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# A RESILIENT FEDERATION? PUBLIC POLICY CHALLENGES FOR THE NEW DECADE

Edited by Charles Breton



CENTRE  
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## Introduction

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# Setting the Post-Pandemic Policy Agenda for Managing the Canadian Federation

Charles Breton and Paisley Sim

As a new, permanent research body within the Institute for Research on Public Policy, the Centre of Excellence on the Canadian Federation was created to build a deeper understanding of Canada as a federal community. Establishing a research agenda in the midst of a global pandemic – an unprecedented global crisis and a stress on the federation – has been no small task. And with governments preoccupied with short-term emergency responses, the word uncertainty quickly came to define the moment. But beyond the flurry of early pandemic policy responses, many of the core challenges facing the federation remain the same and will persist when the pandemic dissipates.

It is against this backdrop that the Centre officially launched a year ago, in September 2020. Central to the launch was an inaugural essay series that aimed to define the policy landscape, “A Resilient Federation? Public Policy Challenges for the New Decade.” To mark our one-year anniversary, we are republishing the nine essays as a single document, in English and French. The challenges outlined in the series were written with COVID-19 at the forefront of the public policy discourse, but they are highly relevant even as the pandemic evolves. All the essays tackle long-standing challenges that are either made more salient as a result of the pandemic or are likely to re-emerge in the coming years.

As the Centre’s first official publications, the essays set the stage for the kinds of issues it will tackle and the debates it will seek to inform, such as reconciliation, public finances, intergovernmental relations, the role of municipalities in the federation, and regional identity. The essays also exemplify the Centre’s commitment to publish – in both official languages – accessible yet detailed and comprehensive analyses of the state of the Canadian federation and of the public policy challenges before us.

## THE ESSAYS

As we formulate post-pandemic life, Jörg Broschek's essay exploring the prospects for a new "national policy" should be required reading for decision-makers at all levels. A resilient federation must be capable of enacting policy changes that redirect aspects of the established order (such as a fossil-fuel-based economy) onto a new trajectory, and of making those changes sustainable by shielding them from reversals by future governments. He highlights how the current window of opportunity afforded by the pandemic could be used to address fundamental, interrelated policy challenges such as the climate crisis, economic inequality and systemic racism. A multipronged approach based on an understanding of the resilience of the federation could point the way toward a collective, long-term recovery.

The urgency of the pandemic meant that traditional processes of elite negotiation were rapidly supplanted by close, often ad hoc, intergovernmental cooperation. Jared Wesley explores how regional tensions and partisan cleavages have been pushed below the surface during periods of what he calls "emergency federalism" (a twist on D.E. Smith's 1969 article), but are bound to resurface post-pandemic. He argues that establishing new, "routinized and rules-based environments" could help foster trust among political elites from different parties and jurisdictions, who might otherwise have few opportunities to develop close working relationships. Wesley suggests ways to alleviate the tensions – institutional tweaks affecting backbenchers up to first ministers aimed at reducing the destructive tribal tendencies that have historically arisen following periods of federal crisis.

Perhaps the main regional flare-up in recent years has been western alienation, a persistent trend explored in detail by Loleen Berdahl. Although discontent may be a constant feature of Canadian federalism, it is neither a cost-free nor a desirable national characteristic. Berdahl provides concrete recommendations on how to reduce regional discontent, by looking beyond quick-fix policy responses and addressing perceptions of unfair economic and political treatment within the federation. She concludes that to understand Canada, we must acknowledge that regional disputes are situated in our different understandings of the country.

The devastating health, social and economic impacts of the pandemic have been most pronounced in cities. Kristin R. Good explores the challenge of realizing the potential of municipal governments, by moving away from the notion of cities as "creatures of the provinces" and embracing the federalism principle in municipalities' relationships with other orders of government. She suggests that cities can secure protections within provincial, rather than federal, constitutions.

Moving beyond debates over empowerment, the essay by Gabriel Eidelman argues that cities do not need new constitutional protections, but rather a new intergovernmental infrastructure suited to the realities of urban policy-making. An urban policy observatory model should focus on better data, better organization and better interfaces. He explores how to start building an urban infrastructure that brings together local, regional, provincial and federal partners to engage in structured dialogue.

Alain Noël argues that understanding Canada as a multinational federation made up of more than one nation is central to building a resilient federation. Though Canada does not recognize itself as such, the work of multiple nations defines our country. To advance reconciliation with Indigenous peoples and begin to recognize our deep-rooted cultural diversity, the Canadian federation must confront hard issues about power, financial resources and natural resource development.

Stéphanie Chouinard and Luc Turgeon explore how effective recognition of both the French and English languages has always been contentious for the federation, and increased protections for linguistic minorities have been won only with hard-fought battles. The challenges facing Canada's French-language regime can be addressed through constitutional, legislative and policy changes, but these are not without shortcomings, given the diversity of language protections across provinces. The recognition, integration and protection of Indigenous languages is an additional, monumental challenge facing the country.

The pandemic has also been marked by a growing public confrontation with the harsh reality of Canada's colonial past. Writing before the June 2021 adoption of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, Sheryl Lightfoot explores the opportunity to embody the model of cooperation and partnership called for in the UN declaration. Her work sheds light on the implementation of the Act and how it is a critical step on Canada's path toward reconciliation.

Provincial and territorial governments are holding an unparalleled stock of subnational debt. Looking beyond the pandemic, Kyle Hanniman highlights how to reconcile fiscal capacity and strengthened incentives for fiscal discipline. The establishment of a federal conditional bailout facility to support those provinces that are teetering on the financial edge may be a viable option, but there need to be clear limits to that support. Increased fiscal support for provinces puts pressures on provincial autonomy, and robust fiscal rules would be required. His look at ways to stabilize provincial borrowing will be a central resource, as governments seek ways to reconcile fiscal solidarity and grow fiscal resilience.

The challenges of the pandemic have been boundary-spanning and have called on all levels of government to adapt to new modes of operation – within a federation that typically resists change. As uncertainty recedes, our hope is that the challenges, ideas and courses of action detailed in these essays will contribute to the resilience and long-term recovery of the federation, and that they will be useful to students and practitioners alike.





# Resilient Federalism and Transformative Policy Change: Prospects for a New “National Policy” in Canada

Jörg Broschek

## INTRODUCTION

Economic, social and institutional constraints make swift policy change difficult even in normal times. The COVID-19 pandemic, however, has created a critical juncture. Such rare historical episodes make us experience the present against the backdrop of possibilities that were, until very recently, difficult to imagine. Moreover, critical junctures are “critical” because decisions made under such conditions can have long-lasting consequences.

It is no coincidence that think tanks, academics and new leadership initiatives in Canada and around the world are seeking to seize the moment. Governments are still preoccupied with short-term emergency responses to contain a highly contagious virus and mitigate its social and economic implications. That leaves room for others to formulate innovative proposals for a postpandemic, long-term recovery.

The challenges these proposals address relate partly to the multiple risks presented by the pandemic, risks that call for effective policy solutions to support public health and long-term care. The broader, emerging debate, however, focuses on how the current window of opportunity can be used to address an array of fundamental, interrelated policy challenges such as global warming, economic inequality and the systemic marginalization of vulnerable groups. Although these policy challenges have been on the agenda for quite some time, the COVID-19 pandemic has brought them into sharper focus. We know from similar critical junctures in the past that transformative change is only possible if certain prerequisites are met. In

Canada, reconstructive leadership, collaborative federalism and the development of a multipronged approach that outlines mutually enforcing policy goals and feasible instruments are of particular importance.

## RESILIENT FEDERALISM

Federal systems are often praised for their resilience. Their institutional architecture appears to be better suited to cope with external challenges, especially if one compares federal systems with centralized, unitary states. This assumption, however, does not hold true when one looks at the practice of policy-making in many federations. In some systems, like Germany, federalism is often blamed for complicating the enactment of major policy projects by producing either political deadlock or decisions that favour the lowest common denominator. In others, like Canada, federalism is criticized for encouraging unpredictable, unilateral policy changes that impede the development of consistent, country-wide approaches to policy challenges.

A resilient federation should avoid both of these pathologies of federal governance. Resilience is commonly understood as the capacity of an organization to evolve dynamically in the face of shocks and stresses as well as other subtler and more gradually emerging problems. This implies sustaining and balancing continuity while promoting adaptive change. There are two challenges to the advancement of transformative policies. The first is enacting a policy change that redirects an already established pathway (such as a fossil-fuel-based economy) onto a new policy trajectory (a low carbon economy). The second is consolidating initial policy changes in an evolutionary process that shields the new pathway from potential reversals. This challenge requires ongoing changes to public policies, and procedural reforms that adjust the overarching governance structure to make transformative change sustainable. A truly resilient federation is capable of coping with both challenges.

Although the architecture of Canadian federalism promotes policy innovation at both the federal and provincial levels, it is difficult to consolidate and sustain a new policy pathway over time. The main challenge for enhancing resilience in the Canadian federation, therefore, is to develop governance capacities that accompany, monitor and reinforce paradigmatic changes at the policy level.<sup>1</sup>

## CRITICAL JUNCTURES AND TRANSFORMATIVE CHANGE IN CANADA

Canada has witnessed the formation, consolidation and partial decay of three large-scale, paradigmatic policy regimes. The first was the National Policy, brought in after the 1878 election by the Liberal-Conservative coalition government led by Sir John A. Macdonald. Its core elements were a protective tariff, railway construction

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<sup>1</sup> By paradigmatic change, I mean a deep and encompassing shift in the way we conceive of and address major challenges across different policy sectors.

and immigration. The second regime followed the Great Depression and the Second World War and is sometimes called the Second National Policy. It entailed a commitment to advance international free trade and the construction of a Keynesian welfare state. The last major paradigmatic change took place in the early 1980s, when a more market-based regime resurfaced under the Progressive Conservative government led by Brian Mulroney. This regime was reinforced in the following decades at the provincial and federal levels.

The 1989 Canada-United States Free Trade Agreement and the 1994 North American Free Trade Agreement strengthened existing patterns of trade liberalization, albeit on a larger scale. In industrial, macroeconomic infrastructure and social policy, priorities shifted more radically toward fiscal restraint, deregulation and privatization. The Mulroney government dismantled or abolished major policy innovations introduced in the spirit of the interventionist, Keynesian, postwar order by the Liberal government led by Pierre Elliott Trudeau. The most notable changes Mulroney introduced were to the Foreign Investment Review Agency and the National Energy Program.

The financial crisis of 2007-08 did not result in paradigmatic policy changes, even though it revealed the vulnerability of the market-based regime.

The parameters of far-reaching change are different today because of the historically unprecedented drop in the price of oil; the escalating impacts of climate change, like wildfires and flooding; divestment activism; and more profitable returns from renewables. The order-shattering, global COVID-19 pandemic may become the catalyst for a new national policy.<sup>2</sup> But although critical junctures reduce the usual constraints on political action and could create a political dynamic conducive to far-reaching policy changes, they do not generate them on their own. To consolidate transformative policy in the long term and avoid abrupt reversals, three additional conditions are crucial in the context of Canadian federalism. They are reconstructive leadership, collaborative federalism and the development of a multipronged approach.

## RECONSTRUCTIVE LEADERSHIP

Stephen Skowronek, a political scientist at Yale University, identified reconstructive leadership as one of four types of recurring leadership patterns in US politics.<sup>3</sup> Each leadership pattern represents a typical reaction to the condition of the inherited policy regime. "Condition" means whether the regime is stable or vulnerable. "Reaction" refers to whether the president supports or repudiates it. Reconstructive presidents, like Franklin D. Roosevelt and Ronald Reagan, took office when the established political order was widely perceived to be in crisis and both were poised to entrench a new regime.

<sup>2</sup> I use the notion of a "national policy" in lieu of a better label, being fully aware that this notion is problematic in a multinational federation.

<sup>3</sup> The other types are "disjunctive," "articulative" and "preemptive." See S. Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Harvard University Press, 1997).

Skowronek's theory can be applied to the Canadian context, with some modifications,<sup>4</sup> to help us to understand potential future scenarios. There have been reconstructive leaders in Canada at both the provincial and federal levels. Tommy Douglas, former premier of Saskatchewan, and Jean Lesage, former premier of Quebec, enacted major policy and institutional reforms that transformed their provinces at a time when the established order was in decay. Mulroney represented the latest manifestation of reconstructive federal leadership. All his successors have worked within the confines of his historical legacy. Some leaders, like Stephen Harper, former Conservative prime minister, further entrenched the principles of the market-based regime. Others, like former Liberal prime ministers Jean Chrétien and Paul Martin, adjusted their programs to align them with a regime they had not previously championed. For example, the Third Way politics of Chrétien and Martin attempted to reconcile centre-left social policies with centre-right economic policies.

At the end of a regime cycle, when established policy goals and instruments are increasingly called into question as they no longer seem suitable to address major challenges, two leadership scenarios arise. Regime affiliates sometimes attempt to breathe new life into an old, perhaps even collapsing, order. This was exemplified by the presidency of Jimmy Carter. It can also describe Pierre Elliott Trudeau's final years in office. He sought to re-establish credibility for an order in decay through the reinvigoration of a highly interventionist federal government. Alternatively, political leaders can adopt a reconstructive leadership style by repudiating the old and entrenching a new policy regime.

It is far from clear that Justin Trudeau is committed to reconstructive leadership. A rhetoric of transformative change, such as he espoused in 2015, is not enough. Reconstructive leadership requires a fundamentally new way of conceiving of the state and society. This was the case with the arrival of Keynesian ideas in Canada in the 1930s and 1940s, and neoliberalism in the 1980s. The nationalization of the Trans Mountain Pipeline appears reminiscent of his father's efforts to rescue an old regime whose time had come to an end. Yet, other decisions by the current prime minister, like the Pan-Canadian Framework on Clean Growth and Climate Change, do indicate a potential for transformative change.

## COLLABORATIVE FEDERALISM

Federal unilateralism is not a viable pathway to consolidate transformative change. To make initial policy innovations sustainable, it is crucial to shield them from disruptive reversals by future governments at the national or subnational level.<sup>5</sup> It is therefore essential to create constituencies of supporters who will help sustain a new policy regime, and to change the cognitive mindset of key stakeholders and the public. Political scientists call this "positive policy feedback."

<sup>4</sup> J. Broschek, "The Politics Prime Ministers Make: Secular and Political Time in Canadian Context," *Canadian Political Science Review* 12, no. 1 (2018): 1-23.

<sup>5</sup> E. Patashnik, *Reforms at Risk: What Happens after Major Policy Changes Are Enacted* (Princeton: Princeton University Press, 2006).

Earlier episodes of transformative politics demonstrate that generating positive policy feedback in a diverse federation like Canada is difficult, but not impossible. Fostering such a dynamic depends on wise policy choices that facilitate a fair transition from one regime to another. It also depends on procedural requirements. A well-functioning system of intergovernmental relations, therefore, is a second precondition to facilitate transformative policy change.

Politically motivated federal-provincial battles over carbon pricing and pipelines hide the fact that Canada's system of intergovernmental relations has worked fairly well in recent years. As Robert Schertzer and Mireille Paquet<sup>6</sup> have shown, initial responses by the federal, provincial and territorial governments to complex intergovernmental problems, like housing, illegal border crossings and the COVID-19 pandemic, were surprisingly effective. This is remarkable, especially when compared with current crisis management in federations such as Germany and Switzerland, which are often praised for their strong, cooperative federalism. In Germany, conflict among Land governments, as well as between Länder and the federal government, surfaced soon after lockdown measures were enacted. It intensified in April and May 2020 over the timing and scope of reopening. This debate reached a new peak when the Land government of Thuringia announced in late May that it would unilaterally lift all restrictions. This was an almost unprecedented step in German intergovernmental relations.<sup>7</sup> In Switzerland, the cantons blamed the federal government for its ongoing, centralized "micromanagement" as the country slowly opened up in May.<sup>8</sup>

Research on Canadian intergovernmental relations indicates evidence of emerging "ties of trust"<sup>9</sup> and different forms of "reciprocity"<sup>10</sup> across policy sectors that can be further cultivated. Such norms are an important prerequisite for problem-solving rather than pure bargaining. Yet at least two major governmental stakeholders still have not been awarded an appropriate role in intergovernmental relations: Indigenous peoples and municipalities.

Since 2015, the federal government has recognized the importance of these stakeholders, and has initiated important changes. But there still exists a significant gap between its partnership rhetoric and the realities of an unchanged, top-down approach to governance. The resurgence of Indigenous protests in early 2020 revealed how far we still are from implementing a functioning, nation-to-nation approach in intergovernmental relations. In a similar vein, the Federation of Canadian Municipalities lacks a formalized role in intergovernmental relations that would allow cities to engage in policy-making, as do Australia and the European Union. As a consequence, new policy initiatives are not coherently integrated, and they are not driven by the specific needs of urban areas.<sup>11</sup>

<sup>6</sup> R. Schertzer and M. Paquet, "How Well Is Canada's Intergovernmental System Handling the Crisis?" *Policy Options*, April 8 (Montreal: Institute for Research on Public Policy, 2020).

<sup>7</sup> "Thuringia: Germany's Coronavirus Guinea Pigs?" *Deutsche Welle News*, May 25, 2020.

<sup>8</sup> "Der Kampf gegen das Virus geht in die nächste Phase - schlägt jetzt die Stunde der Kantone?" *Neue Züricher Zeitung*, May 14, 2020.

<sup>9</sup> C. J. Kukuca, *Provincial/Territorial Governments and the Negotiation of International Trade Agreements*. IRPP Insight 10 (Montreal: Institute for Research on Public Policy, 2016).

<sup>10</sup> R. Schertzer, A. McDougall, and G. Skogstad, *Collaboration and Unilateral Action: Recent Intergovernmental Relations in Canada*. IRPP Study 62 (Montreal: Institute for Research on Public Policy, 2016).

<sup>11</sup> N. Bradford, *A National Urban Policy for Canada? The Implicit Federal Agenda*. IRPP Insight 24 (Montreal: Institute for Research on Public Policy, 2018).

## A MULTIPRONGED APPROACH

Bob Rae, former Ontario premier, wrote recently that “the federal government established the Rowell-Sirois Commission many decades ago to deal with the impacts of the Great Depression. We can rest assured that something like it will be needed once again.”<sup>12</sup> Indeed, the 1938 National Employment Commission and the 1940 Rowell-Sirois Commission provided important expertise that facilitated the transition toward a Keynesian welfare state in Canada. Similarly, the 1984 Macdonald Commission paved the way for a market-based regime in the late 1980s and 1990s.

To be successful, transformative policy change requires the development of a multipronged approach that outlines policy goals and feasible instruments that mutually reinforce each other. This is a major challenge for politics and society, for political and practical reasons. Transformative policy change is inevitably conflict-laden and fraught with uncertainties. It redistributes power resources between persons and places and has uneven effects on the various economic sectors. Moreover, the weight of an increasingly differentiated, complex array of policy legacies is heavier today than during earlier episodes of transformative change.

A commission of inquiry, with a broad mandate, representing the diverse interests of Canadian society, could provide policy guidance, legitimacy and momentum. Research offers important advice for policy-makers and helps stimulate the broader public discourse. Importantly, such a commission could craft an integrated approach. As with past transitions, this would include policy innovations that build industry, infrastructure and society, and promote an effective and legitimate transition to a new policy regime.<sup>13</sup> Industry-building policies flow from reevaluating economic activities in terms of how they generate negative or positive effects on the environment and society. They should include viable ways in which the state can encourage economic behaviour that contributes to more sustainable and resilient communities across the country. Infrastructure-building policies complement this transition. They help promote change in areas like transportation, communication or banking, to develop the technical and financial foundations for organizing economic and social interactions in what will be the postpandemic new normal. Finally, society-building policies compensate for the redistributive consequences of transformative policy, facilitating a fair and inclusive transition toward a new policy regime.

## CONCLUSION

Canadian federalism concentrates power in the hand of provincial and federal executives, while institutional checks and balances are comparatively weak. This enables governments to introduce major policy change more easily than in most federations.

