placed on the goods.”<sup>75</sup> Trebilcock observes that, in *Black v. Law Society of Alberta*, “the majority of the Court endorsed a much broader interpretation of section 121 than the Court had followed for 68 years.”<sup>76</sup>

In his assessment of the *Manitoba Egg Reference*, Gerald Baier points to the role of the federal government in ensuring the economic union. In the early 1970s, Ontario and Québec established marketing schemes intended to prevent surpluses from other provinces in chickens and eggs from entering their provinces and reducing prices received by their producers. Manitoba challenged the Ontario and Québec actions by setting up a similar scheme and referring it to the Manitoba Court of Appeal. Its judgment, upheld unanimously by the Supreme Court of Canada, was that the schemes were unconstitutional since they were designed to inhibit the free flow of goods across provincial boundaries. Writing for the majority of the Court, Justice Martland stated that the Manitoba scheme<sup>77</sup>

is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.

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<sup>75</sup> Robert Howse, *Economic Union, Social Justice, and Constitutional Reform*, pp. 47-48.

<sup>76</sup> M. Trebilcock, “The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy,” p. 561.

<sup>77</sup> *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association (Manitoba Egg Reference)*, [1971], S.C.R. 689, at p. 703.

In Baier's view, "...the federal government, unwilling to ruffle provincial feathers, chose to stand aside and let the smaller provinces be marginalized."<sup>78</sup> In this case, Ottawa could be judged to have abdicated its responsibility to protect Canada's common market.

The *Black* decision is said to have signaled a new Supreme Court interest in the economic union. In the decision, which struck down a rule of the Alberta Law Society prohibiting members of the Society from entering into partnerships with non-residents of Alberta, Justice LaForest, writing for the majority, stated:<sup>79</sup>

A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy....The attainment of economic integration occupied a place of central importance in the scheme....The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.

Certainly, Justice LaForest's unequivocal language suggests that the Court will not be reticent about supporting the economic union when it sees the need and opportunity to do so.

Monahan agrees that there is new Supreme Court interest in the economic union. Of the *Morguard* and *Hunt* decisions, he declares:

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<sup>78</sup> G. Baier, "Judicial Review and Canadian Federalism," in H. Bakvis, G. Skogstad, (eds.), Canadian Federalism: Performance, Effectiveness, and Legitimacy, p. 32.

<sup>79</sup> *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at pp. 608-609.

Two important Supreme Court cases have now recognized that maintaining and strengthening the Canadian economic union is a key principle underlying the entire Canadian constitutional framework. These cases have also expressly stated that Parliament has the legislative authority to enact legislation designed to enhance the functioning of the economic union.

In the *Morguard* ruling, the Court determined that recognition of court judgments by all provinces “is inherent in a federation.” In the *Hunt* decision, it struck down a Québec law prohibiting the removal from the province of documents relating to a Québec business firm. In the former case, Justice LaForest wrote:<sup>80</sup>

A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Charter....In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see Constitution Act, 1867, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities....And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.

Monahan argues that the federal government’s constitutional source of its power to legislate to enhance the function of the economic union lies not in “any one provision of the constitution, but the entire framework and structure of the Canadian constitutional order.”<sup>81</sup>

Monahan is convinced that recent judgments of the Court have strengthened the federal authority to maintain the economic union to such an

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<sup>80</sup> *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1099.

<sup>81</sup> P. Monahan, Constitutional Law, p. 306.

extent that Parliament could take a number of negative integration measures that would represent very strong assertions of federal authority. In his view, as a result of those decisions,<sup>82</sup>

- “Parliament could legislate so as to give effect to a ‘non-discrimination’ principle...such that one province would not be permitted to impose discriminatory standards on the goods, services, investments, or persons of another province.”
- Ottawa “could legislate so as to prevent the establishment or maintenance of restrictions on the free movement of persons, goods, services, or investments across provincial boundaries....The free movement of factors of production across provincial boundaries is essential to the effective conduct of interprovincial trade, the regulation of which has always been clearly a matter of federal jurisdiction.”
- “Parliament could legislate so as to prevent or eliminate obstacles to internal trade - measures that are more trade restrictive than necessary or are adopted as disguised restrictions on trade. In *Hunt*, LaForest J. stated that measures which are designed to discourage interprovincial commerce and the efficient allocation of resources (as opposed to the achievement of legitimate provincial objectives) offend the basic structure of the Canadian federation.”
- “Parliament could legislate so as to provide a common set of rules for the mutual recognition of standards or regulations by provinces.”

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<sup>82</sup> The items which follow are from Monahan’s Constitutional Law, pp. 308-309.

- “Parliament could provide for the enforcement of these requirements by private individuals and persons, either through a specialized tribunal or through the ordinary courts.”

Monahan’s list suggests clearly that Parliament’s trade and commerce and economic integration powers are now very formidable. And he is not alone in his assessment. Legal scholar, Robert Howse, also notes the strengthened powers of the federal government as a result of case law. He writes:<sup>83</sup>

*Both Crown Zellerbach and General Motors clearly afford the federal government some scope to sustain constitutionally harmonizing regulation that impinges on areas of provincial jurisdiction, whether in consumer protection, environment, or financial services. Subsequently, even in cases such as Hunt, where no federal statute has been at issue, the Supreme Court has emphasized the importance of federal jurisdiction to securing the economic union. In Hunt, the Court even went so far as to suggest that the federal government could set rules for the recognition and enforcement of private law judgments by provincial courts where necessary to ensure order and fairness within the Canadian economic union. I do not think one could ever expect a clearer statement by the Court on the link between the expanded scope of the federal government’s general powers and the need for harmonization of provincial laws to secure the Canadian economic union. [Emphasis added.]*

Brouillet agrees with these assessments, although, as noted earlier, she comes at the issue from a very different angle. Her view of the Supreme Court’s rulings on the economic union issue is as follows:<sup>84</sup>

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<sup>83</sup> R. Howse, Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government, p. 12. Elsewhere, Howse argued that economic union measures should be “the product of federal legislation reflecting a national democratic consensus, not of deals between first ministers and bargains between bureaucrats.” To ensure that these measures are sensitive to regional concerns, they should be approved by an elected and regionally representative Senate. For the removal of barriers that are within provincial jurisdiction, an independent commission should be empowered to issue the necessary directives, which would be ratified by “a super-majority vote in the Senate.” See R. Howse, Economic Union, Social Justice, and Constitutional Reform: Towards a High but Level Playing Field, (North York: ON: York University Centre for Public Law and Public Policy, 1992), p. 133.

<sup>84</sup> E. Brouillet, La négation de la nation, pp. 307-308.

La Cour suprême a donc opté pour une vision nettement centralisatrice de ce qui, selon elle, constitue un partage équilibré des compétences législatives en matière économique dans un régime fédératif. Ce faisant, la Cour a considérablement réduit la sphère d'autonomie que s'étaient réservée les provinces en ce domaine qui participe à leur identité particulière. Pour le Québec, la jurisprudence de la Cour suprême relative au partage des compétences économiques constitue donc une hypothèque de plus sur sa capacité de traduire en termes juridiques ce qu'il considère être le rôle approprié de l'État en matière de réglementation économique intraprovinciale, une hypothèque qui grève un aspect important d'un domaine législatif intrinsèquement lié à son identité culturelle particulière, la propriété et le droit civil.

It would seem that, if Parliament had made full use of its strengthened trade and commerce power, there would have been no need for a federal-provincial agreement on internal trade. Apparently, there were others in important federal positions who thought this. Doern and MacDonald report that legal opinions from Justice Canada “expressed considerable confidence” that Ottawa did have the jurisdiction to enact the necessary legislation. The view was shared by officials within the lead department, Industry Canada.<sup>85</sup>

### The Agreement<sup>86</sup>

The Agreement on Internal Trade (AIT) was signed on July 18, 1994, fifteen months after the round of negotiations commenced and a year after the Liberal Party returned to power under Jean Chrétien. It became effective on July 1, 1995. It should be stressed that federal-provincial negotiations to remove barriers to interprovincial trade had been going on under the auspices

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<sup>85</sup> G.B. Doern, M. MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, (Toronto, ON: University of Toronto Press, 1999), p. 148.

<sup>86</sup> For a summary of the Agreement, by chapter, see the Appendix to this chapter.

of First Ministers since 1986. There were annual First Ministers meetings at that time and the issue of internal trade was on the table at every meeting.

The Agreement came about in the aftermath of the failed Meech Lake and Charlottetown constitutional accords. It was negotiated by actors who were keenly aware that, although Québec was represented at the table by the purportedly non-secessionist Liberal government, in the not-too-distant future a second referendum on secession would be held in Québec. This context, as Doern and MacDonald state, “produced a need for success, or as federal negotiators frequently put it, ‘Canada needs a win!’”<sup>87</sup> Moreover, the Québec situation<sup>88</sup>

affected particular provisions in the agreement as each delegation reached its own judgment as to what it thought the Quebec Liberal Government might need to defend itself against the Parti Québécois sovereigntist Opposition. Delegations also had to assess how those same remaining provisions might be used by a Parti Québécois government in power.

It is a truism among professional negotiators and dispute resolution scholars that the party most anxious to get a deal is the party most likely to get the least from the negotiations. Since Ottawa was the party to want a deal the most, it is arguable that its objective - a more integrative economic union - was the one that was advanced the least. Indeed, MacDonald concludes that the exceedingly large number of omissions, exemptions and exceptions “to the

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<sup>87</sup> ibid., p. 8.

<sup>88</sup> ibid., pp. 8-9.

intended philosophy of the Agreement” produced an accord “that is important in only a limited number of unimportant areas.”<sup>89</sup>

The motivation to reduce or eliminate internal trade barriers was no doubt tranquilized by the willingness of each province to factor in the Québec Liberal Party’s needs for the eventual referendum. Those needs probably served also as a convenient excuse for some provinces to maintain their own interprovincial trade impediments. Thus, as David Cohen argues, linking an internal trade agreement with Québec secession “made the existence of an Agreement inevitable, but simultaneously assured that it could not accomplish the national economic integrative agenda which would have been expected in a trade agreement.”<sup>90</sup> It appears, therefore, that, if the negotiation route was the federal government’s preferred option, it would have been well-advised to pursue the talks under conditions more favourable to its agenda.

In their analysis of the AIT negotiations, Doern and MacDonald describe the overall approaches of the various actors. They refer to Alberta and Manitoba as being “the most supportive allies” of the federal government. Québec, too, was supportive, “and indeed the presence of both Alberta and Quebec as allies of the federal government was an interesting reversal of many of the normal recent configurations of federal-provincial politics....” Since both the Bourassa government and the Parti Québécois endorsed free trade in

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<sup>89</sup> M. MacDonald, “The Agreement on Internal Trade: Trade-Offs for Economic Union and Federalism,” in H. Bakvis, G. Skogstad, (eds.), Canadian Federalism: Performance, Effectiveness, and Legitimacy, (Don Mills, ON: Oxford University Press, 2002), p. 143.

<sup>90</sup> D. Cohen, “The Internal Trade Agreement: Furthering the Canadian Economic Disunion?,” Canadian Business Law Journal, Vol. 25, 1995, 257, at p. 275.

general and the North American Free Trade Agreement (NAFTA) and the Canada-US Free Trade Agreement (CANUSFTA) in particular, one wonders why Ottawa did not take advantage of this support and push harder for internal free trade. Since free trade with Canada is in Québec's own interest, particularly if it were to secede, one could plausibly argue that the full application of the federal trade and commerce power to effect internal free trade would not have aroused the kind of reaction in the province that seems to so worry federal decision-makers.<sup>91</sup>

This line of argument is reinforced by the comments on internal free trade contained in the Allaire Report, a highly provincialist document endorsed by the Québec Liberal Party in 1991. The Report states, for instance: "One of the objectives of Canadian federalism is to create a common market, a strong national economy. Yet it is readily acknowledged that the integration of Canada's economy has yet to be achieved. Many barriers to trade remain and, each in its own way, harms our economic performance."<sup>92</sup> Elsewhere, the document states:<sup>93</sup>

The definition of a new economic framework for Québec and Canada must reflect the initial objective of the Fathers of Confederation, i.e. the creation of a true common market that is highly integrated economically. Not only must the new economic order maintain the

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<sup>91</sup> "Ironically," Trebilcock and Behboodi write, "the best relationship that an independent Quebec can realistically aspire to with the rest of Canada is likely to be found in the Agreement on Internal Trade...." See M. Trebilcock, R. Behboodi, "The Canadian Agreement on Internal Trade: Retrospect and Prospects," in M. Trebilcock, D. Schwanen, (eds.), Getting There: An Assessment of the Agreement on Internal Trade, Policy Study 26, (Toronto, ON: C.D. Howe Institute, 1995), p. 87.

<sup>92</sup> Québec Liberal Party, A Québec Free to Choose, Report of the Constitutional Committee of the Québec Liberal Party, for submission to the 25<sup>th</sup> Convention, January 28, 1991; p. 16.

<sup>93</sup> Ibid., p. 29.

current economic space, but it must open and liberalize it even further. This integration will generate new wealth and jobs.

Sounding very much like a document that might have been issued by a federal industry minister, the Allaire Report warns:<sup>94</sup>

Despite the existence of full economic integration for 123 years, inter-regional trade in Canada is hampered by barriers that limit trade in goods (government policies, standards and rules, discriminatory commercialization policies, etc.) or the free mobility of people (non-recognition of diplomas, difficulties in obtaining permits to facilitate the right to do business and freedom to provide services, etc.). The redefinition of the political system will have to avoid any further fragmentation of the Canadian market or the introduction of new trade barriers. In fact, this is a golden opportunity to further facilitate the free circulation of goods and services among the various regions of the country. The new political and economic order proposed by Québec must recognize the benefits of increased trade between the regions. It must seek to maximize the existing potential by eliminating all obstacles to trade.

Québec's interest in removing internal trade barriers was also reflected in the agreement that the Bloc Québécois, Parti Québécois, and the Action Démocratique du Québec came to in the summer of 1995, on the eve of the secession referendum. It stated that as a priority the treaty between Canada and the new state of Québec would ensure that the new Partnership Council, comprised of representatives of Canada and Québec, would have the authority to act on a customs union, and the free movement of goods, individuals, services, and capital. In addition, the two member states of the Council would be free "to adapt and strengthen the provisions of the Agreement on Internal Trade."<sup>95</sup>

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<sup>94</sup> ibid.

<sup>95</sup> See Montreal Gazette, "Agreement Between The Parti Quebecois, the Bloc Quebecois and the Action Democratique du Quebec, Ratified by Messrs. Jacques Parizeau, Lucien Bouchard and Mario

In light of such comments, criticisms from Québec nationalists of federal action to secure the economic union would have been somewhat muted.<sup>96</sup> Moreover, it is hard to believe that the Agreement changed even one Québécois mind in the October 1995 secession referendum.

Support for strong federal action on the economic union would probably have been forthcoming from another unlikely source: the West. The Canada West Foundation, for instance, urged Ottawa to make use of its constitutional right to maintain one common market.<sup>97</sup> It was a view shared by the Reform Party. In a speech during second reading of the Chrétien government's Agreement on Internal Trade Implementation Act, the Reform Party spokesperson, Ed Harper, told the House that his party would oppose the legislation (Bill C-88) because it did not go far enough in removing internal trade barriers; indeed, it "may be a step backward in our already deplorable situation."<sup>98</sup> Mr. Harper castigated the government for not enforcing "the

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Dumont, June 11, 1995," September 9, 1995, p. A6. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>96</sup> Le Devoir reported the reaction of the Parti Québécois to the AIT. Jacques Parizeau, Bernard Landry and Richard Le Hir were highly critical of the Agreement for its many exemptions and exclusions. Parizeau described it as an "aveu d'impuissance," while Landry, according to the report, said it reflected "l'incapacité du système fédérale canadien de s'adapter aux réalités contemporaine de la globalisation et de la mondialisation." Le Hir, according to the report, said the AIT showed that "la plus farouche résistance à l'ouverture des marchés vient du Canada anglais." See Le Devoir, "Commerce Interprovinciale: La Preuve d'Un Fédéralisme 'Sclérose'," July 20, 1994, p. A1. Retrieved from the NewsScan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/) April 23, 2009.

<sup>97</sup> See J. Brodie, M. Smith, "Regulating the Economic Union," in L. Pal, (ed.), How Ottawa Spends 1998-99: Balancing Act: The Post-Deficit Mandate, p. 89.

<sup>98</sup> House of Commons, Debates, May 15, 1995; p. 12628.

constitutional provisions which require free trade among provinces.”<sup>99</sup> The position of the Reform Party was to support<sup>100</sup>

the removal of interprovincial barriers to trade through agreements which include trade dispute settlement mechanisms among the provinces. Should the provinces fail to co-operate in the removal of interprovincial trade barriers, the Reform Party supports constitutional challenges to such impediments wherever possible.

Quoting s. 121, Mr. Harper went on to declare:<sup>101</sup>

It is obvious from these two sections [s. 121 and s. 91(2)] that interprovincial trade is an exclusive federal jurisdiction and the provinces are violating the intent of the Constitution when they erect barriers to trade. *A Reform government would do everything necessary to enforce these constitutional principles....* Reformers find themselves unable to support a bill that lends credibility to the first ministers’ failure of last summer. We demand that the federal government enforce the Constitution which contains the necessary authority to allow free trade between the provinces, especially s. 121, section 91 and the Charter mobility rights and to do everything in its power to ensure that all provincial barriers are eliminated. [Emphasis added.]

Another Reform Party MP, Hugh Hanrahan, went so far as to recommend that all federal transfer payments to provinces that did not eliminate trade barriers be withheld.<sup>102</sup> A third Reform Member, Monte Solberg, formerly a Conservative government cabinet minister, argued that, while his party always favoured decentralization, “on some issues, and I would say commerce is one of them, the authority more properly rests at the federal level. That is why

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<sup>99</sup> *Ibid.*, May 29, 1995; p. 12918.

<sup>100</sup> *Ibid.*, p. 12920.

<sup>101</sup> *Ibid.*, p. 12921.

<sup>102</sup> *Ibid.*, June 19, 1995; p. 14123.

section 121 of the Constitution needs to reign supreme.”<sup>103</sup> In his estimation, there was “growing support that this should be challenged in the courts the next time the provinces try and assert their authority in this area.”<sup>104</sup> Ottawa would thus “be more in charge of interprovincial trade barriers.”<sup>105</sup>

Not to be outdone, the Progressive Conservative Leader at the time, Jean Charest, pledged that if he was elected Prime Minister he would give the provinces one year in which to negotiate with Ottawa the establishment of an Inter-Provincial Trade Commission “that would regulate and enforce interprovincial trade rules.” It would include a binding dispute-resolution mechanism that could be used by both governments and businesses. According to the Financial Post, “If an agreement was not reached, Charest would be ready to use Ottawa's constitutional trade and commerce powers to establish the commission.”<sup>106</sup>

Interest groups appear not to have had a substantial role in the negotiations that produced the AIT. Doern and MacDonald say that “there was a decided absence of public and interest-group involvement” in the negotiations and, indeed, the “decision process was a throwback to ‘executive

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<sup>103</sup> ibid., p. 14134.

<sup>104</sup> ibid.

<sup>105</sup> ibid., p. 14132.

<sup>106</sup> Financial Post, “Lack of Leadership a Barrier to Freeing Up Internal Trade,” May 22, 1997, p. 22. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

federalism'." They suggest that the lack of stakeholder group involvement was the result of an overall lack of interest.<sup>107</sup>

However, the federal government at least was very aware of where the large business groups stood, as this comment from the Hon. Raymond Chan shows:<sup>108</sup>

The government has felt strong and repeated pressure from the private sector to deal with the problems associated with internal barriers to trade and conflicting regulations on cross-border flows of people and capital. We have received representations from the Canadian Manufacturers' Association, the Canadian Chamber of Commerce, the Business Council on National Issues, the Canadian Federation of Independent Business, the Canadian Bankers Association, the Canadian Construction Association, and so on. This list is long and the problems are deeply felt and broadly experienced.

These groups have maintained their interest in promoting greater economic integration. They endorse the Trade, Investment, and Labour Mobility Agreement, because it is said to go much further than the AIT in removing interprovincial trade barriers and which, according to a Chamber of Commerce executive, was undertaken by the two provinces out of frustration with the AIT.

It is fair to say that labour was relatively silent on the economic union issue generally and the AIT specifically. But it is not clear if this was because of a lack of interest, as Doern and MacDonald claim. Certainly, in its submission to the House of Commons committee studying the Agreement on Internal Trade Implementation Act, the Canadian Labour Congress (CLC)

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<sup>107</sup> G.B. Doern, M. MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, p. 161.

<sup>108</sup> House of Commons, Debates, May 15, 1995; p. 12624.

complained about the secretive negotiation process that produced the AIT. It argued that public hearings ought to have been held before the AIT was ratified by the signatory governments instead of during the legislative implementation phase.<sup>109</sup>

The TILMA has prompted the CLC and left groups generally to be considerably more vocal. As with the AIT, these interests are concerned that TILMA will reduce the ability of the signatory governments to intervene in the economy. In addition, in a recent paper, Erin Weir of the CLC and Marc Lee of the Canadian Centre for Policy Alternatives (CCPA) argue that the real objective of TILMA “is not to facilitate inter-provincial trade, but to reduce different provincial regulations to the lowest common denominator.”<sup>110</sup> They also disputed the idea that interprovincial trade barriers are a significant problem and that their removal would yield substantial economic benefits. A similar argument was made by Mr. Lee in a presentation to the Senate Committee on Banking, Trade and Commerce.<sup>111</sup>

Clearly, the concern of labour groups differs from the focus of this dissertation. Whereas the former have issues with the content of

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<sup>109</sup> Canadian Labour Congress, Submission by the Canadian Labour Congress Regarding Bill C-88 An Act to Implement the Agreement on Internal Trade, November 1995. The submission explained that CLC officials met only once with the chief federal negotiator and that was late in the process. Some provincial federations of labour affiliated with the CLC were consulted by provincial governments, again late in the process.

<sup>110</sup> See E. Weir, M. Lee, The Myth of Inter-provincial Trade Barriers and TILMA's Alleged Economic Benefits, Research Paper #43. Canadian Labour Congress, February 26, 2007, p. 5.

<sup>111</sup> See M. Lee, Presentation to the Senate Committee on Banking, Trade and Commerce, May 17, 2007; downloaded from [www.progressive-economics.ca/2007/05/17/marcs-testimony-to-the-senate/](http://www.progressive-economics.ca/2007/05/17/marcs-testimony-to-the-senate/)

interprovincial trade agreements, this paper is about which level of government has responsibility for bringing down the internal trade barriers.

In his presentation to the Senate Committee, Mr. Lee offered an interesting proposal for the elimination of internal trade barriers that was not unlike that proposed by Mr. Charest: the Senate Committee should identify the most egregious trade barriers, “vetting those to make sure they do not violate any public interest concerns,” and then press for action from the country’s governments. In these circumstances, Ottawa should be prepared to use “federal constitutional powers to resolve the issue if necessary.”<sup>112</sup>

The reaction of the print media to the Agreement appears to have been mostly negative. The Vancouver Sun, for instance, called it a “wimpy trade deal” and declared that what was badly needed were provincial politicians with “the wit to understand that what benefits the national economy enriches its component parts.”<sup>113</sup> In a similar vein, the Financial Post opened one of its editorials by stating that “If Ottawa ever needed an excuse to be heavy-handed with the provinces, then their mishandling of the Agreement on Internal Trade is it.”<sup>114</sup> In another editorial, the paper stated: “Not only does this agreement not go far enough, it’s full of loopholes and loose language, has a toothless dispute settlement mechanism, and on top of it all, a paralyzing requirement

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<sup>112</sup> ibid., p. 3.

<sup>113</sup> Vancouver Sun, “Protectionism Alive and Well Thanks to Wimpy Trade Deal,” editorial, June 30, 1994, p. A.18. Retrieved from Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>114</sup> Financial Post, “Ottawa Could Do More to Free Up Internal Trade,” editorial, February 24, 1998, p. 18. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

for provincial unanimity for all decisions, big and small.”<sup>115</sup> The Hamilton Spectator, on the other hand, concluded that the deal was a “productive exercise” and a “breakthrough” despite the many compromises.<sup>116</sup>

The Edmonton Journal described the AIT in muted terms, calling it far from finished but “an essential first step.” The paper's more interesting observation was the following:<sup>117</sup>

...the wonder when one reads through the agreement is that it should be necessary at all. One of the defining features of a country, of course, is the obligation of its citizens to live under a common set of laws and to adhere to them in every aspect of life. Unfortunately, this does not extend to the country's commercial relations....It's something we should have done 127 years ago.

Of course, it was something that *was* done “127” years ago. It was not the founders' commitment to internal free trade that was the problem but, rather, their failure to create a Canadian final court of appeal.

The largest newspaper in the country, the Toronto Star, was scathing in its denunciation of the AIT, of provincial protectionism, and of federal meekness. According to its editorial, “The governments failed to put the overarching national interest above provincial self-interest.” It also noted the irony

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<sup>115</sup> Financial Post, “Lack of Leadership a Barrier to Freeing Up Internal Trade,” editorial, May 22, 1997, p. 22. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>116</sup> Hamilton Spectator, “Interprovincial Trade One Small Step,” editorial, July 21, 1994, p. A.6. Retrieved from Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>117</sup> Edmonton Journal, “At Long Last a Start to Canadian Free Trade,” editorial, July 19, 1994, p. A8. Retrieved from Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

presented by the commitment of Québec's secessionists to a Canada-Québec common market.<sup>118</sup>

The editorialists at The Globe and Mail were also highly critical of interprovincial trade barriers and of federal timidity. Prior to the signing of the AIT, they wrote:<sup>119</sup>

Forget the economic costs: this is an insult to our nationhood, a violation of our most basic rights as citizens. The continued presence of these internal barriers is an enduring humiliation, a living reminder of the inability or unwillingness of the federal government to assume its proper responsibilities in the face of provincial arrogance and pettiness. For make no mistake, this is Ottawa's job: the repeated failure to secure the economic union by negotiation among the provinces has proved that. Whatever powers one may or may not wish to assign the federal government, this surely is among the very first of its duties. It is why we have a federal government.

In an editorial after the AIT was signed, the paper described the agreement as "modest" and as "not good enough." In the paper's view,<sup>120</sup>

When it comes to buying, selling and working with each other - going about our business - we should not be speaking of federalism. We should be speaking of one space: an economic union. Then we would not need 'a dispute-settlement mechanism' to deal with conflicts that should not arise in the first place.

It was particularly critical of both levels of government, stating:<sup>121</sup>

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<sup>118</sup> Toronto Star, "Putting Provinces Head of Canada," editorial, July 3, 1994, p. E2. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>119</sup> The Globe and Mail, "Let Our People Trade (2)," editorial, April 6, 1994, p. A18. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>120</sup> The Globe and Mail, "Economic Union, Elusive Still," editorial, July 18, 1994, p. A10. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>121</sup> ibid.

The premiers have consistently resisted every effort to establish a full economic union....The federal government has never been able to overwhelm this resistance. Now, having refused to impose an agreement - an option it seemed not to explore seriously - Ottawa has been co-opted into saluting this agreement as a triumph of federalism.

Le Soleil also advocated the elimination of trade barriers. It described the AIT as “un pas dans la bonne direction, certes, mais un pas très timide.”<sup>122</sup> Jean-Robert Sansfaçon, an editorial writer for Le Devoir, was reported by the Montreal Gazette as having said that the AIT was a step in the right direction “But given the number of major exceptions to the agreement, we hardly have the real national free-trade agreement we had been promised.”<sup>123</sup>

So, in addition to business, the Reform Party, the Progressive Conservative Party, the Québec Liberal Party, and the Parti Québécois, a large part of the print media wanted to see strong action on internal trade. This list does not include the courts which, we have seen, would likely have upheld federal action on internal trade.

The contextual factor that shaped the AIT the most was the negotiation of international trade agreements like NAFTA. They clearly supplied the motivation for governments to do something about internal trade barriers. Indeed, Monique Jérôme-Forget has written: “The deal was born of the recognition at both the federal and provincial level that it is ridiculous to negotiate free trade with the U.S. and Mexico and still maintain more than 500

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<sup>122</sup> Le Soleil, “Un Accord Opportun,” editorial, July 20, 1994, p. A10. Retrieved from the Newscan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/) April 23, 2009.

<sup>123</sup> Montreal Gazette, “Too Many Exemptions; Le Devoir Editorial Writer Says Interprovincial Trade Deal Falls Short,” June 30, 1994, p. B3. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

barriers between the provinces.”<sup>124</sup> At one point, a company in one province could bid on a contract issued by the U.S. government but could not bid on a contract issued by another province! Clearly, such a situation was unacceptable.

Douglas Brown, in his analysis of the AIT, observes that its “basic architecture bears strong similarities to the twenty chapters of the FTA [Free Trade Agreement] and the twenty-two chapters of NAFTA.”<sup>125</sup> Doern and MacDonald go further. In their view, there was an implicit understanding that the rules for the AIT would “follow a similar path to those of the General Agreement on Tariffs and Trade (GATT), FTA, and later NAFTA.”<sup>126</sup> They add: “Indeed, it is clear that the experience with GATT and FTA not only had an impact on the structural aspects of the agreement, but also drove much of the philosophical and rules debate in the negotiations regarding the elimination of barriers to trade.”<sup>127</sup>

Thus, what we had were subnational governments assuming the stance of sovereign states, with the full acquiescence of the national government, even though it is Ottawa that, constitutionally speaking, has the power to deal with interprovincial trade barriers.

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<sup>124</sup> M. Jérôme-Forget, “The Crumbling Walls of Provincial Protectionism: Internal Trade Agreement Shows that Federalism can be Flexible Enough to Work,” *Financial Post*, March 4, 1995, p. 23. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> April 19, 2009.

<sup>125</sup> D. Brown, Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada, (Montreal and Kingston: McGill-Queen’s University Press, 2002), p. 150.

<sup>126</sup> G.B. Doern, M. MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, p. 48.

<sup>127</sup> ibid.

While the emergence of international trade agreements may explain why Ottawa moved *when* it moved, it does not explain *the way* it moved. As intimated earlier, it may be argued that the explanation for federal meekness had to do with a perceived need to avoid antagonizing the provinces, especially Québec. With the constitutional failures of the Mulroney government still lingering in people's memory, Ottawa was both “gun shy” and desperate. And yet, as we have seen, the degree of support at the élite level across the country, including Québec, for an end to interprovincial trade barriers was substantial. Thus, if a federal-provincial conflict was going to take place, the federal government was in a position of relative strength. Moreover, internal free trade is not an issue that has the potential to inspire mass public protests, let alone secession. It is an issue that causes consternation in the board-rooms of the nation, not in its living-rooms. Given that the political and business élites in the country, including the nationalist and secessionist élite in Québec, supported internal free trade, it seems reasonable to suggest that provincial opposition to strong federal action to do away with internal trade barriers would have had little credibility, sustainability or persuasive power. Of course, much would have depended on federal willingness to vigorously make its case to the provinces, in the courts if necessary, and in the media.

The signatories to the Agreement on Internal Trade are the federal government, all of the provinces, and two of the territories, Yukon and the Northwest Territories. Nunavut only recently indicated its interest in becoming part of the AIT and it is expected that it will become a signatory in 2009. Like

many IGAs, the AIT is not legally binding; there is no recourse to the courts to resolve disagreements between governments.

Also, since the Agreement was the result of collaborative federalism, it begs the question: if the Agreement fails to do what it is supposed to do, namely, efficiently eliminate or reduce barriers to trade among Canada's sub-national units, who do Canadians hold accountable?

Consistent with Simeon and Cameron's definition of collaborative federalism was the stance that the federal government adopted during both the negotiation of the AIT and its operation. Quite simply, Ottawa functioned and functions as one government among many. It could not even be described as first among equals since it no longer chairs the meetings of the Committee on Internal Trade. As of 2004, the chair of the meetings is rotated annually. Decisions are made by consensus, which, in effect, means the unanimity rule.

Douglas Brown has characterized the federal government's role during the negotiations as being "facilitating and non-aggressive" and suggests that this federal approach has been "one key to the success of the AIT."<sup>128</sup> He notes that, throughout the negotiations, Alberta, "in particular, sought to ensure that the federal role in the agreement would be as one party among the others, with no special role to enforce the agreement and no special privileges in its implementation and administration."<sup>129</sup> In addition, according to Brown, the role was "reinforced by the federal government itself in the stance taken in

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<sup>128</sup> D. Brown, Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada, p. 171.

<sup>129</sup> Ibid., p. 153.

the pre-negotiation period by its chief official Robert Knox and later by the appointment of Arthur Mauro from the private sector as an independent chair.”<sup>130</sup> While one might expect the provinces to insist on a subdued role for Ottawa, it is somewhat jarring to learn of Ottawa’s assent to this approach. Indeed, it is difficult to imagine a previous Prime Minister, such as John Diefenbaker, Lester Pearson or Pierre Trudeau, agreeing to have the role of chair of a federal-provincial negotiation assumed by a private citizen. Clearly, federal acquiescence on this matter speaks to its intensifying habit of self-diminution and increasing willingness to accept confederalism.

In assessing the AIT’s impact on the federal-provincial balance, Brown contends that it has not been “perceived as a vehicle for centralization, and, indeed, the nature of its architecture and its institutional support exemplify a decentralized approach to economic union reform.”<sup>131</sup> Rather than focus on the process, Doern and MacDonald look at the content of the Agreement. First, they describe the opposing arguments: on the one hand, there are those who fear that the AIT<sup>132</sup>

has set limits around the [federal] powers, and that the courts, using doctrines of “constitutional convention,” may simply conclude that what is practised (namely, the internal agreement as a living document) is what the constitutional trade-and-commerce power in fact is.

On the other hand, there is the argument, which Doern and MacDonald endorse, that the federal trade and commerce power is strengthened by the

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<sup>130</sup> ibid.

<sup>131</sup> ibid., p. 171.

<sup>132</sup> G. Doern, M. MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, p. 162.

Agreement “because it is the discriminatory power of provincial governments that have been most reined in. In short, the range of available provincial policy instruments has been narrowed. Many actions that provinces previously did take are simply less and less possible.”<sup>133</sup>

While Doern and MacDonald are correct in saying that some provincial actions are no longer permissible, this did not come about because of the exercise of federal power. The very modest restrictions on the provincial ability to erect internal trade barriers were put in place by the provincial governments themselves. It was not the application of federal power, through federal legislative action or otherwise, that set up the restrictions. Rather, it was done through political negotiations by the parties. Admittedly, s. 91(2) probably gave Ottawa some leverage in cajoling the provinces to reduce or eliminate the barriers but one cannot infer, as Doern and MacDonald do, that the AIT strengthened the federal government’s trade and commerce power.

It is obviously not clear what the Agreement will lead to constitutionally, if anything. It may or may not produce a constitutional convention, but it is arguable that, if the federal government continues to ignore its trade and commerce power, it will probably go the way of the disallowance power or, perhaps, the declaratory power. The adage about ‘using it or losing it’ seems particularly apt in this case.

In any event, one cannot conclude that the AIT has been effective. Certainly, the absence of an energy chapter, fourteen years after it became

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<sup>133</sup> ibid.

effective, does not speak well of the AIT. And the fact that full labour mobility has not yet been achieved, and will not be achieved for some time, is a fairly clear demonstration that the AIT process is not a model of how to do public policy.<sup>134</sup> Also, the negotiators were supposed to expand the coverage of the agriculture chapter by September 1997 but discussions continued, twelve years later.

James Prentice, the Minister of Industry at the time, told the Senate Committee on Banking, Trade and Commerce that “The examples of internal trade barriers in our country are legion.” And this after more than thirteen years of the AIT. He continued:<sup>135</sup>

Without belabouring the point, you are aware of the restrictions in some food products and alcohol, which highlights that it is easier for a truck to carry a heavy load of goods from Alberta to Mexico than to travel to British Columbia, because the weight and dimension restrictions for transport trucks vary from province to province.

In a recent paper comparing the AIT and TILMA, Amela Karabegović and Robert Knox, who was the federal negotiator in the AIT talks, were harsh in their criticism of the AIT, describing it as “a limited and complex undertaking that is difficult to understand and apply. It is unenforceable and its obligations

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<sup>134</sup> On January 16, 2009, the First Ministers issued a document entitled, “A Declaration regarding the Agreement on Internal Trade.” The document states that the signatories endorse the Ninth Protocol of Amendment: Labour Mobility (Chapter 7). This amendment will revise chapter 7 to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified to practise that occupation by all other Parties. One wonders why this amendment was necessary considering that mutual recognition was the stated objective of the chapter right from the beginning. In its December 5, 2008 News Release, the Committee on Internal Trade indicated that April 1, 2009 was the target date for full implementation of the labour mobility provisions.

