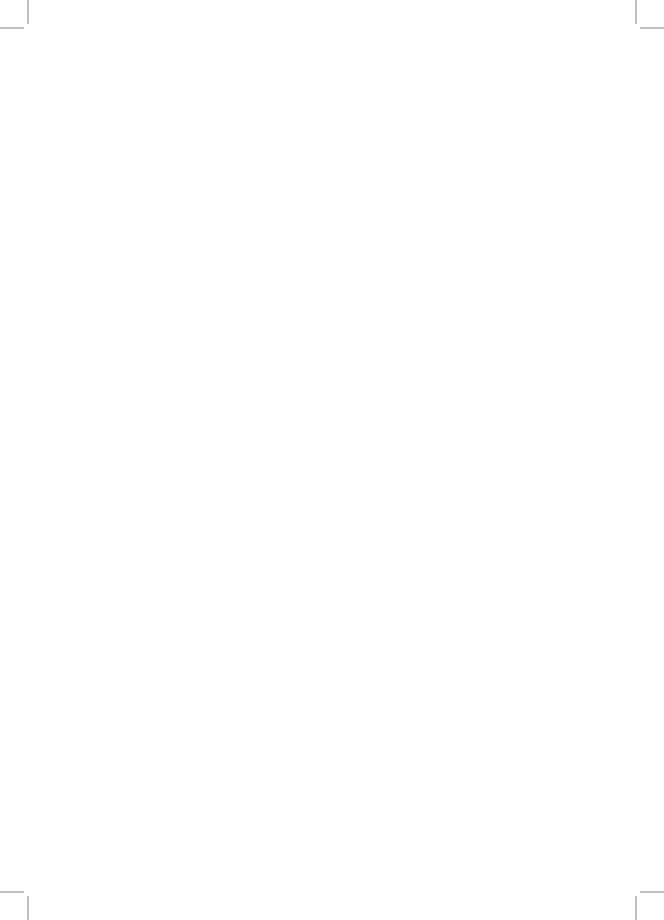
Canadian Content



McGill Undergraduate Journal of Canadian Studies



Canadian Content

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Notes on Contributors

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Liam Mather is a third year history student at McGill. He is an avid spectator of baseball, golf, and campus politics; his other interests include Bruce Springsteen, travelling, and debate. A Toronto native, Liam is a long suffering fan of the Maple Leafs. Fortunately, he found solace in preparing a school assignment that brings together two of his passions: hockey, and the political and social history of 20th century Canada. Liam currently resides in Montreal with his roommate, and fel-

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Sam Pinto is a U3 Political Science major with a double minor in History and Canadian Studies at McGill University. He has spent the last three years working at the *McGill Tribune*, both as a news editor and production manager. Sam is passionate about Canadian politics and public policy. Most recently, Sam worked for the advocacy group Canadian Journalists for Free Expression, where he focused on issues related to free expression in Canada such as access to information law, the muzzling of scientists, and Bill C-51. Sam will be graduating in Fall 2016, and plans to pursue a master's degree in public policy.

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Sarah Waters is a U2 student studying Geography and French. She enjoys videography, playing guitar, tennis and hopes to spend her post-McGill years seeing the world.

Foreword

his issue of Canadian Content, assembled and produced by the students of the Canadian Studies Association of Undergraduate Students' at McGill University, marks a bold windup to this 2015-2016 academic year. During the academic year, I have had the pleasure of being hosted by the McGill Institute for the Study of Canada as the Eakin Visiting Fellow in Canadian Studies, and it has been a wonderful pleasure to meet and work with the vibrant mix of students studying within its programs. The Institute remains at the forefront of Canadian studies and has been a fantastic host to my work this year as well.

Wide-ranging, compelling, and at times contentious, the students of Mc-Gill's Canadian Studies program demonstrate in this issue how the past can be used as a vital index of whatever it is that may be to come. When Liam Mather's article, for instance, examines the links between the NHL and the war effort during the Second World War, the paper turns up the unexpected, like ways in which the hockey league was not only called upon to act as a morale booster both at home and abroad during the war, but also how the league, on behalf of its players, was able to evade and bend the restrictions faced by other Canadians during wartime. Similarly, in investigating the history of Canada's access to information legislation, Sam Pinto discovers the ways in which the legislation has historically failed to deliver precisely the clarity and transparency that it was designed to induce, leading to a "culture of government secrecy." In turn, we are challenged in this issue to revise our understanding of perceptions of anti-Semitism in Canada and Montreal through Madeleine Gomery's nuanced examination of male Jewish writers' works that arrived after the Second World War. In all of these efforts, then, we bear witness to ways in which Canadian studies is a discipline rife with nuance and contention, a discipline that is constantly at work in revising its own historical self-understandings.