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<sup>12</sup> B. Rae, “Federalism and the COVID-19 Crisis: The View from Canada” (Ottawa: Forum of Federations, 2020), 2, [http://www.forumfed.org/wp-content/uploads/2020/04/Bob\\_RAE\\_CanadaCOVID.pdf](http://www.forumfed.org/wp-content/uploads/2020/04/Bob_RAE_CanadaCOVID.pdf)

<sup>13</sup> L. Eden and M. A. Molot, “Canada’s National Policies: Reflections on 125 Years,” *Canadian Public Policy* 19, no. 3 (1993): 232-51.

However, it can also become an obstacle for the formulation and implementation of broad, coherent programs over time. Canada has successfully addressed these challenges in the past, through a combination of reconstructive leadership, intergovernmental collaboration and a commission of inquiry with a broad mandate. This facilitated the transition to a new regime.

Sustaining a broad, new policy trajectory is, therefore, not impossible. At this critical juncture, with an increasingly vulnerable market-based regime still in place, centre-left politicians hold most of the cards. It is crucial, however, to anticipate potential setbacks and to mobilize the governance capacities required to navigate the complexities of reform in the long term. By definition, critical junctures are relatively short periods in time, but the window opened by the COVID-19 pandemic will not close within weeks or even months. Nevertheless, decision-makers need to act quickly as they refocus their activities from emergency management to planning long-term recovery. It will be important to launch this process well before the window closes.





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# Recognition and New Arrangements: The Challenges of a Multinational Federation

Alain Noël

## INTRODUCTION

Canada is a multinational federation made up of more than one nation, but it does not recognize itself as such. Quebec, the only French-speaking state in North America, has not signed the *Constitution Act, 1982*, and the process of reconciliation with Indigenous peoples has resulted in not much more than apologies and symbolic gestures.<sup>1</sup> As the majority of Canadians appears to be satisfied with this state of affairs, and political avenues toward change remain blocked, we may need to resign ourselves to this situation, even though it breeds distrust and makes all institutional reform difficult. Eventually, national minorities might also come to accept the status quo. But this logjam is not healthy. As the German sociologist Wolfgang Streeck observed, just because there is no solution in sight doesn't mean we should not take the measure of the problem.<sup>2</sup> If we want to conceive of Canada as a resilient federation, we must acknowledge its failings and begin to contemplate possible solutions. There are many possible routes, but it is imperative that we start by recognizing the reality of internal nations, and then come to new arrangements with them. "Arrangement" is an apt word here, for it refers at once to an agreement with the other reached through concessions, and to a whole made up of many parts, such as a floral arrangement. Crafting a rich arrangement out of our differences is the existential challenge facing Canada.

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<sup>1</sup> P.H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).

<sup>2</sup> W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London: Verso, 2014), viii.

## A MULTINATIONAL FEDERATION THAT DOES NOT SPEAK ITS NAME

Canada has never recognized itself as a multinational federation. Constitutionally, even democracy was not strongly entrenched; the main constitutive texts were largely silent on responsible government and parliamentary democracy, focusing instead on the prerogatives of the Crown.<sup>3</sup> In the *Reference Re Secession of Quebec* (1998), in which the Supreme Court explicitly introduces the democratic principle as a pillar of Canada's constitutional order, legitimacy rests less on the will of the people than on respect for the Constitution.<sup>4</sup> The same applies to the peoples who made up the Canada of 1867. The Supreme Court refers to "different peoples" but does not name them, and hastens to add that, by forming a federation, those peoples agreed to merge into one nation.<sup>5</sup>

Beyond the constitutional texts, however, political factors have prevailed. As Université Laval law professor Patrick Taillon observes, "the silence of Canada's constitutional texts has not prevented the development of effective democratic practices,"<sup>6</sup> through the gradual transformation of practices and customs into conventions. The same holds true, to some extent, for multinational federalism. While Indigenous peoples were excluded from the negotiations that led to the creation of the federation in 1867, and were reduced to "cultural minorities" in the 1998 Reference, their place in Canada's constitutional order was already enshrined in various treaties recognizing their sovereignty. These treaties continued to develop and evolve under the new federation.<sup>7</sup> Similarly, the idea of a pact between two founding peoples was rejected from the outset in English Canada,<sup>8</sup> but the de facto balance of power between the two peoples had a lasting and tangible impact on the federation's development. Without this balance of power, the convention of a constitutional veto for Quebec – which was observed until 1981 – would not have any rationale; official bilingualism would not have been adopted; and equalization payments might not exist.<sup>9</sup>

Canada, however, has failed to enshrine these relationships in law. With no formal recognition of its multinational character, the Canadian federation has had difficulty in finding arrangements that reflect its deep diversity.<sup>10</sup> Despite the talk about reconciliation with Indigenous peoples and land acknowledgements before public events, the negotiations on self-government, the provision of services and management of

<sup>3</sup> P. Taillon, "Une démocratie sans peuple, sans majorité et sans histoire: de la démocratie par le peuple à la démocratie par la Constitution," in *Ré-imaginer le Canada : vers un État multinational?*, ed. F. Mathieu and D. Guénette (Quebec City: Presses de l'Université Laval, 2019), 145-146.

<sup>4</sup> Taillon, "Une démocratie sans peuple, sans majorité et sans histoire," 153.

<sup>5</sup> Taillon, "Une démocratie sans peuple, sans majorité et sans histoire," 163.

<sup>6</sup> Taillon, "Une démocratie sans peuple, sans majorité et sans histoire," 148-149.

<sup>7</sup> M. Papillon, "Les traités avec les peuples autochtones : un 5<sup>e</sup> pilier de l'ordre constitutionnel canadien ?" in *Ré-imaginer le Canada : vers un État multinational?*, ed. F. Mathieu and D. Guénette (Quebec City: Presses de l'Université Laval, 2019).

<sup>8</sup> A.I. Silver, *The French-Canadian Idea of Federation*, second edition (Toronto: University of Toronto Press, 1997).

<sup>9</sup> H. Rioux Quimet, "Quebec and Canadian Fiscal Federalism: From Tremblay to Séguin and Beyond," *Canadian Journal of Political Science* 47, no. 1 (2014): 57-58; D. Béland, A. Lecours, G.P. Marchildon, H. Mou and M.R. Olfert, *Fiscal Federalism and Equalization Policy in Canada* (Toronto: University of Toronto Press, 2017), 18.

<sup>10</sup> A.-G. Gagnon, "La valeur de la diversité au sein des démocraties libérales avancées : un monde qui nécessite des repères renouvelés," in *Ré-imaginer le Canada : vers un État multinational?*, ed. F. Mathieu and D. Guénette (Quebec City: Presses de l'Université Laval, 2019).

resources have not progressed much. To go further on these negotiations, hard issues about power, financial resources and natural resource development will have to be addressed.<sup>11</sup> In the case of Quebec, the *Constitution Act, 1982* remains a significant obstacle to the very idea of recognizing the country's deep-rooted diversity.

## MULTIPLE DEADBOLTS

Political actors, scholars and observers agree that a constitutional reform of any significance is highly unlikely to occur. To begin with, the rules of the game are very exacting. If the governments had followed the rules they were preparing to entrench in law, the Constitution would not have been adopted.<sup>12</sup> To change the amending formula now, the provinces and the federal government must agree to it unanimously. After having substantially modified the constitutional order, the governments ensured its permanence by making the negotiations they had just conducted virtually impossible to replicate.

Politically, any attempt at constitutional reform is likely to launch wide-ranging negotiations involving a host of issues and a large number of actors, including Indigenous peoples. The bar for legitimacy would be high, as some provinces now require that any constitutional reform be put to a referendum.

It is therefore impossible to go back to the conditions that existed at the time of the Meech Lake Accord, when the intention was to agree on a limited number of concessions that would encourage the Quebec government to sign the Constitution. In fact, according to all experts, the Constitution can no longer be modified. It is, in the words of political scientist Kenneth McRoberts, "beyond repair."<sup>13</sup>

It must be said that, with the exception of McRoberts and a few others, few people in English Canada are troubled by this. The *Constitution Act, 1982* reflects the nationalism of the majority. Most Canadians can live with it, and they don't see the need to recognize and accommodate the expectations of the country's internal minority nations; that is, Quebec and Indigenous peoples.

Even with the rigidity it imposes, a constitution that cannot be amended appears to be a worthy trade-off. In the eyes of the majority, for example, if the Senate cannot be reformed, then this is the price to pay to maintain the status quo and the balance of power this unelected, ineffective second chamber embodies.<sup>14</sup>

<sup>11</sup> Russell, *Canada's Odyssey*, 438-439.

<sup>12</sup> P. Taillon, "Les obstacles juridiques à une réforme du fédéralisme," *Cahier de recherche*, Institut de recherche sur le Québec (2007), 9.

<sup>13</sup> K. McRoberts, *Misconceiving Canada: The Struggle for National Unity*, second edition (Don Mills: Oxford University Press, 2019), 358.

<sup>14</sup> McRoberts, *Misconceiving Canada*, 359; A. Noël, *Utopies provisoires : essais de politique sociale* (Montreal: Québec Amérique, 2019), 205.

## RECOGNITION AND NEW ARRANGEMENTS

Twenty-five years after the 1995 referendum on sovereignty, which was supposed to break the deadlock, the government of Quebec has yet to find a formula that would enable it to move forward in a satisfying way. In 2001, Liberal MNA Benoît Pelletier, who became Quebec's minister of Canadian intergovernmental affairs, published a report that provided Jean Charest's government with a course of action. In 2017, the government of Philippe Couillard produced its own Quebec affirmation policy, entitled *Quebecers - Our Way of Being Canadian*.<sup>15</sup> These two documents broadly restated and updated the demands made in the negotiations on the Meech Lake Accord. But they did not have much to propose as solutions that would remove the formidable political and institutional barriers preventing constitutional reform. The Charest government awkwardly conveyed the need to wait until the time was ripe for change; Couillard's government cautiously confined itself to expressing a preference for an open conversation among Canadians.

In fact, the conversation never started. Prime Minister Justin Trudeau dismissed the idea of discussing the Quebec affirmation policy even before he had seen it. Seven of the thirteen provincial and territorial premiers did not even bother to react to the policy, which was discussed mostly in the Quebec media.<sup>16</sup> Social scientists and legal scholars do not necessarily have more answers to confront this political impasse. In Quebec there is a rich school of thought on diversity that is grappling with the challenge of imagining a multinational federalism that could come to arrangements with its internal nations.<sup>17</sup> This school has made a significant contribution to the analysis of the normative and comparative foundations of multinational federalism, and it clearly informs Quebec's affirmation policy. But at the end of the day, it has little to say about how to confront what Université du Québec à Montréal political science professor Alain-G. Gagnon calls "the might makes right principle."<sup>18</sup> In Canada – as in Spain – it is precisely the force of might that stands in the way of multinational federalism.

In a rare essay on the subject, legal scholar Dave Guénette explores the few paths that are still open "to steer Canada toward a structure that is more consistent with its multinational character."<sup>19</sup> He identifies two possibilities, the unilateral and the bilateral approaches, thus avoiding the multilateral process, which Peter Russell describes as "virtually unusable."<sup>20</sup>

The unilateral approach would compel consideration of an issue by holding a referendum on a constitutional question, citing the obligation to negotiate recognized by the Supreme Court in the *Reference Re Secession of Quebec*. Another option here, which

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<sup>15</sup> Gouvernement du Québec, *Quebecers - Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations* (Quebec City: Secrétariat aux affaires intergouvernementales canadiennes, 2017).

<sup>16</sup> McRoberts, *Misconceiving Canada*, 364.

<sup>17</sup> Gagnon, "La valeur de la diversité au sein des démocraties libérales avancées," 30.

<sup>18</sup> A.-G. Gagnon, *La raison du plus fort: plaidoyer pour le fédéralisme multinational* (Montreal: Québec Amérique, 2008).

<sup>19</sup> D. Guénette, "D'ambiguïté et d'opportunités : le constitutionnalisme et les tensions nationales au Canada," in *Ré-imaginer le Canada : vers un État multinational ?*, ed. F. Mathieu and D. Guénette (Quebec City: Presses de l'Université Laval, 2019), 304.

<sup>20</sup> Russell, *Canada's Odyssey*, 425.

is in fact the only option for Indigenous peoples, would be to resort to the courts.<sup>21</sup> Both of these unilateral options have obvious limitations. The obligation to negotiate leads directly to the multilateral track. Going to the courts could result in an expansion of rights, but it also entails the risk of strengthening a status quo that is unfavourable to the true recognition of internal nations.

The bilateral approach would take advantage of the possibility recognized in section 43 of the *Constitution Act, 1982*, of amending, by agreement between the federal government and a province, a constitutional provision that concerns that province. By using this process regularly, a province could increase the asymmetry in the federation. Bilateral intergovernmental agreements could also serve this purpose, although their legal status is more precarious.<sup>22</sup> Similarly, Indigenous peoples could attempt to win recognition of their claims by negotiating new treaties.

Because it does not necessarily lead back to a multilateral process, the bilateral approach appears more promising. The possibility of intergovernmental or treaty agreements, in particular, holds greater hope for circumventing the rigidity of the constitutional framework. Guénette is concerned that such agreements, which can always be rescinded, are more fragile. This is a legitimate concern, but it should not be overstated. The final Canada-Quebec agreement on the Quebec Parental Insurance Plan, signed in February 2005, is an example. After lengthy negotiations, this bilateral agreement introduced substantial asymmetry into social policy by allowing Quebec to keep Employment Insurance funds for parental leave and use them to create its own parental leave plan, which is more generous and better meets the expectations of civil society and parents.<sup>23</sup> Legally, nothing prevents a return to the status quo ante in the event of a disagreement. Institutional logic, however, makes such backtracking highly unlikely. Once established, new social programs might change around the edges, but they are rarely dismantled.

Another option, which Guénette does not consider, is to take the unilateral route without any constitutional expectations. Somewhat like the bilateral approach, this approach seeks to move forward without waiting to affirm the prerogatives and distinct character of an internal nation. If, for example, Quebec opted for proportional representation, and thus a new system of government, this would represent a strong assertion of its national character. In a country that is allergic to major political reforms, Quebec would be charting its own long-term course, without resorting to negotiations and constitutional amendments. By following its own path, Quebec would force its partners in the Canadian federation to recognize and come to terms with its distinct character.

<sup>21</sup> Guénette, "D'ambiguïté et d'opportunités," 304-305.

<sup>22</sup> Guénette, "D'ambiguïté et d'opportunités," 308-309.

<sup>23</sup> A. Noël, "Asymmetry at Work: Quebec's Distinct Implementation of Programs for the Unemployed," in *Making It Work*, ed. K. Banting and J. Medow (Montreal and Kingston: McGill-Queen's University Press, 2012).

## CONCLUSION

Canada is undeniably a multinational federation. Its history only makes sense when it is read in light of the recurring need to come to arrangements that satisfy its constituent nations.<sup>24</sup> But this fact is not recognized, either constitutionally or politically. Canada still thinks of itself as a one-nation state and, leaving nothing to chance, it has installed a multitude of barriers to prevent any challenge to the constitutional status quo. This policy of denial breeds distrust and prevents constitutional modifications of any significance. There seem to be few ways out, as the Quebec government, Indigenous communities and scholars have shown as they search for a solution. Under the circumstances, it will be up to the minority nations to take the lead and affirm their visions and prerogatives, in order to force the majority to recognize them and address their expectations. The results would probably be modest and fall short of what is required, but there is no other way. As I stressed in the introduction, the fact that a satisfactory solution appears improbable should not prevent us from recognizing and addressing the problem.

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<sup>24</sup> Russell, *Canada's Odyssey*, 16; McRoberts, *Misconceiving Canada*, 360.

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# Unfinished Business: Implementation of the UN Declaration on the Rights of Indigenous Peoples in Canada

Sheryl Lightfoot

## INTRODUCTION

The nation-state that we call Canada was founded on the unilateral and arbitrary denial of the right of First Nations, Inuit and Métis peoples to self-government. The nineteenth-century, colonial presumption was that Indigenous peoples would either disappear or be assimilated into the larger society. That has not happened. Indigenous peoples largely remain, in the twenty-first century, trapped within this archaic framework. Any positive future for the federation requires that Canada as a state, and all Canadians as individuals, resolve this injustice. That means coming to terms with the inherent rights of Indigenous peoples in a much more meaningful and transformative way than has taken place to date.

There has been progress in some areas of self-government. Yet in most areas of our lives, Indigenous peoples in Canada remain at the mercy of decisions taken by politicians, bureaucrats and judges with little knowledge or appreciation of our laws, protocols, traditions, values and needs.<sup>1</sup> This inflicts a high price on our communities. It is particularly high for the growing population of Indigenous youth, who continue to be denied the opportunities and quality of life afforded to other young people in Canada.

We have seen repeatedly how the status quo leads to turmoil and conflict, as Indigenous peoples are forced to use blockades and other tools of economic disruption to defend their rights. Canada as a state can have little claim to legitimacy if it does not

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<sup>1</sup> The author speaks in the first person about Indigenous peoples because she is Anishinaabe from the Lake Superior Band of Ojibwe.

honour what the Supreme Court of Canada has referred to as the “pre-existing sovereignty” of First Nations, Inuit and Métis peoples.<sup>2</sup>

Polls suggest the overwhelming majority of Canadians want a future that includes genuine reconciliation with Indigenous peoples.<sup>3</sup> But what does reconciliation mean?

## THE FRAMEWORK FOR RECONCILIATION

The Truth and Reconciliation Commission of Canada took a long, hard look at some of the most horrific crimes committed under Canada’s colonial laws and policies. It concluded in its 2015 report that reconciliation is possible, provided Canada is prepared to transform its political, economic and legal relationship with Indigenous peoples.<sup>4</sup> The commissioners pointed out there is already a framework at hand for this “work of generations.”

In its first principle of reconciliation, the commission stated that “the framework for reconciliation at all levels and across all sectors of society” is the United Nations Declaration on the Rights of Indigenous Peoples. The declaration is a global human rights standard adopted by the UN General Assembly in September 2007, after more than 20 years of intensive deliberations between states and Indigenous peoples. It affirms that Indigenous peoples, like all nations, have the inherent right of self-determination. It also explicitly repudiates the doctrines of racial superiority used to justify and give cover to the denial of this right.

The declaration calls on states to work collaboratively with Indigenous peoples to undo the profound harm caused by generations of forcibly imposed policies, like residential schools, and prevent such harms being inflicted again. To this end, it sets out a wide range of necessary rights protections and obligations in areas such as education, land management, social services and economic development. Taken together, these protections and obligations constitute a program of action for Indigenous peoples to reassume control over our lives and futures.

Indigenous advocates around the world dedicated decades of hard work to advance this international human rights instrument.<sup>5</sup> They sacrificed time with their families and communities to press for their rights in the halls of the United Nations. They did so because the standards set out in the declaration’s lengthy preamble and 46 articles are what we need to rebuild our communities and ensure that future generations can grow up secure and prosperous in their own cultures and identities.

<sup>2</sup> See, for example, *Delgamuukw v. British Columbia*, [1997] 3 SCR No. 1010, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

<sup>3</sup> Reconciliation Canada, *The Canadian Reconciliation Landscape: Current Perspectives of Indigenous Peoples and Non-Indigenous Canadians* (North Vancouver: Reconciliation Canada, 2017), [https://reconciliationcanada.ca/staging/wp-content/uploads/2017/05/NationalNarrativeReport-ReconciliationCanada-ReleasedMay2017\\_3.pdf](https://reconciliationcanada.ca/staging/wp-content/uploads/2017/05/NationalNarrativeReport-ReconciliationCanada-ReleasedMay2017_3.pdf).

<sup>4</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: National Centre for Truth and Reconciliation, University of Manitoba, 2015), [http://nctr.ca/assets/reports/Final%20Reports/Executive\\_Summary\\_English\\_Web.pdf](http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf).

<sup>5</sup> S. Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Abingdon, UK: Routledge 2016).



Our elders and other leaders recognized that it was crucial to have these standards affirmed as international human rights. This would create pressure on states like Canada to finally engage with Indigenous peoples on the kind of fundamental change that is so urgently needed.