<sup>135</sup> Canada. Standing Senate Committee on Banking, Trade and Commerce, *Proceedings*, Issue 10 - Evidence - March 6, 2008, p. 4 of retrieved copy ([www.parl.gc.ca/39/2](http://www.parl.gc.ca/39/2), retrieved April 17, 2008).

can be and are ignored by governments.”<sup>136</sup> They conclude “that the AIT failed to establish free trade within Canada....”<sup>137</sup>

In their analysis, Don Lenihan and David Hume point to two problems in particular:<sup>138</sup>

It is widely agreed that progress on implementing the AIT has been disappointing, at best. Most of the targets and goals included at its signing have not been met. Commentators cite two key reasons: first, its reliance on a consensus model of decision making, and, second, an ineffective dispute resolution process.

Todd Hirsch, former Chief Economist at the Canada West Foundation, contended that the lack of an enforcement mechanism enable governments to ignore both the spirit and the letter of the AIT.<sup>139</sup> Minister Prentice would agree. In his testimony to the Senate Committee, he stated: “The essential criticism of the Agreement on Internal Trade process has been the absence of teeth in the dispute resolution clause. I read somewhere that of the eight rulings made under the Agreement on Internal Trade, the provinces chose to disregard six rulings.”<sup>140</sup>

Another westerner, Graham Parsons, President of the Organization for Western Economic Cooperation, agrees. He has argued for the replacement of

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<sup>136</sup> R. Knox, A. Karabegović, Myths and Realities of TILMA, Studies in Trade Policy, (Vancouver, BC: Fraser Institute, February 2009), p. 7.

<sup>137</sup> Ibid., p. 1.

<sup>138</sup> D. Lenihan, D. Hume, Governance in the Agreement on Internal Trade, (Ottawa, ON: KTA Centre for Collaborative Government, July 2004), p. 3.

<sup>139</sup> T. Hirsch, “Interprovincial Trade: Where the Exceptions Make the Rules,” in Dialogues, Vol. 3, Issue 1, Winter 2007, p. 20.

<sup>140</sup> Canada. Senate Standing Committee on Banking, Trade and Commerce, Proceedings, Issue 10 - Evidence - March 6, 2008, p. 14 of retrieved copy.

the “failed AIT” with a “federal Canadian Internal Trade Commission,” which would be a “national economic tribunal with judicial powers derived from Section 91 of the Constitution.” Its objective would be to “use the federal authority to challenge and end provincial barriers to trade.”<sup>141</sup>

Perhaps the most convincing indicators of the AIT’s inadequacy are the TILMA and the internal trade negotiations that Ontario and Québec are pursuing. TILMA is a trade agreement that is described by its supporters as going much further than the AIT in addressing internal trade barriers. It appears to have been the motivation behind the Ontario-Québec negotiations. If the AIT had been effective, TILMA would not exist and McGuinty and Charest would not now be negotiating.

The ineffectiveness of the AIT has to do with the model used to bring it about: collaborative federalism. This type of decision-making, where the federal government plays the role of equal partner as opposed to guardian and protector of the national interest, is problematic because the provincial participants have little incentive to make anything other than painless, inconsequential demands on each other. The impulse to collude in keeping obligations and commitments to a minimum is irresistible. With Ottawa acting as though interprovincial trade was a provincial concern, appearing not to have a bottom line on internal trade barriers, surrendering the role of chair to a private citizen, forming its negotiation strategy on the basis of the upcoming Québec election, and agreeing to a NAFTA-like negotiation format, there was

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<sup>141</sup> G. Parsons, “Raising the Dead: Breathing Life into Canada’s Internal Trade Agreements,” in *Dialogues*, Vol. 3, Issue 1, Winter 2007, p. 14.

no actor to vigorously make the case for the economic union and to insist on substantial concessions from the provinces. Moreover, in choosing not to engage the public on the issue, Ottawa missed an opportunity to garner support for its position. By explaining to citizens the link between trade barriers and national cohesion and the rationale for federal jurisdiction over interprovincial trade, the federal government might have been able to strengthen its negotiating position and to stiffen its resolve to get a more demanding agreement.

The AIT was negotiated while Liberal Jean Chrétien was Prime Minister. Neither of his two successors, Liberal Paul Martin nor Conservative Stephen Harper, repudiated the Agreement. Arguably, the Harper government has taken the economic union issue more seriously than the Martin government, though it has taken a largely hands-off approach. In 2006, Industry Minister, Maxime Bernier, told a Senate Committee that “The provinces play the most important role because it is in their jurisdiction. Our role is to push this idea of more cooperation and more freedom among the provinces.”<sup>142</sup> What is startling about this comment is the way the Minister demoted the federal role on interprovincial trade. He seemed unaware that interprovincial trade is a matter for the federal jurisdiction. He stated further that he did not see the need “to impose anything on the provinces, because of the current leadership

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<sup>142</sup> Canada. Standing Senate Committee on Banking, Trade and Commerce, *Proceedings*, Issue 13 - Evidence - December 14, 2006, p. 4 of retrieved copy ([www.parl.gc.ca/39/1/](http://www.parl.gc.ca/39/1/), retrieved April 22, 2008).

and the desire expressed by the provinces to settle this problem.”<sup>143</sup> Despite the AIT’s large number of exemptions, omissions and exceptions, despite the widespread agreement that the AIT has not been effective in significantly reducing internal trade barriers, the Minister nevertheless accepts that the provinces have “the desire” to settle the issue. Finally, referring to a federal-provincial meeting on interprovincial trade barriers, Minister Bernier stated: “Premier Doer chaired the meeting. He reports to the confederation. We have leadership from the provincial premiers and provincial governments. The leadership is there.”<sup>144</sup> That the leadership on the issue should and can legitimately come from Ottawa seems not to have occurred to the Minister.

By October 2007, the federal position seemed to harden. In the Speech from the Throne, the federal government declared:<sup>145</sup>

Our Government will also pursue the federal government’s rightful leadership in strengthening Canada’s economic union. Despite the globalization of markets, Canada still has a long way to go to establish free trade among our provinces. It is often harder to move goods and services across provincial boundaries than across our international borders. This hurts our competitive position but, more importantly, it is just not the way a country should work. Our Government will consider how to use the federal trade and commerce power to make our economic union work better for Canadians.

This position was confirmed by Mr. Bernier’s successor, Mr. Prentice, before the Senate Committee. But, like his predecessor, Mr. Prentice was at pains to point out the work being done by the provinces on internal trade barriers, as if

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<sup>143</sup> Ibid., p. 8.

<sup>144</sup> Ibid., p. 16.

<sup>145</sup> Canada. Speech from the Throne, October 16, 2007; retrieved on April 20, 2008 from [www.pm.gc.ca](http://www.pm.gc.ca)

to suggest that it would be illegitimate for Ottawa to act. And despite the AIT's ineffectiveness, the Minister nevertheless declared that "the overall Agreement on Internal Trade approach is the best way forward..."<sup>146</sup>

Interestingly, it was Saskatchewan Senator Tkachuk, not the Ministers, who expressed concern about a possible consequence of the AIT's weaknesses: the emergence of trading blocs among the provinces. To Minister Bernier, the Senator stated:<sup>147</sup>

...I am not happy that separate agreements are taking place among some powerful groups. Ontario and Quebec hold most of the consumer market in Canada and Alberta and B.C., both wealthy provinces, have signed an agreement....[T]his balkanization bothers me and I am concerned that Ontario and Quebec might use their agreements to keep other provinces out of their markets, thereby doing it for selfish motives rather than for national motives.

The fact that two trading blocs are emerging in the country appears not to be a concern of the federal government.<sup>148</sup>

### Applicability of the Theory

A major objective of this chapter has been to show how Canada's central government refrained from making full use of its legitimate constitutional powers in the area of trade and commerce but, instead, participated as simply another government in the AIT negotiations and assented to the result.

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<sup>146</sup> See Canada. Standing Senate Committee on Banking, Trade and Commerce, Proceedings, Issue 10 - Evidence - March 6, 2008, p. 11 of retrieved copy.

<sup>147</sup> Canada. Standing Senate Committee on Banking, Trade and Commerce, Proceedings, Issue 13 - Evidence - December 14, 2006, p. 9 of retrieved copy.

<sup>148</sup> It should be noted that the AIT actually allows provinces and territories to enter into separate bilateral or multilateral trade arrangements providing that the arrangement further liberalizes trade, there is full disclosure about the arrangement, and the signatories are willing to have other provinces and territories enter the agreement. So, while Senator Tkachuk's concern that Ontario and Québec will keep other provinces out of their markets does not seem justified, he is right to be bothered by a trade agreement that allows groups of provinces to establish separate agreements among themselves.

After providing historical context, pointing among other things to the founders' views on the federal trade and commerce power, the chapter showed how several decisions of the JCPC significantly circumscribed that power. The impact was not inconsequential. As the former Dean of the Queen's University Faculty of Law, John Whyte, observed,<sup>149</sup>

[I]t would be wrong to suggest that Parliament and the federal government have always had all the constitutional power over the economy that they needed. To the contrary, both the federal trade and commerce power and the peace, order and good government clause in the opening paragraph of s. 91 of the Constitution Act, 1867, have been interpreted to frustrate federal plans for economic management from the earliest days of Confederation.

Whether one believes the JCPC's rulings to be a good thing or a bad thing, the fact is that they reflected a certain view of Canadian federalism, one that was at odds with the vision expressed by the founders and that favoured the enlargement of provincial jurisdiction and the narrowing of the federal. The chapter then showed how Supreme Court decisions restored some of the scope of the federal trade and commerce power. A number of legal scholars, including Armand de Mestral, Eugénie Brouillet, Patrick Monahan, Michael Trebilcock, and Robert Howse, suggest that the power is now a muscular one. So, why did Ottawa not enthusiastically use its strengthened trade and commerce power to legislate internal free trade?

The overall aim of this thesis is to demonstrate that the theoretical framework described in chapter two explains why Ottawa is reluctant to employ its valid constitutional powers. Constructed with two theories,

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<sup>149</sup> J. Whyte, "Federal Powers Over the Economy: Finding New Jurisdictional Room," Canadian Business Law Journal, Vol. 13, No. 3, December 1987, 257, at pp. 267-268.

historical institutionalism and the theory of constitutional abeyances, the framework holds that the constitutional abeyance pertaining to the founders' views on Canadian sovereignty left Canada with a foreign judicial institution to adjudicate disputes between the central and sub-national governments. That institution made a string of judgments that set it and its successor institution, the Supreme Court of Canada, on a certain path, making both path dependent and shaping the political goals and strategies of the executive branch of the federal government. To extend the metaphor, it was a path that led away from federal assertiveness. Even though Supreme Court rulings in *Black, Hunt, Morguard*, and *General Motors* affirmed federal jurisdiction over trade and commerce, by the time those decisions were made the 'damage' had been done. In the HI language of Paul Pierson, by the time those decisions came down, "norms of appropriateness" had developed which precluded federal use of its interprovincial trade power.

In the early 1980s, Pierre Trudeau, rarely shy about using federal power, nevertheless was uncertain about Ottawa's authority to secure the economic union. His uncertainty was justified, given the Supreme Court's rulings in the 1976-80 period. As late as 1987, John Whyte could remark on the scale of Ottawa's "underconfidence," its "lack of jurisdictional confidence" on trade and commerce matters.<sup>150</sup>

The Mulroney government was also uncertain about the applicability of the federal interprovincial trade power. In an effort to clarify the power, in

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<sup>150</sup> ibid., p. 267.

1991 it issued constitutional proposals on the economic union which, by making the economic union a shared responsibility, would have diminished the role of the federal government in trade and commerce. But rather than add clarity, the very limited proposals, which turned out to have little appeal to the provinces, only contributed to the confusion since the Supreme Court had just come down with a series of decisions that strengthened the federal power.

By the time Jean Chrétien's government came to power in 1993, the momentum toward provincialization had gathered considerable steam. This recalls Pierson's self-evident comment about the timing of political events: an event that happens "too late" may have no effect. The Supreme Court's rulings strengthening the federal trade and commerce power were delivered just when the Mulroney government's constitutional reform efforts had seriously whetted the appetites of the provincial governments for substantially more powers. Ottawa had neither the inclination nor the will to face down the provinces or to use its newly strengthened trade and commerce power. Rather, it was motivated by a felt need to show that "federalism works." And yet, federal action on internal trade barriers probably would have had the approval of the Supreme Court and a substantial part of the media, as well as the support of at least business, the West, probably Ontario, parts of Québec, the Reform Party, and the Progressive Conservative Party.

The uncertainty felt by the Trudeau, Mulroney and Chrétien governments was a consequence of the rulings of the JCPC. By repeatedly restricting Ottawa's capacity for action, even at one point going so far as to

declare trade and commerce an ancillary power, the JCPC left the federal authority with an illusory power, a power in name only, at least as far as internal trade is concerned. Thus, Ottawa could never rest comfortably in the knowledge that its trade and commerce power was a strong and comprehensive one, never be sure of the limits of the power. The Supreme Court's assumption of the role of final appeal court did not resolve the matter for, not surprisingly, it showed inconsistency, resorting to the JCPC's principles at one point, upholding federal power at another. While the 1989-90 rulings appear to represent a decisive move away from JCPC jurisprudence, by that time Ottawa was firmly on the path of collaborative federalism on internal trade. It remains to be seen whether the federal government will, at some point, overcome its lack of confidence and act resolutely to secure the economic union.

Appendix to Chapter 4: Summary of the AIT by Chapter

*Chapter One: Operating Principles:* it sets out the objective of the AIT and the principles that the signatories will try to adhere to. For instance, s. 3(b) of Article 101 states: “Parties will treat persons, goods, services and investments equally irrespective of where they originate in Canada.” Article 102 requires

that the governments ensure compliance by their agencies and crown corporations.

*Chapter Two: General Definitions:* here, several terms are defined. Perhaps the most significant of the definitions is that of the phrase, “legitimate objectives.” It refers to any of the following objectives pursued within the territory of a Party: public security and safety; public order; protection of human, animal or plant life or health; protection of the environment; consumer protection; protection of the health, safety and well-being of workers; and affirmative action programs for disadvantaged groups. The use of “legitimate objectives” gives Parties an important ‘out’ in the sense that a province or territory may erect an internal trade barrier if it is intended to achieve any of these seven objectives. Another important term is “harmonization.” It means “making identical or minimizing the differences between standards or related measures of similar scope” (Article 200). In the same vein, the term, “mutual recognition,” means “the acceptance by a Party of a person, good, service or investment that conforms with an equivalent standard or standards-related measure of another Party without modification, testing, certification, re-naming or undergoing any other duplicative conformity assessment procedure” (Article 200).

*Chapter Three: Reaffirmation of Constitutional Powers and Responsibilities:* the chapter consists of only one Article. It simply affirms that nothing in the Agreement alters the legislative authority of the federal or provincial governments.

*Chapter Four: General Rules:* the chapter identifies the general rules that the parties are to conform with. Douglas Brown describes them as the rules “used commonly in international trade policy.”<sup>151</sup> They are:

- reciprocal non-discrimination - Parties must accord to goods, services, persons and investments of others no less favourable treatment than they accord to their own goods, services, persons and investments or those of another Party;
- right of entry and exit - no Party can adopt regulatory measures that restrict or prevent the movement of persons, goods, services or investments across provincial boundaries;
- no obstacles - the signatories agree that their regulatory measures will not create obstacles to interprovincial trade;
- legitimate objectives - an obstacle can be permitted if it is in pursuit of a legitimate objective, (see Chapter Two above);
- reconciliation - the Parties agree to reconcile their standards by harmonization or by mutual recognition;
- transparency - the Parties agree to make their legislation, regulations, procedures, guidelines, and administrative rulings readily accessible to each other.

*Chapter Five: Procurement:* the chapter provides a framework for government procurement policies. Generally, it requires that governments and government entities establish open tendering processes so that bidders from all of the

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<sup>151</sup> Ibid., p. 148.

signatories can compete on equal terms. Article 504, s. 1 requires that each Party accord to the goods and services of any other Party “treatment no less favourable than the best treatment it accords to its own goods and services[.]” The suppliers of goods and services are also expected to receive the same treatment. The Parties were permitted to exclude some government entities from the provisions of the chapter. Québec, for instance, excluded the Caisse de Dépôt and Hydro-Québec. Bryan Schwartz notes that the thrust of the chapter is not unlike that of the Canada-U.S. Free Trade Agreement and of the General Agreement on Trade in Services.<sup>152</sup>

*Chapter Six: Investment:* the chapter establishes rules regarding barriers to investments. For instance, no province can require an enterprise of another province to have a representative office or enterprise, or be a resident, in its territory as a condition for doing business in the province. No province can weaken its environmental measures as a way to entice enterprises to its territory. No Party, in the dispensing of incentives, can discriminate against an enterprise because it is owned or controlled by an investor of another Party.

Excluded from the chapter’s application are financial institutions and services. Also, the provinces were allowed to compile a list of their programs that they can exempt from the application of the chapter’s requirements.

The chapter includes a Code of Conduct on Incentives. The purpose of the Code is to minimize the adverse effects of a provincial government’s incentives on the other provinces. The Code stipulates that no province can

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<sup>152</sup> B. Schwartz, “Assessing the Agreement on Internal Trade: The Case for a ‘More Perfect Union’”, in D. Brown, J. Rose, (eds.), Canada: The State of the Federation 1995, (Kingston, ON: Institute of Intergovernmental Relations, Queen’s University, 1995), p. 204.

provide an incentive that would result in an enterprise relocating an existing operation to its territory. Also, it requires that no province provide an incentive to one of its enterprises in order to undercut the competitors of another province in obtaining a contract. While certain economic development incentives are permitted, the Code asks provinces to take into account the economic interests of other provinces in applying the incentives and to refrain from implementing those that would adversely affect the economies of other provinces.

*Chapter Seven: Labour Mobility:* the chapter “applies to measures adopted or maintained by a Party relating to occupational standards, licensing, certification, registration and residency requirements of workers, which create barriers to labour mobility” (Article 702). Its aim is “to enable any worker qualified for an occupation in the territory of a Party to be granted access to employment opportunities in that occupation in the territory of any other Party, as provided in this Chapter” (Article 701). A barrier to labour mobility erected by a province may be permitted if it can be demonstrated that the purpose of the measure is to achieve one or more of the legitimate objectives listed in chapter two. The intergovernmental Forum of Labour Market Ministers is charged with overseeing the implementation of the chapter and producing an annual report on its operation.

*Chapter Eight: Consumer-Related Measures and Standards:* a short chapter, it deals with measures and standards intended to protect the personal safety and economic interests of consumers. It is not a particularly demanding chapter

and, indeed, it affirms early in the chapter the right of a province to adopt measures “establishing the level of consumer protection that it considers appropriate.” However, it does require provinces to harmonize their consumer standards in three areas: direct selling, upholstered and stuffed articles, and cost-of-credit disclosure. It requires the elimination of discriminatory licensing, registration and certification fees on suppliers, and it eliminates the residency requirement for suppliers.

*Chapter Nine: Agricultural and Food Goods:* the chapter deals only with what are called technical barriers; that is, barriers that arise because of differing product and grade standards, plant and animal health regulations, transportation and other legislation affecting the movement of products between provinces. Non-technical barriers result from government policies and programs such as price and income stabilization programs, supply management initiatives, and financial assistance programs. With respect to the former, the parties committed to working together to develop and implement common national standards within the next five years. With regard to non-technical barriers, the parties agreed to “address the internal market aspects of the policy issues...within a time frame consistent with Canada’s international obligations” (Article 903, s. 2(d)).

*Chapter Ten: Alcoholic Beverages:* in something of a twist on a previous requirement, this chapter obligates the Parties to accord alcoholic beverage products of each other to treatment no less favourable than the treatment they accord to the alcoholic beverage products of “non-Parties under existing

international trade agreements to which Canada is a Party” (Article 1004, s. 2). Thus, in this sector, the influence of international trade agreements is direct. The provinces are also required to reconcile, “through harmonization or other means, standards-related measures such as labelling and packaging regulations and requirements and oenological practices” (Article 1007). A number of exceptions are permitted. For instance, Ontario and B.C. can require private wine store outlets to favour provincial products over those of another province. Québec can require any wine sold in grocery stores to be bottled in the province, provided that alternative outlets are provided in Québec for the sale of wine of other Parties.

*Chapter Eleven: Natural Resources Processing:* the list of exceptions to the provisions of this chapter clearly indicates that the provinces were loathe to accept restrictions on their management of the natural resources within their territories. Article 1102, s. 3 and Annex 1102.3 state that the Agreement does not apply to water resources; to Alberta’s and British Columbia’s regulations on the export of logs; to Québec’s measures on the export of unprocessed fish; to Newfoundland and Labrador’s measures requiring fish to be processed at provincially licensed facilities; to the licensing, certification, registration, leasing of forestry, fisheries or mineral resources; and to the management or conservation of forestry, fisheries or mineral resources. Bryan Schwartz posits that the generally close relationships between provincial governments and

resource and energy interests restrained governments from taking measures that would subject those interests to more competition.<sup>153</sup>

*Chapter Twelve: Energy:* the parties were unable to reach agreement on energy issues. Thus, the contents of this chapter were left up to future negotiations which, to this day, twelve years after the AIT became effective, have not proven fruitful. Doern and MacDonald suggest that the failure to reach agreement has to do with “sensitivities regarding the interprovincial wheeling of electrical energy.” What this means is that the negotiators were and remain unable to reach agreement on the issue of a province wanting to export electrical energy to the U.S. via another province. Alberta, for instance, is hoping to export electricity to California but is unable to do so because it and B.C. cannot agree on how this could be done. A similar dispute exists between Québec and Newfoundland and Labrador. Doern and MacDonald make the point that the negotiators were unable to deal with the “very real political power and prestige of provincially owned utilities.”<sup>154</sup>

*Chapter Thirteen: Communications:* this chapter is very brief, only two pages. It stipulates that provincial communications monopolies are not to use their monopoly position to engage in anti-competitive conduct in any market in which they operate.

*Chapter Fourteen: Transportation:* since the federal government plays a substantial role in transportation policy, there is a considerable degree of

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<sup>153</sup> B. Schwartz, “Assessing the Agreement on Internal Trade: The Case for a ‘More Perfect Union’,” p. 210.

<sup>154</sup> G. B. Doern, M. MacDonald, Free-Trade Federalism: Negotiating the Canadian Agreement on Internal Trade, p. 133.

legislative and regulatory uniformity. However, both levels of government are involved in highway transport; hence, the need for a chapter on transportation. The chapter prohibits provincial discrimination against carriers from other jurisdictions. The provinces also agreed to harmonize or mutually recognize regulatory and standards-related measures. The Council of Ministers Responsible for Transportation and Highway Safety was mandated to monitor and facilitate the reconciliation of regulations and standards. Like other chapters, this one identifies the several provincial enactments and regulations to which the chapter's provisions do not apply.

*Chapter Fifteen: Environmental Protection:* the chapter “applies to environmental measures adopted or maintained by a Party that may affect the interprovincial mobility of people or interprovincial trade in goods, services or investments” (Article 1502). It also makes this stipulation: “No Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental measures as an encouragement for the establishment, acquisition, expansion, ongoing business activities or retention in its territory of an enterprise” (Article 1505, s. 5). Generally, the chapter requires parties “to harmonize environmental measures that may directly affect interprovincial mobility and trade....” (Article 1508). Another intergovernmental body, the Canadian Council of Ministers of the Environment, is tasked with facilitating the process.

*Chapter Sixteen: Institutional Provisions:* the purpose of this chapter is to establish the Committee on Internal Trade. The objectives of this confederal

body are to oversee the implementation of the AIT and to assist in the resolution of disputes arising from the implementation. The Committee is comprised of cabinet-level representatives from each participating government. Each party serves as chair of the Committee for a period of one year. The chapter also established a Working Group on Adjustment to help the parties adjust to the Agreement, and an Internal Trade Secretariat to provide administrative and operational support.

*Chapter Seventeen: Dispute Resolution Procedures:* several of the AIT's chapters - six, seven, nine, ten, eleven, fourteen, and fifteen - contain their own dispute resolution procedures. The dispute resolution mechanism set out in this chapter can be accessed only if a complaining party has first used the procedures provided in the applicable chapter. Complaints may be lodged by a government on its own initiative, by a government at the request of an individual or private party, or by an individual or private party if a government refuses to take up its complaint. Essentially, the process of chapter seventeen requires a complaining party to first try to engage the alleged offending government in consultations on the matter. If the process is not successful, a dispute resolution panel is formed. If the complaint has merit, the offending party is expected to comply with the panel's recommendations. If compliance does not happen, the complaining party may suspend benefits of equivalent effect or impose retaliatory measures of equivalent effect. According to an Internal Trade Secretariat document, entitled "Achievements," obtained from its website, the governments "continued to work to develop a more effective

enforcement mechanism, including the possibility of monetary penalties up to \$5 million....The goal is to implement panel reports successfully without resorting to the court system and to consider a limited appeals mechanism.”<sup>155</sup>

*Chapter Eighteen: Final Provisions:* the most notable items here are the articles that exempt regional development programs, cultural industries, measures pertaining to Aboriginal peoples, and financial institutions from the application of the Agreement.

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<sup>155</sup> See Internal Trade Secretariat, “Achievements,” March 2009, [www.ait-aci.ca/index\\_en/progress.htm](http://www.ait-aci.ca/index_en/progress.htm), p. 6. Retrieved April 25, 2009. While this document states that the monetary penalties are a “possibility,” the First Ministers’ “A Declaration regarding the Agreement on Internal Trade” issued on January 16, 2009 states that the signatories *endorse* the provision for monetary penalties of up to \$5 million. The latest consolidated version of the Agreement, dated 2009, makes no reference to monetary penalties. The discrepancy between what the First Ministers endorsed and what is in the actual documents may be related to Ontario’s difficulties with a draft of the dispute resolution chapter that was circulated to governments in December 2008.

## Chapter 5: The Canada-Wide Accord on Environmental Harmonization

The objectives of this chapter are to show that the Canada-Wide Accord on Environmental Harmonization (CWAEH) represents a federal retreat in environmental policy-making, and to determine if this retreat can be explained by the theory we have constructed. The theory holds that federal diffidence stems from certain constitutional omissions that are related to the founders' views on Canadian sovereignty. The chapter opens by identifying the sources of federal and provincial powers and by providing some historical context. It then reviews a number of judicial decisions, including those pertaining to the federal POGG power. Thirdly, the chapter offers an analysis of the Accord. It concludes by discussing the applicability of the theoretical framework.

Unlike internal trade, the environment did not become a constitutionally fraught concern for the courts until the last quarter of the twentieth century, suggesting that it was not an area of federal-provincial contestation. It was not until the 1960s that governments in Canada started to see it as a serious issue that must be addressed; thus, in the early 1970s they created departments and agencies responsible for environmental matters and enacted long over-due legislation.

Both senior levels of government can claim the constitutional right to legislate in the area. Provincial authority comes mainly from the property and civil rights power and s. 92(a) of the Constitution Act, 1867 under which the provinces have exclusive authority to make laws relating to the

development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in

relation to the rate of primary production therefrom; and...development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Other sources include the provincial power to regulate in “all matters of a merely local or private nature in the province” (s. 92(16)); to regulate the management and sale of public lands and timber; and to regulate local works and undertakings. It must be kept in mind that, despite these robust sources of authority, a province is limited in that it cannot regulate pollution emanating from other jurisdictions that affects the environment within its borders.

The federal government’s powers in the environmental area have been divided into two categories: the conceptual powers and the functional powers.<sup>1</sup> The former consist of the peace, order and good government power, the trade and commerce power, the taxing and spending powers, the criminal law power, and the declaratory power. The functional powers are those arising from federal responsibilities for navigation and shipping, sea coast and inland fisheries, canals, harbours, rivers and lake improvements, aboriginal peoples, federal lands, and federal works and undertakings. One of the federal government’s most significant constitutional bases for environmental action has been its power over fisheries, which enables it to regulate in the area of water pollution.

### Historical Context

F.L. Morton has pointed to the long lineage of provincial health legislation, noting, for instance, that “Ontario enacted its first Public Health

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<sup>1</sup> See Dale Gibson, “Constitutional Jurisdiction over Environmental Management in Canada,” University of Toronto Law Journal, Vol. 23, No. 1, Winter 1973.

Act in 1884.”<sup>2</sup> He also states that it was the late 1960s “when the federal government first became interested” in environmental policy.<sup>3</sup> His argument is that the abundance of early health-related legislation bolsters the provincial case for jurisdictional paramountcy in the environmental domain.

Morton's claim regarding the origins of federal interest in environment policy is not quite accurate. The federal Fisheries Act of 1868 was intended to prevent the destruction of the nation's fisheries. This detailed enactment regulated what fish could be caught when, when fish may be bought and sold, and how fish may be caught. Section 4, for example, stated: “No one shall use mackerel, herring nor caplin seines for taking codfish, and no codfish seine shall be of a less sized mesh than four inches in extension in the arms, and three inches in the bunt or bottom of the seine.” The Act also prohibited the dumping of “deleterious substances” in any water where fishing was carried on or where the fish mentioned in the Act frequented. Section 19 of the Act, which actually used the word, “pollution,” generally empowered the Governor in Council to make or amend regulations

found necessary or deemed expedient for the better management and regulation of the sea-coast and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction of fish and to forbid fishing except under authority of leases or licenses....

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<sup>2</sup> F.L. Morton, “The Constitutional Division of Powers with Respect to the Environment in Canada,” in K. Holland, F.L. Morton, B. Galligan, (eds.), Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States, (Westport, CT: Greenwood Press, 1996), p. 37.

<sup>3</sup> Ibid., p. 41.

The Act's wording, its detail, the timing of its enactment, and its provision for penalties in cases of infringements suggest that fisheries protection was an important issue for Ottawa in the latter part of the nineteenth century.

In 1873, Parliament passed An Act for the Better Protection of Navigable Streams and Rivers. Section 1 of this brief enactment states:

From and after the passing of this Act, no owner nor tenant of any saw-mill, nor any workman therein, nor other person or persons whosoever, shall throw or cause to be thrown, or suffer or permit to be thrown, any sawdust, edgings, slabs, bark or rubbish of any description whatsoever, into any navigable stream or river either above or below the point at which such stream or river ceases to be navigable.

Nine years later, in 1882, Parliament passed the Navigable Waters Protection Act to strengthen the legislative protection of Canada's inland waters.

In 1906, Prime Minister Laurier called the first Canadian Forestry Convention, a conference that two scholars described as the “single event and date when the concern for conservation planning can be said to have been born in Canada.”<sup>4</sup> It eventually led to the introduction in Parliament in 1909 of an Act to Establish a Commission for the Conservation of Natural Resources.

Initially chaired by Clifford Sifton, the Commission of Conservation was comprised of federal and provincial ministers and university professors. It was an advisory and research body, reporting to the federal Cabinet and mandated to review any questions dealing with the conservation and better utilization of the nation's natural resources.

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<sup>4</sup> A. Artibise, G. Stelter, “Conservation Planning and Urban Planning: The Canadian Commission of Conservation in Historical Perspective,” in R. Kain, (ed.), Planning for Conservation, (London, UK: Mansell Publishing, 1981), p. 21.

In 1909, Opposition Leader, Robert Borden, introduced a motion in the House of Commons calling for the creation of a select standing committee on natural resources which would “have authority to inquire into and consider and report upon all matters appertaining to the conservation and development of the natural resources of Canada....” Sounding like today’s sustainable development advocates, Mr. Borden told the House that Canada’s resources “should be both developed and conserved, so that they may be of the greatest possible advantage to the present generation and may also be handed down as a continuing heritage to those who come after us in the work of upbuilding this Dominion and the British empire.”<sup>5</sup>

In 1910 the federal government assumed the obligations of the Canada-US Boundary Waters Treaty, negotiated and signed on Canada’s behalf by Britain. The Treaty established the International Joint Commission, which was charged with maintaining water quality on both sides of the international border.

The point of mentioning these early initiatives, of course, is not to make the case for exclusive federal control of environment policy. Rather, the purpose is to show that federal interest in this area goes back at least as far as, if not farther than, that of the provincial governments.

Kathryn Harrison has analyzed two decades of environmental policy beginning in the early 1970s, particularly the approaches of the federal and provincial governments. She concludes that generally speaking the two levels

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<sup>5</sup> House of Commons, Debates, February 1, 1909, pp. 355-356.

of government have gotten along quite well on environmental issues. The reason is that “the federal government has typically declined to test the limits of its constitutional authority with respect to the environment.”<sup>6</sup> The question is: why?

For Harrison, the contention that federal timidity is attributable to a federal unwillingness to confront the provinces is not a convincing one since Ottawa has not been shy about trenching on provincial jurisdiction in other fields, e.g., health care, post-secondary education, and oil-pricing. In her view, any explanation of federal actions would be incomplete without a consideration of the “electoral incentives” that a government faces. That is to say, when environmental issues are salient in the public mind, both levels of government act, and they are not afraid of stepping on each other’s toes in doing so. However, when the saliency moderates, both levels “relax their environmental ambitions.” “Thus, the absence of electoral incentives, rather than constitutional constraints or provincial opposition per se, may explain why the federal government historically has not pursued a larger role in environmental protection.”<sup>7</sup>

Harrison refers to the early 1970s as the period of the “first green wave.” During this time, Ottawa enacted a number of important environmental laws including the Canada Water Act of 1970 and the Clean Air Act of 1971. Regulations controlling water discharges from six industrial

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<sup>6</sup> K. Harrison, “Passing the Environmental Buck,” in F. Rocher, M. Smith, (eds.), New Trends in Canadian Federalism, 2<sup>nd</sup> edition, (Peterborough, ON: Broadview Press, Ltd., 2003), p. 314.

<sup>7</sup> Ibid. p. 316.

sectors - pulp and paper; metal mining; petroleum refining; meat and poultry processing; potato processing; and chlor-alkali mercury plants - were implemented under the Fisheries Act, and certain types of air pollution from four sectors - asbestos mines and mills; secondary lead smelters; vinyl chloride plants; and chlor-alkali mercury plants - were implemented under the Clean Air Act. Amendments were made to the Fisheries Act to strengthen the protection of fish habitat.<sup>8</sup> However, the four largest provinces, B.C., Alberta, Ontario, and Québec, resented these initiatives and, as a result, federal-provincial relations “were characterized by tension and conflict.”<sup>9</sup>

Soon after this period of activism, the economy replaced the environment as governments’ most pressing concern. Not only did the legislative momentum subside but Ottawa refused to implement or enforce its own standards. The pattern that emerged was that, while Ottawa would develop national discharge standards in consultation with the provinces, the provinces would take responsibility for establishing and enforcing requirements at least as strict as the agreed national requirements. Ottawa would refrain from enforcing the regulations unless the provinces failed to act. But, Harrison writes: “In practice...despite a record of widespread noncompliance with federal standards, the federal government rarely intervened...”<sup>10</sup>

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<sup>8</sup> M. Winfield, “Environmental Policy and Federalism,” in G. Skogstad, H. Bakvis, (eds.), Canadian Federalism: Performance, Effectiveness and Legitimacy, (Don Mills, ON: Oxford University Press, 2002), p. 125.

<sup>9</sup> K. Harrison, “Passing the Environmental Buck,” p. 320.

<sup>10</sup> ibid., p. 321.

By the late 1980s and early 1990s, environmental concerns again surged in importance to the public so, again, both levels of government enacted important legislation including, at the federal level, the Canadian Environmental Protection Act and the Canadian Environmental Assessment Act (CEAA), both of which were opposed by the four large provinces.<sup>11</sup> New regulations to control the use and release of toxic substances into the environment were established, environmental assessments became more common, and Canada signed a number of international environmental agreements.<sup>12</sup>

When, by the mid-1990s, deficits, trade, and constitutional issues replaced the environment at the top of the nation's political agenda, federal and provincial governments settled into a period of retrenchment and relative inaction, highlighted, aside from staff and funding cutbacks to environment ministries, by negotiations on the Canada-Wide Accord on Environmental Harmonization.