These shifts, in turn, reflect changes today in this strange space that many people call Canada. In examining, for instance, Indigenous Treaty rights, Jeff Baillargeon shows how the legal system evolves over time, as inconsistently used terminologies come into focus through the courts; the shifting sands of legal interpretation remind readers that the systems in place in Canada exist to be challenged, improved whenever possible, and rejected when needed. Similarly, B.E. Hartley's comparative examination of Canadian federalism and the Spanish state

system in this issue demonstrates some of what is at stake in addressing asymmetries within nation-state systems, another tension that continues to develop in Canada and beyond. In turn, Kary-Anne Poirier's examination of the niqab debate in Quebec, which sees the debate as both "reactionary" and "animated," seeks to understand how, in contemporary Quebec, it is possible to live alongside one another. This analysis demonstrates how undertones of racism, implicit in society, threaten to erupt without much warning; the old, previous debate around "reasonable accommodation" is only one part of the story about where the niqab debate has gone. This is a story with which Quebec and Canada at least need to reckon given, for instance, the discomfort that many in the public have stated about the resettlement of Syrian refugees, as this piece makes clear.

Where, then, does this issue of Canadian Content leave us? In part, it leaves us looking toward l'avenir, toward that which is yet to come, or toward whatever it is that might arrive. That which will come, of course, is the future, le futur, which we cannot yet know. But what might come, what might be invented or invited into our lives is perhaps more interesting. What is the future that we might invent, rather than the future that we might foretell? We might, for instance, learn from David Helps' "Five Theses on Canadian Literature" in this issue, or hold them up as a candle to the darkness of what is yet to come: Gothic romances and the tattered tapestries of the twentieth-century still might teach possibilities for mending old wounds and for dreaming as we peer into the gloom. What each of us might dream, however, is as unknowable as each of the differences between ourselves, or even our own self-difference from one moment to the next. A piece like Shelley Lin's "Last Night" also leads us to tomorrow, "back to life," to find homes that we do not yet know, in which we might hope against hope that there is a future for us all.

Kit Dobson

2016 Eakin Visiting Fellow in Canadian Studies McGill Institute for the Study of Canada Associate Professor, Mount Royal University

Letter From the Editors

the Canadian Studies Association of Undergraduate Students' annual research journal! Representing the interdisciplinary nature of Canadian Studies, the pieces presented in this journal vary on a wide range of topics and disciplinary approaches. We hope that the conversations this journal engenders will reflect that multifaceted approach to the issues facing contemporary Canada.

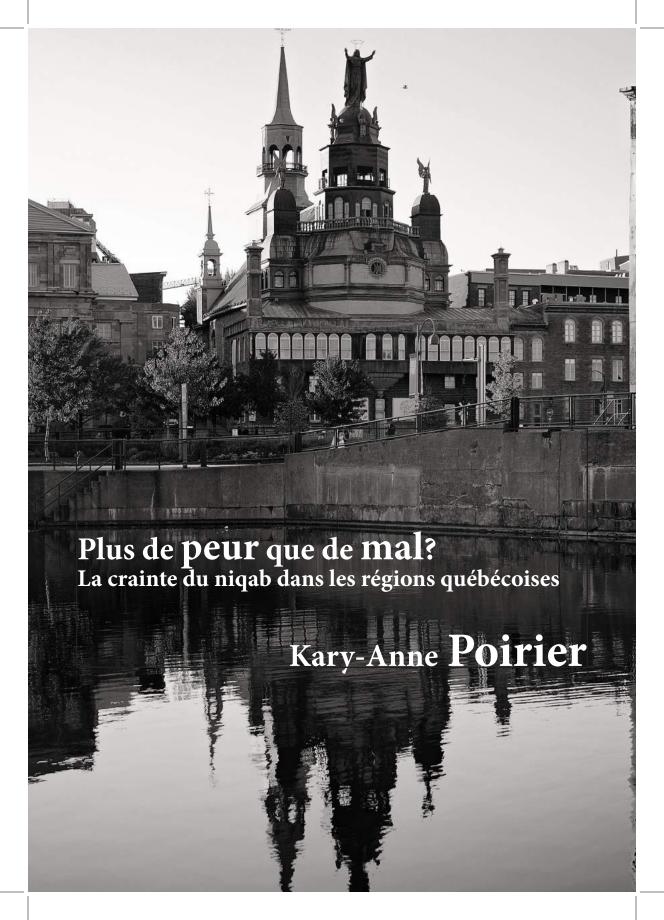
As always, we would like to extend our thanks to the Arts Undergraduate Society and the McGill Institute for the Study of Canada for their generous support of our journal. We would also like to thank Professor Kit Dobson, the 2016 Eakin Visiting Fellow in Canadian Studies, for kindly agreeing to introduce this volume.