The process of negotiation and adoption of the declaration was a rocky one. Canada played a critical role in building state support for it and then voted against its adoption. In 2010, the Conservative government led by Stephen Harper endorsed the declaration it had previously denounced, expressing confidence “that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”<sup>6</sup> In 2016, Justin Trudeau’s Liberal government went a step further, announcing that it was a “full supporter of the UN Declaration, without qualification.”<sup>7</sup> In the December 2019 Speech from the Throne, the government promised to “co-develop and introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples in the first year of the new mandate.”<sup>8</sup>

Canada is now part of a global consensus, demonstrated in unanimous resolutions of the UN General Assembly, that the declaration must be upheld not only in principle but in practice. Implementation, however, remains a challenge. The Truth and Reconciliation Commission called the declaration the framework for reconciliation. Measures to implement it are a litmus test of whether talk about reconciliation is meaningful or empty virtue-signalling.

In late 2019, I had the privilege of being in the British Columbia legislature when the province introduced a law to implement the declaration. The legislation is modest in scope. It does not make sweeping changes to provincial law and policy. It simply requires the province to start working with Indigenous peoples to create a shared implementation plan, including new laws and reforms to existing laws. These will be brought back to the legislature at a future date. This process began in early 2020, but details of the review and action plan are unclear.<sup>9</sup>

Although the BC legislation was a small step, it nonetheless felt like a rare and genuine moment of reconciliation in action. This was underlined by the fact that the act was passed with the support of all the parties in the provincial legislature, and it met with a chorus of support that included not only Indigenous peoples but also industry leaders.<sup>10</sup>

<sup>6</sup> Canada, Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (Ottawa: Indigenous and Northern Affairs Canada, 2010), <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

<sup>7</sup> Canada, Indigenous and Northern Affairs Canada, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (Ottawa: Indigenous and Northern Affairs Canada, 2016), <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>8</sup> Canada, Privy Council Office, “Speech from the Throne” (Ottawa: Privy Council Office, 2019), <https://www.canada.ca/en/privy-council/campaigns/speech-throne/speech-from-the-throne.html>.

<sup>9</sup> M. Hudson, *New Tools for Reconciliation: Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples* (Montreal: Institute for Research on Public Policy, 2020), <https://irpp.org/research-studies/new-tools-for-reconciliation-legislation-to-implement-the-un-declaration-on-the-rights-of-indigenous-peoples/>.

<sup>10</sup> Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th session, 41st parliament, 2019, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>.

Unfortunately, it is not hard to find less optimistic examples.

The BC implementation act was modelled on Bill C-262, a private member's Bill brought forward by Romeo Saganash, an MP for the New Democratic Party. It was passed in the House of Commons in 2018, and one might reasonably expect it would now be part of Canadian law.<sup>11</sup>

Like the BC legislation that it inspired, the federal legislation was modest in scope. All it required was that the government begin the process of working with Indigenous peoples to identify laws and policies that should be changed and implementation measures that should be prioritized. The Bill might have been called "The Least We Can Do and Still Claim to Support the UN Declaration." Even that was demonstrably too much for some. When the Bill was passed, Conservative MPs in the House of Commons were caught on camera high-fiving each other after voting against it. The Bill died in June 2019 after Conservatives in the Senate used stalling tactics to successfully prevent the final vote needed to bring it into law.

## DEFENDING THE STATUS QUO

Self-determination, the equality of all individuals and peoples, the right to learn and express one's own culture and traditions, the right to be free from discrimination and forced assimilation: these are universal human rights that the global community has committed to uphold. The Indigenous rights movement has engaged at the cutting edge of some of the most critical issues facing liberal democracies. They include how to interpret and apply universal human rights standards to meet the needs, often collective, of those who have been excluded, and heal the profound harms that have resulted.

The Indigenous rights agenda is both conservative and radical. It is conservative because its core demand is for the recognition of rights recognized, at least in name, by nearly all countries in the world. It is radical because recognizing that these rights have been denied, and that a debt of remedy is owed, challenges the legitimacy of liberal democracies like Canada that are otherwise known for abiding by global human rights and the rule of law.

Efforts to advance the UN declaration inevitably confront the same systemic racism that has maintained Canada's power over Indigenous peoples all along. Those who enjoy the privileges of colonial society dominate public discourse. They can define, according to their own values, the urgency of the problems and the acceptability of solutions. While denying the urgency of confronting systemic racism and discrimination, politicians and pundits have often proven adept at weaponizing racism to obstruct the efforts of Indigenous peoples to achieve transformative change. Examples abound, including fearmongering with claims that Indigenous peoples are seeking "special rights and privileges," or that Indigenous peoples "are asking for too much,

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<sup>11</sup> Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st session, 42nd Parliament, 2018, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

which will bankrupt the country,” when in fact Indigenous peoples are merely seeking an end to discriminatory policies and equal rights to other peoples in Canada.

Some politicians, notably those in BC, and academics take a positive stance on implementation of the declaration.<sup>12</sup> Opponents, whether politicians or commentators, tend to follow the same script. They acknowledge that Indigenous peoples have been treated unjustly. They may express support for the declaration’s principles, but some claim that Canada does not need to implement it. After all, they say, Indigenous rights are already recognized in the Constitution, and Canada is on the right track to implementing those rights through government policy and court jurisprudence. Some go on to claim that implementation of the declaration would be harmful, because it would violate the appropriate balance of rights already established in Canadian legal tradition.

Despite the apparently progressive tone set by acknowledging injustices against Indigenous peoples and the need for reconciliation, these arguments are revealed as defenses of the status quo in three ways. First, there is the condescending claim to know better than Indigenous peoples what they really need. Second, there is the undeniable complacency in the face of the gravity of harms still being experienced by Indigenous peoples. Third, there is the implicit suggestion that Indigenous peoples are asking for too much. There is a reliance on racist tropes in such arguments, although the opponents may not always be aware of it.

Take as one example an opinion piece published in the *Financial Post* while the federal implementation Bill was before the House of Commons.<sup>13</sup> The authors, a prominent corporate lawyer and a former deputy minister of the Department of Indian Affairs and Northern Development, note that Indigenous peoples have suffered “historic wrongs.” They then claim that the evolution of Canadian jurisprudence and government policy “has already gone a long way” toward redress. While the UN declaration is “full of statements of hope and aspiration,” they write, its implementation “would dismantle our courts’ carefully constructed approach to reconciliation” and make the balancing of rights “impossible.” To support this extraordinary assertion, the authors rely on the claim that the UN declaration would “give Aboriginal Canadians rights not enjoyed by other Canadians.” The examples they provide are the provisions requiring the consent of Indigenous peoples for decisions impacting their lands.

“Consent” is worth unpacking. Canadians are not unfamiliar with it. Most adults have at one time or another signed a consent document. This is widely established as a right enjoyed by all Canadians. However, when the UN declaration deals with land rights, it is not talking about individual rights. It is explicitly talking about collective rights. These are rights of Indigenous nations that are exercised through our Indigenous governments and decision-making traditions in the same way that all governments make

<sup>12</sup> See, for example, M. Papillon and T. Rodon, *Indigenous Consent and Natural Resource Extraction* (Montreal: Institute for Research on Public Policy, 2017), <https://irpp.org/research-studies/insight-no16/>.

<sup>13</sup> H. Swain and J. Baillie, “The Trudeau Government Signs On to Give Aboriginals Veto rights Nobody Else Has,” *Financial Post*, January 26, 2018, <https://financialpost.com/opinion/the-trudeau-government-signs-on-to-give-aboriginals-veto-rights-nobody-else-has>.

collective decisions on behalf of their citizens. All Canadians already enjoy these same rights through the federal, provincial and territorial governments, and governments are required by the Constitution and the common law to respect other governments' jurisdictions.

However, even if the rights elaborated in the declaration are fundamentally different from the rights of all Canadians, is this an inherently bad thing? The Canadian constitutional tradition lauded in the *Financial Times* piece already recognizes the distinct rights of Indigenous peoples. The treaty rights that are entrenched in the Constitution are not the same for Indigenous and non-Indigenous treaty partners. The Supreme Court has said that the title rights of Indigenous peoples are *sui generis*, in a class by themselves: they are collective, intergenerational, and include defined jurisdictional powers that are distinct from the property rights of all Canadians.<sup>14</sup>

Such differences are part of how one builds a federation among distinct peoples. Canadian legal tradition also clearly recognizes that differences in the application of rights are essential for achieving substantive equality in a context of entrenched and systemic discrimination.

## THE LITMUS TEST OF IMPLEMENTATION

The Supreme Court has said that there is a constitutional imperative to reconcile the gulf between what it characterized as the "pre-existing sovereignty" of First Nations, Inuit and Métis peoples, and the merely "assumed" sovereignty of the Canadian state. The federation's response to this imperative has been piecemeal and lacklustre, at best. While some Indigenous peoples have achieved significant recognition of their rights through court decisions or agreements, many still have no formal recognition of their rights over lands that were used and controlled by their ancestors long before the creation of Canada.

The UN declaration is remedial, in that it sets out measures that must be taken to rectify centuries of routine and systematic denial and violation of Indigenous peoples' basic human rights. It is also forward thinking, in that it calls for partnership and collaboration to build harmonious and just relationships.

It can be argued that the various provisions set out in the declaration already have legal effect in Canada. Canada has a well-established legal tradition of turning to international human rights standards to interpret domestic legal obligations. The declaration is already being used in this way. It has been cited in the decisions of lower courts, tribunals and other bodies, and this process will only continue. The federal government has invited such use of the declaration in the new *Impact Assessment Act*, which explicitly refers to the government's commitment to uphold the UN declaration.<sup>15</sup>

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<sup>14</sup> First established in *Guerin v. The Queen*, [1984] 2 SCR 335, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do>.

<sup>15</sup> M. Hudson, *New Tools*.

This means that some forms of implementation are already under way, and they will inevitably have an impact on the legal framework of Canadian federation. There are, however, numerous problems in leaving interpretation and application of Indigenous rights wholly in the hands of the courts. Engaging in long and costly litigation imposes a heavy burden on Indigenous peoples and on Canada as a whole. The courts have clearly stated that adversarial litigation is not the way to achieve reconciliation.

One of the advantages of implementation legislation like that adopted in BC is that it provides an opportunity to approach implementation in a much more coherent way than case-by-case litigation. I remain hopeful such legislation will be adopted federally. Implementation legislation is an opportunity to embody the model of cooperation and partnership called for in the UN declaration by establishing processes where the federal, provincial and territorial governments can work collaboratively with Indigenous peoples.

Legislation is far from the entire solution to reconciliation, it is a preliminary step toward implementation of Canada's obligations under the UN declaration. It is, however, a necessary step, and it is long overdue.



# Strengthening Canada's Fiscal Resilience

Kyle Hanniman

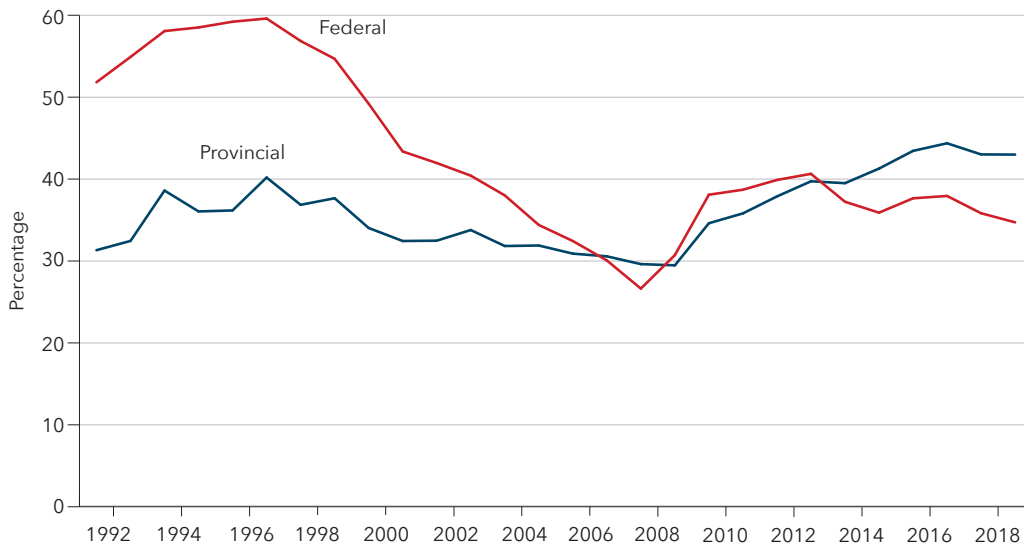
## INTRODUCTION

One of the greatest sources of Canada's resiliency in recent years has been the public sector's ability to borrow. It allowed us to run countercyclical deficits during the global financial crisis and to build bridges for struggling businesses and households during the current pandemic. But this capacity varies considerably across orders of government. The federal government is in a far better position than the provinces to stabilize its debt-to-GDP ratio. It is also less vulnerable to credit shocks. This asymmetry is not unique to Canada. Still, it poses special risks for us because of our unparalleled stock of subnational debt.

Canada needs to gradually stabilize provincial borrowing, while ensuring other policy goals, including the provision of adequate services, investment and fiscal stabilization, are met. Unlike the 1990s, low interest rates will help policy-makers reconcile these objectives. But low interest rates will not be enough. We also need to find ways to bolster provincial fiscal capacity while strengthening incentives for fiscal discipline. That was true before the pandemic sent deficits soaring. It will be even truer as the economy recovers.

I propose a two-pronged approach: a significant increase in federal transfers and the establishment of a conditional bailout facility to finance provincial deficits at federal interest rates. The additional transfers would boost provincial fiscal capacity. The bailout facility would require applicants to agree to a fiscal consolidation plan. The first piece would signal Ottawa's willingness to support provincial revenues. The second would define the limits of that support and the conditions for seeking more.

**Figure 1. Gross debt to GDP**



Source: IMF.

## THE SIZE AND SOURCES OF PROVINCIAL DEBT

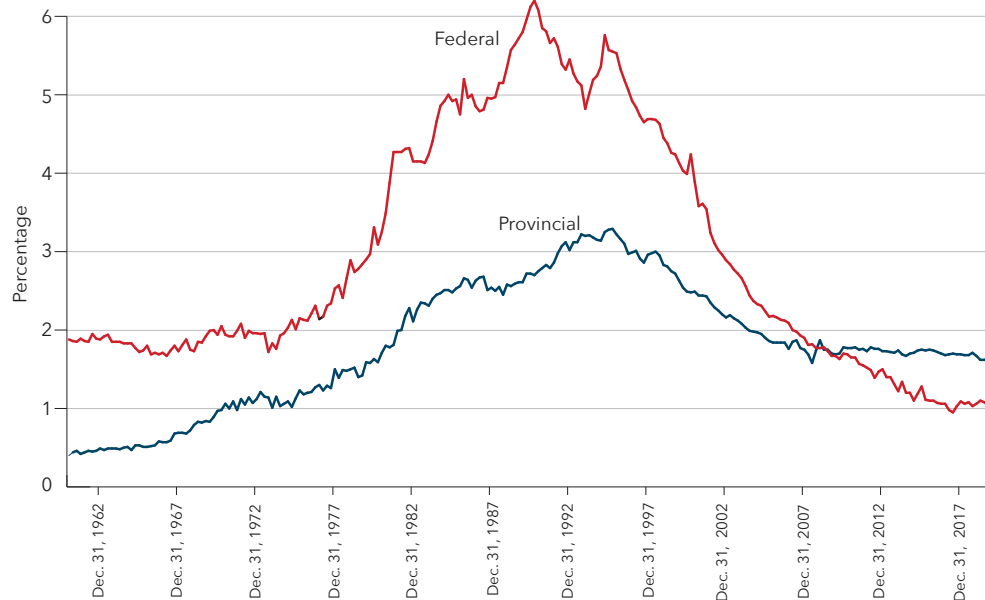
The provinces entered the crisis with the world’s highest gross subnational debt as a percentage of GDP. Even more worrying than the level was the trend. The provinces had yet to recover from the global financial crisis when COVID-19 struck. Their debt ratio in 2018 was 43 percent of GDP, nearly 50 percent higher than the ratio prior to the global financial crisis. Now provinces are forecasting a collective deficit of over 4 percent of GDP. This is significantly higher than anything we saw after 2008.

Why are provincial debts so high? The sources are numerous, but three stand out: (1) rigid and open-ended expenditures, especially on health care; (2) cyclical revenue streams, including income tax, sales tax and resource royalties; and (3) their ability to borrow at low interest rates and without federal restriction. The first source puts steady upward pressure on spending. Sources 2 and 3 make provincial budget balances vulnerable to shocks. Source 3 allows provinces to finance structural and cyclical shortfalls with debt.

But how, if provincial debts are so high, do provinces manage to borrow so cheaply? One reason is the secular plunge in global interest rates. Another is the assumption, widely held among investors, that Ottawa is unlikely to let a province default. A provincial default could have severe consequences for Canada’s economy, given the massive presence of the provinces in capital markets. It would also undermine Ottawa’s capacity to realize its social welfare commitments given the integration of federal and provincial welfare states. Many provincial bondholders are betting,



Figure 2. Interest payments to GDP



Source: Statistics Canada and author's calculations.

therefore, that if provinces do not keep them whole, Ottawa will.<sup>1</sup> This does not elevate provinces to the status of federal borrower, but it does increase their borrowing capacity significantly.

## SHOULD WE BE WORRIED?

Provincial debts now exceed their previous 1996 peak, a scary thought for academics and policy-makers who cut their teeth in the early 1990s. Deficits were soaring, provincial credit ratings were plummeting, and Saskatchewan and Newfoundland were struggling to roll over their debt. But interest rates are much lower today, so much so that provincial interest payments to GDP have been relatively flat since the shock of 2008. Clearly, the provinces *can* shoulder higher debts than ever before.

But *should* they? This is a harder question. On the one hand, there is no question that governments should borrow more and for longer, and not just because they are in the midst of a pandemic. Many believe COVID-19 has merely accelerated the long-term trend of advanced economies toward a state of "secular stagnation".<sup>2</sup> Business investment has been languishing for years. The recent shock will only depress it further. The lockdowns may also lead to a structural decline in household

<sup>1</sup> Hanniman, K. 2018. "Is Canadian Federalism Market-Preserving? The View from Credit Markets." In *Federalism and the Welfare State in a Multicultural World*, edited by E. Goodyear-Grant, R. Johnston, W. Kymlicka and J. Myles. (Montreal and Kingston: McGill-Queen's University Press).

<sup>2</sup> Summers, L. 2014. "Reflections on the 'New Secular Stagnation Hypothesis.'" In *Secular stagnation: Facts, causes and cures*, edited by C. Teulings and R. Baldwin. Ebook. (London: CEPR Press) 27-38. <https://voxeu.org/content/secular-stagnation-facts-causes-and-cures>.

spending, as demand for precautionary savings grows. The consequence is a low-growth, low-inflation, and low-interest rates environment likely to extend well beyond official lockdowns or the discovery of a vaccine. Central banks cannot fix the problem. Their principal stimulant, the interest rate, is already at zero. Only fiscal authorities can provide stimulus and they are under growing pressure to increase public investment as well. Borrowing is not without risk in this environment. Interest rates and inflation may rise. But the balance of risks clearly recommends larger deficits and longer paths to fiscal balance.

On the other hand, it is not clear how provincial borrowers should conduct themselves. The textbook rules for subnational borrowing (limiting borrowing to investment and a modest degree of tax smoothing) have never applied to provinces. They are too powerful and too consequential to the macro economy for that. But they are not central government borrowers either. Their bonds are less liquid or easy to trade on secondary markets. They are also less creditworthy. That is partly because provinces rely on a narrower and more volatile set of tax bases. More importantly, it is because they do not run their own central bank. The provinces cannot rely on the electronic printing press in the event of a liquidity crisis. They have to generate cash through taxes and other less certain means. Bailout expectations compensate for that asymmetry to some extent, but there is always some possibility that Ottawa or the Bank of Canada will fail to pull a teetering province from the brink. Their borrowing conditions reflect that fact.