A review of the history of recent environmental policy reveals two features of the policy. One is the reluctance of governments to impose standards, particularly at the federal level. Leading environmental scholars

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<sup>11</sup> These two enactments along with the Fisheries Act are the federal government's principal legal tools for protecting the Canadian environment. The CEAA was enacted in 1992 and the CEPA was enacted in 1988 and amended in 1999.

<sup>12</sup> M. Winfield, "Environmental Policy and Federalism," p. 125.

have made this observation. Nancy Olewiler, for instance, has described Canadian environmental policy this way:<sup>13</sup>

Most regulation at the federal level has been in the form of guidelines that suggest a nonbinding target or range. Provincial regulations are in the form of both guidelines and binding standards. Environmental legislation in Canada has been largely based on a cooperative model of negotiation between the government regulator and the polluting party in the form of memoranda of understanding.

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Federal environmental legislation in Canada has been primarily enabling rather than mandatory. What this means is that officials are authorized to develop regulations. They rarely have the obligation to act.

Inger Weibust sees the absence of national standards as being the major reason why Canada does so poorly in protecting the environment, and she advocates the replacement of the current decentralized, cooperative approach by a system of federally set minimum national standards similar to the systems used in the US and the European Union. She writes: "From the perspective of improving environmental protection, there are no compelling arguments against minimum national standards. They remain rare in Canada, however, because of the provincial hostility to such measures and the federal government's reluctance to pick a fight with the provinces over the environment."<sup>14</sup>

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<sup>13</sup> N. Olewiler, "Environmental Policy in Canada: Harmonized at the Bottom?," in K. Harrison, (ed.), Racing to the Bottom?: Provincial Interdependence in the Canadian Federation, (Vancouver, BC: UBC Press, 2006), p. 125.

<sup>14</sup> I. Weibust, The Great Green North? Canada's Bad Environmental Record and How the Feds Can Fix It, (to be published in a forthcoming volume on Canadian federalism by the University of Ottawa Press). In her recently published book, Weibust presents a powerful critique of the way the two levels of government address environmental issues. See her Green Leviathan: The Case for a Federal Role in Environmental Policy, (Surrey, UK: Ashgate Publishing Limited, 2009).

A second feature is the federal government's uneasiness about enforcing the regulations that it did set. Not only did it delegate the enforcement job to the provinces it ignored the numerous occasions when the provinces refused to enforce federal environmental regulations. For instance, in a study of enforcement practices of Environment Canada from 1970 to 1982, Lorne Giroux found that the attitude of the federal Environmental Protection Service (EPS) "has been one of restraint" in Québec "based on the fear of causing constitutional and political friction with Québec."<sup>15</sup> Even though non-compliance with federal standards for effluents in the pulp and paper industry was highest in Québec, there never was a case prosecuted in Québec. But non-compliance and non-enforcement were not confined to Québec. Giroux quotes from a study by the Law Reform Commission of Canada:<sup>16</sup>

Our review of the EPS delegation scheme suggests that federal delegation of environmental enforcement authority amounts to a virtual abdication of responsibility for enforcement and has promoted discrepancies in the nature of enforcement responses across Canada.

An internal memorandum from the federal Department of Fisheries and Oceans confirmed the federal "negotiate and compromise at all costs philosophy" with respect to the non-enforcement of Fisheries Act violations by a number of large firms in B.C.<sup>17</sup>

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<sup>15</sup> L. Giroux, "Delegation of Administration," in D. Tingley, (ed.), Environmental Protection and the Canadian Constitution, (Edmonton, AB: Environmental Law Centre (Alberta) Society, 1987), p. 89.

<sup>16</sup> Ibid., p. 85.

<sup>17</sup> Quoted in T. Schrecker, "Of Invisible Beasts and the Public Interest," in R. Boardman, (ed.), Canadian Environmental Policy: Ecosystems, Politics, and Process, (Don Mills, ON: Oxford University Press, 1992), p. 91.

The lack of enforcement of federal environmental legislation remained a concern well into the 1990s, so much so that the House of Commons Standing Committee on Environment and Sustainable Development undertook a review of enforcement and issued its findings and recommendations in 1998. The report, published prior to the signing of the Canada-Wide Accord on Environmental Harmonization, documented the operational incapacity of Environment Canada to enforce federal legislation as well as the apparent lack of political will to do so. The report referred to the federal tendency, after it signs an administrative agreement with a province, “to withdraw from the field,” reducing its resources accordingly. It was particularly troubled by the effect on Environment Canada when environmental responsibilities are handed over to the provinces. It stated:<sup>18</sup>

The loss of federal capacity due to “downloading” of responsibilities on the provinces or territories is a problem...even under administrative agreements. Once one level of government effectively devolves its responsibilities to another, it progressively abandons the field and loses its capacity to operate. In the end, it will lose the necessary budgets, staff and expertise. As Franklin Gertler of the Quebec Environmental Law Centre pointed out, “when a province decides not to enforce a piece of federal legislation, then it’s very difficult for the federal government to go back to its previous role because it doesn’t have the means to do so anymore.”

The Committee indicated its preference for joint federal-provincial enforcement activity rather than the one-window approach which characterizes the Canada-Wide Accord. It also recommended that the federal Environment Minister, when negotiating environmental agreements with the provinces,

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<sup>18</sup> House of Commons Standing Committee on Environment and Sustainable Development, Enforcing Canada’s Pollution Laws: The Public Interest Must Come First!, Third Report, May 1998, pp. 37-38.

territories and Aboriginal governments, “ensure that it retains full authority and accountability, as well as the appropriate means and resources to enforce CEPA and the pollution prevention provisions of the Fisheries Act.”<sup>19</sup>

The House Committee noted the effects on Canada’s international standing if it fails to enforce environmental laws. Pointing out that, as a signatory to the North American Agreement on Environmental Cooperation, one of the side deals to the North American Free Trade Agreement, Canada is obligated to enforce its own environmental laws, the Committee observed that failure to do so “could prompt one of the contracting parties to cite Canada for a persistent pattern of non-enforcement of its environmental laws, and should the complaint be sustained upon review, Canada could face a stiff monetary penalty.”<sup>20</sup> Equally important, Canada would hardly be in a position to criticize other nations for not enforcing their own laws, whether they be environmental laws, labour laws, or human rights laws.

Harrison was not the only scholar to notice federal reticence about using its valid constitutional powers on the environment. For instance, legal scholar, J. Owen Saunders, wrote in 1986:<sup>21</sup>

Even where there appears to be a strong argument for the constitutional validity of a greater role on its part, the federal government has chosen to take the more cautious road of restraint. Perhaps the best example of this approach is the reluctance by Ottawa to make active use of some of the powers it has asserted for itself in the Canada Water Act, and the

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<sup>19</sup> ibid., p. 38.

<sup>20</sup> ibid., p. 19.

<sup>21</sup> J. Owen Saunders, “Good Federalism, Bad Federalism: Managing Our Natural Resources,” in J. Owen Saunders, (ed.), Managing Natural Resources in a Federal State, (Calgary, AB: The Carswell Company, 1986), p. xii.

maintenance of a policy of encouragement and leadership in water quality matters rather than unilateral pursuit of its own goals.

Similarly, in 1992 Skogstad and Kopas made the point that, while CEPA and CEAA had the potential to substantially increase federal scope for action, Ottawa “voluntarily restricted its ability to trespass on what the provinces have come to believe is their territory.”<sup>22</sup> For example, it agreed not to act unilaterally and it consented to allow the application of provincial laws instead of federal if they were equivalent to federal laws.

In his discussion, Saunders went on to point out that federal willingness to practice restraint in its use of its powers can have devastating effects for some groups. He referred in particular to Ottawa’s refusal to confront those provinces whose development-oriented policies on resources were trampling on the rights of Aboriginal peoples, “rights which the federal government is charged with protecting.”<sup>23</sup> Saunders concluded:<sup>24</sup>

In effect, then, there is a danger that in our emphasis on flexibility as a desirable quality of a federal system, on the ability of governments to reach accommodations outside the formal constitutional ordering, we may - perhaps in the interests of short-run political expediency - lose sight of some of the principles the formal constitution is designed to protect....If any federal state has discovered that political accommodations designed to avoid inconvenient constitutional niceties may come back to haunt subsequent generations, it is Canada, with its unhappy history of minority language rights in Manitoba. In our enthusiasm for the bargaining approach, it may be tempting to forget on occasion that not all items *should* be negotiable. [Emphasis in original].

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<sup>22</sup> G. Skogstad, P. Kopas, “Environmental Policy in a Federal System,” in R. Boardman, (ed.), Canadian Environmental Policy: Ecosystems, Politics, and Process, (Don Mills, ON: Oxford University Press, 1992), p. 54.

<sup>23</sup> J. Owen Saunders, “Good Federalism, Bad Federalism: Managing Our Natural Resources,” p. xv.

<sup>24</sup> Ibid., p. xvi.

Saunders's last point is worth emphasizing. To be sure, there are some policies that should be subject to joint federal-provincial decision-making. But, on some issues, provinces need only be informed of federal action. On others, provinces need only be given the opportunity to provide feedback. Moreover, even in a federal system, it is legitimate for the national government to insist that its conception of the national interest prevail. It is equally legitimate for it to go over the heads of provincial governments and appeal directly to citizens. Such a tactic may result in competition between Ottawa and the provinces or a province for citizen support. Such competition tends to be greeted with distaste by federal politicians and public servants, especially when the Québec secession issue is factored in.

And yet, political competition is what enlivens and animates a democracy. And it is difficult to believe that Quebecers would flock to the secessionist cause because Ottawa had the audacity to enact environmental protection measures!

One of the more significant studies of the constitutional basis of environmental policy-making was issued by the House Committee's predecessor, the House of Commons Standing Committee on Environment, in 1992. Its report clearly makes the case for an assertive federal role in environmental protection. What is startling is that it did so even though most of the Members on the Committee were Progressive Conservatives and even though it was issued just after the demise of the Meech Lake Constitutional Accord and just prior to the federal-provincial agreement at Charlottetown, a time when political élites were preoccupied with satisfying the autonomy

demands of the provinces, especially Québec. Consider that the House Committee:

1. recommended that constitutional proposals recognize areas of provincial jurisdiction in “specific and unambiguous statements” in order to ensure that they “are compatible with a strong federal commitment and capacity in regard to environment and sustainable development....”<sup>25</sup> The Committee was “impressed by the unanimity and the convergence of views on federal leadership” and it included quotations from both industry and environmental groups in support of strong federal leadership.<sup>26</sup>
2. treated the federal declaratory power not as an anachronism or as something to be bargained away but rather as a potential tool for environmental protection. Indeed, it flatly rejected the Mulroney government’s proposal, contained in Shaping Canada’s Future Together, that Ottawa relinquish this power. The report recommended that the power “be clarified with respect to the ability of the federal government to maintain and enhance environmental quality and to promote sustainable development....”<sup>27</sup>
3. rejected the Mulroney government’s proposal that the federal residual power, i.e., the peace, order and good government power, be weakened.

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<sup>25</sup> House of Commons Standing Committee on Environment, Environment and the Constitution, Report of the Standing Committee on Environment, March 1992, p. 27.

<sup>26</sup> Pollution Probe and the Canadian Environmental Law Association were quoted as was TransCanada Pipelines Limited. The latter stated: “Federal authority over the environment should be dominant to provide uniform regulation across the country in respect of environmental processes as well as pollution controls” (see p. 25).

<sup>27</sup> Ibid.

In the Committee's view, the power "is one of the basic foundations for federal action to protect the environment and promote sustainable development." It "should in no way be diminished in its ability to deal with environmental needs."<sup>28</sup>

4. acknowledged the perception that the federal government avoids using its constitutionally valid powers to the fullest, quoting a witness from the Canadian Bar Association:<sup>29</sup>

If there's one frustration that those of us interested in environmental matters suffer it is that there has been a good deal of timidity on the part of the federal government in asserting its jurisdiction in environment. We suppose this is for fear of treading on provincial toes.

The House Committee also addressed the inadequacies of the federal government's international treaty implementation power. It did not recommend that Ottawa be given the power to implement all international environmental agreements but it clearly saw the present arrangement as being more than a little problematic. The report states:<sup>30</sup>

[T]he Committee agrees that ensuring the implementation of international environmental agreements is a real and urgent need. Without it, Canada's negotiating position is unnecessarily constrained by what the federal government believes would be acceptable to all affected provinces; Canada's credibility on the international scene may be called into question; and major opportunities to protect and improve the Canadian environment may be missed or diminished. It seems clear that Canada will be hard pressed to fulfill the international environmental commitments that it has made in recent years.... The Government of Canada should not be in the position of having to plead that a failure to fulfill a commitment was due to its lack of

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<sup>28</sup> ibid., p. 31.

<sup>29</sup> ibid., p. 10.

<sup>30</sup> ibid., pp. 28-29.

environmental authority....[W]e recommend that the Government of Canada address the general question of the treaty power in its revised constitutional proposals, because of its significance for environment and sustainable development in Canada.

The report also made reference to two groups advocating a strengthened federal treaty implementation power. The West Coast Environmental Law Association recommended that “the Government of Canada revise its constitutional proposals by expressly enumerating a federal power to legislate as necessary to implement Canada’s international environmental agreements.” Also included was the recommendation of the Canadian Bar Association that the peace, order and good government power be used by Ottawa to implement international obligations that have a national dimension.<sup>31</sup>

The Committee proposed that the environment continue as an area of shared jurisdiction but it also acknowledged the difficulties that such an arrangement would produce. It referred to the comments of witnesses who stated that “Canadians do not know who is responsible for what. They often do not know where to turn when they want to have legislation enforced.”<sup>32</sup> It also referred to the Canadian Bar Association’s concern about “the uneven enforcement of environmental laws that has sometimes been the result of delegation to the provinces of enforcement responsibilities under federal statutes.”<sup>33</sup> Not surprisingly, therefore, the Committee suggested that

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<sup>31</sup> ibid., p. 29.

<sup>32</sup> ibid., p. 5.

<sup>33</sup> ibid. In this regard, the Committee also noted the comments of former Tory Environment Minister, Thomas MacMillan: “The record of provincial governments in this country in the environmental field is appalling, when the federal government has devolved or delegated some of its authority,

agreements allowing for delegated powers include provisions (a) requiring regular and public reporting to the legislature of the delegating authority by the jurisdiction to which the powers are delegated, and (b) permitting the revocation of those delegated powers if, in the opinion of the legislature of the delegating jurisdiction, “the powers are not being effectively exercised by the jurisdiction to which powers have been delegated[.]”<sup>34</sup>

The then Environment Minister’s enthusiasm for a greater role for the Canadian Council of Ministers of the Environment (CCME) where, Jean Charest noted, “*all governments are equal*,” elicited no specific reaction from the Committee members, although their report called for a strengthening of the formal and informal mechanisms for consultation and cooperation among governments in Canada and for the harmonization of existing and proposed regulations and actions in support of environmental protection. [Emphasis added.]

The activities of the CCME were noted by the House Committee in its 2007 review of CEPA 1999. Explaining that the CCME is responsible for setting non-binding Canada-wide standards (CWS) for emissions of toxic substances, such as mercury, the review stated:<sup>35</sup>

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especially for enforcement, to the provinces, as it did, for example, vis-à-vis section 33 of the Fisheries Act” (see p. 26).

<sup>34</sup> Ibid., p. 41.

<sup>35</sup> House of Commons Standing Committee on Environment and Sustainable Development, The Canadian Environmental Protection Act, 1999 - Five-Year Review: Closing the Gaps, April 2007, p. 44. So concerned was the Committee that it recommended that the government consider using s. 330 (3.1) of CEPA 1999 which allows it to make regulations with limited geographical application. “Such regulations might avoid the need for a nation-wide consensus and therefore a race to the bottom, while having a greater measure of enforceability” (p. 44).

There do seem to be problems with the CWS, but cooperation between jurisdictions is essential and it is difficult to imagine a radically different approach to establishing it. The trick is to avoid a race to the bottom, which does seem to be what is happening. The federal government should show leadership at the CCME in an effort to prevent this from happening.

This comment is significant, suggesting as it does that a race to the bottom is going on among jurisdictions in terms of environmental protection and that there is a need for federal leadership in an organization that, as we noted earlier, operates as though all governments in Canada are equal. The comment is notable also because it seems to suggest that the CCME process is the only approach available to governments. This would not be accurate for there is available to governments the paramountcy doctrine. This doctrine, described by Monahan as “a judge-made rule of interpretation,” is applicable in areas of concurrent jurisdiction. It means that when federal and provincial laws conflict, that is, when there is an express contradiction between two laws, such that it is impossible to comply with both the federal and provincial laws, or when the provincial law frustrates the purpose of the federal one, the federal law prevails. The provincial law is not rendered invalid or *ultra vires*. It means only that the part of the provincial law that contradicts the federal is inoperative.<sup>36</sup> The paramountcy doctrine would seem to be an alternative to the CCME process that is worth further investigation.

This approach was, in fact, recommended by the Special House and Senate Committee on the Constitution in its 1972 report. It proposed that air

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<sup>36</sup> For more on the paramountcy doctrine, see P. Monahan, Constitutional Law, 2<sup>nd</sup> edition, pp. 127-128.

and water pollution be a matter of concurrent jurisdiction and that, “in the event of conflict between the new concurrent Federal and Provincial powers in the area of air and water pollution, Federal legislation should be paramount.”<sup>37</sup>

In light of the foregoing review of the federal approach to the environment, Harrison’s claim that governments in Canada alternate between periods of environmental activism and environmental neglect depending on the electoral incentives available to them should perhaps be re-phrased; that is to say, Ottawa alternates between periods of environmental neglect and periods of *apparent* environmental activism.

The issue assumes greater urgency when a 2005 report from the David Suzuki Foundation is recalled. The report ranked Canada twenty-eighth out of the thirty member countries of the Organization for Economic Cooperation and Development (OECD) in environmental performance. Among other things, Canada’s greenhouse gas emissions were found to be two times higher than the average for the other industrialized countries. Canada ranked twenty-seventh in sulphur oxides pollution. The study reported further that Canada had not improved at all since 1992, having the same ranking then as it did in 2005.<sup>38</sup>

As a number of scholars and environmental activists have shown, Canada’s environmental performance has been considerably worse than that of the US. Barry Rabe, for instance, found that Canadian greenhouse gas

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<sup>37</sup> Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, 1972, Final Report, tabled in the House of Commons March 16, 1972. See A. Bayefsky, Canada’s Constitution Act 1982 & Amendments: A Documentary History, Volumes I and II, (Toronto, ON: McGraw-Hill Ryerson Limited, 1989), Volume I, p. 300.

<sup>38</sup> These data were obtained from a CBC News story on the Foundation’s report, dated Tuesday, October 18, 2005. See [www.cbc.ca](http://www.cbc.ca). Retrieved on Friday, December 7, 2007.

emissions climbed by 26 per cent between 1990 and 2004, while US emissions increased by 15 per cent.<sup>39</sup> Rabe found further that “Using the metric of ‘carbon intensity’, the ratio of greenhouse gas emissions per unit of gross domestic product, American carbon intensity declined 17 per cent during the 1990s as opposed to only 10 per cent in Canada.”<sup>40</sup>

Since Rabe wrote, Canada's performance vis-à-vis the US has not improved. In 2009, the World Wide Fund for Nature (WWF), a global environmental organization, and Allianz SE, a global financial services corporation, issued their third annual report on the climate change efforts of the G-8 countries. The study ranked the eight countries on the basis of three groups of indicators: improvements since 1990, current status, and policies for the future. The study summarized Canada's performance as follows:<sup>41</sup>

Canada scores lowest of all G8 countries: total emissions are steadily increasing and are far above the Kyoto target, per capita emissions are among the highest in the world. Mid to long-term greenhouse gas targets are inadequate. A plan to curb emissions was developed last year but has not been implemented.

The report noted further that Canada is among the four countries - France, Japan, the US being the others - where the share of renewable energy is declining or stagnating.<sup>42</sup>

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<sup>39</sup> B. Rabe, “Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems,” *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 20, No. 3, July 2007, p. 427.

<sup>40</sup> *Ibid.*

<sup>41</sup> WWF, Allianz SE, *G8 Climate Scorecards 2009*, (July 2009), p. 9. Retrieved from the WWF-Canada web site, <http://wwf.ca>, July 3, 2009.

<sup>42</sup> *Ibid.*, p. 7.

It is not unreasonable to suggest that Canada's record would be much better if the federal government had not approached environmental issues with such timidity and attentiveness to provincial sensitivities.

It was because of the federal government's inaction on the environment that the David Suzuki Foundation decided to do a study of provincial and territorial initiatives on climate change. Published in 2008, the study concluded that "Close to two decades of inaction have left most provinces, and the country as a whole, with much higher greenhouse gas emissions than they had in 1990."<sup>43</sup> It also found that "Most provinces have stronger targets than the Canadian government and stronger policies to achieve them."<sup>44</sup> Among the subnational units, British Columbia was determined to have the Best climate change policies. The worst are those of the Alberta government. The government of Québec has Very Good climate change policies. Manitoba and Ontario have Good policies, the three Maritime provinces and Nunavut have Fair policies, and the governments of Newfoundland and Labrador, Saskatchewan, Yukon, and the North West Territories were judged to have Poor climate change policies.

In terms of actual outcomes, only Québec and the three Territories reduced emissions since 1990. Only the three western-most provinces did *not*

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<sup>43</sup> D. Marshall, Provincial Power Play: Breaking Away from Federal Inaction on Climate Change. Retrieved from the web site of the David Suzuki Foundation, [www.davidsuzuki.org](http://www.davidsuzuki.org), June 5, 2009, p. 3.

<sup>44</sup> Ibid.

reduce emissions in the 2003-06 period. Ten of the subnational jurisdictions reduced greenhouse gas emissions in 2006.<sup>45</sup>

Another recent report that compares the environmental performances of the provinces and territories (as well as the federal government) comes from Friends of the Earth Canada.<sup>46</sup> It assessed the jurisdictions on the extent to which they protect ten environmental rights, including the right to information and notice, the right to participation, protection for environmental whistleblowers, and provision for an independent environment auditor or commissioner. Ontario was determined to be the best performer and was given a “Final Grade” of B. The worst performers were Alberta and Saskatchewan. The federal government, the Québec government, and the governments of the NWT and Nunavut came in second and were given a C+.

Why Ottawa has chosen to take a deferential approach to environmental issues remains to be answered. The 1998 House Committee report says that the lack of resources is responsible. The theory proposed in this dissertation - integrating historical institutionalism and constitutional abeyance theory - says that the answer has to do with the legacy of the founders’ constitutional

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<sup>45</sup> In a recent article, one of Canada’s strongest provincial autonomy advocates, Thomas Courchene, and J.R. Allan call upon the federal government to play a more active role on climate change. (“The Provinces and Carbon Pricing: Three Inconvenient Truths,” *Policy Options*, Vol. 30, No. 1, December 2008-January 2009). They note that in both Canada and the US the subnational units are “driving the carbon-pricing agenda while their respective national governments are either politically or ideologically unwilling to assume leadership on this file” (p. 60). After reviewing constitutional, competitiveness and fiscal concerns, Courchene and Allan conclude:

The bottom line here is that competitiveness and efficiency require a national (or even international) market characterized by a single price. While there may still be ample opportunities within this overall framework for the provinces to play key roles, federal action is necessary to ensure competitiveness and efficiency: Ottawa has the constitutional authority to act in this area, and must undertake vital tasks that the provinces cannot (p. 63).

<sup>46</sup> See [www.foecanada.org](http://www.foecanada.org), Standing on Guard! Ranking Environmental Rights in Canada 2009. Retrieved June 5, 2009.

omissions bearing on Canadian sovereignty. Professor Harrison suggests that federal reticence has to do with electoral incentives. A fourth possible explanation rests on the concerns of Canadian business. The remainder of this chapter considers these explanations. The next section, on the relevant jurisprudence, will attempt to shed light on the role of the Judicial Committee of the Privy Council and of the Supreme Court of Canada.

### Judicial Decisions

The preceding chapter of this dissertation traced the evolution in judicial thinking on the federal government's trade and commerce power. The objective was to find out the scope of the power and to see if the Supreme Court's decisions on the power were consistent with those of the JCPC. What we learned was that the JCPC made a number of restrictive judgments on the power, setting it and the Supreme Court on a certain course, thereby making both path dependent. Forty years after it became the country's final court of appeal the Supreme Court began to move away from the JCPC's decisions, but by that time, the federal government's lack of jurisdictional confidence had become almost paralyzing. The result was the decision to negotiate the Agreement on Internal Trade.

In this chapter, the objective is the same; that is, to find out the impact of judicial decisions on the federal government's power to regulate on environmental matters.

Perhaps Ottawa's most potent source of authority to enter the environmental field is its peace, order and good government power. We begin

this section, therefore, by reviewing Judicial Committee and Supreme Court decisions on the POGG power.

The first case of interest is the 1896 *Local Prohibition* case in which the Judicial Committee determined that the POGG clause should “not have the same capacity as the federal enumerated powers to override provincial jurisdiction over matters of a local or private nature.” The decision no doubt took the wind out of the sails of the POGG provision. However, Lord Watson did leave an out for the federal government. He wrote:<sup>47</sup>

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and...that which...has become a matter of national concern, in such sense to bring it within the jurisdiction of the Parliament of Canada.

Here is expressed the national dimensions or national concern aspect of the peace, order and good government provision.

The impact, however, of Watson’s comment on his colleagues and successor was minimal and the national concern aspect went into judicial dormancy for several decades. In the 1922 *Board of Commerce* case, Lord Haldane ruled that the POGG clause was, in fact, only an emergency power, to be employed only under exceptional conditions, such as “war or famine.”<sup>48</sup> This interpretation endured into the 1970s. As discussed earlier, in 1925,

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<sup>47</sup> Ontario (Attorney General) v. Dominion (Attorney General), [1896] A.C. 348, at p. 361.

<sup>48</sup> Reference Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919, [1922] 1 A.C. 191, at p. 200.

Haldane struck down an eighteen-year-old federal labour relations law, ruling that neither the POGG clause, nor the trade and commerce power, nor the criminal law power, could be invoked to sustain federal paramountcy in labour policy.<sup>49</sup>

When the Supreme Court replaced the JCPC as Canada's final appeal body in 1949, the balance of power shifted toward the central government, but only slightly. A number of decisions did invoke the national concern branch of the POGG power but, as Gerald Baier points out, its use did not result in "a Canadian revolution of American proportions. The Supreme Court did not shift dramatically to a centralized vision of federalism."<sup>50</sup>

In 1976, the meaning of the POGG clause was again at issue. In *Reference Re: Anti-Inflation Act*, the Court ruled that a federal law to deal with inflation was constitutional. But, evidently unwilling to get off the path set by the JCPC, the majority of the justices upheld the law on the basis of the emergency aspect of the POGG clause. In his analysis of the decision, Peter Russell concludes that "the Court did not endorse the expansive interpretation of Parliament's general power....Instead, the Court as a whole could agree only on the Judicial Committee of the Privy Council's 'emergency doctrine....'"<sup>51</sup>

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<sup>49</sup> Toronto Electric Commissioners v. Snider, [1925] A.C. 396.

<sup>50</sup> G. Baier, Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada, (Vancouver, BC: UBC Press, 2006), pp. 58-59.

<sup>51</sup> P. Russell, "The Anti-Inflation Case: the Anatomy of a Constitutional Decision," Canadian Public Administration, Vol. 20, No. 4, p. 633.

Chief Justice Laskin and three others supported the majority but differed in that they recognized the applicability of the national concern aspect.<sup>52</sup>

The meaning of the national concern branch was given greater clarity in 1988 with the Supreme Court's decision in *R. v. Crown Zellerbach*.<sup>53</sup> By a four to three majority, the Court upheld the right of Parliament to regulate the dumping of waste in marine waters, that is, the waters just off the coast of a province. The basis of the decision was the national concern dimension of the POGG power.

However, the Justices stipulated that in order for the power to be invoked several conditions had to be met. Writing for the majority, Justice LeDain stated that to qualify as a matter of national concern a matter must have become of national concern since the time of Confederation or must be a new matter which did not exist at that time. In addition, it must have a "singleness, distinctiveness and indivisibility" that clearly distinguish it from matters of provincial concern; that is, it must not only be distinguishable from provincially regulated matters it must also have definable limits. Here, justices must factor in the effect on other jurisdictions of a provincial failure or unwillingness to deal with the issue. Finally, a judgment that determines that an issue falls under federal jurisdiction because of the national concern argument must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power in Canada.

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<sup>52</sup> *Ibid.*, p. 656.

<sup>53</sup> *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

For the majority of justices, the federal environmental legislation in question, i.e., the Ocean Dumping Control Act, (now part of the Canadian Environmental Protection Act) met the above conditions, thus making it *intra vires* the Parliament of Canada.

A number of scholars interpreted the judgment as a substantial enlargement of the federal residual power and predicted that the federal-provincial balance in Canada would shift significantly in favour of the federal government. Political scientist, F.L. Morton, for instance, said that the Court's decision in *R. v. Crown Zellerbach* signaled the "abrupt end" to its restrained application of the national dimensions aspect, adding that it may "open the door to more unilateral federal environmental legislation" and "confer a *prima facie* legitimacy on federal regulation in almost any environmental policy area deemed to be of national concern."<sup>54</sup> Morton also quotes legal scholars Brun and Tremblay who assert that the decision "clashes with both the spirit and the letter of the constitution" and that it threatens an "excessive centralization of powers."<sup>55</sup> Another legal scholar, Eugénie Brouillet, described the decision as being "en totale contradiction avec sa décision dans le *Renvoi anti-inflation*." She adds that "on peut se demander jusqu'à quand les provinces seront autorisées à légiférer relativement à ces matières qui, chose certaine, sont considérées très 'importantes' dans la société contemporaine. »<sup>56</sup>

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<sup>54</sup> F. L. Morton, "The Constitutional Division of Powers with Respect to the Environment in Canada," pp. 46-48.

<sup>55</sup> *Ibid.*, p. 47.

<sup>56</sup> E. Brouillet, *La négation de la nation*, pp. 295-297.

While the decision may have enlarged the power, the fears expressed by these scholars seem not to have been realized, at least not yet. Since the *Crown Zellerbach* ruling, use of the national concern branch of the POGG power by Ottawa has been infrequent, suggesting that uncertainty still surrounds the limits of the power.

The judiciary in Canada seems to be more comfortable invoking the criminal law power than the residual power. In 1990, for example, Hydro Québec was charged with dumping a highly toxic substance, polychlorinated biphenyls (PCBs), into the St. Maurice River in contravention of sections 34 and 35 of the Canadian Environmental Protection Act. The utility, joined by the government of the province, challenged the constitutionality of the federal Act. In a close, five-to-four decision, the Court determined that the Act was *intra vires* the Parliament of Canada.

Aside from upholding the law's constitutional validity, the decision is significant for at least a couple of reasons. First, it affirmed the legitimacy of a strong federal role in environmental protection. Justice La Forest, who dissented in *Crown Zellerbach*, made this clear when he wrote:<sup>57</sup>

In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment....

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<sup>57</sup> R. v. Hydro Québec, [1997] 3 S.C.R. 213, at p. 314.

Justice La Forest's wording suggests a federal role that is more than peripheral or merely supplementary to that played by the provinces. It is a role whose object is to protect Canadians' basic values and to ensure adherence to Canada's international obligations.

Secondly, the Court upheld the constitutionality of the law not on the basis of the federal POGG power but rather its criminal law power. Because the Act provided for a series of prohibitions - including the dumping of PCBs into Canadian rivers - that were accompanied by penal sanctions, the law was determined to be a valid exercise of the federal criminal law power.

We get some idea as to why the Court preferred one power over the other from Justice La Forest's comment that deeming a matter to be of national concern means that it falls within the exclusive and paramount power of Parliament. Since environmental protection is "all-pervasive," placing it within Parliament's jurisdiction could "radically alter the division of legislative power in Canada."<sup>58</sup> But for La Forest, the constitution must "be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."<sup>59</sup> In

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<sup>58</sup> Ibid., p. 288.

<sup>59</sup> Ibid. This comment by Justice La Forest raises the question of whether the Court is correct in making decisions on the basis of their impact on the general structure of the constitution. Should the basis of its decisions not simply be the law? And should not the "general structure of the constitution" be the concern of Parliament? Certainly, the JCPC displayed few qualms about altering the general structure of Canada's constitution.

making these comments, La Forest was warning against “an enthusiastic adoption of the 'national dimensions' doctrine.”<sup>60</sup>

In his analysis of *Hydro Québec*, Gerald Baier emphasizes the Court’s preference, when faced with the choice of invoking the POGG power or the criminal law power, to go to the latter, mainly because, in the words of Justice La Forest, the national concern justification “inevitably raises profound issues respecting the federal structure of our Constitution which do not rise with anything like the same intensity in relation to the criminal law power.”<sup>61</sup>

Baier wonders if perhaps the criminal law power will “become a proxy for national concern.” This possibility has some basis when one considers Justice La Forest’s crystal clear comment in *RJR-MacDonald v. Canada* that the “criminal law power is plenary in nature and this Court has always defined its scope broadly.”<sup>62</sup> In this decision, the justices upheld the use of the federal criminal law power to ban tobacco advertising by a margin of 7-2. Writing for the majority, La Forest stated:<sup>63</sup>

The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil.

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<sup>60</sup> Ibid.

<sup>61</sup> Quoted in Baier, Courts and Federalism, p. 140.

<sup>62</sup> *RJR-MacDonald v. Canada* [1995] 3 S.C.R. 199, at p. 240.

<sup>63</sup> Ibid., p. 246.

In *Hydro Québec*, La Forest went further, declaring: "...it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard...."<sup>64</sup> He also declared that pollution prevention "is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions."<sup>65</sup> Again: "...I agree...that the stewardship of the environment is a fundamental value of our society and that Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values."<sup>66</sup> And finally: "The protection of the environment, through prohibitions against toxic substances, seems to me to constitute a wholly legitimate public objective in the exercise of the criminal law power."<sup>67</sup> It would be hard to find stronger endorsements of a federal power.

Sven Deimann's commentary on the *Hydro Québec* decision refers to the ruling as "a welcome confirmation of the federal role in environmental policy-making." He does not discuss the national concern branch of the POGG power, but he does point to the ways by which federal authority over the environment may be restricted, notwithstanding the supportive rulings of the Supreme

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<sup>64</sup> R v. *Hydro Québec* [1997] 3 S.C.R. 213, at p. 290.

<sup>65</sup> *Ibid.*, p. 293.

<sup>66</sup> *Ibid.*, p. 297.

<sup>67</sup> *Ibid.*, p. 300.

Court. One has to do with “the mechanisms of Canadian executive federalism” which may undo “what has been finely crafted at the judicial level.” Deimann is referring here, of course, to the CWAEH. The Accord may be effective but only if “harmonization does not inhibit the ability of one of the participants to engage in environmental unilateralism” and only if the Accord creates “a dynamic for upward harmonization....”<sup>68</sup> With respect to Deimann’s former point, more will be said later in this chapter. Regarding his second, Olewiler has looked at the question of whether there is a race to the bottom in provincial environmental policies. She compared several environmental indicators in Ontario, Québec, British Columbia, Alberta, Manitoba, and Saskatchewan. She concludes that there does not appear to be a race to the bottom, indeed, that there is not much of race at all, either to the top or the bottom, and the regulatory stance “is largely stuck at the status quo.”<sup>69</sup> One indicator looked at by Olewiler was provincial government expenditures for pollution abatement and control. She found that in the 1989-99 period, they had declined in all provinces except Manitoba. This result is consistent with a race to the bottom and it should have produced an increase in the number of manufacturing establishments per capita. However, all provinces, including the biggest budget-cutter, BC, experienced a decline in the number of such establishments. Two provinces, Québec and Saskatchewan, did see an increase in the share of the provincial Gross Domestic Product (GDP) made up of

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<sup>68</sup> S. Deimann, “R. v. Hydro Québec: Federal Environmental Regulation as Criminal Law,” McGill Law Journal, 43, 4, 1998, downloaded from the web, February 13, 2008, pp. 9-10.

<sup>69</sup> N. Olewiler, “Environmental Policy in Canada: Harmonized at the Bottom?,” p. 137.

pollution-intensive industries, but the budget cuts in the period were much smaller than those of BC and Ontario. BC not only experienced a decline in the share of GDP made up of pollution-intensive industries but also annual declines in sulphur dioxide, nitrogen dioxide, ground-level ozone, and carbon monoxide.