Finally, our sincerest thanks must be given to Professor Will Straw, whose support and dedication to Canadian Studies students, CSAUS, and *Canadian Content* over his five-year term as Director of the McGill Institute for the Study of Canada has been unparalleled and greatly appreciated. The most helpful, accessible, and kind advisor and mentor we could ask for, he will be greatly missed in the MISC. As his term comes to a close, we wish him the best of luck with what is yet to come!

We hope you enjoy Canadian Content 2016!

Sincerely,

CSAUS 2016



Plus de peur que de mal? La crainte du niqab dans les régions québécoises

es symboles religieux viennent envenimer le débat politique québécois non seulement depuis le projet de ladite Charte des valeurs québécoises, mais encore de plus bel alors que l'épisode se répétait tout au long de la dernière campagne électorale fédérale. La question du niqab au Québec enflamme décidément les débats publics. Depuis un moment, surtout depuis ces deux avènements politiques, une crainte du niqab émane, surtout dans les régions québécoises et les plus petites municipalités. Le simple geste de porter un sac de patates sur sa tête ou tout autre objet pouvant agir à titre de masque laisse présager un profond malaise. Chose certaine, la question du niqab secoue : le débat est réactionnaire, à vif. Il faut chercher à comprendre. Pourquoi ce malaise survient-il? Comment peut-on assurer le « vivre ensemble » ainsi que la laïcité des institutions du Québec? Quel regard pose les médias locaux sur la question du niqab? Quels en sont les effets directs et indirects sur le discours populaire?

De nombreux chercheurs se penchent depuis des années sur des questions relatives à l'immigration, notamment celle des accommodements raisonnables au Québec. Il s'agit toujours de propos très délicats à soulever et à aborder. Effectivement, le débat devient épineux surtout lorsque nous considérons l'unicité du Québec, tout spécialement à cause de sa particularité linguistique. La fragilisation de la langue française est effectivement un vecteur poussant à ébranler toute une nation. Il est important de garder en tête que le Québec fut à son tour, colonisé, persécuté et mis à l'écart par la force du nombre; celui de l'océan anglophone canadien. Gardons également en tête, que cette pression du nombre est toujours présente sur divers pans : culturels, linguistiques, historiques, etc. (Stasiulis, p. 183, 2013).

La place de la laïcité dans une société donnée fait l'objet de nombreuses recherches, notamment au Québec. De biais avec la question des accommodements raisonnables, devons-nous croire que ceux-là deviennent trop permissifs? Viennent-ils réduire les chances vers l'atteinte de cette laïcité au Québec? De quelle laïcité parlons-nous au juste? Pour en revenir au niqab, d'un côté, il se manifeste comme un symbole poignant et provocateur, de l'autre, plutôt comme une affirmation religieuse. Chose certaine, une scission survient, non seulement dans les opinions, mais dans la dualité qui subsiste entre urbanité et ruralité. Tout

porte à croire que les populations régionales du Québec craignent le niqab étant donné leur méconnaissance et leur distance face à ce dernier. Je propose dans cet article une réflexion critique portée sur la construction d'un véhicule de la méconnaissance qui pousse à cette crainte. Il se centrera dans un premier temps, sur la division d'opinions succinctes qui existent au Québec. La plupart du temps, une scission subsiste entre le discours de la grande région de Montréal et celui des autres régions du Québec. Dans un deuxième temps, le rôle des médias sera étudié ainsi que le regard qu'ils posent sur le débat entourant le niqab. Plus précisément, il est clair que leur travail, agrémenté de sensationnalisme ou d'autres stratégies journalistiques, peut préconcevoir certains discours et ainsi créer des volte-faces.