Three implications follow. First, the provincial sector is more vulnerable to credit shocks. The provinces pay an additional interest rate spread over what the federal government pays. That spread increases when financial volatility rises and investors seek safety and liquidity in federal bonds. Federal interest rates typically fall during these periods, often bringing provincial rates down with them. But provincial rates never fall as aggressively and the additional spread prevents the provinces from fully exploiting Canada's safe-haven status. If market volatility becomes too extreme, it can even become difficult to price and issue provincial debt. We saw this for brief periods during the global financial crisis, the commodity bust of 2015-16 and the stock market meltdown of early 2020.<sup>3</sup>

Second, Ottawa is in a much better position to stabilize its debt. Canada's long-run economic growth rate has exceeded the long-run federal interest rate for much of the country's history.<sup>4</sup> That means Ottawa can potentially lower its debt-to-GDP ratio without ever running a surplus. Some provinces have also borrowed at rates lower than the long-run economic growth rate in recent years. But Ottawa's superior credit standing and diversified economy make it a better bet for a favourable ratio of long-term growth to long-term interest rates going forward.

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<sup>3</sup> This is a bigger problem for provinces with small and illiquid pools of debt than it is for Ontario and Quebec.

<sup>4</sup> Kronick, J.K. 2020. "A Baseline Understanding of Fiscal Sustainability." Intelligence memo, CD Howe Institute, June 15. <https://www.cdhowe.org/intelligence-memos/jeremy-m-kronick-%E2%80%93-baseline-understanding-fiscal-sustainability>

Third, the vulnerability of provinces, along with the scale of their spending and debt, alters the country's relationship with capital markets. It makes our public sector more vulnerable to credit shocks and rising interest rates than our more centralized peers. It also makes us more vulnerable to the austerity those changes can trigger.

Provincial vulnerabilities should not be exaggerated. The provinces benefit from rock-bottom interest rates and a robust fiscal union. Imagine what shape their budgets would be in without Ottawa's emergency support to businesses and households. And, since April 2020, the Bank of Canada has been buying significant quantities of provincial short- and long-term debt. This will help stabilize provincial borrowing conditions the next time financial turmoil strikes.

But central bank interventions are primarily liquidity, not solvency, devices and they have not fully insulated provinces from global shocks.<sup>5</sup> We also need to appreciate that provincial borrowing capacity stems, in part, from investors' bailout expectations. Those expectations lower spreads in the short run, but they encourage more borrowing. That is not a big deal if interest rates remain low; Ottawa's fiscal capacity remains robust; and bond buying does not interfere with the Bank of Canada's other policy objectives (which it could in a more inflationary environment). But the additional debt may increase the odds of austerity if one or more of these conditions shift. It also chips away at Ottawa's credit standing. This is a slow process given Ottawa's credit strengths.<sup>6</sup> We caught a glimpse of it in June when Fitch, one of the big three international credit rating agencies, cited rising provincial debt and the multilevel challenges of containing it as a risk to Canada's fiscal health.

In short, provinces can and should borrow more than they did in the 1990s. They should also adopt a slower path to fiscal consolidation. But their debts are uncomfortably high given the sector's vulnerabilities and the broader national risks. How do we then put them on a more sustainable path?

## REFORMING THE TRANSFER SYSTEM<sup>7</sup>

The answer depends, in part, on the source of provincial deficits. Many think it is the vertical fiscal imbalance. The provinces are responsible for the brunt of fixed and open-ended expenditures, while the federal government enjoys a disproportionate share of the revenue-raising capacity and space. A natural solution, therefore, is to transfer a larger share of federal revenues to the provincial level.<sup>8</sup> These proposals often come in two forms: one-off transfers to help provinces with the pandemic and the economic recovery, and longer-term measures to address their structural and

<sup>5</sup> Oil prices plummeted, for example, shortly after the announcement of the Provincial Bond Purchase Program in April and provincial bond spreads briefly spiked.

<sup>6</sup> Canada's wealthy economy, stable institutions and ability to borrow in its own currency still make its bonds very attractive in relative terms.

<sup>7</sup> The following two sections draw on Hanniman, K. 2020. "COVID-19, Fiscal Federalism and Provincial Debt: Have We Reached a Critical Juncture?" *Canadian Journal of Political Science* 53(2): 279-285.

<sup>8</sup> Transferring tax points is another approach, but not one I have space to cover here.

cyclical deficits. The former includes the \$19 billion the federal government has committed to help provinces restart their economies. The latter includes a larger, needs-based Canada Health Transfer, particularly for provinces with aging populations, and an enhanced Fiscal Stabilization Program to offset provincial revenue shocks.<sup>9</sup>

How likely is the federal government to adopt these or similar reforms? Given its own bulging deficit, a repeat of 1995, when it slashed provincial transfers, may seem like a more likely post-pandemic response. But most of the deficit spending is temporary and interest rates are likely to remain low for some time. Ottawa will have to make fiscal adjustments, but it has far more fiscal space than many assume. Political conditions also seem ripe. The federal government was poised to enhance the Fiscal Stabilization Program before the pandemic. The crisis has piqued federal interest in several areas of provincial jurisdiction, including child care and long-term care.

A bigger role is not a given. Several provinces objected to the conditions attached to the restart funds. Similar resistance may dampen federal enthusiasm to provide further support. Eventually, Ottawa may also come under pressure to rapidly consolidate its deficit, if not from bond markets, then from political forces.

There is also no guarantee additional transfers would work. Cross-national evidence shows higher transfers often increase deficits, particularly if they shield (or appear to shield) borrowers from irresponsible choices.<sup>10</sup> Pandemic-related transfers are temporary and unlikely to create this perception. Ottawa can also mitigate moral hazard, as it usually does, by allocating recurring transfers according to clear and fixed criteria. But the pressure for bailouts will be high and no amount of fiscal engineering will substantially lower investors' bailout expectations. Additional transfers may increase the capacity to balance provincial budgets, provided the associated conditions do not create undue pressures for additional spending. Incentives are another matter.

## NATIONAL FISCAL CONSTRAINTS

The provinces are not the only federal units that borrow with an implicit guarantee. But they are one of the few implicitly backed sectors that borrow without national constraint. These constraints often arise precisely because of bailout beliefs. Markets allow units to borrow more than they can sustain, a bailout arrives and the centre demands a degree of fiscal restraint in return. This process has played out in several federations, including Germany and Brazil. It has yet to materialize in Canada, despite the provinces' periodic market struggles. Why?

First, Canada is a deeply federal society with powerful provincial governments. A conditional bailout would be met with about as much enthusiasm as a structural adjustment

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<sup>9</sup> Béland, D., A. Lecours, M. Paquet, and T. Tombe. 2020. "A Critical Juncture in Fiscal Federalism? Canada's Response to COVID-19." *Canadian Journal of Political Science* 53(2): 239-243.

<sup>10</sup> Rodden, Jonathan. 2006. *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*. (New York: Cambridge University Press).

from the International Monetary Fund. Canadian governments have generally tried, therefore, to avoid it. In 1936, Alberta's Social Credit government took avoidance to the extreme. It opted to default rather than accept the supervision of a federal loans council (a condition of the next bailout).

Another obstacle is institutional. Renegotiating intergovernmental burdens is challenging in any federation. Certain institutions, notably a vertically integrated party system, can help facilitate and enforce the bargains.<sup>11</sup> Canada lacks this institutional machinery.

Neither obstacle would matter if provinces faced a prolonged debt crisis. They would have to accept Ottawa's dictates or default. But it is not clear, outside of a situation like the Great Depression, when that might arise. Saskatchewan flirted with default in 1993, but quickly turned it around with a small, unconditional bailout from Ottawa, which allowed it to maintain its investment grade credit rating.<sup>12</sup> It also undertook a series of austerity measures<sup>13</sup> motivated, in part, by the fear of requiring a larger and thus conditional level of federal support. Saskatchewan's response was a natural one in a country that avoids centralization at all costs. But it is precisely the sort of abrupt and ad hoc adjustment that we ought to avoid. How can we get ahead of the next crisis?

## RECONCILING FISCAL CAPACITY AND DISCIPLINE

One possibility is the establishment of a conditional bailout facility to lend at federal rates. If it is established soon, it could lend unconditionally until the recovery is well under way. Beyond that, it could require recipients to commit to a fiscal consolidation plan. An independent third party could monitor compliance, which might ease provincial opposition and commit both parties (federal and provincial) to the bailout terms. If the federal government launched the facility with an expanded set of transfers, the message would be clear: The federal government would be available to assist the provinces, but there would be limits to that support, and there would be no free bailouts for provinces that failed to live within them.<sup>14</sup>

Consolidation plans imply a loss of provincial autonomy, but the use of the facility would be voluntary. The stigma of application alone might provide enough incentive to avoid it. None of this will satisfy ardent decentralists. But it is a reasonable compromise, given the costs and risks of provincial bailouts and debt.

Another objection is that the scheme would transform the federal government into the International Monetary Fund, allowing it to impose austerity on vulnerable populations through conditional loans. But combining the facility with additional transfers,

<sup>11</sup> *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism*.

<sup>12</sup> MacKinnon, J. 2003. *Minding the Public Purse*. (Montreal and Kingston: McGill-Queen's University Press).

<sup>13</sup> The drop in the province's deficit to GDP was also supported by robust economic growth after 1992, but Kneebone, R.D. and K.J. McKenzie. 1999. "The Characteristics of Fiscal Policy in Canada." *Canadian Public Policy XXV(4): 483-501*, attribute most of the drop to the province's fiscal retrenchment policies.

<sup>14</sup> While this approach may work well for most provinces, we may require more immediate, far-reaching and specialized approaches for provinces (e.g., Newfoundland and Labrador) facing the most severe challenges.

including ones that reflect differing spending needs, should disabuse many of those beliefs. It would also be an improvement over Ottawa's approach in 1995, when it slashed provincial transfers and left the disciplining to bond markets.

None of this would be easy. Fiscal rules would have to be robust enough to stabilize provincial debt. They would also have to be general and flexible enough to protect provincial autonomy, accommodate swings in business cycles and ensure adequate levels of public investment. We would also need to monitor compliance and commit federal and provincial governments to consolidation plans. These are daunting collective action problems, even for relatively centralized multilevel systems. We may decide our highly fragmented and contested model is not up to the task. But that does not make the challenge any less urgent. We need to find ways to reconcile fiscal solidarity and discipline. Otherwise our fiscal resilience may be at risk.

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# Imagining the Canadian Language Regime of Tomorrow

Stéphanie Chouinard and Luc Turgeon

## INTRODUCTION

The Canadian federation was built on a compromise between two linguistic communities, anglophones and francophones. This compromise still exists today and is now part of our national fabric and identity, in addition to being enshrined in the *Canadian Charter of Rights and Freedoms*.

However, the effective recognition of these two languages, and especially of the French language, has always been a challenge for the federation, and increased protections for linguistic minorities have only been won through hard-fought battles. Over the past few decades, French has gradually been losing ground in Canada, so much so that there are now more speakers of non-official languages than French speakers. This trend feeds the fervour of detractors of official bilingualism. In addition, in the last few years, several voices have called for greater recognition of Indigenous languages in Canada. These pressures led to the adoption of the federal *Indigenous Languages Act* in 2019, but this legislation has been strongly criticized by some Indigenous communities and has yet to be implemented.

In light of these issues, and considering the budget cutbacks already announced in official languages programs and those that will follow in order to reduce the significant budget deficit caused by the COVID-19 pandemic,<sup>1</sup> how should the language regime evolve in order to meet the challenges of tomorrow's federation? In order to answer this question, it is important to begin by considering the historical and contemporary forces at work in the formation and evolution of the language regime.

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<sup>1</sup> The uncertain future of the Campus Saint-Jean in Alberta is an example of the impact of these cutbacks.

## THE EVOLUTION OF CANADA'S LANGUAGE REGIME: A STORY OF COMPROMISE

Canada's relationship with the language issue is marked by historical tensions between anglophones and francophones. The various pre-Confederation colonial governments seesawed between oppression and protection of the francophone minority. The *British North America Act (BNA Act)* of 1867 reflected this tendency and represented a compromise between the various constituent units of the federation. The language issue would be an "ancillary" jurisdiction: the two orders of government could use it as they saw fit, in accordance with the powers granted to them in sections 91 and 92 of the *BNA Act*. This compromise was reflected in a number of responsibilities – which were not always assumed – of the Canadian state and some<sup>2</sup> of its constituent units toward their respective linguistic minorities in the legislative and judicial domains. In education, the constitutional right to maintain denominational schools was interpreted as a guarantee regarding the language of instruction. But many provinces soon restricted or even eliminated access to French-language education. It goes without saying that Indigenous languages did not enjoy any protection at that time. On the contrary, colonialist measures and institutions such as residential schools were intended to prevent the transmission of Indigenous languages to younger generations.

The compromise of 1867 did not settle the language issue in the country – far from it. Many language crises followed the *BNA Act*. From the Métis rebellion led by Louis Riel to the crises of francophone schools outside Quebec, a number of events caused resentment among francophones, who were often deprived of education, public services, public service positions and political representation.

This resentment contributed to the rise of nationalism in Quebec and demands for recognition of francophones outside Quebec. In response, Canada passed the *Official Languages Act (OLA)* in 1969. That same year, New Brunswick passed its own *Official Languages Act*, establishing official bilingualism in the province. These laws mandated their respective public services to serve citizens in both official languages and also led to the adoption of measures to ensure fair representation of both linguistic communities in public institutions. Since 1969, amendments have been passed to make Canada's and New Brunswick's language obligations more robust (the entrenchment in the Constitution in 1982, the creation of offices of official languages commissioners and active offer measures, among others).

## CHALLENGES FACING CANADA'S LANGUAGE REGIME TODAY

The language regime implemented from the 1960s onwards has had several positive effects. First, it contributed to the expansion of French-language services and to a significant increase in the representation of francophones in the federal public service. Second,

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<sup>2</sup> With the *BNA Act*, Quebec was created as a bilingual province. Manitoba also became a bilingual province when it joined Confederation in 1870. The other provinces had no obligations toward their francophone minorities.



in the wake of the adoption of the *Constitution Act, 1982* and various subsequent decisions of the Supreme Court of Canada, access to French-language education outside Quebec has been expanded considerably. Third, despite the acrimonious debates of the 1960s surrounding the *OLA*, the level of social acceptance of the Act has risen significantly.<sup>3</sup> Over the years, a number of surveys have shown strong support for the principle of official bilingualism and its importance as a cornerstone of Canadian identity.<sup>4</sup>

Nevertheless, the implementation of Canada's language regime brings its own set of challenges. On the one hand, given the "ancillary" constitutional nature of language as a jurisdiction, language protections vary widely from one province and territory to another. In addition, evident shortcomings persist in the way the regime has been implemented. For example, the guarantee for federal public servants to work in the official language of their choice often comes up against the pervasive use of English in the federal public service. Part VII of the *OLA*, which sets out the federal government's obligation to enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development, was recently gutted by the Federal Court for being too vague.<sup>5</sup>

At the same time, individual bilingualism is advancing at a snail's pace, despite the proliferation of immersion programs across the country. In 1961, 12.2% of Canadians said they could carry on a conversation in both official languages. By 2016, this proportion had risen to 17.9%, an increase mainly due to francophones learning English in Quebec, where bilingualism has almost doubled in 50 years.<sup>6</sup> Although the objective of the *OLA* was never to make Canada a country of bilingual individuals, the slow increase in individual bilingualism is seen by many as a failure of the language regime.

In addition, the social acceptability of bilingualism seems to be gradually eroding. Today, only slightly more than half of Canadians believe that bilingualism is important,<sup>7</sup> and nearly one-third of Canadians would like English to be the only official language in the country.<sup>8</sup> Regional variations exist, and support for bilingualism tends to be lower in Western Canada. In our view, this questioning of the language regime stems from several elements.

First, it is undeniable that the major changes to the language regime were directly linked to attempts to curb the independence threat that was present in Quebec from the 1960s

<sup>3</sup> Office of the Commissioner of Official Languages, "Official Languages and Bilingualism Survey Research Presentation" (2016), <https://www.clo-ocol.gc.ca/en/publications/other/2016/official-languages-and-bilingualism-survey-research>.

<sup>4</sup> A. Parkin and A. Turcotte, *Bilingualism: Part of Our Past or Part of Our Future?* (Ottawa: Centre for Research and Information on Canada, 2004).

<sup>5</sup> Office of the Commissioner of Official Languages, *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530, <https://www.clo-ocol.gc.ca/en/language-rights/court-decisions/federation-des-francophones-de-la-colombie-britannique-v-canada>.

<sup>6</sup> M. Turcotte, "Results from the 2016 Census: English-French Bilingualism among Canadian Children and Youth" (Ottawa: Statistics Canada, 2019), <https://www150.statcan.gc.ca/n1/pub/75-006-x/2019001/article/00014-eng.htm>.

<sup>7</sup> Léger, *Report: Federal Politics* (March 22, 2019), <https://leger360.com/wp-content/uploads/2019/03/Federal-Politics-March-22-2019-1.pdf>.

<sup>8</sup> Léger, *Report: Federal Politics* (February 1, 2020), <https://leger360.com/voting-intentions/federal-politics-february-1st-2020/>.

to the early 2000s. However, this threat is now only a shadow of its former self: only one-quarter of Quebecers would like to see Quebec separate today.<sup>9</sup> Recognition of the French fact is therefore no longer perceived as an imperative for national unity.

Second, Canada's demographics are changing. Today, 2 out of every 5 Canadians were not born in Canada, and there are now more allophones than francophones (allophones make up 22.3% of the population; francophones, 21.4%).<sup>10</sup> While there are no major differences between anglophones and allophones in terms of support for bilingualism,<sup>11</sup> the increasing weight of the allophone group is regularly used as an argument to call into question the relevance or legitimacy of the language regime.<sup>12</sup>

Third, the emergence of populist movements on the electoral scene in some provinces has prompted a questioning of policies for the recognition and protection of francophone minority communities. For example, the People's Alliance of New Brunswick criticizes linguistic duality at every turn on the pretext of "common sense," and in Ontario, Premier Doug Ford's Progressive Conservative government made Franco-Ontarians the first victims of its budget cuts.

Furthermore, Canada is now faced with a new issue: the recognition, integration and protection of Indigenous languages. This is a monumental challenge, given the large number of Indigenous languages in Canada (there are more than 70), Indigenous peoples' mistrust of the Canadian state because of colonialism and the precarious state of the majority of these languages. Indeed, only six of them are not in imminent danger of extinction: Inuktitut, Inuinnaqtun, Cree, Atikamekw, Tlicho and Naskapi.<sup>13</sup> The issue, then, is not only to protect Indigenous languages but also to revitalize them, since merely transmitting them from one generation to the next will not be sufficient to ensure their survival. In the case of languages whose extinction is inevitable, documentation for archival purposes is also a priority.

The *Indigenous Languages Act* mandates the federal government to support the efforts of Indigenous communities to reclaim and revitalize their languages to ensure their survival. Although the government prides itself on having drafted the Act in collaboration with Indigenous peoples, the legislation has been widely criticized for its non-binding nature and the weakness of the obligations it imposes on the federal government. In addition, although the Act provides for the creation of a new position of Indigenous languages commissioner, the position is still vacant.

<sup>9</sup> K. Braid, "Canadians across All Regions Feel Country More Divided than Ever" (Ipsos, November 5, 2019), <https://www.ipsos.com/en-ca/news-polls/Canadians-Across-Regions-Feel-Country-More-Divided-than-Ever>.

<sup>10</sup> Statistics Canada, *Proportion of Mother Tongue Responses for Various Regions of Canada, 2016 Census* (2017), <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dv-vd/lang/index-eng.cfm>.

<sup>11</sup> L. Turgeon, A. Bilodeau, A.-G. Gagnon, A. Henderson and S. White, "Attitudes toward Official Bilingualism in Multilingual States: the Canadian Case," paper presented at the meeting of the International Political Science Association, Montreal, July 24, 2014.

<sup>12</sup> Based on data from their provincial diversity study, Turgeon et al. (2014) report that 66% of anglophones and 66% of allophones outside Quebec say it is important to preserve English and French as the country's two official languages.

<sup>13</sup> H. Choquette, "The Constitutional Status of Aboriginal Languages in Canada," doctoral thesis, Faculty of Law, Queen's University (2016).

Challenges to the *OLA* and the necessary, albeit belated and too timid, addition to the Canadian language regime of measures to protect Indigenous languages show that debates on language issues are destined to continue. So what kind of language regime will Canada need in order to meet the challenges of tomorrow, and how will it get there?