More worrisome for Deimann is Canada's stance regarding international trade rules; that is, globalization. He writes:<sup>70</sup>

It is perplexing to note in this context that the Canadian government has been most actively involved in efforts to impose trade disciplines on itself as well as other WTO members that would, for all practical purposes, render nugatory the very powers...to regulate that have been attributed to Parliament by the Supreme Court of Canada by virtue of section 91(27) of the Constitution Act, 1867.

Deimann cites the WTO challenge, brought by Canada and the United States, to the European Community (EC) decision to ban the use of growth hormones in bovine meat production. The EC decision was based on the precautionary principle, which calls upon governments to prohibit a substance even when the scientific evidence is non-existent or inconclusive. It is this principle that increasingly is the basis of environmental decision-making in developed countries. However, in its ruling, the WTO Appellate Body referred to the *limited* applicability of the precautionary principle. Thus, for Deimann, WTO law "seeks to impose fetters on democratically legitimated decision-makers where Canadian constitutional law stresses the privileged position of

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<sup>70</sup> S. Deimann, "R. V. Hydro Québec: Federal Environmental Regulation as Criminal Law," p. 10. Section 91(27) is the criminal law provision.

Parliament to decide - on the side of precaution if it so wishes - matters of policy.”<sup>71</sup>

A third commentary on the Supreme Court’s decision in *R. v. Hydro Québec* comes from Jean Leclair and, of the three discussed herein, is the most interesting. Leclair, a professor of law, sees the decision as a positive development but for reasons that have little to do with the law. In his view, the decision is welcome because of “the absolute lack of interest shown by the provinces in the protection of the environment” and he cites the huge cuts in provincial environment budgets as proof of their lack of interest. “Even Quebec environmentalists strongly urge federal involvement in environmental matters, because the attitude of the present government is just plain astonishing.”<sup>72</sup>

Secondly, the Court’s decision “shows how the courts can contribute to the construction of a national identity.” Leclair explains that there is little agreement on what a Canadian identity means and that constitutional conversations have not been helpful in stimulating a sense of belonging. This is problematic because the political institutions of a society “will appear legitimate to its members, that is, they will freely submit to its dictates, as long as these institutions pursue the shared values of the members of the community.”<sup>73</sup>

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<sup>71</sup> ibid.

<sup>72</sup> J. Leclair, “The Supreme Court, the Environment, and the Construction of a National Identity: *R. v. Hydro Québec*,” Review of Constitutional Studies, Vol. 4, No. 2, 1998, p. 375.

<sup>73</sup> ibid., p. 376.

Since politicians have been unsuccessful in developing a sense of shared civil allegiance among Canadians, other institutions, including the courts, can step in. Leclair argues:<sup>74</sup>

Indeed, the courts, as much as the political institutions, can play a great part in the definition of a national identity....I believe that this is precisely what the Supreme Court has been doing lately, albeit maybe unconsciously, through its interpretation of the federal criminal law power. It gives Parliament the opportunity to identify and define what it believes to be the fundamental values of our society.

He continues:<sup>75</sup>

In recognizing very extensive powers to Parliament in matters such as the protection of health (*Imperial Tobacco*) and the protection of the environment (*Hydro Québec*), two highly sensitive issues for *all* Canadians, the Court participates in a process of legitimation of the Canadian state and in the construction of national identity. Not only do protection of health and the environment represent two values perceived by many as traditionally and typically “Canadian” values, but they also have the singular quality of enabling us to transcend the issues which constantly divide us (language, ethnic origin, etc.). In other words, they are values about which we can all agree. Thus, they operate as symbols of what being a Canadian really means.

The extensive legislative responsibility that Ottawa has for health and the environment reinforces the legitimacy of the federal government “because by legislating over matters which are important to the average Canadian, the central government brings itself closer to the people and gains more visibility.”<sup>76</sup> Leclair concludes by arguing that the significance of the *Hydro*

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<sup>74</sup> ibid., p. 377.

<sup>75</sup> ibid.

<sup>76</sup> ibid.

*Québec* decision does not reside in the broad interpretation given to the federal criminal law power but rather in,<sup>77</sup>

the fact that the Court reinforces the legitimacy of the central government by authorizing it to encroach extensively on provincial jurisdictions for the sake of protecting matters which are considered vitally important to all Canadians wherever they live, whatever language they speak. In other words, these encroachments are justified because they are aimed at protection of the “fundamental values of our society.” In identifying and defining those fundamental values, the Court actively participates in the construction of a “Canadian identity.”

Leclair’s important observations highlight the political importance of judicial decisions.

In 1989, the first of two judicial decisions related to dam construction came down. Both cases have to do with federal government’s failure to comply with its own Environmental Assessment and Review Process Guidelines Order (EARP), section 6 of which reads:

These Guidelines shall apply to any proposal

...  
(b) that may have an environmental effect on an area of federal responsibility.

Adopted in 1984, the Order was intended for use by federal departments, boards and agencies to ensure that proposals are subject to an environmental screening or initial assessment to determine whether there might be adverse environmental effects. If this initial screening finds that there would be, a full EA must be undertaken.

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<sup>77</sup> ibid., p. 378.

In the 1989 Rafferty-Alameda case,<sup>78</sup> the Federal Court found that the federal Minister of the Environment, in granting a license to the Saskatchewan Water Corporation to build two dams - one called Rafferty and the other, Alameda - on the Souris River, failed to comply with the EARP. Since the Souris River is considered an international river, proposals to construct, operate or maintain an international river improvement are subject to the International River Improvements Act and thus require a federal license.

The law suit was brought by the Canadian Wildlife Federation. The Federal Court's ruling in favour of this citizens' group was upheld by the Federal Court of Appeal.

In the second dam-related case, delivered in 1992, the Supreme Court unanimously confirmed the constitutional validity of federal environmental assessment (EA) regulations, contained in the EARP. The case originated with the decision of the government of Alberta to construct an irrigation dam on the Oldman River.<sup>79</sup> The project, opposed by both Aboriginal citizens and environmentalists, had been the subject of a provincial EA. However, federal approval was also required under the federal Navigable Waters Protection Act. When that approval came without a federal EA, the Friends of the Oldman River Society launched a law suit to get the federal Departments of Transport and Fisheries and Oceans to conduct an EA under the EARP. The Supreme

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<sup>78</sup> Canadian Wildlife Federation v. Canada (Minister of the Environment) [1989] 3 F.C. 309.

<sup>79</sup> Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 S.C.R. 3

Court ruled that the Guidelines Order was both constitutional and legally binding.

Yet another Supreme Court ruling dealing with environmental assessment upheld federal legislation.<sup>80</sup> In 1994, the Court unanimously held that the National Energy Board (NEB) acted properly when it attached conditions to the export license that it granted to Hydro Québec to export power to the US. The Board, in arriving at its decision, considered itself to be bound by the EARP and, of course, by the National Energy Board Act and the accompanying regulations. Section 15 of the National Energy Board Part VI Regulations stated:

Every license for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the license respecting

...  
(m) the requirements for environmental protection.

Harrison attaches considerable significance to this decision, suggesting that, as a result of the decision, the federal government may be able to use its trade and commerce power to impose environmental conditions on enterprises that export their products internationally and interprovincially.<sup>81</sup>

After the *Oldman River* decision, Ottawa moved to replace the EARP with the Canadian Environmental Assessment Act. Passed in 1992 but not proclaimed until 1995, the Act establishes that it applies when a federal authority is the proponent of a project, when it provides financial assistance to

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<sup>80</sup> Québec (Attorney General) v. Canada (National Energy Board) [1994] 1 S.C.R. 159.

<sup>81</sup> K. Harrison, "Passing the Environmental Buck," pp. 318-319.

a proponent, when federal lands are involved, or when the federal government is the regulatory authority. Missing from this list of triggers is one providing that the law will apply when projects in one province will impact the environment in another province.

Not surprisingly, the provinces were incensed by the court decisions and by Ottawa's legislation, contending that federal involvement in environmental assessment was unnecessary since they were already doing it. But they were angry for another reason. As Harrison points out, the most prominent EARP disputes, including the Rafferty-Alameda and Oldman dams disputes, "challenged the provinces' authority to develop their own closely guarded Crown resources." She quotes one provincial official as saying, "The bottom line is not environmental protection here, but economic development."<sup>82</sup>

The comment is revealing. It is reflective of the close relationship that typically exists between provincial decision-makers and each province's dominant economic interests, and, indeed, it may be the coming together of economic interests with provincial autonomy concerns that explains federal government laxity on the environment.

Legal scholar, Alastair Lucas, also noted the economic worries of provincial governments. In a 1989 piece, shortly after the *Crown Zellerbach* decision came down, he pointed out that "Provincial officials are concerned that this new federal environmental jurisdiction will provide a handle for federal regulation of the timing and scale of provincial natural resources and

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<sup>82</sup> ibid., p. 326.

energy developments.”<sup>83</sup> The observation supports the view that provincial policy-makers see environmental policy primarily through an economic development lens. It also suggests that the timing and scale of provincial resource development are not legitimate federal concerns.

The question of the relationship between a subnational government and powerful economic players was dealt with by Tomas Koontz in a study of federalism and forestry policy in the U.S.<sup>84</sup> In this work, Koontz seeks to determine if level of government matters in terms of forest policy outcomes. His units of analysis were four pairs of forests, each pair located in a different state. Each pair consisted of a federally managed forest and a state-run forest. Koontz considered three sets of policy outputs: economic benefits derived from the timber, environmental protection outputs, and citizen participation patterns. He concluded that there were clear differences in the outputs of the federally run forests and the state-run forests. While the latter produced greater revenues from the timber, the federal forest managers exhibited greater concern with environmental protection efforts and citizen participation. Koontz writes:<sup>85</sup>

State officials...face fewer constraints on their ability to pursue activities such as timber sales that yield substantial, direct economic benefits. State forest agency mandates emphasize timber as a source of profit or revenue rather than as just one of many equally valued

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<sup>83</sup> A. Lucas, “The New Environmental Law,” in R. Watts, D. Brown, (eds.), Canada: The State of the Federation, 1989, (Kingston, ON: Institute of Intergovernmental Relations, Queen’s University, 1989), p. 176.

<sup>84</sup> T. Koontz, Federalism in the Forest: National versus State Natural Resource Policy, (Washington, DC: Georgetown University Press, 2002).

<sup>85</sup> ibid., pp. 189-190.

resources. State planning documents provide officials with greater freedom to pursue economic development without significant public input.

From Koontz's study, it is evident that level of government does indeed matter.

Aside from confirming that the federal government can be actively involved in environmental assessments if it chooses to be so involved, the foregoing review of judicial decisions shows generally that the courts have sanctioned a prominent role for the federal government in environmental policy-making.<sup>86</sup> It shows further that the courts are comfortable with federal government use of its criminal law power to achieve environmental objectives. The POGG power may be available to the federal government, although the conditions set by the Court seem to constitute a relatively formidable threshold for acceptance by the Court. Finally, as Harrison suggests, the trade and commerce power may be available to the federal government to achieve its goals related to environmental protection.

### The Accord

The Canada-Wide Accord on Environmental Harmonization was signed in 1998 by the federal, provincial and territorial governments except the government of Québec. As noted earlier, it was the product of the work of the Canadian Council of Ministers of the Environment (CCME), an organization made up of all of the governments in Canada (except the municipal and Aboriginal governments). The CCME was established in 1964 as the Canadian Council of

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<sup>86</sup> In testimony before the House of Commons Standing Committee on Environment and Sustainable Development on February 11, 2008, Stewart Elgie, Professor of Law at the University of Ottawa, pointed out that no federal environmental law has been struck down by the Supreme Court of Canada since the mid-1970s. See p. 30 of Committee hearing, retrieved from the Committee website, March 21, 2008.

Resource Ministers. It is jointly funded and its secretariat is located in Winnipeg, not Canada's capital, and the Council's presidency rotates annually among the governments. The web site of the Council declares that Council decisions are made by consensus which, in effect, means the unanimity rule. These structural features of the CCME - the joint funding, the location of the secretariat, the rotation of the presidency, and the unanimity rule - are clear expressions of the equality of all governments vision as identified by Rocher and Smith and discussed in chapter one.

Weibust points to two features of Canadian intergovernment agreements (IGAs), such as the Environmental Harmonization Accord negotiated by the members of the CCME, that are absent in those IGAs but present in the IGAs of some other federations: majority decision-making and the willingness and capacity to draft legally binding agreements.<sup>87</sup> Why Canada's provinces would not agree to be bound by the agreements that they themselves negotiate is very difficult to understand.

The federal government's willingness to involve itself in intergovernmental bodies like the CCME is also difficult to understand. Dominated by the subnational governments - thirteen provincial and territorial governments versus one federal government - the CCME and its counterparts in other areas are not likely to be hospitable places for federal representatives, focused as they must be on the national interest. As Stephen Hazell has

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<sup>87</sup> I. Weibust, "The Great Green North?: Canada's Bad Environmental Record and How the Feds Can Fix It," (to be published in a forthcoming volume on Canadian federalism by the University of Ottawa Press).

written, the “imbalance in numbers virtually guarantees that national interests in environmental assessment are not given appropriate weight.”<sup>88</sup>

In addition, confederal bodies like the CCME are established not to stimulate thinking about and action toward effective policies but to accommodate the jurisdictional concerns of governments. As one advocacy group leader stated:<sup>89</sup>

A lot of the federal-provincial dynamic has taken place with the CCME, the Canadian Council of Ministers of the Environment. That has not been particularly productive at giving us environmental gains. It has probably led to better provincial-federal cooperation, but not to real environmental improvement.

It is arguable, then, that the proper role of federal-provincial bodies is to function not as decision-making structures but as consultative mechanisms.

Two contextual factors that helped to shape the Accord should be noted. First, the negotiations that produced the Accord commenced long before the year in which it was signed. They began before, and continued after, the 1995 secession referendum in Québec. Thus, the parties, especially the federal government, were no doubt influenced by that event. Perhaps it can also be said that the closeness of the vote emboldened the PQ government of Québec and impelled it to refrain from signing the Accord. Secondly, the 1990s were characterized by deep cuts to government environment budgets. For instance, Environment Canada's budget went from \$800 million to \$550 million between

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<sup>88</sup> S. Hazell, Canada v. The Environment, (Ottawa: Canadian Environmental Defence Fund, 1999), p. 98.

<sup>89</sup> D. Stack, Executive Director, Great Lakes United. Quoted in Standing Committee on Environment and Sustainable Development, The Canadian Environmental Protection Act, 1999 - Five-Year Review: Closing the Gaps, April 2007, p. 43.

1988 and 1998. Newfoundland and Labrador and Québec reduced department funding by 65 per cent between 1994 and 1998. Ontario's was cut by 43 per cent between 1995 and 1998. And New Brunswick and Alberta slashed the budgets of their environment departments by 30 per cent between 1994 and 1998.<sup>90</sup>

The Accord is comprised of several documents. There is the Accord itself which contains six parts: Vision, Purpose, Objectives of Harmonization, Principles, Sub-Agreements, and Administration. There are also three sub-agreements, dealing with Environmental Standards, Environmental Assessments, and Inspections and Enforcement. There is finally an Annex, which deals with Public Accountability and Stakeholder Participation.

The Accord proper declares that one of its objectives is to prevent overlapping activities and inter-jurisdictional disputes. Thus, it seeks to ensure that “specific roles and responsibilities will generally be undertaken by one order of government only[.]” However, as we will see shortly, the concern of the Accord's drafters with duplication was not universally shared.

Principle Nine of the Accord proper makes clear that nothing in the Harmonization Accord alters the legislative authority of either the federal government or the provincial governments.

With respect to the Environmental Standards Sub-Agreement, the primary focus is on “Canada-wide priority ambient environmental standards for the quality of air, water, soil, biota, other media, and for other components of

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<sup>90</sup> D. Macdonald, Business and Environmental Politics in Canada, (Peterborough, ON: Broadview Press, Ltd., 2007), p. 137.

ecosystems as well as ecosystems themselves.”<sup>91</sup> Environmental standards may also be established for discharges of a specific type of pollutant, product and/or waste specifications on the limits of a substance, and/or the environmental performance of a commercial product.

Two clauses in this Sub-Agreement are noteworthy. First, priority-setting for the development of Canada-wide standards is to be done through the CCME. One might have thought priority-setting to be a legitimate function of the country’s national government. Secondly, where standards are applied to environmental issues that impact only intraprovincially, the affected government(s) will have the discretion to take appropriate action. However, where standards apply to issues that have transboundary effects, which should be considered a federal responsibility, the Sub-Agreement requires the collective “governments” to seek agreement on “how to attain the standard endorsed by Ministers.” In other words, the federal government does not have the discretion to implement appropriate measures unilaterally, even though “transboundary or interprovincial/interterritorial effects” would appear to be a federal matter exclusively.

The main objective of the Sub-Agreement on Environmental Assessment is to establish a process when more than one jurisdiction must, by law, be involved in environmental assessment. It stipulates that there is to be only one assessment for a proposed project and it establishes criteria for which level of government is to be the lead party. Generally, it states that the lead party is

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<sup>91</sup> Policy-makers distinguish between emissions-based policy instruments, which are imposed on particular sources of a substance, e.g., industrial facilities, and ambient-based policy instruments, which are intended to achieve an environmental target at a particular location.

to be the government best situated to carry out the assessment. Among the criteria are scale, scope and nature of the environmental assessment; capacity to take on the lead role; physical proximity of government infrastructure; scientific and technical expertise; ability to address client or local needs; existing regulatory regime; and interprovincial, interterritorial or international considerations.

To implement this Sub-Agreement, the governments are obligated to negotiate bilateral agreements.

The Inspections and Enforcement Sub-Agreement also requires governments to negotiate bilateral implementation agreements. They are to set out the respective roles and responsibilities of the governments.

The Sub-Agreement states that the federal government's inspection and enforcement functions include international borders and obligations, transboundary domestic issues, federal lands and facilities, and products/substances in Canada-wide trade and commerce. The provinces' functions include industrial and municipal facilities and discharges, application of laws on provincial/territorial lands, and waste disposal and destruction. Reflecting a concern expressed by the House Committee on the Environment and Sustainable Development (see p. 174), the Sub-Agreement states: "Irrespective of agreements to divide the delivery of such activities between or among the governments, each government will maintain an inspection and enforcement capacity."

Shortly before the signing of the Accord, the House of Commons Standing Committee on Environment and Sustainable Development issued an analysis of the agreement. The Committee expressed several concerns about the agreement and recommended that Ottawa not sign it until those concerns were addressed. From the perspective of this chapter, three issues are especially pertinent.

One concern had to do with the stated rationale for the Accord, namely, that there was a need to reduce duplication and overlap. The Committee found “insufficient evidence of overlap and duplication of environmental regulations or activities of the federal and provincial/territorial governments.”<sup>92</sup>

The Committee noted that, for many of the witnesses who appeared before it, the real purpose of the Accord had to do with the devolution of federal environmental powers and it inserted this comment from Marc Beauchemin of the Centre québécois du droit de l'environnement:<sup>93</sup>

The reason has nothing to do with environment. The purpose of the harmonization accord is not to provide better environmental safeguards or enhanced environmental protection to Canadians. The real rationale behind the harmonization initiative is the devolution of federal responsibilities in this area to the provinces. That's the primary objective of the Accord.

The Committee accepted this assessment and concluded that,<sup>94</sup>

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<sup>92</sup> House of Commons Standing Committee on Environment and Sustainable Development, Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment, December 1997, p. 14.

<sup>93</sup> Ibid., p. 16.

<sup>94</sup> Ibid., p. 17.

the provinces may eventually assume a considerable number of the functions to be covered by Sub-agreements to the Accord, and that this approach would leave the federal government with only a limited set of responsibilities of considerably less importance than its current environmental protection role.

It is interesting that, on this issue of devolution, the Committee members indicated a greater willingness to accept the arguments of the representatives of environmental organizations than those of the CCME or Environment Canada.

The House Committee also took note of warnings that the Accord might open “the door to formalization in the long term, or at least, it might make a strong federal position much harder to defend in the future.”<sup>95</sup> This warning is consistent with the theory of historical institutionalism in that the rules of the game established by the Accord and the CCME will likely shape the decisions made by future governments. And, in fact, as we will observe later, the Accord does seem to have become a template for federal initiatives on the environment.

Another concern of the Committee was that the Accord was not so much an exercise in harmonization as an exercise in rationalization, or disentanglement. “Instead of promoting cooperation and complementary action, the Accord and Sub-agreements would define exclusive areas of jurisdiction for each level of government, and prevent the other from playing any role in that field.”<sup>96</sup> The Committee members found it “alarming” that the Accord and the Sub-agreements would take the rationalizing approach and

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<sup>95</sup> Ibid., p. 26.

<sup>96</sup> Ibid., p. 20.

argued that environmental protection can best be achieved by having the two levels of government work in parallel ways rather than by assigning to one level exclusive areas of responsibility.

A third concern was with the way that decisions are made by the CCME, i.e. by consensus. The Committee was worried that this method would lead to the adoption of lowest-common-denominator decisions. It, therefore, proposed that consensus be clarified to mean “a substantial majority of support,” rather than unanimity. This proposal was not implemented by the CCME.

If the House Standing Committee was not enthusiastic about the Accord, environmental non-governmental organizations (ENGOS) were even less so. This came out very clearly in Patrick Fafard's analysis of the views of interest groups on the Accord. He reviewed the submissions to the CCME Secretariat that were presented during the negotiation of the Accord, as well as the testimony of various witnesses that appeared before the House of Commons Committee. Fafard found widespread support among ENGOS for a vigorous federal government role in environmental protection. Indeed, in May 1996, in anticipation of the June 1996 First Ministers' Conference, more than 140 environmental and other organizations from all provinces and territories signed a “Statement for Support for a Strong Federal Role in Environmental Protection.”<sup>97</sup>

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<sup>97</sup> See Canadian Institute for Environmental Law and Policy, Harmonizing to Protect the Environment? An Analysis of the CCME Environmental Harmonization Process, November 1996, p. 7.

Many ENGOs assessed the Accord as one that would weaken the capacity of the federal government to develop and implement environmental policy, and they expressed firm support “for a considerable degree of independent action on the part of the governments, particularly the federal government.”<sup>98</sup> Thus, support for the Accord was virtually non-existent among ENGOs. Fafard writes: “Analysis of the submissions of key interest organizations with respect to the CCME harmonization initiative suggests that ENGOs support a considerable degree of federal unilateralism and are wary of extensive intergovernmental cooperation.”<sup>99</sup>

On the other hand, Fafard found that “Organizations representing business and resource industries...while supportive of intergovernmental cooperation are even more supportive of allocating to provincial governments responsibility for inspections and environmental assessment.”<sup>100</sup> He stated further that “...by and large, the result is more in keeping with the preferences of powerful organizations representing business and industry than it is in keeping with the preferences of ENGOs.”<sup>101</sup>

Harrison drew the same conclusion and pointed out that in 1996 over ninety environmental groups issued a joint statement urging the federal

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<sup>98</sup> P. Fafard, “Groups, Governments and the Environment: Some Evidence from the Harmonization Initiative,” in P. Fafard, K. Harrison, (eds.), Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada, (Kingston: ON, School of Policy Studies, Queen’s University, 2000), p. 91.

<sup>99</sup> Ibid., p. 96.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

government to reject the Accord, which they depicted as an “abandonment of the federal role” in environmental protection.<sup>102</sup> In January of 1998, on the eve of the signing of the Accord, ENGOs again conveyed their opposition to the agreement; more than fifty sent a letter to the Prime Minister asking him not to sign it.

One of the environmental groups that commented at length on the concept of harmonization is the Canadian Institute for Environmental Law and Policy (CIELAP). In 1996, it prepared a report for the Canadian Environmental Network on harmonization and the proposals that were being discussed by the two levels of government. The report made the case for what CIELAP called “dynamic federalism” and distinguished it from harmonization. It stated:<sup>103</sup>

Dynamic federalism creates the potential for more all-inclusive environmental protection regimes. When both levels of government have the ability to enact laws in a particular area...they tend to both want to “occupy the field.” In Canada, when the federal has moved to put environmental laws into effect at the national level, provincial governments have often been prompted to take actions which they otherwise would not have taken.

The report goes on to note that in 1975 Ottawa passed the Environmental Contaminants Act which, for the first time, enabled it to regulate the manufacture, import and use of toxic substances. Quickly, Alberta, Ontario and Québec responded with their own legislation. In other words, the unilateral federal action, as well as the *threat* of unilateral federal action

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<sup>102</sup> K. Harrison, “Federal-Provincial Relations and the Environment: Unilateralism, Collaboration, and Rationalization,” in D.L. VanNijnatten, R. Boardman, (eds.), Canadian Environmental Policy: Context and Cases, 2<sup>nd</sup> edition, (Don Mills, ON: Oxford University Press, 2002), pp. 131-132.

<sup>103</sup> Canadian Institute for Environmental Law and Policy, Harmonizing To Protect the Environment?, p. 3.

induced provinces to enter the field and the actions of both levels worked in the interests of environmental protection.

In CIELAP's view, harmonization is "likely to result in diminished protection of Canada's environment by reducing the role of the federal government, and constraining its ability to take independent action to protect the environment in the future."<sup>104</sup> A major issue for the organization was the possibility that if the federal government did not exercise its legislative authority a convention would emerge giving paramountcy over the environment to the provinces. As a result, any effort "by the federal government to re-assert its legal authority would be likely to engender intense federal-provincial conflict."<sup>105</sup>

Another major concern of CIELAP was the transformation of the CCME into a decision-making body. The authors of the CIELAP report argued that, if this were to happen, and it did, "a significant component of environmental policy-making would be moved out of the reach and oversight of the Legislatures, Parliament and the electorate."<sup>106</sup> It advanced the interesting proposal that, if the CCME were to become a decision-making body, the federal government ought to be given a veto over any CCME proposal or decision pertaining to national standards. "In effect, the federal Minister of the

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<sup>104</sup> ibid., p. 8.

<sup>105</sup> ibid. p. 14. Legal scholar, Marcia Valiante, also pointed to the "risk that a convention could emerge around [Ottawa's] persistent failure to act" on environmental problems. See M. Valiante, "Legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape," in D. VanNijnatten, R. Boardman, (eds.), Canadian Environmental Policy: Context and Cases, pp. 8-9.

<sup>106</sup> ibid., p. 10.

Environment would take responsibility for CCME decisions.” It would only “surrender its authority to set national standards if it feels that the standard and implementation scheme proposed by the CCME are adequate to protect the health of Canadians and the environment.”<sup>107</sup> As the report notes, the proposal would preserve the federal government's capacity to act and provide an incentive to the provinces to agree to robust standards. It can be argued as well that, if Ottawa became accountable to Parliament for the decisions of the CCME, the democratic profile of the CCME would be enhanced.

Whatever one may think of the idea, and whatever flaws one may identify in the proposal, it certainly illustrates the organization's view of the role of the federal government in environmental policy-making.

In 1997, CIELAP and the Canadian Environmental Law Association (CELA) submitted a joint brief to the House Committee on the Environment. The brief was highly critical of the environmental harmonization initiative, noting in particular that one of the expressed rationales for the initiative - i.e., the removal of duplication and overlap - was based on little evidence. The brief stated: “The one study, completed by KPMG Environmental Services, commissioned by the CCME on the issue concluded that little overlap and duplication existed, and that the savings likely to be realized through harmonization would, as a result, be extremely marginal.”<sup>108</sup> The brief

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<sup>107</sup> ibid., p. 18.

<sup>108</sup> CIELAP, CELA, Brief to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' Initiative, October 21, 1997, p. 6.

concluded that the real reason for the initiative had to do with “the federal government’s broader agenda in the area of national unity.” In the groups’ assessment,<sup>109</sup>

The harmonization initiative has become closely linked to the federal government’s desire to demonstrate the flexibility of Canadian federalism, and the potential for non-constitutional approaches to the reform of the federation. This is of concern both in terms of the implication that the project is less and less driven by environmental policy considerations, and the likely ineffectiveness of the underlying approach to national unity.

Echoing a sentiment expressed earlier in this dissertation by the author and by Professor Jean Leclair, the brief concluded that the strategy “puts the federal government in the position of declining relevancy to the day to day lives of Canadians, as it ceases to deliver services, and to be an effective guarantor of national standards in such areas as health care, social policy, and environmental protection.”<sup>110</sup> An inactive federal government is a distant government.

One of the business groups that expressed a view on harmonization was the Insurance Bureau of Canada. It argued that, in general, harmonization “will improve the competitive position of Canadian industry by increasing efficiency through the elimination of duplication, the simplification of operations...the reduction of compliance costs, and the provision of greater certainty.”<sup>111</sup> For Michael Cloghesy, president of the Centre patronal de

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<sup>109</sup> Ibid., pp 6-7.

<sup>110</sup> Ibid., p. 7.

<sup>111</sup> See Fafard, “Groups, Governments and the Environment,” p. 92.

l'environnement du Québec, a single system “ensures that the investor will clearly know what the rules of the game are.”<sup>112</sup> In an opinion piece for The Globe and Mail, Cloghesy denied that the Accord meant devolution of federal powers to the provinces, contending that “the federal government...intends to extend its reach into additional areas currently covered by provincial jurisdiction.” Describing the Accord as “an effort by various levels of government to work together to develop a better system to manage the environment,” Cloghesy argued that the system of environmental management prior to the Accord penalized “the private sector by imposing unnecessary costs related largely to duplication, uncertainty and delays.”<sup>113</sup> George Miller, president of the Mining Association of Canada, told the House Committee on the Environment and Sustainable Development that the Accord should be ratified and implemented because a lack of coordination between the two levels of government “imposes real costs on industry, on both levels of government, and on the taxpayers.”<sup>114</sup>

A search of two newspaper databases, Canadian Newsstand and Newscan.com, revealed that Canadian newspapers were silent on the Canada-Wide Accord, at least editorially. However, a commentary by Manon Cornellier in Le Devoir on a meeting of the CCME does indicate why the government of

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<sup>112</sup> Ibid.

<sup>113</sup> M. Cloghesy, “Should We ‘Harmonize’ the Environmental Rules? PRO/The Accord Scheduled to be Signed Tomorrow by the Environment Ministers is a Constructive Effort by Different Levels of Government to Improve Environmental Management,” The Globe and Mail, January 29, 1998, p. A.19.

<sup>114</sup> See House of Commons Standing Committee on Environment and Sustainable Development, Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment, December 1997, p. 13.

Québec did not sign the Accord.<sup>115</sup> According to the report, in which Cornellier mainly sets out the views of environmental groups on the proposed Accord, the provincial government would not sign until “...la compétence exclusive du Québec soit reconnue dans ses champs de juridiction et que les modifications requises soient apportées aux législations fédérales.” In presenting the views of environmental groups on the role of Ottawa in environmental policy, Cornellier writes:

Les groupes environnementaux...veulent bien que les deux niveaux de gouvernement collaborent mais plusieurs refusent de voir Ottawa se mettre en retrait ou devenir un partenaire parmi d'autres. Ce n'est pas, rapellent-ils avec vigueur, que le fédéral soit sans tache...mais historiquement, il a souvent assuré un leadership, en plus de voir à la résolution de problèmes environnementaux transfrontaliers ou interprovinciaux.

She noted that Alberta, Ontario and Québec had substantially reduced their environment budgets and that “ni le Québec ni le fédéral n'avaient cru bon de poursuivre 20 usines de pâtes et papier pour l'émission de rejets toxiques.” On this latter point, Cornellier includes an observation made by an official of the L'Union québécoise pour la conservation de la nature that a harmonization accord was already in place for the pulp and paper industry and the two levels of government had the power to prosecute “les contrevenants.” Le problème,” she writes, “n'était pas l'entente mais le manque de volonté politique.” One is tempted to conclude from this that intergovernmental

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<sup>115</sup> M. Cornellier, “L'Accord pancanadien: Une pomme de discorde environnementale?,” Le Devoir, Jan. 29, 1998, p. A4; retrieved from Newscan.com June 19, 2008.

agreements are really intended only to give the appearance of action and to provide each level of government with a convenient excuse for inaction.<sup>116</sup>

The only other editorial uncovered was a November 1996 editorial by The Globe and Mail. It did not deal with the Harmonization Accord but its comments are pertinent. It complained that the federal government's proposed legislation to protect endangered species did not make full use of its powers and left most of the matter in provincial government hands. In the editorial's view, "Ottawa has the power. It should use it."<sup>117</sup>

In what ways does the Accord restrain the federal government? In the Accord itself, three provisions are pertinent. One provides that the intent of the sub-agreements is to allow for "a one-window approach to the implementation of environmental measures[.]" Harrison points out that, insofar as national standards are concerned, the "window" is "primarily staffed by the provinces."<sup>118</sup>

A second provision of the Accord proper states that "Roles and responsibilities will be undertaken by the order of government *best situated* to effectively discharge them." [Emphasis added.] A related clause states that "When a government has accepted obligations and is discharging a role, the other order of government shall not act in that role...." These latter two provisions favour provincial power since two of the criteria for determining

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<sup>116</sup> The question also arises: which level of government do Quebecers hold accountable for the failure to prosecute the offenders?

<sup>117</sup> The Globe and Mail, "Endangered and Spaced Out," Nov. 5, 1996, p. A16; retrieved from Canadian Newsstand June 29, 2008.

<sup>118</sup> K. Harrison, "Passing the Environmental Buck," p. 335.

which level of government is “best situated” are “physical proximity” and “ability to address client or local needs.” Indeed, it is arguable that the provisions were intended to preclude the kind of federal intervention - legitimate though it was - that occurred in the *Oldman River* and *Rafferty-Alameda Dams* cases.<sup>119</sup> They also seem designed to prevent Ottawa from playing a “backstopping” role under which it would be able to take action in the event that a province did not take adequate measures.

With respect to the Sub-Agreement on Canada-wide Standards, the Accord requires that they be developed collectively by the Accord signatories. The issue here was pointed out by Harrison: it redefines “the federal government’s role from one of primary responsibility for setting national standards...to participation as one of 13 [sic] governments seeking consensus on standards.”<sup>120</sup>

In addition, the Accord allocates to the provinces responsibility for the implementation of measures “requiring action from industrial, municipal, and other sectors to attain an agreed-upon Canada-wide Environmental Standard.” This provision, as the CIELAP/CELA brief to the House Standing Committee pointed out, would “eliminate the possibility of the development and

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<sup>119</sup> Stephen Hazell argues that the Sub-Agreement on Environmental Assessment “represents a successful power play by provincial governments through CCME to limit the federal role in environmental assessment - to win back ground lost in the *Rafferty* and *Oldman* cases and under CEEA.” See S. Hazell, *Canada v. The Environment*, p. 101.

<sup>120</sup> K. Harrison, *Passing the Environmental Buck*, pp. 335-336.

implementation of federal baseline standards for the major sources of air and water pollution in Canada in the future.”<sup>121</sup>

In this context, the Weibust paper referred to earlier provides a specific example of what happens when IGAs are not binding and decisions are made by consensus in a confederal arrangement.<sup>122</sup> In 2000, the CCME announced a Canada-wide standard for dioxin emissions. It specified a dioxin emissions limit for municipal solid waste incinerators which was to be met by the provinces by 2006. However, one of the country's largest sources of dioxin emissions was explicitly excluded from the standard. Newfoundland and Labrador was allowed to keep using its primitive conical waste burners which, Weibust notes, “are not much more advanced than open burning of garbage.” The dioxin emissions from the province's forty-five conical burners were ten times higher than those of all the municipal solid waste incinerators in the rest of Canada combined. In 2004, an agreement between the CCME and Newfoundland and Labrador stated that the conical burners would be phased out by the end of 2008. But by April 2008, twenty-five of the forty-five conical burners were still operating. In October 2008, the Minister of Municipal Affairs of the

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<sup>121</sup> CIELAP, CELA, Brief to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' Initiative, p. 9.