Montréal et les régions : l'histoire d'un dualisme

Le propos peut sembler fort, mais le racisme est un truc naturel. Tous ceux qui ne sont pas comme le Nous dominant, inquiètent. La première perception de cet Autre, non-intégré, est tout spécialement négative à première vue. Ensuite, après être épluché et étudié, cet Autre gagne la chance de peut-être passer du côté positif de la perception collective (Armony, p. 12, 2015). La laïcité à la française devient-elle la solution à cette crainte de l'Autre qui débarque, qui est inconnu, d'autant plus non familier dans les régions québécoises? Les questions se posent, la crainte s'installe de plus bel, surtout pour le pire avec l'annonce des réfugiés syriens qui ont débuté leur arrivée au Québec depuis quelques semaines. D'après un sondage CROP, six Québécois sur dix sont en désaccord avec l'arrivée massive des réfugiés syriens (JDM, 2015). Les gens ont peur, surtout peur de l'inconnu et cela s'applique également au bout de tissu qu'est le niqab, car lui aussi il Nous est inconnu.

Les opinions à propos de cette peur, voire cette menace selon certains, diffèrent au sein même de la province. Une dualité s'installe entre Montréal et les régions québécoises. Cela s'explique notamment par une perception différente du « vivre ensemble ». En ville, les gens sont habitués au multiculturalisme, ils le côtoient tous les jours. Ils parlent à leurs collègues, leurs amis, leurs confrères dans une langue, l'anglais par exemple et se font répondre en français. C'est une réalité quotidienne. En région, nous ne connaissons pas ce rebranding de la nation québécoise. De plus, l'anxiété persiste au sein même de la population québécoise puisqu'elle même fut fragilisée dans le passé et l'est encore aujourd'hui. À bien y penser, bien que le bilinguisme fasse bonne figure à Montréal, une langue finira toujours par gagner sur l'autre. À une table de quatorze personnes, les dou-

ze francophones parleront en anglais pour les deux anglophones prenant place à l'autre bout de la table. Dans cette dichotomie d'opinions sur le « vivre ensemble », il existe « deux Québecs »: le large bassin multiethnique, polyglotte, multiculturel de la ville (considérons ici Montréal, qui reçoit 87% des immigrants) et les régions québécoises, figurant comme un grand plateau plutôt homogène (Stasiulis, p. 188, 2015). Somme toute, un fossé clair s'établi entre ces deux perceptions.

D'un côté, du côté urbain de Montréal, la population semble plutôt d'emblée donner le feu vert au multiculturalisme. Au fond, quand un peuple perd deux référendums d'affilée et n'en reconduit pas un autre, la moindre des choses qu'il puisse faire c'est faire de la place, à bras ouverts, aux immigrants. Dans ce « premier Québec », la tolérance est au premier plan, parce que la population est confrontée au multiculturalisme quotidiennement. De l'autre côté, du côté des régions, les gens ont peur, plutôt dû à la distance et à l'inconnu. Qu'est-ce qui alimente cette peur? Plusieurs, hypothèses sont possibles. Nous en examinerons deux en rapport avec le niqab.

Premièrement, le sentiment omniprésent que les droits et libertés des femmes soient automatiquement brimés lorsqu'elles se voilent. Les stéréotypes sont communs et majeurs. Il faut dire que le féminisme répandu au Québec est plutôt occidental et athée. Il est donc primordial de se questionner à savoir si d'autres féminismes existent et si le féminisme québécois peut être sujet à une transformation. Dans la configuration actuelle de la société, ce sont les femmes musulmanes, environ 2% de la population québécoise, qui se retrouvent au cœur de la tourmente et autour desquelles le débat public et politique fait rage. Foulard, voile, hijab, niqab, burqa, font désormais partie du vocabulaire populaire québécois. On les identifie, on les définit, on les mesure, on les interprète, on les photographie, on les arbore fièrement ou on les piétine...La question du corps des femmes et surtout des vêtements qui le couvrent, trop ou pas assez, redevient la clé de l'émancipation (M.V. Laaroussi et N. Laaroussi, p. 23-25, 2014).