## REIMAGINING CANADA'S LANGUAGE REGIME

Given the tradition of compromise in the history of the language regime and the step-by-step approach that has characterized the evolution of Canadian language rights and legislation, a rapid and complete overhaul of the Canadian language regime is neither possible nor even desirable. However, we believe that a number of constitutional, legislative and policy changes are necessary.

One of the promises made by the Liberals in the 2019 election was to overhaul the *OLA*. The 50th anniversary of the Act has prompted a number of reflections, on the part of both legislators and civil society, on ways to improve the effectiveness of this quasi-constitutional statute. Among the most important proposals are the revision of Part VII of the Act<sup>14</sup>, the creation of an official languages tribunal to deal with serious or recurrent cases, the adoption of regulations on active offer, the strengthening of the powers of the Office of the Commissioner of Official Languages, the inclusion of an “official languages lens” in public policy analysis based on the gender-based analysis plus (GBA+) model, and the entrenchment of a duty to consult official language minority communities.<sup>15</sup> The latest Speech from the Throne, presented on September 23, fell short of promising an overhaul of the *OLA*, but vowed to “strengthen” it while “taking into consideration the unique reality of French,” promising to protect and promote the country’s minority language, even in Québec, where it is the language of the majority.<sup>16</sup> What this commitment means in concrete terms for the federal government, which historically has scrupulously protected the legislative symmetry between the two official languages while enforcing “substantive equality” in its policies, remains to be seen. The same could be said of the Speech from the Throne’s broad commitment to reconciliation with Indigenous peoples with respect to Indigenous languages.

Another short-term goal for the federal government will be to implement and enhance the *Indigenous Languages Act*. While the first iteration of the Act is a step in the right direction, it does not adequately address the demands of Indigenous communities. For example, in Nunavut, where Inuktitut is the mother tongue of 65.3% of

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<sup>14</sup> The decision in *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*, 2018 FC 530, highlighted the need for a review of the wording of Part VII of the *OLA* or, at the very least, for a regulation to clarify its scope.

<sup>15</sup> Standing Senate Committee on Official Languages, *Modernizing the Official Languages Act. The Views of Federal Institutions and Recommendations* (Ottawa, Senate of Canada, 2019), [https://sencanada.ca/content/sen/committee/421/OLLO/reports/ModernOLAFedInst\\_2019-06-13\\_E\\_Final.pdf](https://sencanada.ca/content/sen/committee/421/OLLO/reports/ModernOLAFedInst_2019-06-13_E_Final.pdf); Fédération des communautés francophones et acadienne du Canada, *La FCFA passe à l'action : Proposition d'un nouveau libellé de la Loi sur les langues officielles* (2019), [https://fcfa.ca/wp-content/uploads/2019/03/La-FCFA-passe-%C3%A0-laction\\_2019-03-05.pdf](https://fcfa.ca/wp-content/uploads/2019/03/La-FCFA-passe-%C3%A0-laction_2019-03-05.pdf).

<sup>16</sup> Government of Canada, *Speech from the Throne* (Ottawa, 2020).

the population,<sup>17</sup> the federal government should commit to provide services to the population in that language. Providing federal services in other Indigenous languages “where numbers warrant” would be a logical further step as this legislation evolved. In our view it is also necessary to include legislative or constitutional protection for education in these languages similar to those in section 23 of the Charter, and to provide the financial means to make that protection a reality. It will also be important to study the broader impact of the *Indigenous Languages Act* on Canada’s language regime. The new legislation will not be implemented in a vacuum. We could see, for example, instances of policy learning between official language minority communities and Indigenous communities in the area of language transmission and retention.

In addition, the importance of Canada’s language regime must be conveyed more effectively to the English-Canadian majority in order to ensure its sustainability. Over the medium term, it will be necessary to broaden and improve access to French language learning for interested anglophones and allophones, as the inability to acquire the other official language is a source of frustration for many people. This frustration is fodder for the detractors of the current language regime because it creates a perception of injustice, particularly with respect to social mobility and access to jobs in the federal public service. A major reinvestment in immersion and the creation of opportunities to learn the other official language for all Canadians – including for new Canadians, who often deplore the lack of such programs – must be a centrepiece of this undertaking. Without going as far as to reform the system so that it requires every Canadian to be bilingual, the opportunity to become bilingual should at least be available to all.

Eventually, the evolution of the language regime should also involve changes to the structures of our federal institutions. Think of the debates surrounding a possible reform of the Senate – there have been several calls over the last decade for guaranteed representation of official language minorities in that chamber to be enshrined in legislation<sup>18</sup> – or the issues of bilingualism and Indigenous representation that resurface every time a Supreme Court of Canada justice retires.<sup>19</sup> The political appetite of our elected officials for such changes does not seem to be there at present, but these structural representation issues are likely to resurface at some point.

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<sup>17</sup> J.-F. Lepage, S. Langlois and M. Turcotte, “Study: Evolution of the Language Situation in Nunavut, 2001 to 2016,” Statistics Canada, (2019), <https://www150.statcan.gc.ca/n1/daily-quotidien/190709/dq190709b-eng.htm>.

<sup>18</sup> C. Tardif and C. Terrien, “Senate Reform and Francophone Minorities,” *Canadian Parliamentary Review* (Spring 2009); L. Cardinal and S. Grammond, *Une tradition et un droit : Le Sénat et la représentation de la francophonie canadienne* (Ottawa: University of Ottawa Press, 2017).

<sup>19</sup> L. Chartrand, B. Feldthusen and S. Han, “Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court,” *Canadian Public Administration*, 51 (1) (2008), 143-53; M. Doucet, “Le bilinguisme : une exigence raisonnable et essentielle pour la nomination des juges à la Cour suprême du Canada,” *University of New Brunswick Law Journal*, 68 (2017), 30-35; for a discussion of the reconciliation of bilingualism and Indigenous representation on the Supreme Court of Canada, see M. St-Hilaire, A. Wawanoloath, S. Chouinard and M.-A. Gervais, “The False Francophone-Indigenous Conflict over SCC Judges,” *Policy Options* (December 18, 2017), <https://policyoptions.irpp.org/magazines/december-2017/the-false-francophone-indigenous-conflict-over-scc-judges/>.

Finally, the transformation of Canada's language regime requires promotion, which in turn requires political leadership. Concrete actions by our elected officials, starting with the Prime Minister, that demonstrate the importance of official and Indigenous languages are essential in order to remind Canadians that they are constitutive elements of Canada's national identity. As the regime evolves and attempts are made to decolonize it, its promotion is a necessary step to ensure that Canadians can understand and approve of the existing regime, and thus be better prepared for future reforms.



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# Reimagining the Canadian Federation through an Urban Lens

Gabriel Eidelman

## INTRODUCTION

The devastating health, social and economic impacts of COVID-19 are most pronounced in Canada's cities. Two-thirds of all cases and 75 percent of all deaths have occurred in Canada's 20 largest municipalities.<sup>1</sup> Greater Montreal, Toronto and Calgary alone account for half of all cases and deaths. The pandemic has also laid bare the precarious financial footing of city governments across the country. Due to a sharp drop in revenues, municipalities face a combined annual operating shortfall of \$10-15 billion.<sup>2</sup>

Successful recovery will require extraordinary collaboration between federal, provincial *and* municipal governments. This can only be achieved by building stronger political institutions linking all three levels. Crucially, it will also require a more fundamental reimagining of the Canadian federation through an urban lens, acknowledging the importance of city-regions and metropolitan centres in the Canadian policy landscape. The status quo is no longer an option. We require a new intergovernmental infrastructure that enables policy-makers at all levels to better understand the needs of our cities and city-regions, and respond with concerted action.

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<sup>1</sup> Canadian Urban Institute, *COVID Signpost: 100 Days* (Toronto: Canadian Urban Institute, 2020), <https://canurb.org/publications/covid-signpost-100-days/>.

<sup>2</sup> Federation of Canadian Municipalities (FCM), "COVID-19: Municipalities seek emergency funding," News Release (Ottawa: FCM, April 23, 2020), <https://fcm.ca/en/news-media/news-release/covid-19-municipalities-seek-emergency-funding>.

## COMMON MISCONCEPTIONS ABOUT CITIES IN CANADA

To reimagine the Canadian federation through an urban lens, we must first dispense with four misconceptions that cloud our understanding of how urban policy and governance in Canada actually works.

First is the truism that more than 80 percent of Canadians live in urban areas. Mayors routinely employ this statistic to demand greater respect and powers for municipal governments within Canada's constitutional framework. But the threshold for what qualifies as an "urban area" in Canada is so low, by international standards and as a matter of common sense, that the figure diminishes the political importance of cities. Take the Town of Two Hills, Alberta, which has a population of 1,352. Statistics Canada considers it to be equally "urban" as the City of Edmonton, which has a population of 1 million.<sup>3</sup> In all, only 100 of Canada's 4,000 or so municipalities have populations greater than 50,000. This leads to a false impression that city issues are trivial and inconsequential – "small town stuff" – compared to federal or provincial matters. Yet nearly 23 million Canadians reside in these 100 municipalities.

Second is the belief that all cities, no matter their size, location or economic importance, deserve equal treatment. Due to COVID-19, municipalities large and small face crippling declines in property taxes and user fees, by far the two largest sources of own-source revenues. But not all city governments face this financial burden equally. Consider that by the end of 2020, the City of Toronto's projected revenue loss from transit fares alone, which have declined 85 percent due to COVID fears, is expected to reach \$800 million. That is equivalent to the entire operating budget of neighbouring Mississauga, Canada's sixth largest municipality by population.

Third is the illusion that most cities are governed by a single city government, when, in fact, more than two-thirds of Canadians live in city-regions mainly comprised of fast-growing suburban municipalities.<sup>4</sup> More people, for example, live in Vancouver's suburbs (the municipalities of Richmond, Surrey, Burnaby, Abbotsford, and the like), with a combined population of 1.8 million, than in the City of Vancouver proper, with its population of 675,000. Together, these areas operate as functionally integrated regional economies, measured by Statistics Canada as "census metropolitan areas" (CMAs), which collectively account for nearly 75 percent of Canada's gross domestic product.<sup>5</sup> Yet they are governed by dozens (or in extreme cases, hundreds) of local and regional authorities.<sup>6</sup> Greater Montreal, for instance, consists of 82 distinct municipal

<sup>3</sup> Statistics Canada defines an urban area as a "population centre" with greater than 1,000 inhabitants and a minimum population density of 400 persons/km<sup>2</sup>. See <https://www.statcan.gc.ca/eng/subjects/standard/pcrac/2016/introduction>.

<sup>4</sup> D.L.A. Gordon, *Still Suburban? Growth in Canadian Suburbs 2006-2016*, Working Paper #2 (Toronto: Council for Canadian Urbanism, August 2018), [http://canadiansuburbs.ca/files/Still\\_Suburban\\_Monograph\\_2016.pdf](http://canadiansuburbs.ca/files/Still_Suburban_Monograph_2016.pdf).

<sup>5</sup> Statistics Canada, *CANSIM Table 36-10-0468-01*, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610046801>.

<sup>6</sup> Not to mention countless local special purposes bodies, better known as ABCs (agencies, boards, commissions, and corporations), such as transit agencies, library boards and police commissions, which operate at arm's length from municipal councils.



governments within the formal boundaries of the Montreal Metropolitan Community. This makes it difficult to determine who speaks, or who *should* speak, for cities and city-regions in the federation.

Fourth is the mistaken assumption that city services are exclusively decided by, paid for and delivered by municipal governments. On the contrary, nearly everything cities do depends in some way on intergovernmental coordination, cooperation or investment. As the COVID-19 pandemic has made clear, local public health units coordinate daily with provincial and federal counterparts. Immigrant settlement policy is now defined by trilateral government arrangements.<sup>7</sup> So too are infrastructure investments, such as the federal Gas Tax Fund, which provides municipalities with \$2 billion in permanent, annual funding through the provinces for roads, highways, water and sewer projects.

In short, urban governance is not simply municipal governance. Urban policy-making necessarily involves *all* levels of government. This is especially true in large cities, which depend on capital-intensive public services, such as mass transit and social housing. Conventional understandings of Canadian federalism continue to neglect this multi-level reality.

## CITIES ARE NOT MERELY CREATURES OF THE PROVINCES

Despite the complexities of urban governance in Canada, most policy-makers continue to treat all cities the same: as mere “creatures” of the provinces. The federal government’s initial COVID-19 Economic Response Plan included hundreds of billions of dollars for provincial governments, Indigenous communities, large industries, small businesses, the charitable sector, universities, students, you name it. Yet not one penny was allocated directly to municipalities. It took four months of negotiation between federal and provincial governments, with limited input from city leaders, to reach a Safe Restart Agreement that dedicated just \$2 billion in emergency funds to cover municipal operating costs and another \$1.8 billion in available operating funds for transit, conditional on provincial cost-matching. At best, this money eases only a fraction of the financial pressure faced by cities, and likely only for the next six months.<sup>8</sup> When asked to explain the delay, Prime Minister Justin Trudeau returned to a parochial narrative saying, “it is up to the provinces to manage and fund municipalities.”<sup>9</sup>

The Prime Minister is well aware that the role of cities in the federation is far more fluid than the constitutional division of powers suggests. Certainly, provincial governments play a dominant role. Several provinces have recently imposed (or threatened to impose) large-scale restructuring of municipal institutions. Many continue to centralize

<sup>7</sup> See E. Tolley, and R. Young, eds., *Immigrant Settlement Policy in Canadian Municipalities* (Montreal and Kingston: McGill-Queen’s University Press, 2011).

<sup>8</sup> Canada, Prime Minister’s Office, “Priorities to safely restart Canada’s economy,” backgrounder, July 16, 2020, <https://pm.gc.ca/en/news/backgrounders/2020/07/16/priorities-safely-restart-canadas-economy>.

<sup>9</sup> R. Tumilty, “Trudeau announces \$2.2B in COVID-19 relief for cities – money they would have received anyway,” *National Post*, June 1, 2020.

policy-making authority in traditional areas of local jurisdiction, such as land-use planning. But at the same time, most provincial governments have amended their legislative frameworks to formally recognize municipalities as legitimate, democratic and accountable orders of government. Since the 1990s, nearly every province has expanded the scope of authority delegated to local governments, adding more permissive language to existing municipal legislation or, in rare circumstances, establishing separate city charters.<sup>10</sup>

Federal engagement in urban affairs is also evolving. True, Canada remains one of only a handful of countries in the Organisation for Economic Cooperation and Development (OECD) without an explicit national urban policy. The federal government has not operated anything resembling a dedicated ministry of cities since the 1970s.<sup>11</sup> Direct federal transfers to municipalities have never totalled more than 1 percent of equivalent transfers to provinces.<sup>12</sup> High-profile federal funding programs meant for cities, such as the Gas Tax Fund, the Public Transit Infrastructure Fund and the National Housing Strategy, intentionally flow through the provinces. That said, successive federal governments have also clearly pursued an “implicit” urban agenda, announcing a variety of programs that, although not explicitly designed for cities, nevertheless have their most significant impacts in cities, such as the Homelessness Partnering Strategy, Local Immigration Partnership Councils and the Innovation Superclusters Initiative.<sup>13</sup>

All told, federal-provincial-municipal relations operate within a byzantine system of bilateral (federal-provincial, federal-municipal or provincial-municipal) and trilateral agreements, frameworks and transfers programs, each negotiated under unique circumstances. Such a disjointed intergovernmental architecture virtually guarantees a merry-go-round of short-term gains and long-term failures. Without institutional deterrents for senior governments that wish to renege on their commitments, any deal struck at one point in time is extremely vulnerable to changing political winds. A structural solution is needed.

## CITIES NEED A NEW INTERGOVERNMENTAL INFRASTRUCTURE

Those sympathetic to the plight of cities often argue for formal recognition of municipalities in the Canadian Constitution, as is the case in federal countries such as Germany, Brazil and South Africa. In this series of essays, Kristin Good creatively suggests securing these protections within provincial, rather than federal, constitutions. Both

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<sup>10</sup> See Z. Taylor and A. Dobson, *Power and Purpose: Canadian Municipal Law in Transition* (Toronto: Institute on Municipal Finance and Governance, 2020), [https://tspace.library.utoronto.ca/bitstream/1807/99226/1/imfgpaper\\_no47\\_Power\\_and\\_Purpose\\_Taylor\\_Dobson.pdf](https://tspace.library.utoronto.ca/bitstream/1807/99226/1/imfgpaper_no47_Power_and_Purpose_Taylor_Dobson.pdf).

<sup>11</sup> The short-lived Ministry of State for Urban Affairs (1971-79) was dissolved due to provincial discontent. It took 20 years for a related Ministry of State for Infrastructure and Communities to resurface, which now operates as a full ministerial portfolio. Tellingly, however, the word “cities” is nowhere to be found in the minister’s mandate letter.

<sup>12</sup> Calculated from Statistics Canada CANSIM Table 380-0022 and CANSIM Table 380-0079.

<sup>13</sup> N. Bradford, *A National Urban Policy for Canada? The Implicit Federal Agenda*, IRPP Insight 24 (Montreal: Institute for Research on Public Policy, 2018), <https://irpp.org/wp-content/uploads/2018/11/A-National-Urban-Policy-for-Canada-The-Implicit-Federal-Agenda.pdf>.

strategies, however, fall prey to the same conceptual trap: they reduce urban issues – by definition, multilevel in nature – to the narrow domain of municipal government.

Cities do not need new constitutional protections. They need a new intergovernmental infrastructure that suits the realities of *urban* policy-making. Federal institutions must be remade to give voice to city leaders and to enable greater dialogue between *all* levels of government on decisions that affect life in cities. That starts with three ingredients: better data, better organization and better interfaces.

Federal and provincial policy-makers have trouble appreciating the importance of cities, in part, because they lack consistent, comparable data that captures the gravity of economic, social and environmental conditions in cities across the country. We need more systematic evidence to guide intergovernmental intervention and cooperation. The Canadian Institute for Health Information underpins federal-provincial discussions on health care by collecting robust, comparative data and producing impartial analyses of health systems across the country. Applying an urban lens to federal-provincial-municipal discussions requires a similarly sophisticated research apparatus.

A constructive idea proposed by the Canadian Urban Institute is the creation of a Canadian urban policy observatory, a one-stop shop for comprehensive, comparable and actionable information on the state of Canada's cities and city-regions.<sup>14</sup> Modelled on similar initiatives in the European Union, a national urban policy observatory would help standardize the qualitative and quantitative data on Canadian cities that currently exist, and would call attention to data that still need to be collected, highlighting potential areas of shared interest and opportunities for intergovernmental collaboration.

But data are not enough. Cities also need more political muscle. Rather than implore senior governments to pay more attention as a matter of principle, cities must invest the necessary human and financial resources to be taken more seriously in the intergovernmental arena. Municipalities that have managed to secure bespoke legal arrangements from provincial governments, such as Montreal, Winnipeg and Halifax, have learned this lesson. They have bolstered their policy capacity and expertise in intergovernmental affairs. The City of Toronto, for example, employs a dedicated intergovernmental relations team of nine specialists within the city manager's office. Still, this pales in comparison to equivalent units within federal and provincial governments. The Government of Ontario employs more than 50 intergovernmental relations specialists within its central agencies, supported by hundreds more in related branches across individual departments.

City-regions also need political muscle. Canada's ten largest census metropolitan areas are home to nearly 20 million Canadians, more than half the country (see table 1). Municipalities in these metro areas must organize to advance a new version of Canadian regionalism. Some metro areas are better equipped than others to get started.

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<sup>14</sup> See G. Eidelman and N. Bradford, *The Case for a Canadian Urban Policy Observatory* (Toronto: Canadian Urban Institute, 2020), <https://canurb.org/wp-content/uploads/Eidelman-Bradford-TheCaseforaCanadian-UrbanPolicyObservatoryFINAL06-16-20.pdf>.