<sup>122</sup> I. Weibust, “The Great Green North?: Canada's Bad Environmental Record and How the Feds Can Fix It,” (to be published in a forthcoming volume on Canadian federalism by the University of Ottawa Press).

province announced that only three or four of the twenty-five would be closed by 2009.<sup>123</sup>

The Environmental Assessment Sub-Agreement also appears to diminish Ottawa's role. It stipulates that the lead party in environmental assessment will be a provincial government when proposed projects are on "lands within its provincial boundary." The federal government will be the lead party only "for proposed projects on federal lands." In this way, Herring points out, the federal authority is restricted to projects on federal government and Aboriginal lands "and is limited to a supporting role in the conduct of assessments outside these jurisdictions."<sup>124</sup> The other circumstances when a federal environmental assessment would apply, (as identified on page 195), were not included in the Sub-Agreement. Kennett thus concludes that the implementation of the Sub-Agreement "would constitute a significant diminution of the federal role in EA [Environmental Assessment]."<sup>125</sup>

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<sup>123</sup> Non-binding confederalism is also the process used to develop the nation's guidelines for drinking water quality. The provinces are free to adopt them as standards or not. As a result, drinking water standards vary across the country. More serious is the length of time it takes to develop a guideline for a known contaminant. It can take up to ten years, even though it is recommended that it take no more than three years. According to the Commissioner of the Environment and Sustainable Development, about fifty of the eighty-three existing guidelines for chemical and physical contaminants are older than fifteen years and "may need to be updated to reflect current science and to protect the health of Canadians." (See 2005 September Report of the Commissioner of the Environment and Sustainable Development, (Ottawa: Office of the Auditor-General of Canada, 2005), p. 13. Retrieved from the Commissioner's web site, [www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200509\\_e\\_1122.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200509_e_1122.html), June 16, 2009). This does not include contaminants for which guidelines have not yet been developed. Not surprisingly, the Commissioner termed this backlog of guidelines "unacceptable." Why the subnational governments insist on, and the federal government accepts, a non-binding confederal approach to the development of national safe water guidelines - let alone standards - is difficult to fathom.

<sup>124</sup> R. Jamie Herring, "The Canadian Federal EIA System," in K.S. Hanna, (ed.), Environmental Impact Assessment: Practice and Participation. (Don Mills, ON: Oxford University Press, 2005), p. 234.

<sup>125</sup> S. Kennett, "Meeting the Intergovernmental Challenge of Environmental Assessment," in P. Fafard, K. Harrison, (eds.), Managing the Environmental Union, p. 124.

Kennett was right to draw this conclusion. Of the eight bilateral EA agreements that Ottawa signed, (including the one signed with Québec), five stipulate that the federal government will be the lead EA party only for projects carried out on federal lands. The agreement with Québec does not include a provision for a lead EA party. Arlene Kwasniak, a law professor and member of the Environmental Assessment Caucus of the Canadian Environmental Network, reports that in the vast majority of cases a provincial government has led the EA process.<sup>126</sup>

As noted earlier, the Sub-Agreement on Inspections and Enforcement sets out the inspection and enforcement responsibilities of each level of government. However, it also goes on to say that the inspection and enforcement function may be carried out by the government best situated to perform the function, as determined by a number of criteria. Again, the “best situated” requirement would appear to favour the provincial level. In addition, the assignment of responsibility to the provinces for the inspection of industrial facilities appears to include the enforcement of federal environmental protection laws.

Given the foregoing ways by which the Accord serves to make the provinces the dominant actor in environmental policy, the CELA/CIELAP brief to the House Committee predicted that the Accord<sup>127</sup>

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<sup>126</sup> A. Kwasniak, Harmonization in Environmental Assessment in Canada: The Good, the Bad, and the Ugly, unpublished, prepared for the Environmental Assessment Caucus of the Canadian Environmental Network, p. 20.

<sup>127</sup> CIELAP, CELA, Brief to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' Initiative, pp. 17-18.

will constrain the ability of the federal government to provide a minimum level of environmental protection for all Canadians....The ability of the federal government to enact new laws and regulations will be circumscribed to the extent that such activities are inconsistent with the harmonization initiative. Indeed, the establishment of such a brake on the federal government is widely believed to be one of the primary reasons why many provinces are so anxious to complete the initiative.

Since the signing of the Harmonization Accord, there appears to have been only one analysis of its intergovernmental relations impact, and that by Mark Winfield and Douglas Macdonald. They open their discussion by suggesting that the Accord appears to have “defined the federal government’s approach to environmental policy.” That is to say, the collaborative federalism that is demonstrated by the Accord is also demonstrated in “the 1999 Canadian Environmental Protection Act, the 2002 federal Species At Risk Act, and the 2003 amendments to the Canadian Environmental Assessment Act.”<sup>128</sup> For example, s. 2(1) of the Canadian Environmental Protection Act stipulates that the federal government will “endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada.” Consider, too, that the Act mandates the creation of an advisory committee to the Minister and the Department. As if the CCME did not give enough voice to the provinces, the CEPA advisory committee is to be - and in fact is - comprised exclusively of government representatives! In addition, s. 10 of the Act allows

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<sup>128</sup> M. Winfield, D. Macdonald, “The Harmonization Accord and Climate Change Policy: Two Case Studies in Federal-Provincial Environmental Policy,” in H. Bakvis, G. Skogstad, (eds.), Canadian Federalism: Performance, Effectiveness, and Legitimacy, 2<sup>nd</sup> edition, (Don Mills, ON: Oxford University Press, 2008), p. 271.

the Minister to negotiate an equivalency agreement with a province if the province's regulations are equivalent to certain regulations in the federal legislation.<sup>129</sup> What this would do, of course, is give the provinces another opportunity to negotiate a weakening of the rules that apply to their province. It is also consistent with the objectives of confederal government one of which is to minimize links between the central government and citizens.

The authors state further that the period following the signing of the Accord has seen little federal-provincial conflict in the areas covered by the Accord. However, they attribute this absence of inter-governmental conflict not to attitudinal changes or effective dispute resolution structures but rather to “federal deference to the provinces with respect to environmental assessment and the regulation of industrial pollution.”<sup>130</sup> In this regard, as we suggested earlier, it appears that the process established by the Harmonization Accord has become a template. In its March 2008 policy statement on curbing greenhouse gas emissions, the Harper government explained that “The federal, provincial, and territorial governments have initiated a cooperative process to work through the regulatory issues, through the Environmental Protection and Planning Committee of the Canadian Council of Ministers of the Environment. Some provinces have indicated an interest in negotiating equivalency

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<sup>129</sup> Surprisingly, the CEPA regulations that may be subject to an equivalency agreement include those regulations pertaining to environmental emergencies and those dealing with Canadian sources of international air or international water pollution. Given their nature, one might have thought that Ottawa would have wanted its own regulations in these areas to remain beyond the reach of an equivalency agreement.

<sup>130</sup> M. Winfield, D. Macdonald, “The Harmonization Accord and Climate Change Policy,” p. 271.

agreements with the federal government.”<sup>131</sup> In effect, by going to the CCME, the Harper government has allowed its greenhouse gas policy to be subject to provincial veto! So, rather than being an assertion of federal power, the policy represents yet another example of federal deference to the provinces.

Winfield and Macdonald focus their comments on environmental assessment and national standards. With respect to the latter, they point out that the implementation of standards has mostly to do with the application of standards to individual facilities and that, “Consistent with the direction of the Accord, this aspect of implementation has been entirely in the hands of the provinces.”<sup>132</sup> With respect to environmental assessment, the authors conclude that the result of the Accord's provisions,<sup>133</sup>

has been that aside from projects on federal lands, where a federal assessment is triggered, meaningful federal environmental assessment of other projects is increasingly a dead letter. Federal environmental assessment requirements have either been folded into provincial processes through provisions for process substitution established through the federal-provincial agreements and the 2003 amendments of the Canadian Environmental Assessment Act, or the absolute minimal federal requirements are applied.

They continue:<sup>134</sup>

'Screening-level assessments', the lowest possible level of federal scrutiny, or very narrowly 'scoped' assessments have been required even for very large projects, such as oil sands developments in northern Alberta, with significant environmental implications....In other cases, such as the York-Durham sewer system (the 'Big Pipe'), which supports

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<sup>131</sup> Government of Canada, Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions, (2008), p. 5; retrieved from Environment Canada website, [www.ec.gc.ca](http://www.ec.gc.ca), June 24, 2008.

<sup>132</sup> M. Winfield, D. Macdonald, “The Harmonization Accord and Climate Change Policy,” p. 273.

<sup>133</sup> Ibid., p. 272.

<sup>134</sup> Ibid.

sprawling urban development north of the City of Toronto, the federal government has sought to avoid triggering federal environmental assessments altogether. It issues 'letters of advice' rather than federal approvals under the Fisheries Act.... Compared to the period prior to the signing of the Accord, when the federal government applied its environmental assessment requirements more assertively (for example, in the cases of the Alberta Pacific pulp mill in northern Alberta and the Great Whale hydroelectric project in northern Quebec in the early 1990s), there has been less scrutiny of major undertakings with significant environmental implications.

The evaluation offered by Winfield and Macdonald by and large echoes the conclusions of the House Standing Committee on Environment and Sustainable Development. In its 2003 report on environmental assessment, it found that “although thousands of small projects are assessed more or less effectively under CEAA each year, many large, potentially environmentally damaging projects avoid assessment or are scoped so narrowly as to make the EA [environmental assessment] of questionable value.”<sup>135</sup> Major development projects, the Committee wrote, “that could have catastrophic effects on the environment are often assessed inadequately or not at all....”<sup>136</sup> Furthermore, in the Committee's view, “the commitment of Cabinet and Privy Council Office to EA has been sporadic to non-existent in recent years.”<sup>137</sup> The Committee highlighted the fact that the CEAA grants officials no enforcement powers or authority to impose penalties for non-compliance.

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<sup>135</sup> House of Commons Standing Committee on Environment and Sustainable Development, Sustainable Development and Environmental Assessment: Beyond Bill C-9, June 2003, p. 9.

<sup>136</sup> Ibid., p. 22.

<sup>137</sup> Ibid., p. 11.

Clearly, the Accord, as predicted, has meant a diminution of federal environmental activism.

Winfield and Macdonald did not consider the impact of the Sub-Agreement on Inspections and Enforcement. However, in 2009, the Commissioner of the Environment and Sustainable Development reviewed federal efforts to protect fish habitat. One could not conclude, on the basis of that report, that the Sub-Agreement stimulated stricter enforcement of the relevant legislation. According to the report:<sup>138</sup>

Fisheries and Oceans Canada and Environment Canada cannot demonstrate that they are adequately administering and enforcing the Fisheries Act, and applying the Habitat Policy and the Compliance and Enforcement Policy in order to protect fish habitat from the adverse impacts of human activity.

The Habitat Policy goes back to 1986. Its major objective is to promote a net gain of fish habitat; conversely, officials were mandated to ensure no net loss of fish habitat. It also set out the strategies to achieve the objective.

According to the Commissioner's report, "In the 23 years since the Habitat Policy was adopted, Fisheries and Oceans has not fully implemented the Policy, and little information exists about the achievement of the Policy's overall long-term objective of a net gain in productive fish habitat."<sup>139</sup> Fisheries and Oceans, the Commissioner found, "rarely monitors whether project proponents actually comply with the Department's conditions of approval or whether

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<sup>138</sup> Commissioner of the Environment and Sustainable Development, 2009 Spring Report of the Commissioner of the Environment and Sustainable Development. Retrieved from the Commissioner's web site, [www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200905\\_01\\_e\\_32511.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200905_01_e_32511.html), May 24, 2009, p. 45.

<sup>139</sup> Ibid.

proponents' actions effectively maintained the expected no net loss in habitat.”<sup>140</sup>

The report is also critical of Environment Canada:<sup>141</sup>

Environment Canada has not clearly identified what it has to do to meet its Fisheries Act responsibility for the pollution prevention provisions, including establishing results expectations and appropriate accountability arrangements that provide national coordination and guidance on the administration of the Act. Environment Canada does not use a risk-based approach to the Fisheries Act to identify, assess, and address risks associated with non-compliance with the Act that could lead to significant harm to fish habitat. It does not have a Fisheries Act compliance strategy for the industries and activities that must comply with the Act's prohibition against the deposit of harmful substances in waters frequented by fish. Environment Canada has not determined whether the results achieved through other legislation (such as the Canadian Environmental Protection Act, 1999), other levels of government, and its own enforcement activities meet the Act's stringent pollution prohibition requirement.

Fisheries and Oceans Canada relies on the provincial governments to administer some of its fish habitat responsibilities. Habitat agreements have been negotiated with four provinces, but “implementation of the agreements varies considerably by province.” For example, since 2001, the Department developed habitat agreements with several conservation authorities in Ontario. However, the Commissioner's report states:<sup>142</sup>

The agreements have few accountability mechanisms, such as performance measures, audit provisions, or formal evaluation requirements. Thus, there is no formal means for the Department to know if the assigned activities have been carried out according to its policies and guidelines. While the agreements state that the Department is responsible for reviewing the letters of advice

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<sup>140</sup> ibid.

<sup>141</sup> ibid., p. 46.

<sup>142</sup> ibid., p. 30.

[recommendations to project proponents] prepared by conservation authorities, we found that the Department did not receive copies of these letters to review.

In addition, Environment Canada relies on the provinces for assistance in enforcing its pollution prevention responsibilities under the Fisheries Act. But, according to the Commissioner,<sup>143</sup>

...Environment Canada cannot demonstrate that the agreements with the provinces are active and being implemented, and it does not know the extent that the legislative frameworks of other jurisdictions can be relied on to support Environment Canada's administration and enforcement of the pollution prevention provisions of the Fisheries Act.

The Commissioner looked specifically at the "Canada-Alberta Administrative Agreement for the Control of Deleterious Substances under the Fisheries Act."

The Commissioner found that the Agreement's Management Committee had not met in over two years and that "Environment Canada has not formally assessed the extent that the arrangements with Alberta fulfill the Department's Fisheries Act responsibilities."<sup>144</sup> In other words, Ottawa does not know if its responsibilities for pollution prevention under the Act are being fulfilled in Alberta.

### Summary

A key objective of this chapter has been to demonstrate that the Canada-Wide Accord on Environmental Harmonization represents an unnecessary retreat on the part of the federal government in the area of

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<sup>143</sup> Ibid., p. 39.

<sup>144</sup> Ibid.

environmental policy.<sup>145</sup> First, the chapter set the historical context in which it showed that federal behaviour during the 1970s and 1980s was characterized by a high level of timidity in setting binding national standards and in enforcing environmental legislation. Even though there were periodic “waves” of federal environmental activism, stimulated by public opinion, the years between the early 1970s and the mid-1990s were highlighted mainly by lax enforcement. Ottawa not only delegated the enforcement function to the provinces it also ignored the numerous occasions when the provinces refused to enforce federal environmental regulations. The discussion also showed the fairly strong support of Parliamentarians and interest groups for federal involvement in environmental policy-making. And this despite the intense efforts of the federal and provincial governments in the late 1980s and early 1990s to provincialize the federation to a breathtaking degree.

The next section of the chapter reviewed some important judicial decisions related to the environment. Several conclusions emerged from the review. First, the Court affirmed the environment as an area of shared jurisdiction. Perhaps more importantly, it made clear that Ottawa is not a peripheral actor in environmental policy-making. Rather, its role is to protect the basic values of Canadians regarding the environment. Secondly, while the Supreme Court broadened the POGG power, it warned against “an enthusiastic adoption” of the power by federal authorities, thus keeping legal scholars and political scientists in a state of confusion about the limits of the power.

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<sup>145</sup> It is probably more accurate to say that, given the nature of federal environmental policy-making and enforcement, the Accord represents not so much a retreat as the formalization of a retreat.

Thirdly, the Court affirmed the criminal law power as a plenary power, declaring that Parliament may use it “to underline” stewardship of the environment as a fundamental value of Canadian society. Fourthly, the federal government has the trade and commerce power available to it to impose conditions on enterprises that export their products internationally or interprovincially. Fifthly, the chapter noted the close relationship that typically exists between provincial decision-makers and the dominant economic interests in each province. The implications of this close relationship for environmental protection and for intergovernmental relations have been profound.

The third section of the chapter analyzed the Accord. It set out the structural features of the CCME, noting in particular its consensus method of decision-making. It also showed how the Accord restrains the federal government in favour of provincial dominance. For instance, it pointed out that the Sub-Agreement on Standards changed the federal government's role from one of primary responsibility for setting national standards to that of equal participant with provincial governments in seeking a consensus on standards. The section showed further that the Environmental Assessment Sub-Agreement significantly narrowed the occasions when Ottawa would be the lead EA party. And it showed that the Accord process has become a template, demonstrated by the Harper government's decision to refer its policy on greenhouse gas emissions to a CCME committee, where, as we know, decisions are made by consensus.

### The Applicability of the Theory

Does our proposed theory, combining historical institutionalism and constitutional abeyance theory, apply? Does it explain why the federal government, in signing the Accord, voluntarily placed restraints on its own powers in favour of an intergovernmental agreement, thereby relinquishing a role as lead government actor on the environment?

In order to demonstrate the applicability of the theory, it would be necessary to show that the Judicial Committee of the Privy Council had vitiated a key federal power or key federal powers. For instance, the last chapter illustrated how the Committee circumscribed the federal trade and commerce power and that, despite later Supreme Court rulings that enlarged the power and gave a broader interpretation to s. 121 than heretofore given, the executive branch was still in the grasp of the JCPC's understanding of the trade and commerce power. The result was the federal government's decision to be part of the negotiations on internal trade, as an equal participant.

The proposed theory applies in a couple of ways. One way has to do with the JCPC's treatment of the POGG clause. The clause was intended to provide Ottawa with the power to enact legislation whose subject-matter did not fall within the provincial heads of power listed in s. 92. It was thus intended to be the residual clause; anything not allocated to the provinces would fall within federal jurisdiction. However, as we saw earlier in the chapter, the JCPC, beginning with the *Local Prohibition* case, severely restricted the applicability of the clause. Eventually, the Committee

determined that the clause was only an emergency provision, an interpretation that continued to have force right into the 1970s when the Supreme Court of Canada upheld the constitutionality of the federal Anti-Inflation Act on the basis of the emergency aspect of the POGG provision.

In 1988, in the *Crown Zellerbach* decision, the Court clarified the POGG power by setting out the conditions under which the national concern aspect could be invoked. While the decision no doubt broadened the power, there is still confusion among legal scholars as to how far Ottawa could go in using the power. We have already noted the comment of Justice La Forest in *Hydro Québec* warning against “an enthusiastic adoption” of the national concern dimension. As a result, Marcia Valiante, was impelled to write: “The extent to which federal environmental jurisdiction can be hung on the POGG power remains uncertain, however.”<sup>146</sup> Similarly, a leading Canadian constitutional scholar, in an electronic communication to the author, pointed out that Ottawa has extensive powers over the environment and identified the POGG power among them, but then added: “However, the outer limits of Ottawa's powers are not completely clear.”<sup>147</sup> Alastair Lucas and Cheryl Sharvit offered this on-the-one-hand-but-on-the-other kind of assessment:<sup>148</sup>

It must be concluded, however, that while in some circumstances the POGG power may support federal standard-setting with respect to

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<sup>146</sup> M. Valiante, “Legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape,” p. 7.

<sup>147</sup> Electronic communication to the author, March 24, 2008.

<sup>148</sup> A. Lucas, C. Sharvit, “Underlying Constraints on Intergovernmental Cooperation in Setting and Enforcing Environmental Standards,” in P. Fafard, K. Harrison, (eds.), Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada, p. 140.

certain substances, the subject of national standards for ensuring a minimum level of environmental protection for Canadians is unlikely to meet the test of national concern, distinctness and scale of impact on provincial jurisdiction established by the Supreme Court of Canada.

Similarly, Choudhry, Gaudreault-Desbiens and Sossin have written:<sup>149</sup>

In any event, both the difficulty of applying the test for determining whether a concern has a national dimension, as reflected in the majority and dissenting reasons in *Crown Zellerbach* itself and in subsequent cases, as well as the impact such a determination may have on the balance of powers within the federation transform any federal impulse to base a pan-Canadian social program solely on Parliament's power to legislate for the peace, order, and good government of Canada into a hazardous enterprise.

It appears that, in order to satisfy the conditions laid out in *Crown Zellerbach*, a federal environmental law must be specific and have defined boundaries.

That is to say, the national concern branch of the POGG power does not empower Ottawa to enact environmental legislation in a blanket fashion.

Rather, it must be very focused about which aspects of the environment it will regulate.

The uncertainty that still adheres to the POGG power is a direct consequence of the questionable interpretations that were attached to the power by the JCPC. Initially, the Law Lords declared that the POGG clause did not have the same authority as the enumerated powers, and while Lord Watson conceded that some matters may reach national dimensions, necessitating federal action, he provided no guidance as to when an issue might be considered to have reached those dimensions. Then, Lord Haldane ruled that

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<sup>149</sup> S. Choudhry, J.-F. Gaudreault-Desbiens, L. Sossin, "Introduction: Exploring the Dilemmas of Solidarity," in S. Choudhry, J.-F. Gaudreault-Desbiens, L. Sossin, (eds.), *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation*, (Toronto, ON: University of Toronto Press, 2006), p. 7.

the power was really only an emergency power. Although the national concern aspect began to receive greater judicial attention from 1946 onward, the emergency interpretation, as noted, was the dominant interpretation well into the 1970s.

For the executive branch, uncertainty surrounding the meaning of the POGG power was a barrier to policy development. In the early 1980s, Environment Canada considered introducing a “Canada Environment Act” in Parliament that would regulate toxic substances, be national in scope, include air, water and soil pollution, and be supported by the POGG power. Lucas, however, has written that “both *legal and political uncertainties* over its constitutional appropriateness ensured that the Canada Environment Act would never reach the Parliamentary agenda”<sup>150</sup> [Emphasis added.]

The uncertainty persists, fueled by the closeness of the *Crown Zellerbach* decision (four to three), by Justice La Forest's warning in *Hydro Québec*, and by the fact that the lower courts involved, namely the British Columbia Provincial Court and the British Columbia Court of Appeal, found the federal legislation to be *ultra vires*. The legal uncertainty may not have been the only factor impelling Ottawa to go along with the Environmental Harmonization Accord but it seems clear that it was a factor. Also clear is that the roots of that uncertainty lie in the JCPC's view of the POGG provision.

While the Law Lords may have diminished the POGG power, they did leave other powers intact. The most important of these is, of course, the

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<sup>150</sup> A. Lucas, “Harmonization of Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework,” in J. Owen Saunders, (ed.), Managing Natural Resources in a Federal State, p. 35.

criminal law power. It is this power, not the POGG provision, that was described by Dale Gibson as the “most significant single head of federal jurisdiction over pollution control.”<sup>151</sup> Justice La Forest and his colleagues on the Supreme Court seemed to agree, as we learned in the discussion of judicial decisions.

Another legal scholar, Amir Attaran, who reviewed the case law on the criminal law power, points out that “the Judicial Committee of the Privy Council took a consistently liberal view of the criminal law power, making this perhaps the only federal power that it did not diminish over the years.”<sup>152</sup> Indeed, it was the Supreme Court of Canada that placed some limits on the power when in a 1949 decision it ruled that the functions of the power are, chiefly but not only, the preservation of public peace, order, security, health, and morality. “With that addition,” Attaran writes, “the criminal law power became the most robust and straightforward jurisdiction in the federal catalogue - a status that has been reaffirmed and heightened by a variety of challenges, not one of which has diminished federal competence.”<sup>153</sup>

The other powers that remain available to the federal government include the spending power, the taxing power, the trade and commerce power, the declaratory power, as well as the specific heads of power that were identified at the outset of this chapter. These powers are not inconsequential

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<sup>151</sup> D. Gibson, “Constitutional Jurisdiction over Environmental Management in Canada,” p. 81.

<sup>152</sup> A. Attaran, “Hazardous Waste? The Criminal Law Power, Federal Environmental Jurisdiction, and Ottawa’s Policy Since *R. v. Hydro-Québec*,” University of New Brunswick Law Journal, Vol. 49, 2000, p. 117.

<sup>153</sup> Ibid.

and the fact that they went untouched by the JCPC and remain available to the federal government obviously weakens the explanatory strength of the theory. However, there is a second way by which the theory applies and it has to do with the economic powers that the JCPC gave to the provinces.

The federal government, in trying to develop an environmental policy, has to consider the impact on the economies of each province. This is both sensible and understandable. What makes Ottawa's situation considerably more difficult, and what was facilitated by Judicial Committee decisions, are the economic clout of the provinces and the extraordinarily close relationship between a provincial government and a province's dominant economic interests.

How did the JCPC add to the economic powers of the provinces? In several ways, but the most important was through the Law Lords' decision in *Citizens' Insurance v. Parsons*. Recall from the discussion in chapter four the observation of Charles Fisher, one of the framers of the Constitution Act, 1867, who became a justice of the New Brunswick Supreme Court: "It was clearly the intention of the framers of the Act that Parliament should have the power to regulate the trade between the several Provinces, and the internal trade of each Province as well as the foreign trade of the whole Dominion." (See page 116 of this dissertation). Thus, the trade and commerce power was given to the federal government. However, as pointed out in chapter four, the JCPC in *Citizens' Insurance* prohibited the federal government from regulating intra-provincial trade, regardless of the size or importance of the industries and

firms in the province, thereby giving the provinces an economic role that would eventually go well beyond that of any subnational government in the other advanced federal states.

Other decisions that enhanced the provincial economic role include the decision in *Atlantic Smoke Shops v. Conlon* handed down by the JCPC in 1943. In this case, the Law Lords altered beyond recognition the provision in the constitution that restricted the provinces to direct taxation. By virtue of the decision, the Judicial Committee gave the provincial governments access to the sales tax - which had been considered an indirect tax - by defining retailers as government collectors of a tax imposed directly on consumers.<sup>154</sup> Also, as noted in chapter four, in *Bonanza Creek Gold Mining v. The King* the JCPC ruled that companies established in one province could operate in any other province if granted permission by the other province, even though one might have thought the incorporation of companies seeking to do business in more than one province should be a federal responsibility.

These and other decisions, including the *Maritime Bank decision*, added to the economic capacity and independence of the provinces. As strong economic actors, the provinces have an interest in attracting investors and developing close ties with them, especially those interested in investing in a province's natural resources. The investors have an interest in cultivating close relationships with the provincial governments that regulate them. Both have a shared interest in opposing federal environmental regulation, the provinces for

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<sup>154</sup> R. Knopff, A. Sayers, "Canada," in J. Kincaid, G. Alan Tarr, (eds.), Global Dialogue on Federalism, Volume 1: Constitutional Origins, Structure, and Change in Federal Countries, (Montreal and Kingston: McGill-Queen's University Press, 2005), p. 124.

political autonomy reasons, the companies for profit maximization reasons. Faced with the opposition of both, the federal government will be and has been very careful about the design of its enactments and regulations. Indeed, we may conclude that Ottawa was motivated to join the Environmental Harmonization process in part to avoid conflict with a coalition of provincial governments and industry. Therefore, we may also say that federal reticence on the environment can be explained, at least in part, by the decisions of the Judicial Committee, an entity that had jurisdiction over Canada because of a constitutional omission related to the founders' views on Canadian sovereignty.

## Chapter 6: The Federal Spending Power<sup>1</sup>

This chapter focuses on the federal government's spending power. The objectives of the chapter are to show if and how the federal government has voluntarily restricted the scope of the power and, if it has, to determine if our theory can explain why Ottawa has done so. As noted previously, the theory - integrating historical institutionalism with constitutional abeyance theory - contends that federal restraint in the application of its tools can be traced back to the founders' conception of Canadian sovereignty and nationhood.

Like the preceding two chapters, this one contains an historical discussion, which follows the evolution of federal thinking on the spending power, up to and including the position of the Harper government. It then delves into the relevant jurisprudence. The chapter ends with a summary and a discussion of the applicability of the theory.

For a definition of the spending power, I draw upon Robin Boadway and Pierre Trudeau. The former defines it as “the granting of money to the regions with conditions attached so as to influence the manner in which regions exercise their own expenditure responsibilities.”<sup>2</sup> Unlike Trudeau's definition below, Boadway's points to the conditionality issue. He also points out that virtually all nations, federal or otherwise, have more than one level of government, and that transfers from the upper to lower levels of government

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1 I am indebted to Peter Oliver, Professor of Constitutional Law, University of Ottawa, for hiring me as a research assistant during August 2009. Professor Oliver received a grant to study the federal spending power. Our discussions and the research I was asked to do were very profitable, helping me to clarify my thinking on the subject and to strengthen this chapter.

2 R. Boadway, “Inter-Governmental Fiscal Relations: The Facilitator of Fiscal Decentralization,” *Constitutional Political Economy*, 12, 2001, p. 96.

are *typically* conditional in nature. In Trudeau's conception, the spending power is "the power of Parliament to make payments to people or institutions or governments for purposes on which it (Parliament) does not necessarily have the power to legislate."<sup>3</sup> Unlike Boadway's definition, Trudeau's points up the jurisdictional issue as well as the fact that grants may go to citizens and institutions in addition to governments. While this definition clarifies the meaning of the *federal* spending power, it should be noted that provincial governments in Canada also have a spending power and, indeed, have used it in areas of federal jurisdiction, e.g., international affairs. Combining the two views, we may say that the spending power is the power of a jurisdiction to grant money to lower-level governments, regions, individuals, and private organizations with conditions attached, for purposes on which the granting jurisdiction may not necessarily have the constitutional authority to legislate.

So, when we speak of the federal spending power in the context of Canadian federalism, we are necessarily also speaking of conditional transfers, subsidies, shared-cost programs, and grants from Ottawa to the provinces, as well as grants, subsidies, and tax breaks to individuals and organizations because it is through them that the power is activated and expressed. Lajoie conveys the first part of this idea in this comment: "The spending power has been around since 1912, when the first program of conditional subsidies for the provinces was implemented by federal authorities in the field of agricultural

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<sup>3</sup> P.E. Trudeau, Federal-Provincial Grants and the Spending Power of Parliament, Government of Canada Working Paper on the Constitution, (Ottawa, ON: 1969), p. 4.

education in the provinces.”<sup>4</sup> Thus, the chapter frequently refers to federal subsidies, grants, shared-cost programs, tax breaks, and transfers in the context of the federal spending power.

The power is contentious because it is said to violate the federal principle, explained by Eugénie Brouillet as follows: “L’État fédératif implique d’abord et avant tout un partage de la souveraineté étatique, soit un partage de la fonction législative entre deux ordres de gouvernement. Cela constitue l’essence du principe fédératif.”<sup>5</sup> The principle is said to be transgressed when Ottawa uses the spending power to establish and support programs that fall within the jurisdiction of the provincial governments. However, as discussed in chapter one, federal arrangements differ from country to country. There is no one type of federalism that is common to all societies, although there are similarities. While Canada adheres generally to the federal principle, its founders proposed a federalism with a dominant central government. Given the founders’ intentions, it seems clear that the federal spending power is, or at least was, consistent with *Canadian* federalism. In this context, it is noteworthy that s. 96 of the Australian constitution gives the federal government the right to provide financial assistance to the states on the terms and conditions that Parliament sees fit. Are we to conclude, then, that Australia is not being faithful to the federal principle because of this clause?

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4 A. Lajoie, “The Federal Spending Power and Fiscal Imbalance in Canada,” in S. Choudhry, J.-F. Gaudreault-Desbiens, L. Sossin, (eds.), Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation, p. 145.

5 E. Brouillet, La Négation de la nation, p. 80.

Similarly, in the US constitution there is provision for a broad spending power which has been reinforced by the courts. Indeed, in a 1987 judgment, Chief Justice Rehnquist stated flat out: “[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of funds.”<sup>6</sup> Again, are we to conclude from this that the US is not really a federal state?

The debate on the federal spending power has been complicated by Canada’s huge horizontal fiscal imbalance (HFI); that is, the immense disparities in wealth and revenue-raising capacity that exist between the rich, larger provinces and the smaller, poorer provinces.<sup>7</sup> If all provinces had been roughly in the same fiscal category, the resolution of the spending power issue would have been considerably easier. But, because of the substantial HFI, finding a way to satisfy simultaneously the autonomy demands of the larger provinces and the equity concerns of the smaller provinces has proven to be exceptionally difficult.

Not surprisingly, this discussion gives rise to one on the values that Canadian federalism reflects. Gaudreault-Desbiens emphasizes that federalism

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6 The case is *South Dakota v. Dole*. The Chief Justice’s quotation was found in T. Sky, *To Provide for the General Welfare: A History of the Federal Spending Power*, (Newark: University of Delaware Press, 2003), p. 345.

7 While the gap between the wealthy provinces and those less wealthy has narrowed in recent years, it remains very wide. For instance, using Statistics Canada data, Stephen Brooks found that the median government transfer to a family of two or more persons was over \$12,000 in Newfoundland and Labrador in 2006 but only about \$3,000 in Alberta and \$4,000 in Ontario. In addition, personal incomes in Newfoundland and Labrador, New Brunswick and Prince Edward Island are about 80-85 per cent of the Canadian average. In 1974, average personal income in Ontario (the wealthiest province at the time) was 112.2 per cent of the Canadian average but in Newfoundland and Labrador it was 66.8 per cent. In 2005, average personal income in Alberta (the wealthiest province then) was 113 per cent of the Canadian average but in Newfoundland and Labrador it was 84 per cent. See S. Brooks, *Canadian Democracy: An Introduction*, 6<sup>th</sup> edition, (Don Mills, ON: Oxford University Press Canada, 2009), p. 83.

cannot only be about jurisdictional autonomy. That value must be balanced against “that of solidarity.” All governments, it would seem to follow, are obliged to ensure that the balance reflects citizen interests and that neither principle is taken to excess. The principle of solidarity is the particular concern of the federal government, as Gaudreault-Desbiens points out: “...while the expression of the principle of solidarity may take many forms, the federal government clearly has a legitimate constitutional interest in its implementation.”<sup>8</sup>

Gaudreault-Desbiens divides the exercise of the federal spending power into two categories: federal transfers to the provinces and federal transfers to citizens and organizations. Each application has a different guideline. With respect to the former, he argues that the federal government offends “federalism’s core normative principles” when it attaches “genuinely prescriptive conditions” to transfers to the provinces. He distinguishes between legitimate standards (or principles) and unconstitutional rules. An example of a standard or principle, he writes, would be “accessibility” as described under the Canada Health Act. Standards and principles “could *prima facie* be constitutional because they leave a substantial margin of appreciation to the recipient provinces.” An example of an unconstitutional rule for Gaudreault-Desbiens would be one “determining the maximum delay to be

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8 J.-F. Gaudreault-Desbiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy,” in S. Choudhry, J.-F. Gaudreault-Desbiens, L. Sossin, (eds.), Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation, p. 195.

respected for treatment in an emergency room.”<sup>9</sup>

With respect to transfers to citizens and individuals, Gaudreault-Desbiens is less restrictive, and he emphasizes the principle of solidarity and “the idea of meaningful federal citizenship,” both requiring that the federal government have “enough fiscal room and juridical leverage.”<sup>10</sup> This is legitimate in a federation because, as he points out, “...being what it is, and *considering what it is not - that is, a confederation* - a federation can hardly tolerate blatant discrepancies in the delivery and accessibility of basic social services.”<sup>11</sup> [Emphasis added.] He proposes that,<sup>12</sup>

when an order of government spends, through direct grants to private parties, in a field that is constitutionally allocated to the other, that spending should be constitutionally allowed so long as it does not substantially undermine a policy or program promulgated by the order of government which does possess primary constitutional jurisdiction over the matter, or conflicts with its purpose.

Gaudreault-Desbiens does not explain why such a guideline would be necessary; that is to say, he does not show that, historically, federal transfers to citizens and organizations have consistently undermined provincial policies or conflicted with provincial purposes.

The constitutionality of the federal spending power is under some dispute. For F.R. Scott, the constitutionality of the power is clear. He argued that the spending power derives from the doctrine of royal prerogative and

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9 *ibid.*, p. 190.

10 *ibid.*, p. 198.

11 *ibid.*, p. 196.

12 *ibid.*, p. 198.

that grants to provinces can be likened to crown gifts. Scott writes:<sup>13</sup>

The Crown is a person capable of making gifts or contracts like any other person, to whomsoever it chooses to benefit. The recipient may be another government, or private individuals. The only constitutional requirement for Crown gifts is that they must have the approval of Parliament or legislature....Moreover, the Crown may attach conditions to the gift, failure to observe which [sic] will cause its discontinuance.

So, according to Scott, even though no mention is explicitly made of the spending power in the constitution, its exercise by Ottawa and by the provincial governments is consistent with the constitution.

For Peter Hogg the constitutional basis lies not in the royal prerogative but on specific clauses of the Constitution Act, 1867, namely, s. 91(3), the power to levy taxes; s. 91(1a), the power to legislate in relation to debt and public property; and s. 106, the power to appropriate funds. Hogg suggests further that s. 36 of the Constitution Act, 1982, which authorizes equalization payments, “seems to reinforce by implication a broad interpretation of the spending power.”<sup>14</sup>

In his analysis, Professor La Forest (as he then was) draws a conclusion similar to that of Hogg. Referring to the various expressions of the spending power, La Forest thought it “doubtful” that “their constitutional validity could

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13 F.R. Scott, “The Constitutional Background of Taxation Agreements,” *The McGill Law Journal*, Vol. 2: 5, Autumn 1955, p. 6. The royal prerogative embraces discretionary powers that had belonged to the monarch but which, with the installation and evolution of parliamentary government, have fallen to the political executives. In Canada’s case, the political executives with prerogative powers include those of the provincial governments. David Smith, whose work is discussed in chapters one and two, has written extensively on the crown’s prerogative and has argued that the provincial executives’ assumption of the crown’s prerogative powers has, among other things, contributed to Canada’s regionalization.

14 P. Hogg, Constitutional Law of Canada, student edition, (Scarborough, ON: Carswell, 2000), p. 164.

be successfully challenged.”<sup>15</sup> Indeed, La Forest refers specifically to federal statutes authorizing conditional grants to provinces, e.g., hospital insurance, and concludes that “they appear to be valid.”<sup>16</sup> In fairly clear language, La Forest also recommended that any proposals to restrain the spending power “should be adopted only if an arrangement can be devised that will not strangle the federal government.”<sup>17</sup>

François Chevette, writing during the time of the Meech Lake Accord, makes an interesting observation on the spending power. He contends that it is an inevitable power of government, “un pouvoir inévitable.” “Prétendre qu'on gouvernement ne peut jamais dépenser ou mener des activités qui vont au-delà de ses compétences est absurde.”<sup>18</sup> Speaking of Québec's spending power, Chevette asks:<sup>19</sup>

...d'où le Québec tirerait-il son autorité, lui qui n'a pas compétence en matière de radio-télévision, pour opérer Radio-Québec? Comment pourrait-il, sans compétence sur le commerce d'exportation, investir dans la commercialisation de l'amiante et de bien d'autres produits? En vertu de quoi maintiendrait-il des délégations à l'étranger, alors même qu'il est généralement reconnu que les affaires étrangères relèvent d'Ottawa? Et faudrait-il modifier la Constitution pour permettre à Ottawa de mettre sur pied des musées nationaux?

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15 G.V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution, 2<sup>nd</sup> edition, Canadian Tax Foundation Paper 65, (Toronto, ON: Canadian Tax Foundation, 1981), p. 51.

16 Ibid., p. 50.

17 Ibid., p. 199.

18 F. Chevette, “Contrôler le pouvoir fédéral de dépenser: un gain ou un piège?,” in R. Forest, (ed.), L'adhésion du Québec à l'Accord du Lac Meech, (Montreal, QC: Les Éditions Thémis, 1988), p. 156. To Chevette's list, we may also add the substantial efforts on the part of provincial leaders to encourage trade between other countries and their province, despite the fact that international trade is clearly a matter of federal jurisdiction.

19 Ibid., p. 155.

While governments will inevitably spend in areas that fall outside of their jurisdiction, the power, he argues, should be controlled; hence, his qualified support for the Accord's provision on the spending power.

Andrew Petter has been a vocal critic of the federal spending power and does not accept the constitutional bases that others have advanced. For instance, he does not accept Scott's argument that the power derives from the crown's prerogative because funds dispensed by the executive must be spent in accordance with legislation, (as Scott himself acknowledged) and such legislation must be consistent with sections 91 and 92 of the constitution. Sections 102 and 106, which establish a consolidated revenue fund and which empower Ottawa to use the fund for the "public service of Canada," are not justifiable bases of the spending power either because, in Petter's words, "it is improbable that the framers of these sections intended them to have so broad an effect."<sup>20</sup> Here, Petter is unconvincing, at least to me, since my reading of the intentions of the founders suggests that they would, indeed, have wanted the sections to have a broad effect.

Historians and political scientists appear to be divided on whether the founders wanted a dominant central government or a more evenly balanced federalism. Knopff and Sayers, and Simeon and Papillon note the conflicting views and suggest that both sides have persuasive arguments.<sup>21</sup> Those with a

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20 A. Petter, "Federalism and the Myth of the Federal Spending Power," Canadian Bar Review, Vol. 68, 1989, at pp. 455-456.

21 R. Knopff, A. Sayers, "Canada," in J. Kincaid, G. Alan Tarr, (eds.), Constitutional Origins, Structure, and Change in Federal Countries, (Montreal and Kingston: McGill-Queen's University Press, 2005). R. Simeon, M. Papillon, "Canada," in A. Majeed, R. Watts, D. Brown, (eds.), Distribution of Powers and Responsibilities in Federal Countries, (Montreal and Kingston: McGill-Queen's University, 2006).

provincialist orientation point to the list of significant provincial powers contained in s. 92, including education, property and civil rights, the management and sale of public lands, and all matters of a merely local or private nature, the latter being a type of residual clause.<sup>22</sup>

On the other hand, a number of the the powers given to the central government were not only substantial they were highly intrusive. They include: the right to disallow provincial legislation; the declaratory power; the power to levy both direct and indirect taxes; the power to appoint and dismiss provincial superior court judges; the power to appoint Senators (notwithstanding that the Senate was to represent regional interests); the power to regulate in the area of trade and commerce which, as we learned in chapter four, was intended to include intraprovincial trade and commerce; and the residual power under which all issues not falling under s. 92 fall under federal jurisdiction. These are not minor powers. Indeed, as Garth Stevenson wrote, “The terms of union clearly embodied a very centralist concept of federalism....”<sup>23</sup>

It should be stressed that the Québec Resolutions contained the above list of federal government powers, as well as a Resolution, (45), which would require provincial laws conflicting with federal laws in areas of concurrent jurisdiction to give way to the federal laws. These Québec Resolutions were

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22 Note the word, “merely,” in the text. The implication seems obvious. In Québec Resolution No. 43 (18), the corresponding phrase reads: “And generally all matters of a private or local nature, *not assigned to the general parliament.*” It appears that the founders wanted to circumscribe this provincial “residual” power.

23 G. Stevenson, *Unfulfilled Union*, 3<sup>rd</sup> edition, (Gage Educational Publishing Company, 1989), p. 33.

approved by the delegates who attended the Conference, including, from the three original provinces, Brown, Cartier, Chapais, Galt, Langevin, Macdonald, McGee, Oliver Mowat, Taché, Fisher, Tilley, and Tupper.

Given the invasiveness of the central government powers, and the fact that the Québec Conference adopted the Resolutions containing those federal powers, and the fact that they made it into the Confederation agreement, I conclude that the founders did, indeed, come to favour a more centralized federalism, although this view was not universally shared among the legislators in the three original provinces. Among the political scientists who concur with this widely held assessment are Bottomley, Hueglin and Fenna, Jackson and Jackson, Russell, David Smith, and Jennifer Smith.<sup>24</sup> Recall, too, Vaughan's views on the intentions of the constitution's drafters set out in chapter three. "It is impossible to overemphasize," Vaughan writes, "the conclusion that the constitutional framers resolutely intended to establish a strong central government and at the same time to reduce the legislative authority of the provincial governments."<sup>25</sup> Finally, I note the assessment contained in the 1972

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24 S. Bottomley, "Globalization and the Democratic Deficit: Challenging Times for Canada's Political Institutions," in Y. Abu-Laban, R. Jhappan, F. Rocher, (eds.), Politics in North America: Redefining Continental Relations, (Peterborough, ON: Broadview Press, 2008), p. 136; T. Hueglin, A. Fenna, Comparative Federalism: A Systematic Inquiry, (Peterborough, ON: Broadview Press Ltd., 2006), pp. 158-159; R. Jackson, D. Jackson, Politics in Canada: Culture, Institutions, Behaviour and Public Policy, 7<sup>th</sup> edition, (Toronto, ON: Pearson Prentice Hall, 2009), p. 198; P. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, 3<sup>rd</sup> edition, (Toronto, ON: University of Toronto Press, 2004), pp. 24-25; D. Smith, The Invisible Crown, p. 13; J. Smith, "The Constitutional Debate and Beyond," in F. Rocher, M. Smith, (eds.), New Trends in Canadian Federalism, 2<sup>nd</sup> edition, (Peterborough, ON: Broadview Press, Ltd., 2003), p. 52.

25 F. Vaughan, The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic, p. 66.

report of the Special Joint Committee on the Constitution:<sup>26</sup>

The division of powers set out by the Fathers of Confederation in 1867 seemed to give more power to the Federal Parliament than to the Provincial Legislatures, and seemed to favour a system in which Parliament would be the dominant authority. The peace, order and good government clause, the disallowance power, the residuary power, the nature of the powers in section 91 as opposed to section 92; sections 24, 58, 59, 90, 93, 94, 95 and 96 and the *general spirit of the entire Constitution all point to this*. [Emphasis added.]

It is reasonable to affirm further that an unfettered spending power was quite consistent with the intentions of the constitution's framers.

Petter also does not accept s. 91(1a) as a justification for the federal spending power. He points out that those who use this section distinguish between spending and regulating. Petter rejects the dichotomy, arguing that there is “no basis in language or in logic” for suggesting that spending and regulating by Parliament are independent activities. “Rather, spending should properly be viewed as one component of a larger reallocative activity.”<sup>27</sup> It is not clear why Petter would say that there is “no basis in language or in logic” for separating spending from regulating. It happens all of the time. In development assistance, in grants from foundations or governments to community organizations, in government assistance to industry, and on myriad other occasions, a granting body will transfer funds without telling the recipient, in minute detail, how the money is to be spent. To be sure, the recipient will be held accountable but the granting body will not micromanage

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26 Special Joint Committee on the Constitution, Final Report, tabled in the House of Commons, March 16, 1972. See A. Bayefsky, Canada's Constitution Act 1982 & Amendments: A Documentary History, Volumes I and II, (Toronto, ON: McGraw-Hill Ryerson Limited, 1989), Vol. I, p. 261.

27 A. Petter, “Federalism and the Myth of the Federal Spending Power,” p. 457.

or 'micro-regulate' the funds.

Petter rejects the contention that Ottawa has the power to levy taxes for any purpose, stating that it contradicts case law, which we will get to shortly, as well as ss. 54 and 90 of the constitution which “clearly contemplate that governmental responsibility for the raising of a revenue for provincial purposes by any means of taxation rests exclusively with the provincial authorities.”

Andrée Lajoie firmly dismisses all of the arguments of those who defend the constitutionality of the federal spending power. In her view, “Nothing in the constitutional attributions of federal powers relating to the Consolidated Revenue Fund or to appropriations for the public service authorizes conditional expenditures in fields of provincial jurisdiction.”<sup>28</sup> In other words, the federal spending power, contrary to the arguments of Scott, Hogg, and others, is not part of our constitutional law.

However, the thrust of Professor Lajoie's argument is that a spending power such as the one claimed by the Canadian federal government is inconsistent with the federal principle. The case for the power simply does not stand up “within the context of a federation.” With more than a little hyperbole, she posits that not only does the power deprive the provinces of the share of the tax revenue that they need to exercise their powers, and thus producing a vertical fiscal imbalance, it has also transformed the federation “to the point where Canada is not a real federation any more, but rather a

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28 A. Lajoie, “The Federal Spending Power and Fiscal Imbalance in Canada,” p. 154.

centralized monist state.”<sup>29</sup>

Finally, I note here the view of Claude Ryan. Though not a legal scholar, Ryan spent a career thinking and writing about Canadian federalism and Canadian constitutional tensions. On the spending power, he wrote:<sup>30</sup>

I am not inclined to question this power in principle, for two reasons. First, the spending power is an essential feature of a sovereign state. Second, in the past, this power was necessary - or very useful to say the least - in situations of serious economic and social difficulty, and in promotion of equal opportunity for all Canadians....The leadership of the federal government during the last half-century allowed Canada to establish a wide-ranging social security net. This would have been impossible without the federal spending power.

For Ryan, the constitutionality of the power was not in doubt. The comment is somewhat surprising, given Ryan's views on Québec autonomy and its unique character in Canada.

### Historical Context

Given the disagreement among scholars, it would be useful to find out what the founders had in mind regarding federal-provincial financial relations. Their general approach is conveyed in Québec Resolution number 64:

In consideration of the transfer to the general parliament of the powers of taxation, an annual grant in aid of each province shall be made, equal to 80 cents per head of the population as established by the census of 1861....Such aid shall be in full settlement of all future demands upon the general government for local purposes and shall be paid half-yearly in advance to each province.

In other words, the original intent was to have the federal government collect

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<sup>29</sup> *Ibid.*, p. 162.

<sup>30</sup> C. Ryan, “The Agreement on the Canadian Social Union as Seen by a Quebec Federalist,” in Alain-G. Gagnon, H. Segal, (eds.), The Canadian Social Union Without Quebec: 8 Critical Analyses, (Montreal, QC: Institute for Research on Public Policy, 2000, p. 216.

the revenues, in various ways, and then have it distribute subsidies to the provinces to enable them to carry out their functions. Elaborating, A.T. Galt told citizens in his famous speech at Sherbrooke, Québec.<sup>31</sup>

The outlay of all the provinces being however greater than their local revenues it became necessary to make provision out of the general fund for the purpose of enabling their local legislatures to carry on the machinery of government. It was proposed to take away from them every source of revenue they possessed except minor local revenues, and then to give them from the public chest a sufficient subsidy to enable the machinery to work.

Both provincial debts and provincial capital assets were to be assumed by the central government. The subsidy arrangement was adopted simply because the revenue-raising capacities of the provinces were seriously limited, especially since they no longer had access to import duties. It is known that Galt and Brown disliked the subsidy arrangement but came to accept it because of the highly inadequate tax base of the provinces. According to Johnston, “The facts seem to indicate no fears were expressed that this would lead to political dependence; rather, the provinces seemed concerned only with receiving a satisfactory share of the federal subsidy.”<sup>32</sup> The continued existence of this insufficiency within some provinces is an important rationale for federal retention of the spending power.

Johnston has pointed out that the financial arrangement agreed to by the framers at Confederation has had a political impact in the sense that, in

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31 A.T. Galt, Speech on the Proposed Union of the British North American Provinces: Delivered at Sherbrooke, C.E., by the Hon. A.T. Galt, Minister of Finance, 23<sup>rd</sup> November, 1864, (Montreal: Longmoore and Co., 1864), p. 18.

32 R.E. Johnston, The Effect of Judicial Review on Federal-State Relations in Australia, Canada, and the United States, (Baton Rouge, LA: Louisiana State University Press, 1969), p. 123.

short order, the success or failure of a provincial government was measured in terms of the amount of additional revenues it was able to secure from the federal government. It is a criterion that has endured to this day.

The origin of the federal case for the spending power appears to go back to 1869. At that time, Nova Scotia had indicated that the subsidy it received from Ottawa was grossly inadequate. The federal government agreed and offered to increase the amount. The question was: how was this increase to be accomplished? The opposition to the federal government plan produced what Vipond called “the first sustained attack on the federal spending power.”<sup>33</sup> For some Members, notably Liberal Edward Blake, increasing the subsidy to Nova Scotia would require a constitutional amendment since the subsidy arrangement and the amounts for each province were inserted into the constitution. Government Members, however, argued that such a step was not necessary, only passage of a bill by Parliament. They contended further that the federal government was free to dispose of its money as it wished. Cartier, for instance, stated that an increase in the Nova Scotia subsidy “would be making a grant, which it would be in the power of Parliament to make.”<sup>34</sup> Christopher Dunkin, an ardent defender of provincial rights, agreed. In his view, “We could not withhold what the Union Act gave Nova Scotia; but we could give more if we pleased.”<sup>35</sup> The Prime Minister asked the British

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33 R. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, p. 43.

34 House of Commons, Debates, June 11, 1869, p. 739.

35 Ibid., pp. 739-740.

government for an opinion on the issue and received a letter, dated August 23, 1869, from the Secretary of State for the Colonies in which he states that, according to the “Law Officers of the Crown,” the Act increasing the subsidy to Nova Scotia “is one which it was competent for the Parliament of Canada to pass....”<sup>36</sup> In other words, Ottawa was free to spend its money as it saw fit.

Interestingly, the Tremblay Commission observed that, in changing the subsidy to Nova Scotia, “the federal government remained within the policy line laid down by Section 118 of the Constitution, that is, it stayed within the line of statutory and unconditional subsidies.”<sup>37</sup> It also acknowledged that the financial arrangement provided for in the act of union influenced the trajectory of the federal spending power.

Given the general nature of the financial relationship between Ottawa and the provinces that the constitution set out - and it is clearly one of dependence - it should come as no surprise that early in the life of Canada conditional grants should make their appearance. Indeed, between 1912 and 1919, five conditional grant programs emerged. The federal funding was for agricultural instruction, technical education, highway construction, the establishment of employment offices, and the combating of venereal disease. In 1927, Parliament passed the Old Age Pensions Act.

In the case of technical (or vocational) education, Ottawa established a royal commission in 1910 to investigate the issue but it did not act until 1919

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36 House of Commons, Sessional Papers, Third Session of the First Parliament, Vol. 5, No. 25, p. 6.

37 Québec. Royal Commission of Inquiry on Constitutional Problems, Report, Volume 2, p. 213.

when Parliament passed the Technical Education Act. It made available to the provinces a total of \$10 million over ten years. The grants made to the provinces were “contingent upon expenditure for technical education by a province of an amount at least equal to what it received from the federal government.”<sup>38</sup>

The constitutionality of the Act was discussed in the House of Commons. Two Québec MPs from the Opposition Liberals held differing views as to the constitutional validity of the legislation. On the one hand, Ernest Lapointe, a future justice minister for Mackenzie King, contended that the Act infringed on provincial jurisdiction. If Ottawa is going to give money to the provinces for technical education, it “should be given freely to the provinces without any string attached to it. The provinces should be free to expend the money *for the purposes stipulated*, and there should be no control by the Federal Government of questions that are purely provincial.”<sup>39</sup> [Emphasis added.] On the other hand, Rodolphe Lemieux, a former law professor and a Laurier labour minister, did not agree that there was “any infringement of provincial rights.” He enthusiastically supported the Technical Education Act, including the section of the Act requiring that every province receiving a grant furnish the central government with evidence showing that it was indeed expended for technical education. For Lemieux, “The Dominion Government has the right to

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38 J. Maxwell, Federal Subsidies to the Provincial Governments in Canada, (Cambridge, MA: Harvard University Press, 1937), p. 207.

39 House of Commons, Debates, June 20, 1919, p. 3805.

see that such moneys as are advanced are spent for the object intended....”<sup>40</sup>

In his analysis of the technical education grants, Maxwell concluded that the greatest weakness of the legislation was “the inadequate administration” it was given. By this, he means that a system of inspection ensuring that the money would be well spent was not created. “The result was a heterogeneity of standards, with much work of an unsatisfactory quality.”<sup>41</sup>

Generally, Maxwell concluded that conditional grants are superior to unconditional subsidies and he is critical of federal over-sensitivity to the charge that it used conditional grants to invade provincial jurisdiction, particularly in the cases of agricultural instruction and technical education. Consequently,<sup>42</sup>

To parry the accusation of invasion of provincial rights, the federal government declared that the grants would be for a limited time; it defined its aims in ambiguous terms; and it was afraid to supervise expenditure except in a nominal way. As a result the provinces spent the grants much as they chose, and money was frittered away to little purpose.

The Old Age Pensions Act of 1927 also gave rise to discussions in the House on the constitutionality issue. During one such discussion, the view of the Deputy Minister of Justice on the legislation's constitutionality, set out in a letter to a House committee studying old age pensions, was noted by a Member. In his letter, the Deputy stated:<sup>43</sup>

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40 House of Commons, Debates, June 5, 1919, p. 3172.

41 Ibid., p. 212.

42 Ibid., p. 247.

43 See House of Commons, Debates, p. 1944 and p. 1955.

I am of opinion, therefore, that the subject-matter of pensions has been entrusted to the provincial legislatures rather than to parliament. I do not mean to suggest that parliament has not the power to legislate upon the subject so as to assist the provinces or to establish an independent voluntary scheme, provided that in either case the legislation does not trench upon the subject matter of property and civil rights in the province, as, for example, by obligating any province or person to contribute to the scheme.

Here, the Deputy Minister lays out the condition under which the federal spending power could be exercised. The pensions legislation, like the technical education enactment, gave provinces the option of participating in the program or not.<sup>44</sup> Eventually, all of the provinces agreed to be part of both initiatives.

The Royal Commission on Dominion-Provincial Relations did not consider the spending power as such, but it did have something to say about taxation arrangements and about conditional grants. With respect to taxation, the Commissioners seemed to take their inspiration from the country's founders since the essence of their proposals to deal with the crisis in provincial finances was to have the provinces withdraw entirely from the fields of income taxes, corporation taxes and inheritance taxes. In return, the federal government would provide the provinces with an amount necessary for them to discharge their responsibilities. This plan was never implemented mainly because of the opposition of Ontario and Québec.

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44 It appears that the governments of the western provinces were supportive of greater central government involvement in social policy. For instance, the government of Saskatchewan was of the view that both old age pensions and technical education ought to be federal responsibilities, and the government of British Columbia argued that old age pensions falls within the federal jurisdiction. The Alberta Premier at the time thought that old age pensions were "more a Federal obligation than a Provincial one." Quoted in The Labour Gazette, July 1925, p. 670. This view may have been shared by other provinces. According to Christopher Armstrong, "At a meeting with the prime minister and the labour minister in the fall of 1919 officials from all of the provinces agreed that unemployment and health insurance and old age pensions were federal responsibilities...." See C. Armstrong, The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942, p. 136.

With respect to conditional grants, the Royal Commission found them to be “an inherently unsatisfactory device.” Its reasons had to do with the difficulties in the administration of the grants and in measuring whether “provincial performance” in the delivery of the services assisted by the conditional grants met agreed-upon standards. It also found the threat of federal government withdrawal of a grant to a province for failing to meet conditions to be an empty one. Since provinces were not impressed by the threat, “The power to withdraw the grant is not an effective sanction except against the most flagrant of abuses.”<sup>45</sup>

The Commissioners, therefore, argued against joint federal-provincial administration of programs, stating that “Where legislative power over a particular subject matter is divided, it is ordinarily desirable that these powers should be pooled under the control of a single government in order to secure unified effort in administration.”<sup>46</sup> How exactly this would be accomplished was not spelled out by the Commissioners.

Beginning in 1968 and ending in 1971, a series of federal-provincial constitutional discussions was held to air fiscal issues generally and the spending power in particular. At this time, the federal government submitted a working paper on the power under the name of the new Prime Minister, Pierre Elliott Trudeau.

The Trudeau paper made the case for the retention of the federal

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45 Canada. Royal Commission on Dominion-Provincial Relations, Report, Book I, (Ottawa, ON: King's Printer, 1940), p. 259.

46 Ibid.

spending power, as might have been expected. However, as so often happens when Ottawa defends its jurisdiction, the paper proposed a way to restrict its spending power, the first time that a federal government publicly offered to do so. The specific elements of the federal proposal are the following:<sup>47</sup>

1. Parliament's power to contribute to provincial government programs and services should be stated explicitly in the constitution; Trudeau proposed this even though he believed that s. 91(3) and s. 91(1a) were the constitutional basis of the federal spending power;<sup>48</sup>
2. Parliament's power to make unconditional grants to provincial governments to support provincial programs and services should be unrestricted; and
3. Parliament's power to make conditional grants in areas of provincial jurisdiction should be restricted in two ways: first, a broad national consensus in favour of federal support should be shown to exist; this consensus would be demonstrated if the legislatures of three of Canada's four regions - Ontario, Québec, the West, and Atlantic Canada - voted in support of a proposed shared-cost program; secondly, provinces should have the option of not participating in the program. In these cases, the people of the province would be paid grants equivalent to the average per capita amount paid to the participating provinces.

Here, Trudeau offered to give the provinces a say in whether Ottawa should

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47 P. Trudeau, Federal-Provincial Grants and the Spending Power of Parliament, pp. 36-40.

48 Ibid., p. 12.

embark on a conditional grant scheme and he lent legitimacy to the opting-out route. However, true to his democratic inclinations and his distrust of provincial power, he proposed that citizens, not provincial governments, be the recipients of the compensation. While Trudeau's proposals were never constitutionally entrenched, it can be said that the restriction in point number 3 above became and is federal policy.

Anticipating Lajoie's argument that use of the spending power deprives provinces of revenue for their own priorities, Trudeau argued that "the tax-raising potential of Canada's provinces differs very markedly across Canada, because of the differing levels of income and economic activity in the country."<sup>49</sup> He noted:<sup>50</sup>

One percentage point of personal income tax, for example, yields about \$3.14 per capita in Ontario, \$2.98 in British Columbia, \$2.21 in Quebec, \$1.89 in Saskatchewan, \$1.27 in New Brunswick and 91 cents in Prince Edward Island (1968-69 figures). Similarly one point of corporation income tax yields \$3.40 per capita in Ontario, \$3.29 in British Columbia, \$2.39 in Quebec, \$1.82 in Saskatchewan, \$1.38 in New Brunswick and \$1.00 in Prince Edward Island.

The point, of course, is that without federal transfers to lower income provinces, which are made possible by the federal spending power, they would not be able to maintain a level of public services relatively comparable to those of the other, wealthier provinces.

Trudeau's paper also seemed to anticipate the emergence of collaborative federalism (or confederalism). That is to say, he noted the

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49 Ibid., p. 30.

50 Ibid.

possibility that some may argue for provincial responsibility for intergovernmental grants. So, for instance, it would be the provincial premiers, acting collectively, who would have the power to determine what equalization payments would be made to which provinces and who would make them. Thus, “federal-provincial grants would become interprovincial grants.”

Trudeau's counter-argument was that “there exists in a federal state a Parliament which has been chosen by all citizens, and which because it has been directly elected is uniquely able to represent the 'national interest' of the citizens - as distinguished from their 'provincial interests'.”<sup>51</sup> Making a clear distinction between federalism and confederalism (or collaborative federalism), Trudeau stated:<sup>52</sup>

Only in a “confederal state,” where the directly elected Parliament is replaced by intergovernmental conferences of state ministers or other delegates, is it necessary to define the national interest by political negotiation rather than by public election. It is in the nature of federalism, in other words, for the citizen to look to Parliament for an expression of his national or extra-provincial interests.

Here, Trudeau emphasized the point that in a federal system it is Parliament, not conferences of first ministers or councils of provincial premiers, that is responsible for the fashioning of national policy.

Trudeau's proposals on the federal spending power, it might be noted, did not make it into the 1971 Victoria Charter.

The former Prime Minister's proposals on the spending power were criticized by Donald Smiley and Ronald Burns in a paper that appeared in the

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51 *Ibid.*, pp. 32-34.

52 *Ibid.*, p. 34.

Canadian Tax Journal. The authors were concerned that they were excessively restrictive, that they would bring an element of inflexibility in the use of the power which would hamper future generations of policy-makers, and that constitutionalizing the restrictions could have unintended consequences. In their words, “Embodying the restriction on the spending power in an inflexible manner in the constitution may well amount to a resolution of present political difficulties at the cost of hobbling future policy-makers in meeting the problems which will undoubtedly confront them.”<sup>53</sup> The preference of the authors was to see the spending power dealt with on a case-by-case basis by political negotiations.

The authors, who believed that the spending power is justified under s. 91 (1a) of the constitution, wondered if the federal government at the time, that is, the Trudeau government, fully appreciated “the importance of the power.” It is indisputable, the authors write, that the conditional grant “has in recent years played an important part in the development of some reasonably equivalent level of a good many public services in Canada.”<sup>54</sup> They suggest that if Trudeau’s restrictions were in place in 1940 “much social and economic progress would have been impeded if not altogether obstructed.”<sup>55</sup> Going further, they say that “there were governments in power in Ottawa which were in general more sensitive than those in the provinces in meeting pressing social

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53 D. Smiley, R. Burns, “Canadian Federalism and the Spending Power: Is Constitutional Restriction Necessary?,” Canadian Tax Journal, Vol. XVII, No. 6, November-December 1969, p. 479.

54 Ibid., p. 474.

55 Ibid., p. 482.

needs.” The implication here is that Canadians were fortunate that the central government had access to a spending power.

Juxtaposing the benefits that the spending power has brought Canadians with the preoccupation of governments with the jurisdictional impact of the power, Smiley and Burns write: “The question that keeps coming to the fore here, as in most areas of federal-provincial relationships, is whether we are arguing about jurisdictional rights for their own sake or whether the interests of the people of Canada are also receiving a share of attention.”<sup>56</sup>

For Smiley and Burns, the federal spending power is tied up with Ottawa's capacity to govern in the national interest. Making an argument similar to that of this thesis, they assert:<sup>57</sup>

It would seem that the government of Canada recognizes its role but has...become somewhat reluctant to play it, and is seeking to share the billing [with the provinces]. There is no true and final test of the national interest, but unless we are prepared to concede a basic role in it for the central government a convincing reason for that government's existence may be hard to find.

With respect to the opting-out provision in Trudeau's proposal, Smiley and Burns objected in principle to the idea of rewarding individuals in a province that has refused “to join with the others in pursuit of a national objective.”

Finally, the two authors criticized the Trudeau government's bargaining strategy. That is to say, they wondered what the particular motivations were that impelled it “to surrender” the spending power at such an early stage in

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56 *ibid.*, p. 475.

57 *ibid.*, p. 474.

the federal-provincial negotiations. They argued:<sup>58</sup>

The federal government's ideas of political bargaining here... seem based on the concept that if you give your adversaries what they want at the start they will stop harassing you; but today's experience is that more often you merely whet the appetite for further concessions.

This description of Ottawa's bargaining strategy with the provinces, I would argue, is as apt today as it was in 1969.<sup>59</sup>

The Macdonald Commission's proposals on the spending power were very similar to those of Prime Minister Trudeau. It advocated the retention of the power but, like Trudeau, proposed that it be used in areas of provincial jurisdiction only when a broad national consensus supported its use. It proposed further that federal transfers to the provinces be reviewed every five years.

As with the Royal Commission on Dominion-Provincial Relations, the Macdonald Commission expressed doubts about the utility of conditional grants (aka, shared-cost grants). For reasons that have to do with accountability and administrative costs, it suggested that the federal government "look to a shared-cost program as a last resort, rather than as a first resort....In general...the democratic objectives of accountability and clarity of roles are more effectively secured if a government pursues programs under its own

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58 *Ibid.*, p. 481.

59 It is somewhat ironic that the former Prime Minister should be criticized for giving in to the provinces on the spending power and for being too generous in his bargaining strategy. By the time he left office, Mr. Trudeau had acquired a reputation as a centralizer and as a formidable negotiator on constitutional issues. However, it should be remembered that, as an academic, Trudeau had opposed federal grants to universities, seeing them as a federal incursion into provincial jurisdiction made possible by the federal spending power. He, therefore, may have had a residue of sympathy for the provincial argument. It may also be suggested that, while the former prime minister always argued for a strong central government, his centralizing inclinations have been vastly overstated.

jurisdiction.”<sup>60</sup> The Commission's proposals did not include an opting-out provision.

The drafters of the Meech Lake Accord appear not to have been as critical of shared-cost programs as those who wrote the report of the Macdonald Commission, but they did seek to give the provinces more room in responding to federal use of the spending power. The Accord proposed a new s. 106A (1) for the constitution that reads: “The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared cost program that is established by the Government of Canada...in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.” How Ottawa would determine if a provincial program was compatible with national objectives was not spelled out, nor were the consequences if the provincial program was determined not to be compatible.

The Charlottetown Constitutional Accord proposed the same reform but it went further and proposed that a framework governing the use of the federal spending power be developed by First Ministers. In other words, the Accord invited provincial premiers to help design restrictions on a federal power. Like the Trudeau proposal, it seems an odd concession on the part of Ottawa, given the benefits that Canadian citizens have reaped from federal use of its spending power in the areas of health, education and welfare.

A common complaint of the autonomy-seeking provinces is that the

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60 Canada. Royal Commission on the Economic Union and Development Prospects for Canada, Report, Vol. 3, (Ottawa, ON: Minister of Supply and Services, 1985), p. 247.

federal spending power distorts provincial priorities. Realistically speaking, that is pretty much the point of conditional grants. In a federal system, as opposed to a confederal system, it is entirely legitimate for a central government to determine, for example, that a national system of publicly funded health care is in the national interest and to use the powers at its disposal to move the subnational units in that direction. In any event, as Gaudreault-Desbiens intimated earlier, a modern, democratic central government in a federal system can hardly stand by and watch health, education and welfare policies flourish in a few provinces and starve or languish in the majority of provinces.

Québec has long opposed the use of the spending power. At least since 1950, Québec governments have denounced the power and federal resort to conditional grants. The report of the Tremblay Commission dealt with the issue at length. The most recent expression of this opposition was contained in the report of the Québec Commission on Fiscal Imbalance. Its major recommendation was that the federal government vacate the tax field now occupied by the federal Goods and Services Tax. Other recommendations are that federal health and social transfers to the provinces be eliminated, that the equalization program be enriched, that the province maintain its position regarding the unconstitutionality of the federal spending power, and that the province have the unconditional right to opt out of any federal programs that fall within the jurisdiction of the provinces, with full financial compensation; (there would be no requirement that the province set up a program similar to

the federal).

The report covers a number of contentious issues. One has to do with its view on the constitutionality of the federal spending power. It articulates an interpretation of the Canadian constitution that is very much at odds with the interpretation held by this dissertation. It states:<sup>61</sup>

The absence of any reference to the “federal spending power” in the Canadian Constitution is not an oversight: in most of the federations that resort to this power, it is explicitly enshrined in the constitution. This is true of the Australian federation whose Constitution was adopted in 1900 by the British Parliament. It is noteworthy that, in this case, the same Parliament, at the same time, incorporated from the outset the notion of “federal spending power” into the constitutional provisions of another federation while it avoided doing so with respect to Canada. The absence of this provision in the Canadian Constitution is no accident.

The point seems to be that the founders intentionally left out an explicit provision on the spending power from the Canadian constitution in order to protect provincial autonomy. Hamish Telford agrees with the Commission on this.<sup>62</sup> Here, I assert my profound disagreement. First, it is not clear where the Commission got its information regarding the role of the British Parliament in the drafting of the Australian constitution. A lengthy paper by one of Australia’s leading constitutional scholars, Cheryl Saunders, on the development of the Australian Commonwealth government’s spending power, contains no evidence to suggest that Britain had a role to play in the inclusion

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61 Commission on Fiscal Imbalance, A New Division of Canada’s Financial Resources, (Québec City, QC: Government of Québec, 2002), p. 114.

62 H. Telford, “The Federal Spending Power in Canada: Nation-Building or Nation-Destroying?,” Publius: The Journal of Federalism, 33: 1, Winter 2003, p. 26.

of the spending power provisions in that country's constitution.<sup>63</sup> An electronic communication from another Australian constitutional scholar, Gabrielle Appleby, confirms Britain's non-involvement.<sup>64</sup> At the same time, the report ignores the British government's support for Macdonald's handling of Nova Scotia's subsidy complaint.

More importantly, the Commission's analysis flies in the face of the assessment of the numerous scholars who have studied the Canadian constitution that its primary intent was to do almost anything but protect provincial autonomy. As Bakvis, Baier, and Brown observe: "Scholars generally agree that the Confederation agreement was intended to create a strong national government with relatively weak provincial counterparts."<sup>65</sup> Indeed, Kenneth Wheare called Canada's constitution "quasi-federal" because of its centralizing orientation. As discussed earlier, the POGG power, the declaratory power, the trade and commerce power, the powers of reservation and disallowance, the unlimited taxing power - these were all designed to make the central government muscular and dominant. The suggestion that the founders left out an explicit provision on the spending power because they wanted to safeguard provincial autonomy is highly inconsistent with several other features of the constitution, not to mention the statements of Macdonald and other founders on how they viewed the relationship between the federal and

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63 C. Saunders, "The Development of the Commonwealth Spending Power," Melbourne University Law Review, Vol. 11, June 1978.