**Table 1. Canada's ten largest census metropolitan areas**

CMA	No. of Municipal Governments	Combined Population	Proportion of Canadian Population (%)
Toronto <sup>1</sup>	27	5,928,040	16.9
Montreal	91	4,098,927	11.7
Vancouver	21	2,463,431	7.0
Calgary	8	1,392,609	4.0
Ottawa-Gatineau	19	1,323,783	3.8
Edmonton	23	1,321,426	3.8
Quebec City	28	800,296	2.3
Winnipeg	11	778,489	2.2
Hamilton	3	747,545	2.1
Kitchener-Cambridge-Waterloo	6	523,894	1.5
Total	188	19,378,440	55.3%

Source: Statistics Canada, Focus on Geography Series, 2016 Census.

<sup>1</sup> Total governments in Toronto CMA includes four upper-tier municipal governments not listed by Statistics Canada.

The Vancouver area Mayors' Council on Regional Transportation has built sufficient political profile and resources to directly engage the British Columbia and federal governments, as evidenced by recent attempts to secure COVID-related emergency transit funding. But similar metropolitan institutions are rare in other parts of the country. We need new mechanisms to articulate the collective needs of city-regions.

Finally, we need better interfaces for regular, ongoing dialogue between municipal, regional, provincial and federal authorities to address urban problems. City leaders typically communicate with provincial and federal officials through informal channels – for example, a personal call to a local MLA or MP, or private conversations between senior public servants – rather than formal arrangements.<sup>15</sup> This is much too fragile a foundation on which to build productive, long-term intergovernmental relations.

The Federation of Canadian Municipalities, a registered federal lobby which represents more than 2,000 members, includes a Big City Mayors' Caucus made up of mayors from 22 of the country's largest municipalities. The Prime Minister and fellow cabinet ministers often meet and address both groups at annual conferences and special events. But these are one-off exercises in stakeholder relations, not sincere efforts in intergovernmental diplomacy.

Compare this to the durable machinery of federal-provincial and territorial relations, lubricated by regular meetings of first ministers, ministers, deputy ministers and other senior officials, and supported by a well-established system of intergovernmental committees, working groups and secretariats. In many cases, further assistance is provided by independent agencies with explicit mandates to facilitate joint federal-provincial decision making. These include the Canadian Institute for Health Information, which collects and

<sup>15</sup> J. Lucas and A. Smith, "Municipalities in the Federation," in *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 4th edition, edited by H. Bakvis and G. Skogstad (Toronto: University of Toronto Press, 2020).

analyzes standardized health system performance indicators from federal and provincial departments of health, and the Canadian Intergovernmental Conference Secretariat, which handles administrative planning and logistics for intergovernmental meetings.

None of these interfaces are set up to work with cities, let alone apply an urban lens to their work.<sup>16</sup> They must either be adapted or redesigned from the ground up. This might mean expanding the mandate of the conference secretariat to include regularly scheduled federal-provincial-municipal conferences. It could mean exploring new organizational structures, such as urban caucuses that bring together local, provincial and federal representatives from a city-region. Or it could mean a version of “territorial cooperation areas” that are now emerging in Europe.<sup>17</sup> No one model or framework is likely a silver bullet; further research and experimentation is no doubt required. But at a minimum, any new initiative should be driven by a simple objective: to incentivize and institutionalize multi-level discourse on urban issues.

## CONCLUSION

There is nothing inevitable about how cities are governed in Canada, nor what role they should play in the Canadian federation. The COVID crisis makes this clearer than ever before. It is time to move past constitutional debates over *municipal* empowerment, and start building a new *urban* intergovernmental infrastructure that brings together local, regional, provincial and federal partners in regular, structured dialogue.

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<sup>16</sup> The closest comparable institution may be the Intergovernmental Committee on Urban and Regional Research, originally established in 1967 following a federal-provincial first ministers conference on housing and urban development. The federal government, through the Canadian Mortgage and Housing Corporation, withdrew support for the committee in 2011. The committee now provides limited support only to provincial and territorial ministers responsible for local government, as well as a lending library and research service known as *Muniscope*.

<sup>17</sup> See the European Commission’s *ESPON 2020 Cooperation Programme*.



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# Building Bridges: Toward a Reform of Canadian Intergovernmental Relations

Jared Wesley

## THE CONTEXT

Global crises have a way of easing regional tensions in Canada, at least temporarily. Faced with a common external threat like the Great Recession, federal and provincial governments tend to put aside partisan and regional animosities in the name of the greater good. Disagreements over means and priorities may persist – such as how much to invest in recovery or which sectors to bail out first – but Ottawa’s willingness to loosen the purse strings makes it easier to generate consensus. Amid the financial crisis of 2008-2009 for instance, Prime Minister Harper was able to induce provinces to chip in to the recovery effort by offering to cost-match shovel-ready infrastructure projects.<sup>1</sup> His Economic Action Plan resembled those of Mackenzie King and Louis St. Laurent, both of whom financed the postwar growth of provincial welfare states using fifty-cent dollars. Beyond the money, the public’s willingness to “rally around the flag” in the midst or aftermath of global crises also helps convince provincial premiers there is little alternative but to support Ottawa’s leadership.

We have seen evidence of a similar calming of the waters amid the COVID-19 pandemic. Heated fights over carbon pricing and pipeline construction have given way to a national consensus on the importance of flattening the curve. As in the past, Ottawa has used a combination of increased funding and deference to provincial autonomy to maintain the peace. To date, the federal government has sent over \$30 billion to

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<sup>1</sup> D. M. Brown, “The Financial Crisis and the Future of Federalism in Canada,” in *The Future of Federalism: Intergovernmental Financial Relations in an Age of Austerity*, ed. R. Eccleston and R. Krever (Cheltenham: Edward Elgar, 2017), 73-94, accessed July 27, 2020, <https://www.elgaronline.com/view/ed-coll/9781784717773/9781784717773.00011.xml>.

the provinces in the form of unconditional and conditional grants to cover everything from personal protective equipment and contact tracing to child care and public transit. This amount does not count the sector-specific support that benefits provincial economies dependent on oil and gas or fisheries. While touting the fact that the funds must be spent on a particular set of federal priorities, provinces maintain considerable autonomy over how to spend the cash.

These periods of “emergency federalism” have been few and far between and short lived, however.<sup>2</sup> Regional tensions may be pushed below the surface, but they do not disappear entirely. Following brief periods of cooperation, battles between Liberal prime ministers from Pearson to Trudeau and Western conservative premiers like Manning, Bennett, Thatcher and Lyon were every bit as pitched as those between Harper and the likes of Williams, Wynne and Notley. The tensions re-emerged as Ottawa turned off the fiscal taps and first ministers hit the hustings in the first set of post crisis elections. With less money to go around, challenges lingering and electoral accountability looming, premiers looked around for other leaders to blame. If history is any guide, we are about to enter a similar phase in the COVID-19 pandemic, and it is worth asking whether similar regional and partisan cleavages will re-emerge in the months to come.

## THE PROBLEM: TRIBALISM, PARTISANSHIP AND REGIONALISM

Notwithstanding a bump in the prime minister’s popularity across the country early in the pandemic, federal party support remains balkanized: with less than half of the seats in the House, the governing Liberal Party caucus is rooted in Central and Atlantic Canada; the Bloc Québécois has emerged as a regional force; and the Conservatives remain entrenched in Western Canada.

Coupled with the rise of province-first parties in several jurisdictions,<sup>3</sup> these partisan fortresses have hardened regional divisions across the country. Regional leaders are at odds with each other on some of the most fundamental questions facing federal and provincial governments today, including the proper role of government in society, the economy and the environment. Yesterday’s struggles for Quebec sovereignty find echoes in the nascent separatist movement in parts of the West.<sup>4</sup> And we are once again hearing rumblings of constitutional amendments to achieve a fairer deal for certain provinces in confederation.<sup>5</sup>

<sup>2</sup> D. E. Smith, “Emergency Government in Canada,” *The Canadian Historical Review* 50, no. 4 (1969): 429-448, accessed July 27, 2020, <https://www.utpjournals.press/doi/pdf/10.3138/CHR-050-04-04>.

<sup>3</sup> T. Naumetz, “Ford and Western Premiers Line up Against Trudeau for Leaders’ Summit,” *iPolitics*, March 11, 2020, <https://ipolitics.ca/2020/03/11/ford-and-western-premiers-line-up-against-trudeau-for-leaders-summit/>.

<sup>4</sup> L. Cecco and D. Argen, “Wexit: Alberta’s Frustration Fuels Push for Independence from Canada,” *The Guardian*, November 25, 2019, <https://www.theguardian.com/world/2019/nov/25/wexit-alberta-canada-independence-separatism>.

<sup>5</sup> “Fair Deal Panel,” Government of Alberta, accessed July 27, 2020, <https://www.alberta.ca/fair-deal-panel.aspx>.



This balkanization has coincided with the demise of Canada's great "brokerage parties." Partisanship has been both a divisive and a unifying force throughout Canadian history.<sup>6</sup> In periods of stability, mainstream political parties have brokered competing regional, ethnic, linguistic and ideological demands within national party organizations and through pan-Canadian appeals and campaigns. This style of brokerage politics has waxed and waned over the course of Canadian history, interrupted by periods of intense inter-regional conflict over the terms of national unity.

During these times, parties become entrenched in specific regions of the country, and their coalitions can break down,<sup>7</sup> spawning splinter parties at the federal and/or provincial level. The Cooperative Commonwealth Federation, Social Credit, Reform and the Bloc Québécois are familiar manifestations of this pattern, as are provincial parties like the Parti Québécois, the Saskatchewan Party and the United Conservatives in Alberta. Inter-regional conflict spills outside the confines of internal party politics and becomes the subject of intense partisan and intergovernmental debate.<sup>8</sup> National unity falls under threat at the elite level, despite the fact that citizens are less divided than their leaders.<sup>9</sup>

These partisan and intergovernmental tensions border on more "tribal"<sup>10</sup> forms of political contestation. Rather than being adversaries united by an allegiance to common goals and a respect for the rules of the game, partisans can become entrenched as enemies, challenging the core institutions of the state and the very legitimacy of their opponents to govern.<sup>11</sup> The forces are more developed in the United States but show signs of spreading to other countries, including Canada.<sup>12</sup> How do we reform our institutions to promote trust-building over tribalism?

## THE SOLUTIONS: BUILDING TRUST

At the root of the problem: elites from different parties and jurisdictions have few opportunities to develop close relationships, be they professional, transactional or personal. Establishing new, routinized, rules-based environments can help foster

<sup>6</sup> M.A. Engelmann and F.C. Schwartz, *Political Parties and the Canadian Social Structure* (Upper Saddle River: Prentice Hall, 1967).

<sup>7</sup> R. K. Carty, William P. C., and L. Young, *Rebuilding Canadian Party Politics* (Vancouver: UBC Press, 2000).

<sup>8</sup> A. L. Esselment, "A Little Help from My Friends: The Partisan Factor and Intergovernmental Negotiations in Canada," *Publius* 43, no. 4 (2013): 701-27, accessed July 27, 2020, <https://academic.oup.com/publius/article-abstract/43/4/701/1939741>.

<sup>9</sup> L. Berdahl and E. Montpetit. "Canada: Is It Really a Country Divided?" *The Conversation*, accessed August 6, 2020. <https://theconversation.com/calada-is-it-really-a-country-divided-118514>.

<sup>10</sup> S. E. Hobfoll, *Tribalism: The Evolutionary Origins of Fear Politics* (Cham: Palgrave MacMillan, 2018), accessed July 27, 2020, <https://link.springer.com/book/10.1007%2F978-3-319-78405-2>.

<sup>11</sup> M. Ignatieff, "Enemies vs. Adversaries," *The New York Times*, October 16, 2013, <https://www.nytimes.com/2013/10/17/opinion/enemies-vs-adversaries.html>.

<sup>12</sup> "Tribalism Is Tearing Canada apart," *Maclean's*, January 11, 2019, <https://www.macleans.ca/politics/ottawa/tribalism-is-tearing-canada-apart/>.

these trust ties.<sup>13</sup> Conversely, ad hoc, distanced and one-off or infrequent encounters engender more competitive and combative behaviours based on dog-eat-dog (zero-sum) calculations.<sup>14</sup> Leaders who know they must encounter their intergovernmental counterparts on a regular basis are more likely to treat them as adversaries with whom they share common goals, as opposed to enemies that need to be vanquished. They are more likely to model good behaviour if they expect others will have the opportunity to reciprocate. Short-term trade-offs may be negotiated and compromises achieved in the name of a longer-term, more stable set of interactions. Institutionalization helps to establish these sorts of norms, rules and routines.

There are three types of institutional innovations that can help take the tribal edge off Canadian intergovernmental relations by building stronger and more durable trust among public officials of different regions and parties. All of them find precedent or familiarity in various corners of Canadian politics.

## REFORMING EXECUTIVE FEDERALISM

Interactions among premiers and prime ministers can be improved in a number of ways. First ministers' meetings should become more institutionalized. The ad hoc and top-down nature of first ministers' meetings creates a sense of gamesmanship and tension between the prime minister and premiers.<sup>15</sup> As agreed to in the Charlottetown Accord,<sup>16</sup> annual first ministers' meetings would have made the events more frequent, routine and predictable. Agendas should be set jointly among first ministers, allowing all participants to table items of importance. The pandemic has necessitated weekly teleconferences among first ministers, but these have been directed by the federal government. A more permanent and collaborative process would help address tribal tendencies.

In addition, first ministers should convene joint cabinet meetings with their counterparts across the country. This includes the federal government travelling to other parts of the country to meet with other governments on a government-to-government basis. Interprovincial meetings have merit, as well. Such joint cabinet meetings have a history in Western Canada,<sup>17</sup> with provincial governments meeting on an occasional basis

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<sup>13</sup> P. G. Thomas, "Trust, Leadership, and Accountability in Canada's Public Sector," in *The Evolving Physiology of Government: Canadian Public Administration in Transition*, ed. O. P. Dwivedi, T. A. Mau, and B. M. Sheldrick (Ottawa: University of Ottawa Press, 2009), 215-48, accessed July 27, 2020, <https://books.google.ca/books?uid=113709351670954014717&hl=en>.

<sup>14</sup> J. Wallner, *19th Century Division of Powers, 21st Century Problems: Understanding Canadian Intergovernmental Relations* (Ottawa: Canada 2020, 2014), accessed July 27, 2020, [https://canada2020.ca/wp-content/uploads/2014/05/2014\\_Canada2020\\_PaperSeries\\_EN\\_Issue-05\\_FINAL.pdf](https://canada2020.ca/wp-content/uploads/2014/05/2014_Canada2020_PaperSeries_EN_Issue-05_FINAL.pdf).

<sup>15</sup> J. P. Meekison, H. Telford, and H. Lazar, ed., *Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004), accessed July 27, 2020, <https://www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/pub/archive/SOTF/SOTF2002.pdf>.

<sup>16</sup> J. Makarenko, "Charlottetown Accord: History and Overview," *Maple Leaf Web*, February 10, 2009, <https://www.mapleleafweb.com/features/charlottetown-accord-history-and-overview>.

<sup>17</sup> L. Berdahl, "Region-Building: Western Canadian Joint Cabinet Meetings in the 2000s," *Canadian Public Administration* 54, no. 2 (2011): 255-75, accessed July 27, 2020, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1754-7121.2011.00173.x>.

in the early twenty-first century. The federal government has made a habit of hosting *cabinet retreats* outside Ottawa, but these seldom involve formal, joint meetings with cabinet colleagues in the host province.

## INTERLEGISLATIVE FEDERALISM

Beyond first ministers and their cabinet colleagues, relations among backbench members of federal and provincial assemblies can also be enhanced.

Parliamentarians across Canada should establish an Interlegislative Council. Senators and members of parliament participate in a number of parliamentary associations<sup>18</sup> and “friendship groups”<sup>19</sup> with their counterparts in other countries. These well-structured organizations are meant to foster the exchange of ideas, information and experiences across borders. No similar organization connects federal, provincial and territorial (FPT) legislators within Canada, although cabinet ministers meet at least annually with their FPT counterparts at sectoral meetings. These forums of interlegislative federalism have been recommended repeatedly throughout the last several decades.<sup>20</sup>

Federal, provincial and territorial governments should also establish an interlegislative exchange program. Legislators from certain regions should be paired with those with alternative viewpoints from other parts of the country. Legislators would spend time with each other in their respective districts, shadowing each other when meeting with local stakeholders, citizens and colleagues to formulate a better sense of how politics operate in other parts of Canada.

## INTRALEGISLATIVE FEDERALISM

At the federal level, interparty regional caucuses should be established and institutionalized. Most federal and provincial parties have internal regional groups of legislators who meet on a regular basis. And there are dozens of issue-based interparty caucuses in Ottawa and the capitals of the larger provinces (e.g., the Diabetes Caucus). Yet, outside the Senate, there are no interparty regional caucuses in Canada akin to those found in the United States, where formal groups like the Northern Border Caucus and Western Caucus meet to generate consensus around common legislative priorities. Setting up formal, routine meetings of federal legislators from the same region would be of benefit in generating trust ties across partisan lines. It would also allow partisan adversaries to disagree in private without resorting to public disputes. If extended to the Upper Chamber, it could help build bridges among senators and MPs. If these

<sup>18</sup> “Parliamentary Associations,” Parliament of Canada, accessed July 27, 2020, <https://www.parl.ca/diplomacy/en/associations>.

<sup>19</sup> “Friendship Groups,” Parliament of Canada, accessed July 27, 2020, <https://www.parl.ca/diplomacy/en/friendship-groups>.

<sup>20</sup> T. Hueglin, “Treaty Federalism as a Model of Policy Making: Comparing Canada and the European Union,” *Canadian Public Administration* 56, no. 2 (2013): 185–202, accessed July 27, 2020, <https://onlinelibrary.wiley.com/doi/abs/10.1111/capa.12013>.

caucuses were to meet outside the National Capital Region on an occasional basis, it could open opportunities to meet with provincial legislators, breaking down jurisdictional barriers in the process.

These are not silver-bullet solutions, of course. None address the effects of a media bent on generating and sensationalizing conflict among parties and across regions. Collectively, however, these new institutions would help build trust and protect against the threats to national unity that often accompany the coupling of partisanship and regionalism in Canada. Critics will charge that the reforms amount to “taking the politics out of politics.” Some amount of disagreement and conflict is desired and expected in a democratic society. If this conflict comes at the expense of common cause and purpose, however, it can threaten the integrity of that society’s political institutions, which are designed to allow for peaceful discourse and productive debate about the common good. The last time Canada’s party system was as regionally divided as it is today, we came within a few thousand votes of facing the existential crisis of losing a province from Confederation. While calls for disintegration are quieter and coming from another corner of the country, they are nonetheless indicative of the same destructive tribal tendencies. As the national unity of the early months of the pandemic wears off, modest steps can be taken to encourage our political leaders to prevent us from reaching that point.

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# Reconsidering the Constitutional Status of Municipalities: From Creatures of the Provinces to Provincial Constitutionalism

Kristin R. Good

## INTRODUCTION

A common refrain among Canadian political and legal analysts is that municipalities are “creatures of the provinces.” This odd and disparaging way of describing an order of government in the Canadian federation downplays the democratic and constitutional significance of municipalities. It disengages citizens from their municipal institutions and therefore lessens the scrutiny of municipal decisions and the accountability of municipal decision-makers.

The phrase also perpetuates the notion that municipalities are administrative arms of provincial governments. It downplays their fundamentally political nature. It implies that municipal responsibilities are unimportant local matters that require pragmatic, apolitical responses. The debate about systemic racism in policing is an obvious example of the political nature of municipal authority. Municipal laws and their enforcement also have enormous consequences for who wields power in cities. Although zoning formally regulates land use, it also governs people by indirectly controlling who can use land and for what purpose.<sup>1</sup> Municipal law-making could reflect and contribute to the inclusion of the diversity of urban populations in a variety of areas of jurisdiction that are fundamental to everyday life, such as property standards bylaws. However, they are not currently meeting this potential.<sup>2</sup>

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<sup>1</sup> I. Skelton, “Keeping Them at Bay: Practices of Municipal Exclusion” (Winnipeg: Canadian Centre for Policy Alternatives, Manitoba Office, September 2012), <https://www.policyalternatives.ca/publications/commentary/keeping-them-bay-practices-municiple-exclusion>.

<sup>2</sup> M. Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago and London: University of Chicago Press, 2012), chapter 3.

A fundamental challenge in the Canadian federation is to realize the potential of municipal government by recognizing its democratic and constitutional significance. Canada needs to embrace the “federalism principle” in municipalities’ relationship with other orders of government. The Supreme Court of Canada recognized the “principle of federalism” as a “political and legal response to underlying social and political realities,” “inherent in the structure of our constitutional arrangements” and as a principle that “triumphed” over parts of the written constitution that appeared to contradict it, since such written elements were interpreted in its light.<sup>3</sup> Fully animating the federalism principle in Canada involves rethinking how to empower municipalities to govern local communities in ways that reflect their territorial diversity. It also requires thinking creatively about how to better link them to provincial and federal institutions as well as intergovernmental processes. I argue that the laws that establish and delegate power to municipalities (and create municipal systems) ought to be considered a particular kind of constitutional law – “organic statutes,” which are ordinary (unentrenched) statutes that are constitutional in subject matter and significance. In the British constitutional tradition, which is largely based on unwritten constitutional conventions, organic statutes are used to establish certain constitutional rules plainly and in writing; the term is meant to distinguish them from ordinary statutes in areas such as health and transportation policy. The authors of a *The Canadian Regime*, an influential textbook on the Canadian constitution, mention provincial human rights codes as an “illustrative example” of such organic statutes in Canada’s constitutional regime, which incorporates elements of both British and American constitutionalism. Human rights codes are unentrenched provincial statutes but by no means ordinary areas of policy since “they deal with fundamental rights such as equality and protection against discrimination.”<sup>4</sup> As systems that create rules for the division of power between two orders of government and for the establishment of legislative bodies (municipal councils), I argue that municipal systems are more similar to other “organic statutes” like provincial human rights codes than “ordinary statutes” that govern specific policy areas.<sup>5</sup> As such, they should be seen as unentrenched written elements of existing provincial constitutions. Furthermore, although provincial constitutions are distinct elements of the Canadian constitutional order, they exist within a broader constitutional context that places limitations on their actions and that is animated by underlying principles. As such, the provincial laws that establish municipal systems not only reflect and further important constitutional values in provinces but also the broader Constitution (for example, the principles of federalism and democracy discussed above). In other words, creating and altering a municipal act is of greater constitutional significance in a federation and constitutional order that values the federalism principle.

Since the *Constitution Act, 1982*, establishes that provinces can amend their constitutions unilaterally (with some important restrictions), provincial constitutions are a source of constitutional flexibility. Unlike the onerous amendment procedures

<sup>3</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 17, [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?site\\_preference=normal](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?site_preference=normal). Paragraphs 55-57.

<sup>4</sup> P. Malcolmson, R. Myers, G. Baier and T.M.J. Bateman, *The Canadian Regime: An Introduction to Parliamentary Government in Canada* (Toronto: University of Toronto Press, 2016), 19.

<sup>5</sup> See Malcolmson et al., *The Canadian Regime*, 18-19 for a discussion of unentrenched constitutional laws as an element of Canadian constitutionalism.

applying to other parts of the federal Constitution, significant constitutional changes can be enacted through a simple majority vote. However, what is missing are mechanisms to protect municipalities against unilateral change by a provincial government, and to allow them greater authority over the governance of their own communities.

In this essay, I introduce the notion of manner and form limitations. These are self-imposed procedural restraints that limit a legislative body's enactments.<sup>6</sup> Such limitations would provide stability for municipal systems within provincial constitutions without introducing unnecessary rigidity. Provisions such as the ones I outline could be designed in ways that balance respect for municipal democracy, autonomy and stability with the interests of broader provincial political communities.

## CREATURES OF THE PROVINCES: CONSTITUTIONAL DOCTRINE AND DISCOURSE

Constitutions define “a set of rules that authoritatively establishes both the structure and the fundamental principles of the political regime.”<sup>7</sup> Canada's constitution differs from most constitutions insofar as it is not contained in a single unified document but instead includes a variety of elements including entrenched acts, unentrenched “organic statutes,” constitutional conventions, case law and others.<sup>8</sup> Thus, although it is significantly more complex than what is contained in these two entrenched laws, the following two acts are commonly considered Canada's “Big C” Constitution – *The Constitution Act, 1867* and *The Constitution Act, 1982*. The 1867 Act established Canada as a federation with a constitutionally protected distribution of legislative authority between the federal and provincial governments.

Section 92 of the 1867 Act lists provincial areas of exclusive legislative authority. Subsection 8 is “Municipal Institutions in the Province.” This subsection describes a different type of legislative power than the other areas of legislative authority listed in the section. It involves creating municipalities, which are territorial and democratically elected governmental bodies. They are corporations that “allow residents of a specific geographic area to provide services that are of common interest” and were a historical “response to the desire of local communities to exercise self-government.”<sup>9</sup> Municipalities are also legislative bodies that enact and enforce municipal laws. These are called bylaws because their legal authority derives from provincial statutes.

Proponents of the “creatures of the provinces” view assume that, since the Constitution establishes municipalities as an area of provincial legislative competence, instead of an independent order of government, we should conclude that they lack

<sup>6</sup> P.W. Hogg, *Constitutional Law of Canada (2016 Student Edition)* (Toronto: Thomson Reuters, 2016), 12.3 (b).

<sup>7</sup> Malcolmson et al., *The Canadian Regime*, 13.

<sup>8</sup> Hogg, *Constitutional Law of Canada*, chapter 1.

<sup>9</sup> C.R. Tindal and S. Nobes Tindal, *Local Government in Canada (5<sup>th</sup> edition)* (Scarborough, ON: Nelson Thomson Learning, 2000), 2.

constitutional status and significance. One clear example of this doctrine's hegemony and impact is in the 1997 decision by the Ontario Court of Justice against a challenge to the provincial *City of Toronto Act (1997)*, which dissolved six municipalities and created a "megacity" through a unilateral process and in the face of significant opposition by municipalities and citizens. The Act was challenged by five of the six Toronto municipalities (including East York) that were amalgamated as well as a variety of citizens' organizations and individual citizens.<sup>10</sup> In *East York v. Ontario*, the court stated that municipal institutions "lack constitutional status"; "are creatures of the legislature and exist only if the provincial legislation so provides"; "have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation"; and "may exercise only those powers which are conferred upon them by statute."<sup>11</sup> More generally, the court cited noted local government expert Andrew Sancton. He stated that Canadian municipalities have "no constitutional protection whatsoever against provincial laws that change their structures, functions and financial resources without their consent."<sup>12</sup>

Canadians have witnessed these limitations in the many provincially imposed reorganizations that have taken place since the 1990s, without the consent of municipalities or citizens. The most dramatic was the Ontario government's 2018 decision to significantly reduce the number of members on Toronto's city council during a municipal election.

## MUNICIPAL SYSTEMS AND PROVINCIAL CONSTITUTIONALISM: AN ALTERNATIVE CONSTITUTIONAL INTERPRETATION

Reconceiving municipalities as organic elements of provincial constitutions faces another fundamental hurdle: provincial constitutions are overlooked and even erased in the scholarship, the popular constitutional imagination<sup>13</sup> and in the "megaconstitutional"<sup>14</sup> debates of the last few decades. In those debates, the division of power and provincial representation in institutions of intrastate federalism, particularly the Senate, became dominant concerns. Section 92 needs to be recast in a different constitutional light. Instead of examining it through a division-of-power lens, one must also apply a provincial constitution lens. Doing so reveals that section 92 lists areas of

<sup>10</sup> See B. Milroy, "Toronto's Legal Challenge to Amalgamation," in *Urban Affairs: Back on the Policy Agenda*. C. Andrew, K.A. Graham, and S.D. Phillips. (Montreal & Kingston: McGill-Queen's University Press 2002) for a discussion of the case and the politics surrounding it.

<sup>11</sup> *East York (Borough) et al. v. Ontario (Attorney General)*, 1997, CanLII 12263 (ON SC), <https://www.canlii.org/en/on/onsc/doc/1997/1997canlii12263/1997canlii12263.html>.

<sup>12</sup> Sancton, cited in *East York v. Ontario*.

<sup>13</sup> Academic knowledge about them has been lost because many constitutional law experts appear to have forgotten their pre-Confederation history and essentially written distinct and pre-1867 provincial constitutions out of the constitutional mainstream. See N. Wiseman, "Clarifying Provincial Constitutions," *National Journal of Constitutional Law* 6, no. 2 (1996), 269-94, and P. Price, "Provincializing Constitutions: History, Narrative and the Disappearance of Provincial Constitutions," *Perspectives on Federalism* 9, no. 3 (2017).

<sup>14</sup> Peter Russell coined the term "megaconstitutional" politics to describe the period from the negotiation of the Fulton-Favreau amending formula of 1964 to the rejection of the Charlottetown Accord in 1992. This was a period in which the very nature of the Canadian political community was questioned. It was "exceptionally emotional and intense" and dominated political life in Canada. See P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (third edition) (Toronto: University of Toronto Press, 2004), 75.



legislative authority related to particular public policies or areas of jurisdiction but also lays a flexible foundation for the development of traditions of provincial constitutionalism. Its first subsection contained a crucial element of a constitution,<sup>15</sup> the *power of provinces to amend their own constitutions*.

It is unreasonable to think the Framers of the Constitution would have created a third order of government if they valued municipal democracy and attributed any constitutional significance to municipalities. Modern federalism was a new constitutional form at the time.<sup>16</sup> The provinces themselves were embryonic structures in the federation's so-called "colonial era."<sup>17</sup> It would have been premature to include municipalities in the Constitution as separate orders of government with distinct areas of legislative and fiscal authority. This would have created unmanageable rigidity because amending formulae for the division of powers among governments were not included in the Constitution at that time. Regardless of the Framers' intentions, the Constitution is a living document that ought to be approached through the lens of modern democratic values and underlying constitutional principles.

## MUNICIPALITIES, FUNDAMENTAL VALUES AND THE CANADIAN CONSTITUTIONAL ORDER

Why do provinces create municipal governments? What is their purpose? It is useful to note that the reasons for dividing power between provinces and municipalities are largely similar to the reasons for establishing a federation. Both types of power-sharing are territorial methods of dividing power that advance fundamental democratic principles. They uphold liberty by providing a check on the unilateral exercise of power by a single legislative body. They uphold equality by decentralizing political institutions and thus facilitating participation in democratic decision-making. They further the welfare of local populations by tailoring services to the territorial diversity

<sup>15</sup> This section was repealed when the Constitution was patriated in 1982 and multiple amending formulae were included in the *Constitution Act, 1982*.

<sup>16</sup> Newer federations, such as South Africa, have incorporated constitutional recognition of municipal government.

<sup>17</sup> A well-known typology divides Canada's evolution into historical eras beginning with the colonial era. See R. Simeon, I. Robinson and J. Wallner, "The Dynamics of Canadian Federalism" in *Canadian Politics (sixth edition)*, ed. J. Bickerton and A.-G. Gagnon (Toronto: University of Toronto Press, 2014). However, Jenn Wallner's recent typology, which identifies three modes of federal practice (colonial, classical and interdependent), is useful in terms of our thinking about provincial-municipal relations. Together, these typologies highlight that, although certain practices may have been more common in the federal-provincial relationship in the so-called colonial era, such impulses persist. One might argue that a colonial mode of federal practice usefully characterizes actions such as imposed municipal amalgamations and the reorganization of authority, which reflect the "unilateral and controlling aspects" of a colonial way of practising federalism. See J. Wallner, "Practices of Federalism in Canada" in *Canadian Politics (seventh edition)*, ed. J. Bickerton and A.-G. Gagnon (Toronto: University of Toronto Press, 2020), 156. Put another way, the result of the "creatures of the provinces" doctrine is "totalitarian provincial control over local political institutions: control that is at odds with the 'principles of a free and democratic society.'" See W. Magnusson, "Are Municipalities Creatures of the Provinces?" *Journal of Canadian Studies* 39, no. 2. (2005), 6.

of political communities, ensuring their effectiveness.<sup>18</sup> David Cameron argues that provincial-municipal divisions of power have a “quasi-constitutional status” because of the contribution they make to democratic life in provinces.<sup>19</sup> This view has been given more weight since the Supreme Court of Canada recognized “democracy” and the “principle of federalism” as underlying constitutional values in Canada’s constitutional order.<sup>20</sup> Those fundamental values are supported by a trend in the provinces of statutes that empower municipalities by establishing municipal systems and city charters, and a more expansive interpretation by the courts of the scope of municipal powers. The principle of federalism is advanced in Canadian municipal systems. Legislating in this area should therefore be approached with particular care. Yet even if one accepts that municipalities have a type of organic constitutional status in provincial law, this does not provide sufficient protection for municipalities against the unilateral imposition of change to their democratic institutions, boundaries and authority.

## MANNER AND FORM LIMITATIONS AS PROTECTIVE LEGAL MECHANISMS

More flexible ways of power-sharing are needed for the distribution of powers between provincial governments and municipalities than for power-sharing between the federal government and provinces. The development of more empowering municipal laws in provinces,<sup>21</sup> particularly since the mid-1990s, shows the system’s ability to adapt to changes at the local level, particularly within larger cities. Municipalities further the federalism principle by capturing the diversity of local communities in more specific and grassroots ways than Canada’s vast provinces can achieve. They provide a much-needed check on provincial legislatures, which are dominated by the political executive, as is the House of Commons.

With some exceptions, making constitutional changes at the provincial level respecting municipalities would be no different than passing ordinary legislation. They would require a majority vote in the legislature. In this context, in 2007 the Quebec National Assembly considered a private member’s bill, introduced by Daniel Turp, a Parti Québécois member. The Bill, titled *Québec Constitution*, would have begun to codify the province’s constitution. It included an amending formula requiring a supermajority

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<sup>18</sup> Cameron draws on Arthur Maass, who argues that all forms of dividing governmental power are meant to further these three principles. Maass sees the territorial or “areal” division of power as a particular way of dividing power that is designed to achieve distinct objectives and reflect particular values. Focusing on the rationale for the division of power rather than on the particular legal form it takes serves to highlight the similarities between federal-provincial divisions of power and provincial-municipal divisions of power. See D. Cameron, “Provincial Responsibilities for Municipal Government” *Canadian Public Administration* (1980), 222-35, and A. Maass, ed., *Area and Power: A Theory of Local Government* (Glencoe, Illinois: The Free Press, 1959).

<sup>19</sup> By “quasi-constitutional” Cameron appears to mean that municipalities and municipal systems further constitutional values but since their status is not entrenched in the Constitution they have only a “limited security.” See Cameron, “Provincial Responsibilities,” 234.

<sup>20</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 17, [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?site\\_preference=normal](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do?site_preference=normal).

<sup>21</sup> For an overview, see Z. Taylor and A. Dobson, “Power and Purpose: Canadian Municipal Law in Transition,” Institute on Municipal Finance and Governance, Paper No. 47 (Toronto: Munk School of Global Affairs and Public Policy, 2020).

(a two-thirds vote in favour) to change constitutional laws in the province.<sup>22</sup> This amending formula is an example of what legal experts call manner and form limitations, defined as self-imposed restrictions on a legislative body's authority.<sup>23</sup>

Manner and form procedures could provide the key to protecting municipal autonomy in provincial constitutions in a flexible way.<sup>24</sup> Although they could be introduced as general amendment procedures in codified provincial constitutions, manner and form limitations could also be tailored to specific provincial legislation with constitutional significance such as municipal acts and city charters. I outline below a non-exhaustive list of possible limitations on provincial legislatures' authority in municipal affairs:

- 1) Commitment to consultation: Requiring consultation with the affected municipality before a provincial legislature enacted changes to a city charter or municipal act through a majority vote in the provincial legislature could be specified clearly in the relevant statute. For instance, sections 1(2) and 1(3) of the *City of Toronto Act* refer to a cooperative relationship of mutual respect. However, procedural requirements are absent.<sup>25</sup>
- 2) Supermajority vote: A legal requirement of more than a 50 percent majority vote in the provincial legislature could be required to enact changes to municipal acts, city charters or aspects of them. For instance, a municipal act could require a two-thirds vote in favour to impose an amalgamation on local communities that had not requested or had opposed such action. In consequence, a measure that would significantly affect the authority and political institutions in a municipality would probably be subject to a fuller debate in the provincial legislature and require at least some cross-party support.
- 3) Municipal consent: A Toronto group recently called for a bilateral amendment (using section 43 of the *Constitution Act, 1982*) to the Canadian Constitution to require that the Ontario government acquire a city's consent to make changes to a city charter after it was approved by the provincial legislature.<sup>26</sup> Such a requirement could be excessively rigid, essentially giving a municipality a veto over future changes to aspects of municipal systems that affect not only the community in question but also other municipal communities. Such a proposal could be made more

<sup>22</sup> Bill 196, *Québec Constitution*, 1st Session, 38th Legislature, National Assembly, 2007, <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-196-38-1.html?appelant=MCsection>.

<sup>23</sup> Hogg, *Constitutional Law*, 11-12.

<sup>24</sup> K.R. Good, "The Fallacy of the 'Creatures of the Provinces' Doctrine: Recognizing and Protecting Municipalities' Constitutional Status," Institute on Municipal Finance and Governance Paper No. 46 (Toronto: Munk School of Global Affairs and Public Policy, 2019).

<sup>25</sup> Specifically, the legislation states that: "The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation" and that "For the purposes of maintaining such a relationship, it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City." The *Community Charter* in British Columbia requires consultation between the province and the Union of British Columbia Municipalities. See British Columbia, *Community Charter*, SBC 2003, [https://www.bclaws.ca/civix/document/id/complete/statreg/03026\\_09#section276](https://www.bclaws.ca/civix/document/id/complete/statreg/03026_09#section276), and Ontario, *City of Toronto Act, 2006, SO 2006*, chapter 11, schedule A, <https://www.canlii.org/en/on/laws/stat/so-2006-c-11-sch-a/146170/so-2006-c-11-sch-a.html>.

<sup>26</sup> Charter City Toronto, 2019, "Charter City Toronto Proposal: Starting the Conversation Around Empowering Toronto and Other Canadian Cities," a document prepared by a Toronto residents' group, Retrieved online: <https://www.chartercitytoronto.ca/proposal.html> on July 21, 2020.

flexible by enacting it in provincial (constitutional) law (i.e. municipal acts) and by, for instance, subjecting it to a provision that the requirement of a municipality's consent could be overridden by a supermajority vote in the provincial legislature.

- 4) Referendum: A requirement that a referendum be held before legislative changes are enacted to municipal legislation is another option. British Columbia's *Community Charter* restrains the province's ability to impose amalgamations by requiring that a referendum be held in all affected municipalities and that the measure be supported by more than 50 percent of the votes in each municipality.<sup>27</sup>

Manner and form limitations, which could be adapted over time, are a way of seeking a balance between the forces of unity and diversity within a province. They would require a relatively broad consensus before overriding the wishes of a local community and would provide greater accountability for such decisions. They would also address asymmetry. Rather than a single manner and form requirement that applies to all matters in the municipal realm, these mechanisms could be tailored to municipal acts and city charters (or even parts of them, as with the BC *Community Charter*) on a case-by-case basis. This would provide for flexible and variable relationships between provincial governments and municipalities.

## CONCLUSION

The notion of "creatures of the provinces" is harmful to Canadian democracy and constitutional values in a variety of ways. Failing to recognize the significance of municipalities as democratically elected law- and policy-making bodies and as crucial service providers discourages citizen participation and scrutiny of municipal decision-making. This thwarts decision-making processes that empower local residents and are more responsive to community diversity. One example of the diversity to which municipalities must respond is the diversity resulting from immigration.<sup>28</sup> The "creatures of the provinces" doctrine also neutralizes a powerful constitutional check on provincial legislatures, which suffer from executive dominance.

Citizens must be confident that their municipal institutions and local political communities cannot be redefined unilaterally. Municipalities must be able to invest in long-range planning to offer the infrastructure and services citizens desire and to rationalize and adapt their bylaws to diversity. To do so, they require the basic security of knowing that municipal institutions and powers will not be altered unilaterally by the provincial government without strong justification and accountability. Manner and form mechanisms are flexible ways to limit how provincial legislatures enact legislative change. They have the potential to strike a balance between local democracy and the effective and equitable governance of metropolitan areas and provincial communities.