64 Electronic communication to the author, August 9, 2009.

65 H. Bakvis, G. Baier, D. Brown, Contested Federalism: Certainty and Ambiguity in the Canadian Federation, (Don Mills, ON: Oxford University Press Canada, 2009), p. 74.

provincial governments. To be sure, they did not all feel as strongly as Macdonald but the fact that the proposed powers for the federal government made it through the Québec conference, through the legislative debates and into the Confederation agreement indicates a fairly robust consensus on the desirability of a strong national government for Canada.

On this issue, much has been made of the position of Cartier during the Confederation process. LaSelva, for instance, points to Cartier as a key founder, the one who argued most persuasively for a federal rather than a legislative union, who consistently emphasized the federal nature of the agreement, who strongly asserted that the agreement accepted the existence of multiple races in Canada, and who assured his constituency that provincial autonomy was protected by the agreement. Québec's Tremblay Commission stated that "Cartier never wearied repeating to his colleagues that only a federative system was possible, because of the racial diversity."<sup>66</sup> But Cartier, as Macdonald's closest ally, doubtless also saw, and apparently accepted, that the agreement gave to Ottawa certain powers that placed it in a dominant position vis-à-vis the provinces. Further, it appears that he not only accepted them he saw them as tools to be used. Referring to the fears expressed by the English commercial class in Québec, Cartier said: "There could be no reason for well-grounded fear that the minority could be made to suffer by means of any laws affecting the rights of property...But even supposing such a thing did

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66 Royal Commission of Inquiry on Constitutional Problems, Report, Volume 1, p. 17.

occur, there was a remedy provided under the proposed constitution.”<sup>67</sup>

Cartier’s remedy, of course, was the federal power to disallow provincial legislation.

In the same speech, Cartier stated that “it would be for the general government to deal with our [that is, Québec’s] commercial matters.” This appears to reflect an acknowledgement of Ottawa’s trade and commerce power and its applicability within provinces.

Finally, Cartier and his colleagues from Québec were in a position of considerable power among the delegates to the Québec Conference and in the legislature of Canada. If they had serious misgivings about the formidable powers that were given to the federal government, they had the bargaining power to negotiate the dilution of those powers. Indeed, like Prince Edward Island and Newfoundland, they could have withheld consent. They chose not to. The only conclusion to be drawn is that they accepted the kind of federalism that was being fashioned by the legislators of the three colonies.

The most recent intergovernmental effort to address the spending power occurred in February 1999 when the federal government of Jean Chrétien signed, with the governments of all of the provinces and territories save that of Québec, a Social Union Framework Agreement (SUFA). Intended to provide guidelines for social policy development in the country, the Agreement includes a section on the federal spending power. The section implicitly accepts the constitutionality of the power and it accepts the right of the federal

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<sup>67</sup> See, J. Ajzenstat, et al., (eds.), Canada’s Founding Debates, p. 335.

government to use it. Indeed, the opening paragraphs of the section highlight the importance of the power and its value to Canadian citizens. It then identifies the conditions to which the use of the power will be subject, the most important of which is the requirement that Ottawa obtain the agreement of a majority of the provinces before introducing new Canada-wide initiatives involving intergovernmental transfers for health care, post-secondary education, social assistance, and social services, whether block-funded or cost-shared. This provision has been criticized on the grounds that Ottawa could introduce a new initiative with the support of only six of the smaller provinces and without the support of either Ontario or Québec which, together, have almost sixty per cent of the total Canadian population. On the other hand, it seems highly unlikely that Ottawa would create an intergovernmental initiative that did not have widespread public support and substantial provincial government support. As well, SUFA represents the first time that Ottawa agreed in writing, in an intergovernmental agreement, to restrictions on the spending power.

In his analysis of the Agreement, Christopher Dunn, who supports controls on the spending power, identifies a litany of flaws. He writes:<sup>68</sup>

To a remarkable extent the status quo ante prevailed. The federal authority retained the ability to penalize provinces that did not meet the principles of medicare. The consent formula for the introduction of new Canada-wide, shared-cost programs remained what Chrétien had decreed it to be in 1996: the feds plus a simple majority of provinces, with no population floor; and there was no mention of a consent formula for changing established shared-cost programs. Direct federal spending

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<sup>68</sup> C. Dunn, "The Federal Spending Power," in C. Dunn, (ed.), The Handbook of Canadian Public Administration, (Don Mills, ON: Oxford University Press, 2002), p. 239.

to individuals and organizations faced no significant new impediments, other than a three-month notice provision accompanied by an offer to consult, a minimal condition that, arguably, had already been in practice due to the slow-moving nature of federal-provincial relations. There was no mention of federal compensation for early withdrawal from shared-cost programs, and mutual consent was not required for funding changes, only consultation and 'due notice'. The Agreement did not mention the right to opt out with compensation from new national intergovernmental initiatives.

Of course, for those who support an unfettered spending power, Dunn's flaws are really benefits. The absence of an explicit opting out provision in SUFA on new intergovernmental programs is particularly noticeable.<sup>69</sup> It represents a strengthening of the federal position on opting out. Still, the potential of the requirement that the federal government obtain majority provincial support for new national intergovernmental initiatives should not be downplayed. It, in fact, gives the provinces a veto over the use of a federal power.

It should be mentioned here that, at one point, the government of Québec recognized the legitimacy of the federal spending power. At a 1998 meeting of provincial premiers, Québec went along with a provincial consensus on federal use of the power, a consensus that included an opting-out provision: a province could opt out of a federally funded program in an area of exclusive provincial jurisdiction with full financial compensation provided that it used the funds in the same general area as the federal program. Because SUFA did not contain this opting-out formula, the province chose not to sign it.<sup>70</sup>

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69 The relevant provision in section 5 reads: "A provincial/territorial government which, because of its existing programming, does not require the total transfer to fulfill the agreed objectives would be able to reinvest any funds not required for those objectives in the same or a related priority area." This would seem to preclude the opting-out of new, national, intergovernmental programs.

70 J. Poirier, "Federalism, Social Policy and Competing Visions of the Canadian Social Union," National Journal of Constitutional Law, 13: 3, October 2002, pp. 403-404.

Alain Noël has written disparagingly of the attitude and role of the federal government in the SUFA process. Borrowing from international affairs scholar, Robert Keohane, he referred to Ottawa's approach as an example of "hegemonic cooperation." This type of cooperation, Keohane writes, "relies on a dominant power making rules and providing incentives for others to conform with those rules."<sup>71</sup> Thus, it cannot be said to be an indicator of "non-hierarchical collaboration."

The concept of hegemonic cooperation in the federalism context is roughly equivalent to Rocher and Smith's nationalizing vision of federalism, but the use of the word, "hegemonic," is pejorative, intended to draw a parallel between the aggressive behaviour of the US in the world and the approach of the federal government to intergovernmental relations. Noël initially uses the term in the context of his discussion of the Social Union Framework Agreement. However, later, he suggests the existence of a pattern and uses the term more broadly. He writes:<sup>72</sup>

At this point, we could accept as a relevant description of current trends the idea that Canadian federalism is becoming more collaborative, insofar as more collaboration is indeed taking place. This collaboration, however, is hardly non-hierarchical. For one thing, when important interests are at stake, the pattern is more akin to hegemonic cooperation than to a negotiation among equals seeking to reduce uncertainty.

Noël criticizes Ottawa for acting like a dominant power, determined to set the

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71 Quoted in A. Noël, Without Quebec: Collaborative Federalism with a Footnote?, IRPP Working Paper, (Montreal, QC: Institute for Research on Public Policy, 2000), p.6.

72 Ibid., p. 9.

rules in accord with what it deems to be the national interest and willing to use whatever incentives it possesses to move the other subnational units in a certain direction. As we saw in chapters four and five, this is not an accurate description of the federal stance in the negotiations on internal trade and environmental harmonization. But even if one accepts that Ottawa is exhibiting this behaviour, the question to be posed to Noël here is: so what? It would not be unexpected and would be applauded by those who subscribe to the nationalizing vision of federalism. It would be consistent with the kind of federalism Canada was intended to have, and probably with the kind of federalism practiced in most of the advanced federal countries in the world.<sup>73</sup> Noël is unwilling to accept that Canada is a federal, not a confederal, state and, further, that it has its own way of operationalizing the federal principle. As the federalism scholar, Pablo Beramendi, states, "...central governments in federations (as opposed to confederations) enjoy a much stronger institutional

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73 On the centralized nature of German federalism, see T. Hueglin, A. Fenna, Comparative Federalism: A Systematic Inquiry, p. 36, p. 72. The authors also note at p. 36: "Another of the classic federations, Australia, has also become highly centralized." For more on the centralized nature of Australian federalism, see C. Saunders, "Commonwealth of Australia," in J. Kincaid, G. Alan Tarr, (eds.), Constitutional Origins, Structure, and Change in Federal Countries: A Global Dialogue on Federalism, Volume 1, (Montreal and Kingston: McGill-Queen's University Press, 2005). On the dominance of the American federal government, see F. Rocher, G. DiGiacomo, "National Institutions in North America," in Y. Abu-Laban, R. Jhappan, F. Rocher, (eds.), Politics in North America: Redefining Continental Relations, (Peterborough, ON: Broadview Press, 2008). Belgium and Switzerland are often cited as examples of highly decentralized, federal states. It seems, however, that they are examples of confederal states. In any event, Belgium is hardly a stellar example, given its fragile unity. In the case of Switzerland, Stéphane Dion has quoted Edmond Orban of the Université de Montreal who found from his work that the provinces of Canada "enjoy relatively greater autonomy and, in the case of the larger provinces, relatively greater opportunities than do the Länder and, in particular, the Swiss cantons." See S. Dion, Straight Talk: Speeches and Writings on Canadian Unity, (Montreal and Kingston: McGill-Queen's University Press, 1999), p. 95. The UK is a unitary state that devolved powers to accommodate its national minorities but no one would seriously argue that its national minorities possess the kinds of powers enjoyed by Canada's provinces. Spain is sometimes cited as a comparator to Canada but there is disagreement as to whether it is a federal state. Because the regional governments do not have constitutional protection, Hueglin and Fenna describe Spain as a *de facto* federal state (p. 19). Dion was quite right when he quipped, "...in the very real world of federations, there is doubtless nothing more autonomous than a Canadian province" (p. 97).

position vis-à-vis subnational governments.”<sup>74</sup>

That said, this dissertation is able to find an area of agreement with Noël. In the same discussion, Noël accuses Ottawa of failing “to enunciate a clear overarching view or a well-defined set of principles” and he agrees with Lazar that “the federal government’s behaviour is difficult to predict, making it an uncertain and at times unreliable partner for the provinces.”<sup>75</sup> I concur. The centralism of the founders’ constitution was undermined by the Judicial Committee, leaving Canadian decision-makers at the federal level confused and conflicted, to this day, over which vision of the country to take seriously.

The latest episode in the spending power story occurred when the Speech from the Throne was delivered on November 19, 2008. In it, the Harper government announced its intention to limit the power. The Speech stated:

Our Government will also take steps to strengthen the Canadian confederation. It will respect the jurisdiction of the provinces and territories and will enshrine its principles of federalism in a Charter of Open Federalism. The federal spending power will be constrained so that any new shared-cost program in an area of exclusive provincial responsibility will require the consent of the majority of the provinces to proceed, and that non-participating provinces can opt out with compensation, provided that they implement compatible programs or initiatives.

The difference between this approach to the federal spending power and that contained in SUFA is the Speech’s explicit provision regarding the right of provinces to opt out of shared-cost programs.

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74 P. Beramendi, “Federalism,” in C. Boix, S. Stokes, (eds.), The Oxford Handbook of Comparative Politics, (Oxford University Press, 2007), p. 754.

75 See A. Noël, Without Québec: Collaborative Federalism with a Footnote?, p. 6.

This effort to constrain the power is to be seen as part of the Conservative Party's goal to diminish the federal government. Thomas Flanagan, an academic and Conservative Party advisor, was quoted in a Canadian Press story as stating: "They're boxing in the ability of the federal government to come up with new program ideas....The federal government is now more constrained, the provinces have more revenue, and conservatives should be happy."<sup>76</sup> Further, "they're also boxing in the Liberals from being able to campaign on expensive promises." Other elements of the Conservative plan include the two per cent reduction in the Goods and Services Tax, income tax reductions, the use of tax expenditures, and larger unconditional transfers to the provinces. By reducing the flow of funds to federal government coffers, the Conservatives are attempting to render the federal spending power virtually meaningless.

The Liberal Party of Canada has not made formal statements that would be in opposition to the general approach reflected in SUFA. Since the end of the Second World War it has generally been more willing than the Conservative Party to use the federal spending power in areas of provincial jurisdiction. Liberal Prime Minister, Paul Martin, was certainly willing to use the power to implement a national child care program and the current leader, Michael Ignatieff, has not said anything to indicate that he would go beyond the provisions of SUFA, one way or the other. That said, it appears that the Liberal Party would explicitly accept the right of Québec to opt out of a shared-cost

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<sup>76</sup> Canadian Press report by Alexander Panetta, quoted in the Halifax Chronicle-Herald, March 3, 2008, p. A3. Retrieved from the Newscan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/) January 9, 2009.

program and receive full financial compensation if it implements a similar program. This seemed evident in a 2007 meeting of the House of Commons Standing Committee on Human Resources, Social Development and the Status of Persons with Disabilities. Members were asked to vote on a clause in Bill C-303, an NDP private member's bill on early learning and child care services.

The clause in question is the following:

Recognizing the unique nature of the jurisdiction of the government of Québec with regard to the education and development of children in Québec society, and notwithstanding any other provision of this Act, the government of Québec may choose to be exempted from the application of the Act and, notwithstanding any such decision, shall receive the full transfer payment that would otherwise be paid under section 5.

All of the Opposition Members on the Committee, including the Liberal Members, supported the exemption.

The Liberal Party view of the federal spending power that began to be formulated by Trudeau is somewhat at odds with the view held by previous Liberal Prime Ministers, namely, Lester Pearson and, as we will see later, by Louis St. Laurent. In a federal government white paper on Canadian federalism that was issued under his name shortly before he left office, Pearson was clear on the right of Ottawa to use the power. He stated:<sup>77</sup>

The governments of some provinces do not believe the Parliament of Canada should use the spending power in the way it has; but in fact, the use of this power has been responsible for much of Canada's social and economic progress. There have been demands for wholesale transfers of taxing and spending powers from the Parliament of Canada; the federal

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<sup>77</sup> L. Pearson, "Federalism for the Future," in J. Peter Meekison, (ed.), *Canadian Federalism: Myth or Reality*, (Toronto, ON: Methuen Publications, 1968), pp. 188-189. Significantly, Pearson, unlike some of his successors, was suspicious of intergovernmental decision-making. He wrote: "The federal government must remain responsible to Parliament, and the provincial governments to their legislatures: federal-provincial conferences must, it seems to us, occupy themselves with the art of influence rather than the power of decision-making" (p. 191).

government has replied that transfers to the provinces of powers of such magnitudes would make it impossible for it to discharge its responsibilities for the whole country.

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We believe that the Government of Canada must have the power to redistribute income, between persons and between provinces, if it is to equalize opportunity across the country. This would involve, as it does now, the rights to make payments to individuals, for the purpose of supporting their income levels....

Noticeably absent from this comment was any offer to apply restrictions to the use of the power. Pearson, experienced in international negotiations, was probably aware of the need to resist the temptation to offer a concession before constitutional discussions with the provinces began.

What is remarkable about the history of federal transfers to provinces and individuals in areas of provincial jurisdiction, particularly the early history, was the unwillingness of the provinces to take the issue of the spending power to the Judicial Committee, the place where they had immense success in circumscribing federal power. Even the Old Age Pensions Act of 1927 was not contested in the courts despite the opinion of two constitutional lawyers, engaged by the government of Québec, that the enactment was of doubtful constitutionality.<sup>78</sup> One reason may have to do with provincial politicians' general reluctance to "bite the hand that feeds" them. In this regard, it can also be said that, generally speaking, the provinces, except Québec, are comfortable with federal use of the power. Johnston suggests that a better reason may be the lax federal controls and the generality of the federal

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78 J. Maxwell, Federal Subsidies to the Provincial Governments in Canada, p. 230, 13n. The Government of Québec accepted the grants in 1936.

conditions. A third reason would be the disruptions that would result if Ottawa were told by the courts to stop using the spending power. Fourthly, turning the issue over to the courts could eventually result in the abolition of the *provinces'* spending power, forcing them, for example, to abandon their ventures and ambitions in the international field.

It is certainly clear that, as far as the federal spending power is concerned, Québec is “the odd man out.” For this reason, the issue has not been a subject for discussion at meetings of the Council of the Federation.<sup>79</sup> It explains why Premier Jean Charest told reporters that, “We prefer to have bilateral discussions with the federal government on this matter.”<sup>80</sup> The views of the other premiers appear to be reflected in the following comments of Ontario Premier, Dalton McGuinty, and Saskatchewan's former Minister of Intergovernmental Affairs, Harry Van Mulligan. With respect to the former, a Canadian Press report stated:<sup>81</sup>

Ontario Premier Dalton McGuinty has signalled his wariness of anything that would weaken the federal government's ability to create new

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79 Interestingly, a Council press release issued on July 18, 2008 after a Council meeting in Québec City stated that provinces and territories are investing in adequate, affordable, and stable housing and they “call on the federal government to renew its commitment to adequate, predictable, and sustainable funding, in particular, by renewing the federal housing programs scheduled to expire in March 2009.” In other words, the provinces and territories, apparently including Québec, urged Ottawa to use its spending power in an area of exclusive provincial jurisdiction. Similarly, an article in the February 25, 2006 edition of the *Ottawa Citizen*, reporting on the results of a provincial education “summit,” stated that the provincial premiers wanted the federal government to join them in the effort to improve higher education and skills training systems. The article stated: “Ontario Premier Dalton McGuinty said the message from the summit to the prime minister is the federal government ‘must be a full partner in forging and funding a national education strategy.’”

80 Quoted in *The Sherbrooke Record*, August 8, 2007, p. 4. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> December 31, 2008.

81 Canadian Press report by Joan Bryden, quoted in *The Whitehorse Star*, September 24, 2007, p. 10. Retrieved from the Newscan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/) December 31, 2008.

national social programs. "Are we talking about preventing the federal government from, at some point in the future, setting up social programs like day care or pharmacare? Because I don't support that,' McGuinty warned in August. 'I'm a proud Ontarian, proud to lead this province. But I'm a proud Canadian first."

With respect to Mr. Van Mulligan, the Saskatoon Star Phoenix reported:<sup>82</sup>

But Van Mulligan is troubled by reports the Conservatives are considering a constitutional amendment, or at least an agreement among provinces, to curtail federal spending power....Van Mulligan said such limitations in the past would likely have prevented the federal government's involvement in medicare. "There is a concern, especially for the weaker provinces - provinces that are dependent on equalization. Saskatchewan has been there in the past and Saskatchewan has benefited from a strong federal presence...."

The views of Mr. McGuinty and Mr. Van Mulligan do not appear to be shared by all of the English-speaking premiers. For instance, the Conservative Premier of Nova Scotia, Rodney MacDonald, welcomed the news that the Harper government intends to legislate limits on the federal spending power. In a newspaper interview, the Premier stated: "We understand what the average person on the street wants. Somebody in an office in Ottawa, they don't understand small-town Nova Scotia and we do. The federal government should be concentrated on high-level issues impacting on the country and leaving issues that are our responsibility to us."<sup>83</sup> One has to wonder if Mr. MacDonald considers health care to be a "high-level" issue or a "small-town" issue. For the Nova Scotia Opposition Leader, New Democrat Darrell Dexter, who was quoted in the same newspaper article, the federal intention is worrisome.

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82 Quoted in the Saskatoon Star Phoenix, November 28, 2006, p. A.9. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/> December 31, 2008.

83 The Halifax Chronicle-Herald, October 17, 2007, p. A2. Retrieved from NewsScan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/) January 9, 2009.

Given the considerable support that it has had among most of the provinces, and given the length of time that it has been in use, it is perhaps possible to conclude that a constitutional convention around the federal spending power has emerged.<sup>84</sup>

It appears that Canada's media has not taken a great interest in the spending power issue. A thorough review of two media databases, Canadian Newsstand and Newscan.com, revealed that, while some newspapers did include the opinions of and commentaries by various observers, and while several contained editorials that referred to the spending power *en passant*,<sup>85</sup> from 2004 to 2008 there were few full editorials that expressed an opinion on the federal spending power. Le Devoir was one exception. It criticized the Harper government's intentions for being very similar to what is contained in the Social Union Framework Agreement which, the editorial reminded readers, Québec did not sign. It stated:<sup>86</sup>

L'intérêt que présente la proposition du premier ministre Harper est mineur. Tout d'abord, il n'entend limiter le pouvoir de dépenser que

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84 The Supreme Court of Canada discussed the meaning of constitutional convention in the *Patriation Reference*. It stated: "Being based on custom and precedent, constitutional conventions are usually unwritten rules....In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves." The Court went on to say that conventions cannot "crystallize" into laws, unless it is done by statute. See *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R., 753, at pp. 880-882.

85 For instance, in a July 28, 2004 editorial (p. A14), the Globe and Mail urged the federal government to make use of its spending power "to provide incentives" to the provinces to respect the principles of the Canada Health Act. The editorial also criticized the provinces, particularly Alberta and Québec, for expecting the federal government to simply channel funds to the provinces and not demand an accounting of where and how the money is spent. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/>, January 9, 2009.

86 Le Devoir, October 18, 2007, p. a6. Retrieved from the Newscan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/), January 9, 2009.

pour les programmes à frais partagés. Depuis quelques années, le gouvernement fédéral privilégie les interventions directes auprès des particuliers, des sociétés ou des universités. Bref, on ne limiterait que symboliquement le pouvoir de dépenser, et cette limitation aurait d'autant moins de portée qu'elle ne serait pas enchâssée dans la Constitution. Au surplus, il faudrait pour obtenir une compensation financière que le Québec offre un programme similaire à celui proposé par Ottawa.

The editorial concluded, ominously, “Le Québec ne pourra pas se contenter de si peu.”

The editorial in Le Soleil was less rigid than that of Le Devoir. In September 2008, it criticized the Harper government for not acting on its “promesse d'encadrer le pouvoir fédéral de dépenser,” made first on December 19, 2005. But, while the editorial argued that “ce pouvoir doit être solidement encadré,” it made this interesting observation: “Il ne s'agit pas d'éliminer ce pouvoir. Le PQ et le Bloc eux-mêmes n'hésitent pas à réclamer qu'Ottawa intervienne pour régler tel ou tel problème. C'était le cas l'automne dernier pour les municipalités frappées par la crise forestière.”<sup>87</sup> This raises the question of how far the advocates of restrictions on the federal spending power wish to go. Are they concerned only about federal spending on health, education and welfare? What about the resource industries, which are mostly regulated by the provinces? Should Ottawa be constrained from assisting those industries?

In an article that appeared in La Presse, André Pratte asked a couple of

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<sup>87</sup> Le Soleil, September 9, 2008, p. 34. Retrieved from the Newscan.com database, [www.library.newscan.com.proxy.library.carleton.ca/](http://www.library.newscan.com.proxy.library.carleton.ca/), January 10, 2009.

similar questions:<sup>88</sup>

Faut-il aller, comme le réclame le Québec, jusqu'à empêcher le fédéral de verser directement des sommes à des organismes ou à des particuliers? Ce serait, à notre avis, émasculer Ottawa au profit des provinces, une évolution dont les citoyens - oui, même ceux du Québec! - seraient les grands perdants. Faut-il, comme le demande aussi Québec, remettre en cause les programmes mis sur pied dans le passé grâce au pouvoir de dépenser? Une boîte de Pandora à garder fermée, S.V.P.

For Pratte, "...il est dans l'intérêt de tous que le fédéral puisse intervenir lorsque des problèmes se révèlent être d'envergure pan-canadienne."

Inexplicably, the federal government seems more interested in appeasing those in the province who want stronger limitations on the power rather than those, like Pratte, who are not so doctrinaire on the issue.

The literature, both press and scholarly, seems to show that the advocates of limitations on the power have not gone beyond asserting the demand and explained in detail how and where the limitations would apply.

The Guelph Daily Mercury's editorial was considerably more supportive of the power. Concerned about Prime Minister Harper's promise to promote open federalism - "mostly by gutting the national government's ability to spend in provincial jurisdiction" - the editorial argued that no party in government should "meddle" with the federal spending power "simply to catch its rivals off-guard or without full debate." By "Arbitrarily restricting Ottawa's ability to encourage national initiatives," a governing party would endanger the national government's capacity to ensure that Canada and Canadians are globally

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88 La Presse, August 13, 2007, p. A11. Retrieved from the NewsScan.com database, [www.library.newsscan.com.proxy.library.carleton.ca/](http://www.library.newsscan.com.proxy.library.carleton.ca/), January 9, 2009.

competitive. Further,<sup>89</sup>

This high-cost, low-population country is fiscally too small and too competitively vulnerable to abandon leadership to provinces and territories scattered from coast-to-coast-to coast. It needs a federal government with the capacity to help row as well as steer.

Throwing federal spending powers away now would be as hazardous as a fall election.

Given its importance to Canadians, it is not clear why other newspapers in the English-speaking provinces, particularly some of the larger ones, have not editorialized on the spending power.

With respect to advocacy groups, it seems safe to say that they are not likely to be in favour of restrictions on the federal spending power. The reason is obvious. The more sources of funding the better. It matters little to them where the money for themselves and their causes comes from, so long as it comes. For instance, in a 2004 submission to a federal-provincial meeting on housing, the National Housing and Homelessness Network, a group that includes the Front d'Action Populaire (FRAPRU) in Québec, called for \$2 billion from the federal government for new social housing and related programs. Stating the case more firmly, the President of the Canadian Healthcare Association, which is comprised of health or hospital organizations from each province in Canada, including the Association québécoise d'établissements de santé et de services sociaux, told a House of Commons Committee in 2008 that,<sup>90</sup>

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89 The Guelph Daily Mercury, August 25, 2007, p. A.8. Retrieved from the Canadian Newsstand database, <http://proquest.umi.com.proxy.library.carleton.ca/>, December 31, 2008.

90 P. Fralick, Remarks to the House of Commons Standing Committee on Health on its Review of the 10-Year Plan to Strengthen Health Care, May 13, 2008. Retrieved from the Association's website,

Canadians legitimately expect to have access to comparable services, regardless of the jurisdiction in which they reside, and the Canada Health Act commits to this. Since jurisdiction over health delivery is a provincial-territorial responsibility, some argue that the federal government should only provide the funding, without linking it to conditions or objectives. However, the federal government has a constitutional right - some would say duty - to use its spending power to achieve health objectives for the good of all Canadians.

However, there are other advocacy groups, the Canadian Labour Congress for one, that support the federal spending power but support as well the right of Québec to opt out of social programs that fall within provincial jurisdiction, with full compensation. For instance, Andrée Côté, the Director of Legislation and Law Reform of the National Association of Women and the Law (NAWL), has written that her organization recognizes “Québec's right to determine its own social policies and thus to opt out of any such program with full financial compensation, if it so wishes.”<sup>91</sup>

Neither the Congress nor NAWL would require Québec to set up a program similar to the federal one.

The Child Care Advocacy Association of Canada supports Ottawa's right to use the spending power. However, in the view of the Association's Chairperson, Jody Dallaire, “Federal initiatives must allow Quebec to negotiate to use federal funds in ways that reflect Quebec's particular needs and priorities.”<sup>92</sup>

It is reasonable to conclude that, among advocacy groups, the federal

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[www.cha.ca/index](http://www.cha.ca/index)., January 22, 2009.

91 A. Côté, “The Broken Promises of Prime Minister Harper,” *Jurisfemme*, Vol. 25, No. 1, Spring 2007, p. 10. Retrieved from NAWL's website, [www.nawl.ca/ns/en/jf\\_spring2007.html](http://www.nawl.ca/ns/en/jf_spring2007.html), January 22, 2009.

92 J. Dallaire, Federal Spending Power: The Key to Advancing Child Care in Canada, panel presentation, December 2007, p. 3.

government does have a spending power and can exercise it in areas of exclusive provincial jurisdiction but Québec has the right to opt out and receive full compensation. It is not clear if most believe that Québec should be required to set up a similar program, if it opts out of a federal program. Nor is it clear if there is a consensus that all provinces should have the opting-out right.

### Judicial Decisions

The judicial decision that legal scholars most often cite in connection with the spending power is *Attorney-General for Canada v. Attorney-General for Ontario and Others*. It did not deal directly with the federal spending power but rather with Ottawa's attempt during the Great Depression to establish a national system of unemployment insurance. However, it did have something important to say on the power.

In 1935, Parliament passed the Employment and Social Insurance Act, one of several labour enactments that were the basis of R.B. Bennett's New Deal.<sup>93</sup> The benefits would be financed by compulsory contributions from workers and employers which would go into a special fund. When Mackenzie King came to power, he referred the Act and several others to the Supreme Court of Canada to determine their constitutionality. That it was Ottawa and not the provinces that took the legislation to the courts is more than a little significant. It is yet another example of the federal government's peculiar

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<sup>93</sup> Other labour enactments were the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act, and the Limitation of Hours of Work Act. All three would have implemented conventions of the International Labour Organization. On these, the Supreme Court was evenly divided. The JCPC, however, found all three to be *ultra vires*.

attitude to its own powers. Rather than seeing them as tools to pursue great national purposes and as ways to link the federal government with citizens, Ottawa seems to regard them as tradeable assets. King's action is particularly mystifying, since the legislation pertained to labour, the area in which he specialized. As the country's first Deputy Minister of Labour and then its first, full-time Labour Minister, King had helped to formulate federal labour policy. Perhaps Judy Fudge and Eric Tucker are correct in suggesting that, for King, labour issues were politically contentious; by letting the provinces take responsibility for labour, he would not have to confront those sensitive issues. Doing so also enabled him to appeal to the provincial autonomy advocates in Québec.<sup>94</sup>

In a four-to-two decision, the Supreme Court declared the Employment and Social Insurance Act *ultra vires*. The decision was then appealed to the Privy Council. Among the provinces, only Ontario and New Brunswick were represented at the hearings, Ontario supporting the federal position and New Brunswick contending that the issue fell within provincial jurisdiction. Québec chose not to be represented. It is noteworthy, too, that a 1933 Québec report on social insurance stated: "Unemployment insurance, though under law it comes within provincial jurisdiction, and although in theory it might be applied in the sphere of provincial administration, cannot effectively be

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94 See J. Fudge, E. Tucker, Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948, (Don Mills, ON: Oxford University Press, 2001), p. 136 and pp. 193-194. The authors note that King refused repeated requests from the Trades and Labour Congress for constitutional amendments "that would secure federal competence over labour relations." Instead, King urged the labour movement to "pursue its legislative reforms with provincial governments." (pp. 193-194).

organized...otherwise than in the national field.”<sup>95</sup> In other words, the report called for federal administration of unemployment insurance.

In its ruling, the JCPC found the Act to be *ultra vires* the Parliament of Canada. With respect to the substance of the Act, the Law Lords determined that because the “Act does not purport to deal with any special emergency” it does not fall within the jurisdiction of the central government. Here, the Law Lords were unmoved by the federal lawyers who argued, among other things, that unemployment had become a problem “of national proportions, interest and importance.” On the issue of concern to this chapter, the spending power, the JCPC was also unpersuaded that the Act was a valid exercise of the powers identified in ss. 91(1) and 91(3), that is, public debt and property and the raising of money by any mode or system of taxation. The judgment stated:<sup>96</sup>

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied....But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence....In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.

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95 This passage from the report was quoted by Justice Minister Ernest Lapointe in the House of Commons. See Debates, February 4, 1938, p. 180.

96 *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, at pp. 366-367.

So, according to Lord Atkin, the federal government may create a fund from taxation and use that fund to assist individuals, corporations and public authorities as long as the legislation authorizing the contributions does not fall within provincial jurisdiction. Because the Act in question is an insurance Act, it falls within provincial jurisdiction - i.e., the property and civil rights power - and, therefore, is unconstitutional. The question that the case left unanswered is whether a federal act, authorizing the transfer of funds to the provinces to support provincial unemployment insurance enactments, in much the same way that the federal Technical Education Act supported provincial technical education efforts, would be constitutional.

There have been three basic interpretations of the JCPC decision. On the one hand, there was the interpretation of Leon Mercier Gouin and Brooke Claxton, two jurists who completed a study for the Royal Commission on Dominion-Provincial Relations on the mechanisms of intergovernmental relations. In 1963 Smiley described their work as “the most comprehensive analysis yet made of the constitutionality of grants-in-aid to the provinces.”<sup>97</sup> They were fairly dismissive of the Judicial Committee ruling; regarding the quotation above from the judgment, they stated: “The passage quoted goes much further than was necessary for the decision of the case and so may be disregarded as *obiter*.”<sup>98</sup> In other words, the legislation fell because the

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97 D. Smiley, Conditional Grants and Canadian Federalism, (Toronto, ON: Canadian Tax Foundation, 1963), p. 20.

98 L.M. Gouin, B. Claxton, Legislative Expedients and Devices Adopted by the Dominion and the Provinces, a study prepared for the Royal Commission on Dominion-Provincial Relations, (Ottawa, ON:

subject-matter came under provincial jurisdiction not because the federal spending power is limited to federal responsibilities. But in saying this they did not conclude that the spending power could be used unconditionally. They wrote:<sup>99</sup>

It will be seen from the foregoing that it is our view that the Dominion may grant money for any provincial purpose and that it is only when the statute providing for the grant deals operatively with a provincial matter, that is, deals with property and civil rights in the province, that it is *ultra vires*.

...The Dominion legislation should go no further than to authorize a minister to agree to make a grant to any province which enacted a statute in certain specified terms. The Dominion act would not then be operative Dominion legislation upon a provincial matter; it would be merely a Dominion act to authorize the spending of Dominion money and therefore valid under s. 91 (1). At the worst, even if the Dominion act was declared *ultra vires* the Dominion could continue to make the grant for just so long as the province continued to fulfil the condition to which the grant was originally subject.

This interpretation accorded well with that of former Supreme Court justice, Gerard La Forest. Writing as an academic, La Forest saw the Judicial Committee ruling “as upholding the spending power so long as it is not in substance legislation on a provincial matter....”<sup>100</sup>

The third interpretation was that provided by the Tremblay Commission. It saw the 1937 decision as the definitive declaration on the unconstitutionality of the spending power when it is used in areas of exclusive provincial

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J.O. Patenaude, Printer to the King's Most Excellent Majesty, 1939), p. 21n. The Latin phrase, *obiter dicta*, means “marginal comments” and is used to allow judges to express their views on an issue of a case without binding future courts. Hogg also refers to Atkin's comments as “*dicta*.” See P. Hogg, Constitutional Law of Canada, student edition, (Scarborough, ON: Thomson Canada Limited, 2004), p. 168, 48n.

99 *Ibid.*, p. 22.

100 G. La Forest, The Allocation of Taxing Power Under the Canadian Constitution, p. 48.

jurisdiction. It took issue with the federal claim that its spending in provincial areas is legal, stating:<sup>101</sup>

When the federal Parliament spends, it creates, first of all, an obligation which it subsequently discharges, either by, or under the terms of, an Act. If the obligation is one relating to a matter reserved to the legislative competence of the provinces, the law which gives rise to it, or under whose terms the obligation will arise, must necessarily be a law relating to a matter reserved to the legislative competence of the provinces, and, therefore, unconstitutional. How can the fulfillment of an illegal obligation be legal?

Furthermore, in the eyes of the Tremblay Commission, the federal justification for use of the power - namely, that it is constitutional as long as it does not regulate a matter of provincial jurisdiction - was rejected by the Privy Council.

The Commission stated:<sup>102</sup>

It should be noted that the Privy Council nowhere makes any mention of the distinction put forward by supporters of the centralist thesis, namely, that the federal government may dispose of its money for provincial purposes, provided its law does not “control” or “regulate” a subject within provincial competence. The Privy Council says only that the law is invalid when it “affects,” “invades” or “encroaches upon” subjects exclusively reserved to the provinces.

The Tremblay Commission did not persuade the federal government. In a 1957 speech in the House of Commons, Prime Minister Louis St. Laurent, who was one of the lawyers representing the federal government during the JCPC hearings on the Employment and Social Insurance Act, gave the federal view of federal forays into provincial jurisdiction. Like the Gouin-Claxton view, it appears to have been little influenced by the 1937 JCPC judgment. The Prime

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101 Royal Commission of Inquiry on Constitutional Problems, Report, Volume 2, (Province of Québec, 1956), p. 217.