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<sup>27</sup> *Community Charter*, section 279.

<sup>28</sup> K.R. Good, *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (Toronto: University of Toronto Press, 2009).

Reimagining the place of municipalities in Canada is in line with the country's ongoing evolution from a colonial constitution, in which top-down impositions of authority were allowed and democracy was a force to be tamed, to a constitutional order shaped by the underlying constitutional principles of democracy and federalism. It is time to abandon the notion of municipalities as "creatures of the provinces" and to embrace them as institutions to channel democratically legitimate, equitable and effective responses to today's highly diverse urban challenges.



# The Persistence of Western Alienation

Loleen Berdahl

## INTRODUCTION

Canada is a perplexing country. It sits high on many “world’s best” lists, and Canadians enjoy wide-ranging personal freedoms, a high quality of life, economic prosperity, and the sheer physical beauty of a diverse landscape. At the same time, it has since its start struggled with seemingly intractable regional conflict. At best, regional conflict exists as a dormant undercurrent to most forms of political debate. At worst, it impairs governance and weakens Canada’s sense of common national purpose and aspiration in an increasingly competitive global environment.

I have been studying and writing about a particular dimension of Canada’s regional conflict – western alienation – for over two decades. Over that time, I have observed it rise, fall, and rise again. I have seen its political expression tied to aspirations to strengthen Canada (“the west wants in”) and to tear Canada apart (“wexit”). I have watched it withstand economic booms, recessions, and a global pandemic. Its persistence, I believe, speaks to its structural roots within the Canadian federation.

Although a study of western alienation can stand on its own merit given the importance of western Canada in the national economy and society, I focus on it because I believe that understanding the issue sheds important light on conflict and unity in Canada overall. Western Canada is only one example of Canadian regional conflict, as anyone familiar with Quebec or Atlantic Canadian politics knows. Exploring western alienation allows us to delve into the features of the Canadian federation that exacerbate regional conflict in our vast and diverse country.

Regional conflict is rarely the most urgent concern, but it is perhaps the most perennial. It seems to be baked into Canada's political system, and regional concerns are often prioritized over those relating to, for example, class, gender, race, ethnicity, or ideology. Regional conflict gets in the way of dealing with other matters, and, more important, it presents a threat to the country as a whole.

## IT'S ALWAYS 1867 IN OTTAWA

The political sentiment of exploitation and frustration emerging from some or all of the four western provinces has a long history. Western alienation did not start with Justin Trudeau or pipelines, nor did it start with the constitutional debates of the 1980s that led to the founding of the Reform Party of Canada. It predates the infamous National Energy Program, Pierre Trudeau, Quebec's Quiet Revolution, the Great Depression, and even the establishment of Saskatchewan and Alberta. The history of western alienation is part of the history of Canada and has its roots in the early years of the country.

Canada at the outset was defined from the standpoint of Ontario and Quebec. This is understandable: at the time of Confederation, these two central Canadian provinces were home to the vast majority of the population (in the first national census in 1871, 8 out of 10 Canadians lived in Ontario or Quebec), to the emerging industrial economy, to the new country's financial institutions, and to the headquarters of the major corporations and transportation systems. Meanwhile, the Maritime provinces saw their power and influence diminish as the central colossus grew, bolstered by its proximity to American population centres. At the time of Canada's founding and throughout its early decades, central Canada was not just the centre – it practically was Canada.

It is not surprising, therefore, that the dominant understanding of Canada – what it means to be Canadian, what and who we are as a country – was defined in central Canadian terms. Values and issues important to post-Confederation Ontario and Quebec – the French-English compact, anti-Americanism, pragmatic elitism – were championed as pan-Canadian values that defined the national political culture.

As Canada moved into the 20th century its population and economic patterns shifted, as the west exploded with new growth. Yet this central Canadian vision and its accompanying values never found a comfortable home in the frontier west, whose small francophone populations were swamped by a sea of English-speaking residents, and where French-English biculturalism was less of a priority amid the sprawling diversity of European settler populations.

The interests of the industrial centre often conflicted with and overrode those of the agrarian prairies. And the Canada-US border was merely a geographic line, instead of a historically war-torn battleground. The experiences and challenges of the west were different from those of the central Canada, and western alienation, as we now call it, found expression in complaints about economic exploitation and unfair representation. How these complaints were expressed shifted over the decades (through new



federal political parties; emboldened premiers; weakly supported separatist movements; and calls for policy, institutional and constitutional changes), but the core complaints remained largely the same.

Over time, I have come to see western alienation as a geography-based reaction to this focus on the central Canadian narrative – one of many possible – as the dominant national narrative. In voicing their discontent, western Canadians express concerns that go beyond policy issues and time-bound political events, to a more fundamental critique of this dominant narrative. Western alienation is a critical response to the centre-periphery dynamics of Canadian politics. Western Canadians, then and now, chafe at being treated as peripheral in their own country and have used various strategies in their attempt to redress their treatment.

Western alienation is, in short, an effort to de-centre Canada. It presents an alternative understanding of Canada in contrast to the dominant (1867 central Canadian) standpoint. It calls attention to how that Canada, in theory and practice, privileges central Canadian interests and worldviews over those of others, and demands change.

The persistence of western alienation, I believe, reflects the resilience of the 1867 vision of Canada. This vision has endured as time has moved on and conditions have changed. And while western Canada's population has grown, central Canada is still the centre, home of 6 out of 10 Canadians. The national image established at Confederation remains – and as a result, the western Canadian reaction to this arrangement also persists.

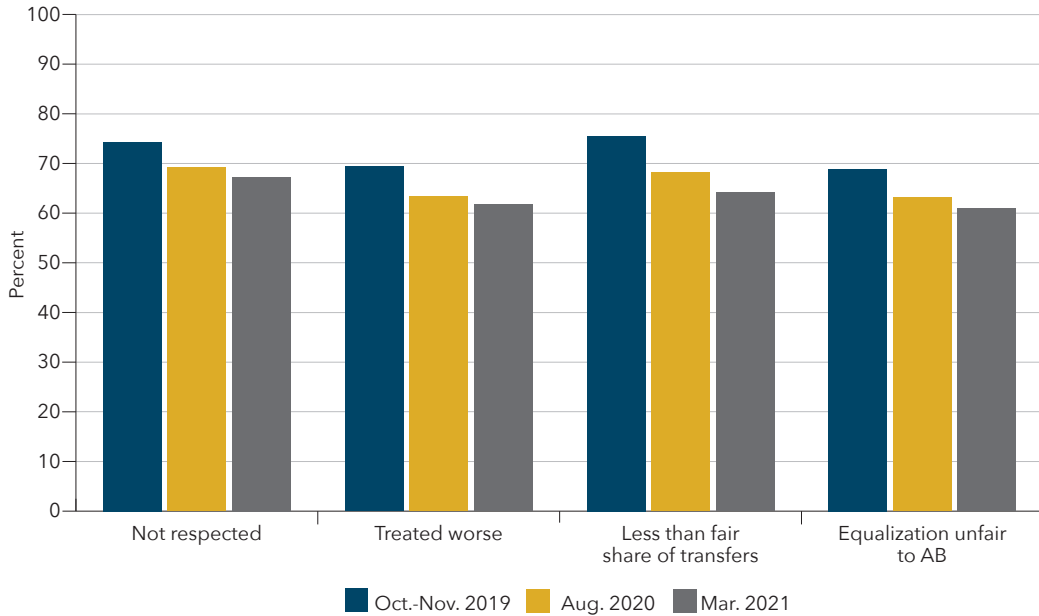
## WESTERN ALIENATION, BUT NOT JUST WESTERN ALIENATION

While I study regional division in Canada from the vantage point of western Canada, it must be stressed that regional discontent – that is, the belief that one's place of residence experiences unfair economic treatment, unfair political treatment and a lack of respect within Canada – is by no means limited to the west, nor is it expressed uniformly in the west. Historically across the country, discontent is seen in three regions: the west (particularly Alberta and Saskatchewan), Quebec, and Atlantic Canada (particularly Newfoundland and Labrador). Discontent isn't always defined by provincial boundaries, and northern Ontario's alienation from the rest of the province is one instance of this.

Stated more simply, regional discontent has been found pretty much throughout the country at one time or another, except southern Ontario.

The fact that regional discontent has endured for more than a century suggests that it is durable and will not be easily uprooted. Indeed, while discontent in Alberta has decreased somewhat since the pandemic began in Canada in March 2020, it remains high (figure 1). Its persistence points to fault lines within our federation, fault lines that I believe go back to patterns created and sustained by a Canada centred on one

**Figure 1. Alienation in Alberta before and during Covid-19**



Source: Common Ground, Viewpoint Alberta Surveys, University of Alberta, Edmonton. <https://www.commongroundpolitics.ca/viewpoint-alberta>

Questions: “In your opinion, is Alberta treated with the respect it deserves in Canada?”; “In general, does the federal government treat Alberta better, worse, or about the same as other provinces?”; “Thinking about all the money the federal government spends on different programs and on transfers to the provinces, do you think Alberta receives more than its fair share, less than its fair share, about its fair share? Canada’s system of equalization payment is unfair to Alberta.” N = 820 (October-November 2019); N = 825 (August 2020); N = 802 (March 2021).

standpoint – central Canada circa 1867. The challenge, as I see it, is to find a way to a new Canada that truly accommodates multiple standpoints, visions and understandings.

## HOW TO REDUCE REGIONAL DISCONTENT

Canada is, has been, and arguably always will be a country defined by compromise rather than grand principles. And compromises must be continually renegotiated. How, in a transformed post-Covid-19 world marked by profound domestic and global change, might the Canadian federation evolve to better reflect present realities, meet future challenges, and avoid reinforcing historical legacies of regional conflict and alienation?

Because western alienation specifically (and regional discontent more generally) is more than a catalogue of sporadic policy grievances, ameliorating it requires looking beyond a quick-fix policy response. At its core, western alienation is not a policy issue and will not be solved with policy responses alone. Federal-provincial disputes about pipelines, pension plans, agriculture and equalization are very real, but they are also symptoms of a deeper cultural malaise. Addressing discontent requires approaches

that confront perceptions of unfair economic treatment, unfair political treatment, and a lack of respect within Canada. The word “perceptions” must be stressed here. For these reasons, my recommendations focus on how Canada functions as a country.

Here are two steps I recommend the federal government takes to start in this direction.

### **Establish a permanent expert panel on equalization**

Public understanding of the equalization system, and of fiscal federalism more broadly, is imperfect at best. What’s more, equalization has become highly politicized and strongly tied to regional discontent, particularly in Alberta. Addressing the politicization of equalization is a necessary first step to addressing perceptions of unfair economic treatment. To do this, Canada should return to seeking arms-length expert advice.

In 2005, the Liberal government of Paul Martin appointed an expert panel to make recommendations on equalization.<sup>1</sup> This expert panel recommended an equalization formula, which the Conservative government of Stephen Harper adopted and put into place in the 2007-08 fiscal year. The Conservatives adapted the formula in 2009, and since then it has not changed significantly, despite two renewal processes (in 2014, under the Harper government, and in 2018, under the Liberal government of Justin Trudeau).

James Feehan argues, “The federal government’s quiet renewal of the equalization formula in 2018 was a missed opportunity. The lead-up to the 2019-24 renewal was a chance to receive feedback and advice from the provinces, policy experts and concerned citizens and groups, and an opportunity to act on that advice.”<sup>2</sup> I agree with this sentiment and take it further: in both 2014 and 2018 the government missed an opportunity to re-establish an arms-length expert panel to obtain that public feedback and to provide that advice. A nonpartisan, regionally representative expert panel would help to ensure a balance of regional interests and would be an important step in “decentring” the current system.

I recommend the Government of Canada establish a permanent, regionally representative, nonpartisan expert panel on equalization. Improving federal tools would increase the system’s capacity to act and be seen to act on the basis of fairness rather than political expediency. In the longer term, the panel could engage in consultations to inform its recommendations for the next equalization formula renewal.

While this may be insufficient on its own to fully address perceptions of regional economic unfairness, it would go a long way to moving Canada in the right direction.

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<sup>1</sup> Canada, Expert Panel on Equalization and Territorial Formula Financing, chaired by Al O’Brien, *Achieving a National Purpose: Putting Equalization Back on Track* (2006), <http://publications.gc.ca/collections/Collection/F2-176-2006E.pdf>.

<sup>2</sup> J. Feehan, *Canada’s Equalization Program: Political Debates and Opportunities for Reform*, IRPP Insight 30 (Montreal: Institute for Research on Public Policy, 2020), 25.

## Locate more federal government offices and jobs outside the National Capital Region

The federal government employs over 300,000 people; just over 230,000 work in core public administration (CPA) and just under 70,000 in separate agencies (e.g., Canada Revenue Agency, Canadian Food Inspection Agency, Parks Canada). In 2020, 46 percent of federal CPA employees – the bulk of whom are skilled knowledge workers – were located in the National Capital Region; this is up from 33 percent in 1995 and 43 percent in 2006.<sup>3</sup>

Is increasingly concentrating Canada's policy-focused knowledge jobs so heavily in Ottawa-Gatineau in the country's best interests? Other countries, including Norway, South Korea, Denmark, Mexico and Malaysia, began shifting public service work out of their national capitals prior to Covid-19;<sup>4</sup> since the pandemic, the United Kingdom has begun to do the same. It is time for Canada to find opportunities to decentralize its CPA workforce, and not just for service-focused activities. There are numerous benefits to doing so, one benefit is it would increase skilled knowledge and bilingual employment opportunities across Canada. Establishing a strong federal employment presence across Canada thus has the potential to buttress provincial economies.

Economic impacts aside, I believe that "getting Ottawa out of Ottawa" would go a long way toward reducing regional discontent. The decentralizing of federal offices and the associated employment would provide a more public face for the Government of Canada across the country. It would ensure that provincial perspectives and voices are heard within the federal public service, and contribute to a move away from the unconscious assumption that central Canadian and Canadian perspectives are one and the same. If there are not enough bilingual workforces available, then that would be a powerful incentive to invest in local language training and opportunities.

There is also reason to believe it would be politically popular: according to the 2021 Confederation of Tomorrow survey, over 7 in 10 Canadians supported "moving more government offices from Ottawa to other cities in the country so that more Canadians would have access to jobs in the federal public service," with at least 3 out of 10 Canadians in all provinces except Ontario strongly supporting this.<sup>5</sup>

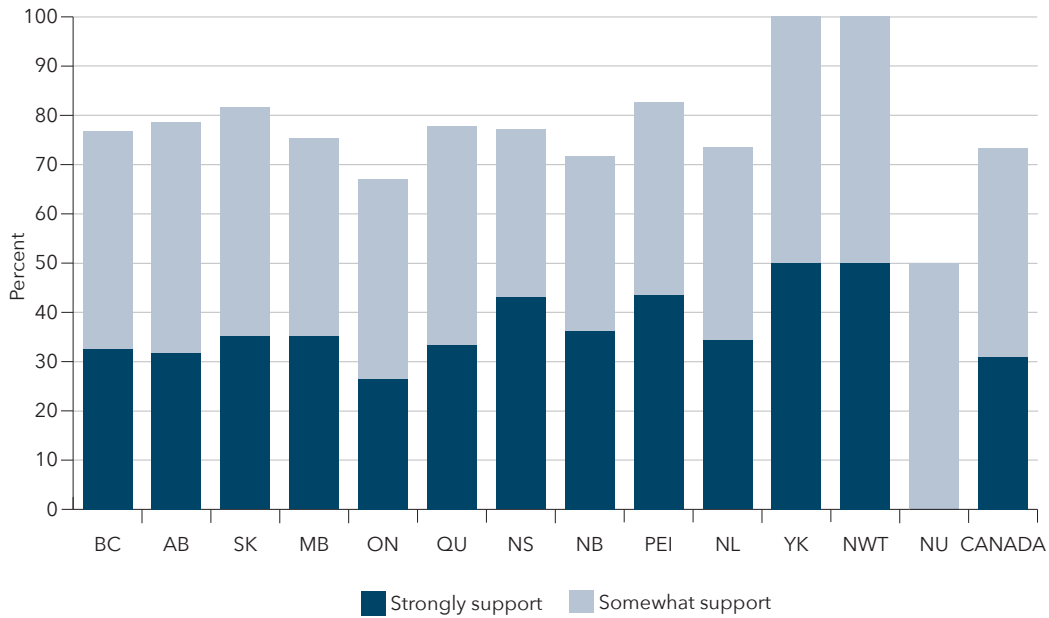
The issue of federal office location may garner growing attention. The Alberta Fair Deal Panel report includes the recommendation to "secure fairer representation of the Federal civil service and federal offices in western Canada" (noting, for example, that Parks Canada's headquarters would be more appropriately located in the western

<sup>3</sup> Canada, Treasury Board of Canada Secretariat, "Population of the Federal Public Service," 2020, <https://www.canada.ca/en/treasury-board-secretariat/services/innovation/human-resources-statistics/population-federal-public-service.html>.

<sup>4</sup> "Why Governments Move Civil Servants Out of National Capitals," *Economist*, April 6, 2019.

<sup>5</sup> These results will be part of a forthcoming Confederation of Tomorrow report. For published reports, see <https://centre.irpp.org/data/confederation-of-tomorrow-surveys/>.

**Figure 2. Support for moving more government offices out of Ottawa**



Source: Environics Institute, Confederation of Tomorrow Survey (forthcoming). <https://www.environicsinstitute.org/>

Question: "Do you support or oppose the following measures to help promote national unity in Canada? Moving more government offices from Ottawa to other cities in the country so that more Canadians would have access to jobs in the federal public service." *N* = 5,814.

provinces, given the proportion of national parks located there),<sup>6</sup> and the City of Regina is currently bidding to be the location of the new Canada Water Agency.

The Covid-19 pandemic has meant that many CPA employees are working from their home offices. The Government of Canada has the opportunity to learn from the national experience with remote work to expand its presence across the country. At the very least, it is an idea that should be pilot tested.

## WHY REGIONAL DISCONTENT MATTERS

Embedded in much of the commentary on the Covid-19 crisis is the idea that the world will never be the same. However, Canadians have gone through a number of global disruptions of similar or even greater magnitude: the challenges of agricultural settlement, the First World War, the Great Depression, the Second World War, and the global financial crisis in the first decade of the 21st century, to name a few. Political institutions and political cultures have been remarkably resilient in the face of disruption. Bringing about true change is a formidable task.

<sup>6</sup> Alberta, Fair Deal Panel, chaired by Oryssia Lennie, *Fair Deal Panel Report to Government* (May 2020), 25, <https://www.alberta.ca/fair-deal-panel.aspx>.

The fact that western alienation has endured for more than a century means that we have to recognize its persistence. While some might argue that discontent is simply a normal feature of Canadian federalism, it is neither a cost-free nor a desirable national characteristic. Further, in a period of growing global political polarization, there are risks to ignoring discontent.

If one wants to understand Canada, one must acknowledge that regional disputes are situated in our different understanding of Canada. Without this starting point, we will simply have the same debates in perpetuity, and the costs to Canada may continue to grow.

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## Biographical Notes

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**Kristin R. Good** is Associate Professor in the Department of Political Science at Dalhousie University. She is best known for her research on local immigration and diversity policies, particularly her *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), which won the Canadian Political Science Association's Donald Smiley Prize in 2010. A second and related research program critically interrogates municipalities' constitutional status in Canada, reflected in this piece and in a recent paper entitled "The Fallacy of the 'Creatures of the Provinces' Doctrine: Recognizing and Protecting Municipalities' Constitutional Status," published as an Institute on Municipal Finance and Governance Paper in 2019. She is a founding co-editor (with Dr. Martin Horak) of the McGill-Queen's Studies in Urban Governance book series.

**Kyle Hanniman** is an assistant professor of Political Studies at Queen's University. He studies fiscal federalism and political economy, with a focus on government bond markets, subnational fiscal policy and inter-regional risk sharing and redistribution. His work has appeared in the *Canadian Journal of Political Science*, the *British Journal of Political Science*, as well as a number of popular outlets, including the *Financial Post* and the *Globe and Mail*. His current book project is entitled *Booms, Busts and Bailouts: Fiscal Federalism and the Limits of Market Discipline*.

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