102 Ibid., pp. 219-220.

Minister stated:<sup>103</sup>

It is on the same general basis of its constitutional right to devote funds from the consolidated revenue fund to national needs that the federal government has distributed, through the national research council, an amount of approximately \$25 million since 1917 for postgraduate research in the field of the natural sciences, these amounts being distributed to individuals and to universities. A great number of other federal programs have the same constitutional basis. Family allowances; the national health program; our financial contributions to pensions for the blind and for disabled persons; our assistance to technical and vocational training and to the unemployed; our equalization payments to the provinces; our contributions under the Canada Forestry Act and the Canada Water Conservation Assistance Act, as well as others, belong to the same category of services which are primarily a provincial responsibility but which are of national concern and have benefited from the appropriations by this parliament to assist in carrying them out. All these programs have common features. They are financed through the consolidated revenue fund. They do not involve any element of compulsion and they apply to classes of responsibilities which relate to matters within the legislative jurisdiction of the provinces but they do not amount to legislation controlling the administration or the operations of these functions.

From the origin of confederation provincial governments have accepted most of these programs and have participated in the financing of some of them without questioning their constitutional validity.

So, as far as the federal government was concerned, the use of the spending power in areas of provincial jurisdiction was acceptable provided that the funds came out of the consolidated revenue fund, that provinces were not forced to participate in the federal program, and that the federal initiative did not attempt to regulate or administer the program.

Later in 1957, Prime Minister St. Laurent received some judicial support for his views. In *Angers v. The Minister of National Revenue*, the Exchequer Court of Canada, the precursor to the Federal Court of Canada, upheld the

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103 House of Commons, Debates, January 29, 1957, p. 754.

constitutionality of the federal Family Allowances Act, 1944. The appellant claimed that the legislation intruded into provincial jurisdiction over civil rights and family matters and as such should be invalidated. However, Justice Dumoulin disagreed and dismissed the appeal, stating:<sup>104</sup>

..la conclusion que la loi des allocations familiales, mesure de bienfaisance nationale, qui s'assimile aux exigences du "bon gouvernement du Canada" (Acte de l'Amérique britannique du Nord, art. 91), ne tend pas à établir la fréquentation scolaire obligatoire, ne s'arroe point la surveillance ni la formation de l'enfance étudiante, et ne modifie, en aucune manière, les bases de la puissance paternelle, ou le droit familial de la Province de Québec.

In other words, since the legislation did not interfere with provincial family law or with the provincial education system, and since there was no element of compulsion in the legislation, and since the legislation could be justified under the POGG clause, the judge ruled that the Act was *intra vires* the Parliament of Canada. The system of federal grants to individuals, part of federal social policy, was upheld.

If Justice Dumoulin was influenced at all by the comments of Lord Atkin in the 1937 decision on the Employment and Social Insurance Act, it is not obvious; nowhere in his ruling is mention made of that decision.

The next time the courts dealt with the spending power was in 1975. At that time, the Ontario Court of Appeal was called upon to adjudicate a dispute between a federal agency, the Central Mortgage and Housing Corporation (CMHC), and a group seeking to build a university housing project in Toronto. In the dispute, the constitutionality of the National Housing Act, 1970 (Part VIa)

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104 Angers v. Minister of National Revenue, [1957] Ex. C.R. 83, at p. 91.

was contested. Part VIa enabled CMHC to make loans for university housing and it set conditions under which the loans could be made. The developer seeking to build the housing project contended that Part VIa was *ultra vires* the Parliament of Canada because it dealt with housing, a subject over which the provinces have exclusive jurisdiction.

The Ontario Court of Appeal disagreed with the developer and ruled that Part VIa of the National Housing Act, 1970 was valid. The judgment states:<sup>105</sup>

Part VIa of the Act is not in pith and substance legislation in relation to housing, but rather legislation to provide financial assistance to certain specified bodies so that they can improve student housing. It falls within the power of the Parliament of Canada under s. 91(1A) - "The Public Debt and Property."

The Parliament of Canada has power under s. 91(1A) to legislate in relation to its own debt and property. It can spend money which it has raised through a proper exercise of its taxing power. It can impose conditions on the disposition of such funds while they are still in its hands. It has used this power to make federal grants-in-aid, which are subject to compliance with conditions that the Parliament of Canada has prescribed.

The judgment states further:<sup>106</sup>

The loaning of public money to aid university or student housing is simply one way of imposing conditions on the disbursing of federal public funds. It is a proper exercise of the power of the Parliament of Canada under s. 91(1A). The true nature and character of the legislation is the disbursement of federal public funds.

These comments on the power are unequivocal but the fact that they were pronounced by a lower court obviously diminishes their impact. Still, they are part of an emerging trend in judicial opinion on the federal spending power, a

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105 Central Mortgage and Housing Corporation v. Co-operative College Residences, Inc. et al, [1975], 71 D.L.R. (3d), 183, at p. 200.

106 Ibid., p. 201.

trend which provincial politicians and future courts could not ignore.

A second lower court commented on the federal spending power in 1986. In *Winterhaven Stables Ltd. v. Attorney-General of Canada*, the plaintiff argued that the Income Tax Act was *ultra vires* the Parliament of Canada because it was direct taxation within a province imposed in order to raise revenue for provincial purposes, namely, health, welfare and post-secondary education, all matters within provincial jurisdiction. The federal programs said to be in violation of the division of powers were the Canada Assistance Plan Act, the Canada Health Act, the Medical Care Act, the Established Programs Financing Act, the Hospital Insurance Diagnostic Services Act, the Blind Persons Act, and the Disabled Persons Act.

The Court dismissed the plaintiff's argument, stating that "the legislation under review is not legislation in relation to provincial matters of health, post-secondary education and welfare but is legislation to provide financial assistance to provinces to enable them to carry out their responsibilities."<sup>107</sup> In reference to the spending power, the judgment stated:<sup>108</sup>

Parliament has the authority to legislate in relation to its own debt and its own property. It is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition so long as the conditions do not amount in fact to a regulation or control of a matter outside federal authority. The federal contributions are now made in such a way that they do not control or regulate provincial use of them. As well there are opting out arrangements that are available to those provinces who choose not to participate in certain shared-cost programmes.

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107 *Winterhaven Stables Ltd. v. Attorney-General of Canada* [1986] 29 D.L.R. (4<sup>th</sup>) 394, at p. 416.

108 Ibid.

Significantly, the Court also made the point that s. 36 of the Constitution Act, 1982 acknowledges federal authority to assist the provinces in providing for essential public services. In the Court's view, "the impugned legislation is simply carrying out objects that the federal government is authorized to undertake...."<sup>109</sup> These comments could not be described as *obiter dicta*, a point that even Andr ee Lajoie acknowledges. Still, she downplays the significance of the ruling, describing it as merely an "isolated decision from a court of appeal from one province" that "cannot settle the question for all of Canada."<sup>110</sup>

Yet another judicial decision pertaining to the spending power came in 1989. In *YMHA Jewish Community Centre v. Brown*, the Supreme Court of Canada dealt with a wage dispute between the Winnipeg YMHA and a group of unemployed workers that it had hired after receiving a job creation grant from the federal government under the Unemployment Insurance Act, 1971. In her decision, Justice C eline L'Heureux-Dub e explained that the source of the power to set up federal job creation programmes was not s. 91(2A) of the Constitution Act, 1867. Rather, "the power to establish a job creation scheme is derived from the federal spending power."<sup>111</sup> While the spending of federal money "cannot bring a matter which is otherwise provincial into federal competence," the "federal government could spend money to create jobs in the private

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109 ibid., p. 419.

110 A. Lajoie, "The Federal Spending Power and Fiscal Imbalance in Canada," pp. 156-157.

111 *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown* [1989] 1 S.C.R. 1532, at p. 1548.

sector, or in areas not directly under its competence.” That is to say, Parliament is “free to offer grants subject to whatever restrictions it sees fit....”<sup>112</sup>

Lawyer David Yudin considers the Justice's comments as *obiter dicta* that, nevertheless, reflect “an unspoken judicial consensus” in favour of the constitutionality of the federal spending power. As a result, while he supports limitations on the power, he believes that it is unlikely “that the Supreme Court would, at this stage of the game, be willing to overturn a practice that has been entrenched for so long, rightly or wrongly, in the relations of the Canadian federation.”<sup>113</sup> This is especially the case given the above comments of Justice L'Heureux-Dubé.

Support for Yudin's assessment comes from an unlikely source. In 2008, Andrew Petter revisited his 1989 paper that appeared in the Canadian Bar Review and that expressed opposition to the idea that there is a constitutional basis to the spending power (see page 242 herein). In his 2008 document, Petter reiterated his distaste for the power and his concern that it undermines both provincial autonomy and political accountability. But he also accepted that the judicial consensus on the constitutionality of the power appears to be in. He noted that the judges of the Supreme Court “have gone out of their way in the past twenty years to say that the Canadian constitution supports the federal spending power.” They have “freely and frequently offered their

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112 ibid., p. 1549.

113 D. Yudin, “The Federal Spending Power in Canada, Australia and the United States,” National Journal of Constitutional Law, 13: 3, October 2002, p. 481.

support for the federal spending power, when arguably not required to so....”<sup>114</sup> Petter described as “too strained and formalistic” Andrée Lajoie’s dismissal of Supreme Court expressions of support for the power as mere non-binding *obiter dicta*.

Mr. Petter also emphasized the point that the spending power is used to circumvent constitutional limitations. In his view, the inflexibility of the Canadian constitution is a defect that “surpasses those of the spending power.”<sup>115</sup> In the absence of flexible provisions to permit the re-assignment of powers, upwards and downwards, Mr. Petter has difficulty “seeing how Canada could function without a federal spending power.”<sup>116</sup> Conversely, if the constitution could be altered more easily, and if the constitution guaranteed the maintenance of a certain level of equalization payments, use of the power would not be necessary.

The judicial consensus on the spending power was strengthened in 1991 in a case having to do with the federal government’s decision in 1990 to limit the growth of transfer payments to the wealthier provinces under the Canada Assistance Plan (CAP). The legislation creating the Plan was passed in the 1960s to help provincial governments cover the costs of social welfare

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114 A. Petter, “The Myth of the Federal Spending Power Revisited,” *Queen’s Law Journal*, 34, No. 1, fall 2008, p. 168. It should be noted that in the 1989 paper, Mr. Petter stated that “It is simply beyond the capacity of courts to undo forty years of political development.” See A. Petter, “The Myth of the Federal Spending Power,” *Canadian Bar Review*, Vol. 68, at p. 473.

115 *Ibid.*, p. 169.

116 *Ibid.*, p. 173. As examples of the re-assignment of responsibilities, Mr. Petter proposed that some or all health care services become the responsibilities of the federal government and that Parliament have “constitutional authority to create a comprehensive income-based tuition system for post-secondary education.” (pp. 172-173).

programs.

The government of British Columbia, taken aback by the federal government move, asked the courts in a reference to determine if Ottawa had any authority to take the action it did with respect to CAP, and if the government of British Columbia had a legitimate expectation that Ottawa would not limit its payments without the consent of the province. On appeal, the Supreme Court of Canada unanimously ruled that the federal government did have the authority to take the measure it did and that the province did not have a legitimate expectation. The Supreme Court noted that, if the “doctrine of legitimate expectations” prevailed, the “business of government would be stalled....Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor.”<sup>117</sup>

From the perspective of this thesis, what is especially important was the response of the Supreme Court to issues raised by an intervenor in the case, the Attorney-General of Manitoba. In Manitoba's view, the federal action amounted to regulation of a subject outside of the federal jurisdiction. On this, the Court disagreed, stating, “The simple withholding of federal money which had previously been granted to fund a matter within provincial jurisdiction does not amount to the regulation of the matter.”<sup>118</sup> The second issue raised by Manitoba was that, in order to protect the autonomy of the provinces, the Supreme Court ought to supervise the federal government's

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117 Reference Re: Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 559.

118 Ibid., p. 567.

exercise of the spending power. The Court rejected this role for itself and declared that "...supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the Canadian Charter of Rights and Freedoms, the courts have no jurisdiction to supervise the exercise of legislative power."<sup>119</sup>

A further strengthening of the judicial consensus on the spending power occurred in 1997. The Supreme Court of Canada was asked to decide on an equality rights case centring on the British Columbia government's decision not to designate the provision of sign language interpreters as an insured benefit under the province's Medical Services Plan. The Court ruled in favour of the appellants, who were born deaf. The unanimous ruling was written by Justice La Forest. In the course of his judgment, La Forest commented on the federal spending power. After acknowledging that hospital insurance and medicare programs come within the exclusive jurisdiction of the provinces, he wrote:<sup>120</sup>

This has not prevented the federal Parliament from playing a leading role in the provision of free, universal medical care throughout the nation. *It has done so by employing its inherent spending power to set national standards for provincial medicare programs.* The Canada Health Act, R.S.C., 1985, c. C-6, requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. *(The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court in Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 567.)* [Emphasis added.]

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119 ibid.

120 Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at p. 647. In his judgment, La Forest made an interesting distinction. While affirming that hospitals fall within the jurisdiction of the provinces, he wrote at p. 646 that "health is not a matter assigned solely to one level of government...." The question arises: does this open up the subject-matter of health to more federal intervention?

La Forest's use of the word, "inherent," seems to reinforce the federal case regarding the constitutionality of the power, as does his declaration that the constitutionality of the power had been determined in a previous decision of the Court.

The last case to be noted here is *Confédération des syndicats nationaux v. Canada*. Two Québec-based unions challenged the constitutional validity of several provisions of the federal Employment Insurance Act, the most pertinent of which for our purposes are those that established five types of employment benefits: wage subsidies, earnings supplements, self-employment assistance, job-creation partnerships, and loans and grants for skills development. In December 2008, the Supreme Court of Canada unanimously ruled that these benefits, including the training assistance, fell within the federal employment insurance power (s. 91(2A)).<sup>121</sup> The judge from the Québec Superior Court also upheld their constitutional validity, and the three justices from the Québec Court of Appeal did so as well.<sup>122</sup> In other words, all of the judges who heard the case upheld the constitutionality of the impugned provisions of the Employment Insurance Act.

The Supreme Court justices did not consider the federal spending power in their ruling. However, the Chief Justice of the Québec Court of Appeal did.

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121 For those who support federal involvement in labour force training, the decision is hugely significant. Among other things, it means that Ottawa acted too hastily when it agreed to the insertion, in the Labour Market Development Agreements that it signed with each province, of a clause recognizing that training is a matter of provincial jurisdiction.

122 In another case on this Act, initiated by the government of Québec, the Supreme Court upheld the constitutional validity of the maternity and parental benefits provisions of the Act. Again, the Supreme Court decision was unanimous.

He divided the five types of benefits into two categories. The first consisted of the wage subsidies, the earnings supplements, and the job-creation partnerships. These, he determined, are “in keeping with the essential characteristics of the unemployment insurance scheme” and, therefore, their constitutionality “should be upheld.”<sup>123</sup> However, the other two benefits, self-employment assistance and skills loans/grants, “are not in keeping with the logic of an insurance or income replacement system, even if the notion is defined broadly.”<sup>124</sup> What makes them constitutionally valid, therefore, is not the federal unemployment insurance power but, rather, the federal spending power. The second category of benefits, the Chief Justice concluded, “were validly adopted by the federal government pursuant to its spending power.”<sup>125</sup>

Given the foregoing court decisions and judicial comments, we can only agree with David Yudin that, when the occasion arises, it seems that it would be extremely difficult for the country's highest court to deliver a ruling that was inconsistent with the fairly robust judicial consensus that appears to have emerged on the federal spending power. Even Andrew Petter has acknowledged the existence of the consensus. Similarly, André Tremblay, in a discussion on SUFA, concluded that “The chances of successfully contesting the

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123 *Syndicat national des employés de l'aluminium d'Arvida Inc. c. Canada (Procureur général)* [2006] R.J.Q. Retrieved on December 12, 2008 from [www.canlii.org/en/qc/qcca/doc/2006/2006qcca1453/2006qcca1453.html](http://www.canlii.org/en/qc/qcca/doc/2006/2006qcca1453/2006qcca1453.html), para. 123.

124 *Ibid.*, para. 124. It is not clear why the Chief Justice of the Québec Court of Appeal was not able to see the link between training and employment insurance. It seems obvious. In Sweden, it was long public policy that the unemployed would almost automatically be eligible for training courses. Indeed, it was sometimes observed that the reason why Sweden's rate of unemployment was so low was that the unemployed were taking training and, therefore, were not officially part of the unemployed.

125 *Ibid.*, para. 125.

federal spending power and conditions of its use agreed upon in February 1999 before the courts are slight.”<sup>126</sup> He cited a number of court decisions in support of the federal spending power that have not been included here, namely, *Finlay v. Canada (Minister of Finance)*, *Friends of the Island Inc. v. Canada (Minister of Public Works)*, *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, *Brown v. B.C. (Attorney General)*, and *Associated Respiratory Services Inc. v. B.C.* Thus, it is not likely that the subnational governments will be the ones to take the federal government to court over the issue, although such a move would be welcomed by those who want the question of the power's constitutionality finally and formally resolved.

If there is one conclusion that can be drawn from the foregoing discussion of the federal spending power, it is that support for its constitutionality and for its exercise is very strong among the provinces, among the judiciary, and probably among Canada's advocacy groups. To be sure, there is support as well for some kind of opting-out provision, but it appears to be only the Québec nationalist/secessionist élite that opposes the power in principle.

### Summary

The chapter opened with a review of some scholars' interpretations of the constitutional bases of the federal spending power. The divergence of views was found to be considerable. Not insignificantly, Gerard La Forest, when he was an academic, considered it to be a valid power of the federal

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126 A. Tremblay, "Federal Spending Power," in A.-G. Gagnon, H. Segal, (eds.), The Canadian Social Union Without Quebec: 8 Critical Analyses, (Montreal, QC: Institute for Research on Public Policy, 2000), p. 185.

government. Andrew Petter and Andrée Lajoie have been vocal opponents of the argument that it is constitutional. My position, as I pointed out, is that ss. 91(3), 102 and 106 of the Constitution Act, 1867 provide the constitutional justification for the federal government.

The section on historical context pointed to various actors' views of the power since Confederation. Two consistencies stand out. One was the persistence of the federal government's stance on the power. From 1869 right up to the time of Prime Minister Trudeau, the federal government saw the power as being a legitimate part of its tool belt, to be employed under certain conditions, which also endured since 1869 and which were spelled out by Prime Minister St. Laurent. A second consistency was the unwillingness of the provincial governments to take the federal government to court over the issue. For the reasons identified, and perhaps for others, the provinces avoided a judicial battle with Ottawa that would settle the issue once and for all. Even when the JCPC had jurisdiction in Canada, the provinces did not avail themselves of this avenue, despite the enormous success they had before it.

The review of judicial decisions looked at eight cases. While the Supreme Court of Canada, in the eyes of most legal scholars, has not decided definitively on the constitutionality of the power, the review found a strong judicial consensus in support of the federal power. However, if chapters four and five are any indication, it could not be concluded that Ottawa will resist the temptation to give the power away - or perhaps further hobble its capacity to make use of the power - in an effort to secure some electoral gains in the

province of Québec.

### Applicability of the Theory

The theory being tested by this dissertation holds that, because of the ambivalence and sensitivities of Canada's founders regarding Canadian independence and nationhood, certain institutions essential to the political development of a country, particularly a federal country, were not spelled out in the constitution. As a result, for over eight decades Canada remained subject to the jurisdiction of a foreign court, the JCPC. In several cases, that body developed a view of federalism that was contrary to the type of federalism set out in the Constitution Act, 1867. Its decisions placed it and the Supreme Court of Canada on a certain path. In the words of historical institutionalists, those institutions became path dependent. As an executive branch is required to do in a country governed by the rule of law, it and the legislative branch crafted their policies to conform with the judiciary's decisions. Thus, their decisions and non-decisions also became path dependent. What has resulted is a confederal relationship between Ottawa and the provinces on several issues. Path dependence has been so tenacious that, even when the courts come down with decisions more favourable to Ottawa, the federal government still opts for collaborative federalism.

Chapter four found the theory - which brings together the theory of constitutional abeyances and historical institutionalism - to be valid in the case of the trade and commerce power and the Agreement on Internal Trade.

Chapter five found it to be valid in the case of environmental powers and the

Canada-Wide Accord on Environmental Harmonization. Can we say that it explains the federal approach to its spending power?

The answer appears to be no, the theory does not; certainly not in the way that it explained federal behaviour on internal trade barriers and on environmental harmonization. With respect to the former, it was found that the JCPC made several judgments that circumscribed the federal trade and commerce power, particularly the interprovincial trade branch of the power. As a result, as late as 1987, legal scholar, John Whyte, remarked on the scale of the federal government's "underconfidence," its "lack of jurisdictional confidence" on trade and commerce matters. So, even though Supreme Court decisions in 1989 and the early 1990s strengthened the power, by the time those decisions were made the habit of the federal government of ignoring internal trade barriers had been ingrained. That is to say, the JCPC's decisions cast a very long shadow over the federal executive, making an assertion of federal power on interprovincial trade barriers highly unlikely.

In chapter five, the principal conclusion was that the economic clout of the provinces and the extraordinarily close relationship between a provincial government and a province's dominant economic interests, made possible by a number of Judicial Committee decisions, impelled the federal government to participate in the work of the confederal Canadian Council of Ministers of the Environment and agree to the Canada-Wide Accord on Environmental Harmonization.

In the case of the federal spending power, there was no decisive JCPC

ruling or string of rulings that gutted the power and set the judiciary and the executive branch on a particular path. As noted earlier, the durability of the power stands out, given the fate of other important federal powers like the POGG power and the trade and commerce power. Surviving virtually untouched for a hundred years, and notwithstanding the consistent objections of Québec governments and the occasional frustrations of some of the other provinces, the spending power escaped a federally or provincially launched court challenge. Ironically, it was not until Pierre Trudeau came to office that the federal government began to offer concessions on federal use of the power. His successors - Mulroney, Chrétien, and Harper - followed his example. Why they willingly restricted the exercise of the power cannot be explained by the theory proposed herein, given that there was no sustained JCPC attack on the power.

It is possible to suggest that the JCPC's overall strengthening of provincial power made it inevitable that Ottawa would treat the spending power in the manner it has. The complicating factor here is that, unlike the federal trade and commerce power, the POGG power, and federal environmental powers, the spending power has robust support among the provincial governments, not to mention the widespread public support for the programs that the power makes possible. Only the Québec political élite has consistently opposed its use. Federal actions appear, therefore, to be almost entirely Québec-driven.

## Chapter 7: Conclusion

### Summary and Findings

The preceding six chapters cover a lot of ground. In a nutshell, they set out an analysis of Canadian federalism, identify a pattern in the federal stance on intergovernmental relations, advance a theoretical framework to explain that pattern, and test the applicability of the theory with three cases. In the first chapter, where the discussion of Canadian federalism was presented, it is noted that the federal habit of deference to the provinces has a long history, that Canada was intended to adhere generally but not slavishly to the federal principle, and that, of the various forms of federalism that compete for preeminence in Canada, it is collaborative federalism that seems to have the momentum behind it. The chapter also notes that there are consequences to the deferential way Ottawa approaches intergovernmental relations.

The dissertation's theoretical framework - integrating historical institutionalism and the theory of constitutional abeyances - is explained at length in the second chapter. Briefly, the argument is that the observed pattern of federal government deference in federal-provincial relations has its roots in the ambivalence of the country's founders toward Canadian sovereignty and nationhood. Several possible reasons for that ambivalence are discussed. That uncertainty resulted in a number of constitutional exclusions, the most serious of which from our perspective was the founders' failure to establish a Canadian final court of appeal. The Judicial Committee, which filled that void until 1949, made a number of decisions pertaining to the division of powers

that have shaped the strategies of the federal executive to this day.

The next chapter reviews the commentaries of several scholars on the Confederation moment. While there does not appear to be extensive work connecting that moment with the federal stance on intergovernmental relations, there certainly is awareness that the founders' self-government aims were very limited and that the flawed Confederation agreement and the process that brought it about have been the source of Canada's deep-seated unity problems.

The aim of chapter four, which focuses on internal trade barriers, is to show how Ottawa was handcuffed in its ability to use the constitution's trade and commerce power by a series of decisions from the Judicial Committee, even though judgments rendered by the Supreme Court of Canada in the late 1980s and early 1990s seemed to significantly expand the federal power to regulate interprovincial trade and to strengthen the economic union. The chapter, which includes an analysis of the Agreement on Internal Trade, shows how it represented a federal retreat and concludes that the theory proposed by the dissertation provides a reasonable explanation for the federal government's decision to address internal trade barriers through collaborative federalism (which I view as synonymous with confederalism).

It was not hard to show in chapter five, which deals with the Canada-Wide Accord on Environmental Harmonization, that the main characteristic of federal environmental policy since the 1970s has been timidity and that the Accord represents a kind of formalization of that timid approach. And this

despite pleas from the ENGO community for Ottawa to involve itself more fully in environmental issues and an unbroken string of court victories upholding federal powers. To be sure, there were periodic waves of environmental activism but Ottawa's approach, highlighted principally by lax enforcement, has been stunningly ineffective. This chapter, too, upheld the dissertation's theory.

The final case chapter is chapter six, which deals with the federal spending power. It shows that, beginning with Trudeau, a succession of Prime Ministers offered restraints on Ottawa's use of the power and, after providing historical context and reviewing several court decisions on the power, the chapter comes to the conclusion that the theory proposed by this dissertation does not explain the federal government's readiness to restrain the power. The reason is that, unlike the powers discussed in chapters four and five, the spending power was not subject to a sustained JCPC attack. Thus, Ottawa's self-imposed restraints cannot be directly attributed to the Judicial Committee, although one might say that the JCPC's provincialist decisions made Ottawa's self-diminution virtually inevitable.

The principal finding, then, is that the study's theory has been supported by two of the three cases. While it is not possible to confidently make generalizations on the basis of this finding, the dissertation does seem to emphasize the importance and merit of 'going back to the source', that is, the Confederation moment, when trying to analyze federal behaviour in intergovernmental relations. To some extent, the dissertation bears out the claim that the founders' uncertainty about Canadian sovereignty and

nationhood had an impact on the degree of resolve that the federal government brings to its relationship with the subnational governments. The third case study did not validate the theory but the argument can be made that the momentum toward provincialization, given a substantial boost by the JCPC's decisions, made it likely that Ottawa would, at some point, voluntarily restrict its exercise of the spending power. A different approach would be necessary to determine how much force this argument has.

In all three cases, it might be noted, the study demonstrated that the federal government retreated from an assertive stance and exhibited deferential behaviour toward the provinces.

Aside from these findings, there are a number of findings and items of interest that are pertinent to the point of the dissertation and ought to be highlighted here. Perhaps the most important is the dissertation's confirmation that the country's constitutional framers had very little trust in each other or in the political institutions that they were establishing. How else can one explain the preference of French Québec's leaders for the maintenance of the British connection and the hope of Macdonald that attachment to Britain would be the glue that would keep Canada united? The seeming sense of collegiality among Confederation's principal framers certainly belied the deep feeling of distrust that existed among them, a distrust that manifested itself in some serious omissions from the constitution. In the view of this study, that lack of trust was extremely costly. It seems self-evident that a state that is constructed on the basis of loyalty to another state is eventually going to have huge problems

maintaining its structural integrity.

If this dissertation has emphasized anything, it is that the Canadian state was created on dubious grounds. For a state, to be ambivalent about its sovereignty is to be ambivalent about its survival. The country's never-ending pursuit of identity, attachment and national solidarity and the hesitancy with which the government of all Canadians deals with intergovernmental relations are testimony to that truth, stemming as they do from the founders' out-sized loyalty to the imperial power and their astonishing lack of trust and confidence in each other and their project.

Another significant finding is that attention to the effectiveness of the policies and structures that Ottawa and the provinces/territories established took a back seat to the objective of intergovernmental harmony. We know that in the case of the Agreement on Internal Trade the governments, particularly the federal government, were motivated by the felt need to show that “federalism works.” And we have pointed out that the Agreement, highly criticized by a range of observers including the federal public servant who participated as the chief representative of the federal government, has not been effective in bringing down interprovincial trade barriers. As noted in the dissertation, one would have a hard time finding a convinced defender of the Agreement.

Intergovernmental harmony in this country is an important consideration, to be sure, but if intergovernmental collaboration cannot efficiently produce results, i.e., effective solutions to the country's problems,

federalism itself will come to be held in disrepute by the citizens in *all* parts of the country.

Related to this finding is the observation that Ottawa's negotiation strategy in the three cases was deeply flawed. This was especially clear in the case of the AIT where the federal objective - to show that federalism works - and the timing - just prior to the Québec secession referendum - inevitably weakened the federal position. The result was a highly defective agreement that in no way could be described as a model of how to do public policy. Even the leadership of the Parti Québécois was motivated to mock its impotence.

With respect to the Environmental Harmonization Accord, it, too, has been an ineffective policy instrument. Canada has been, and remains, a laggard among industrialized countries in terms of environmental performance. The Accord represented not governments' best effort to develop a co-ordinated attack on the country's environmental problems but an attempt by the provinces to minimize federal government intervention in their environmental affairs, regardless of what the constitution and the Supreme Court say. Ottawa consented to this effort not in the interests of the environment but, again, in the interests of intergovernmental peace.

These findings are pertinent because they point to the danger of making public policy via collaborative federalism, at least the way it is practiced in Canada.

### The Theory

After having studied the three cases, I remain convinced that the

theoretical framework I used is a strong one. Further, I remain convinced that the founders' odd attitude toward their project is the basis of the conflicting interpretations of federalism held by the country's political leadership. Granted, the theory could not satisfactorily explain federal handling of its spending power but, as I suggest above, perhaps another approach and methodology would find the link between the founders' ambivalence and the federal attitude toward the spending power. Both constitutional abeyance theory and historical institutionalism seem tailor-made for the Canadian context. It is much too early to give up on the idea that the founders' uncertainty about Canadian nationhood still reverberates, however quietly, within the halls of Ottawa's intergovernmental relations establishment.

It has been noted - by Jonathan Malloy, for instance - that Foley's constitutional abeyance theory has not attracted much interest or attention, that very little literature has emerged as a result of Foley's work. Indeed, it appears that in Canada only David Thomas has made use of the theory. Malloy, thus, wonders: "Is it possible to explain why these ideas have seemingly not caught on fire?"<sup>1</sup>

It is certainly surprising that the theory has not received more scholarly attention, especially in Canada where the constitution is a preoccupation of politicians, public servants, political scientists, and journalists. It may be that scholars have used Foley's theory but did not frame their ideas in the way that Foley did. Recall, for instance, Douglas Verney's work, discussed in chapter

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<sup>1</sup> Electronic communication to author, October 22, 2007.

three. As I noted there, his book came out three years before Foley's but the language he uses clearly has a "Foleyan" ring to it. He talks about Canadians' reluctance to "press arguments to their logical conclusion" and about the contradictions that persist in Canadian politics. Similarly, Robert Vipond, who does not refer to Foley's work in the book discussed in chapter three, talks about how the country's founders preferred to keep the constitutional discussions at a general level for fear that, if they got caught up in a detailed examination, serious disagreement would have arisen. This, too, is Foleyan language. David Smith also referred to the framers' failure to be specific about the status of the state they were creating, while Roger Gibbins pointed to the several issues about which the constitution's framers were silent.

So, while Foley's precise formulation has not been built on, his fundamental point has not escaped the notice of scholars. Constitutional abeyance theory is particularly suitable for Canada and it would not be surprising if numerous other scholars have used the general idea in their writings.

Of course, this explanation for the lack of interest in constitutional abeyance theory does not apply to other countries. As a theory to account for constitutional strains and turmoil, Foley's effort may have limited usefulness in countries where the constitution is not an issue or where issues tend not to be framed in constitutional terms, such as the US and Australia.

#### Further Research

The results of this study suggest the desirability of additional research

on a number of fronts. First, the theory used has been shown to be worthy of further testing and several federal decisions present themselves as possible subjects for investigation. For instance, the decision of the government of Prime Minister Paul Martin to devolve responsibility for parental benefits to the provinces, at the request of the Québec government, could be investigated to determine if the theory provides an explanation for the federal acquiescence. Similarly, the Harper government's decision to give Québec a role at meetings of the United Nations Educational, Scientific and Cultural Organization could be the subject of analysis. Ottawa's handling of labour force training policy is yet another possible case. Conversely, it would be especially useful to identify those areas where the federal government stood firm and rejected any weakening of the federal role, and then to theorize about why Ottawa was able to do so. What were the features of the situation that enabled Ottawa to insist on the integrity of its powers? This research might lead to refinements in this dissertation's theory and contain the seeds of an interesting and new federal approach to intergovernmental relations, one that is less characterized by a lack of jurisdictional and political self-confidence on Ottawa's part.

These types of cases pertain to the impact of the founders' ambivalence on public policies. Equally beneficial would be a more sociological inquiry, one that would look into the impact of the founders' uncertainty on early Canadians' sense of attachment to their new country. Were they conflicted about who to direct their allegiance to? If so, has this conflictedness persisted and manifested itself in different ways? Were there significant differences between

citizens and élites on the link with Britain? Was the attitude toward the US an inevitable result of the founders' original obsession with the imperial power? Does it matter?

Another possible topic of further research is related to the observed federal pattern of deference that has been at the basis of this study. It is related as well to the comments of Mettler and Milstein, noted on page 35 herein, that governing arrangements may work to shape citizen attitudes about government and that citizens' experiences as beneficiaries may affect their sense of political trust and political efficacy. Has Ottawa's retreat in support of provincial autonomy had an impact on citizen attitudes about the federal government and about Canadian federalism? Is there a correlation between the federal retreat and trends in citizens' sense of trust and political efficacy? Is there a correlation between Ottawa's deferential stance and declining levels of political participation, as Mettler and Milstein's paper suggests there could be?

Further research might also be undertaken into the factors that impelled the founders to pursue only limited self-government and not full sovereignty. Chapter two pointed to several possible reasons. Are they equally valid or is there one that has greater explanatory force? Are there additional reasons? Was the influence of British finance capital as strong as Andrew Smith posits?

Finally, crying out for in-depth scholarly research is the negotiation style of the federal government. Very little work has been done on this and yet it would seem that an immense amount can be learned about the federal government approach to intergovernmental relations from an analysis of its

negotiation strategy. How does Ottawa prepare for negotiations with the subnational governments? What kinds of objectives does it set? What are its negotiation resources? How does it see itself when it sits around the negotiating table? How does it deal with the fact that it is outnumbered around the bargaining table? Does it frequently make concessions before the negotiating begins? Does it make an effort to seek allies in civil society? Is intergovernmental peace the constant, over-riding objective? How influential is the position of the government of Québec? Getting answers to these questions would not be easy but I am convinced that it would be a hugely worthwhile undertaking. With more light shed on Ottawa's approach, (as well as the approaches of all governments), both scholars and citizens would be able to make more informed analyses of the results of the negotiations.

### *A Final Word*

If I were to undertake to do a follow-up to this study, I would go first to the literature on colonialism, the objective being to uncover the lasting impacts, cultural and psychological, of colonial status. This effort would be eminently appropriate, given that the country was founded by men with limited vision, weak democratic instincts, and capable of behaviour that could only be described as fawning. Peter Russell could hardly have been more accurate when he referred to the founders as “happy colonials.”

Perhaps the founders' most disturbing trait was their deep sense of distrust of each other and their project. It was this lack of confidence in Canada and the institutions they were creating that the colonialism literature

may identify as being one of the key characteristics of a colonial mentality. It is the job of the national political leadership to free citizens of colonial thinking. In Canada, the founders and their successors willingly neglected this task for many years. As a result, we ended up with the kind of situation where, for instance, Ernest Lapointe's effort to patriate the constitution in the 1920s was stopped dead in its tracks by a Cabinet fearful of two provincial premiers still clinging to the mother country for what could be called colonial reasons.

The proposition that the country's national unity problems have their roots in the founders' decision to leave Canada institutionally incomplete has, I would argue, been strengthened by this dissertation. Had they opted for full constitutional sovereignty, and completed the work of institution-building, the citizens of Canada and its political leadership may have had the space as well as the tools to fashion a more fitting and less dysfunctional way of being together.

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