Pourtant, au Québec, le niqab, c'est bien connu. Voyez par vous-même... Vivre sa religion en public sème la controverse, qu'il s'agisse d'un morceau de tissu ou d'un autre symbole religieux. On pense que les femmes qui portent le voile sont très réservées, pieuses, orthodoxes, mais on découvre rapidement que ce sont des femmes très joyeuses. Le voile n'est peut-être qu'un moyen d'expression, d'affirmation, tout comme l'est la langue française pour les Québécois, dans cet océan anglophone, surmené par l'américanisation (Radio-Canada, 2013). Enfin, la méconnaissance du voile ou du niqab prolifère la distance et maintien les pré-

jugés, pourtant, le féminisme n'est pas forcément athée. La défense de la cause des femmes n'appartient pas qu'aux Occidentales. L'arrivée des femmes musulmanes et des questions concernant les femmes et la religion, ne marque pas un recul, mais plutôt une avancée notable dans le mouvement (M.V. Laaroussi et N. Laaroussi, p. 38-39, 2014). En bref, une éducation populaire, quant à ce nouveau féminisme, partagée avec l'ensemble de la province limiterait cette distance et ce fossé dualistique entre Montréal et les régions québécoises.

Deuxièmement, il y a cette peur, voire cette haine des musulmans qui s'installe ces dernières années avec la montée de l'Islam fondamentaliste. Selon CROP réalisé en 2014 par Radio-Canada, 53% des Québécois disent craindre l'intégrisme musulman dans la province (Radio-Canada, 2014). Il faut voir juste, le discours de l'islamophobie se répète depuis le 11 septembre 2001. Tous les bons « tolérants » crient au stéréotype et demandent à ce qu'on cesse de pointer les musulmans du doigt, qu'on cesse de tous les mettre dans le même panier. À bien y penser, cette islamophobie commencerait-elle à ce justifier? Les attentats se font très nombreux, leur fréquence augmente et, curieusement, la grande majorité de ceux-là sont fait au nom de Daech, au nom de l'État islamique (EI). Sans détourner le débat, la population a-t-elle raison de craindre cette religion? Peut-être. Sans une analyse de fond de l'État islamique, glissons simplement le fait « qu'une provocation en amène une autre ». C'est un cercle vicieux. À force d'imposer son système, d'ouvrir les frontières, de crier haut et fort à une mondialisation saugrenue, au capitalisme sans limite et surtout, à force de tenter de convaincre le monde entier que le système occidental est celui à adopter, de malheureux évènements finissent par arriver. Une forte présence militaire peut d'ailleurs s'avérer comme une provocation. En effet, la France et d'autres pays occidentaux participent activement depuis plus de deux ans à la coalition anti-EI en Irak et en Syrie (Guien, Métronews, 2015). Aux yeux de certains, disons aux yeux de l'EI, cette présence peut clairement être une provocation. À terme, à force de se faire larguer des bombes sur la tête, cette présence pourrait même devenir une provocation aux yeux de civils, de non-partisans. À terme, ces civils pourraient finir par rencontrer la tentation de joindre les rangs de l'EI ayant comme simple motivation que tout cet acharnement cesse. Cependant, depuis les récents attentats de Paris, cette présence militaire devient possiblement justifiable. La façon dont on présente les choses, peut-être moins. La méconnaissance perdure et le fossé se creuse de plus bel entre urbanité et ruralité : les Québécois ont peur. Imaginez ceux qui vivent dans de petites municipalités paisibles comme tout, depuis « toujours ». Personne n'a envie que ça Nous tombe sur la tête, ici aussi. Les gens ont peur, et avec raison. Et l'accueil de réfugiés syriens dans tout ça? Pourquoi ne pas partager l'arrachement et le déchirement vécu par ces peuples, mettre en commun les expériences vécues par Québécois ou Syriens, créer un rapprochement et ainsi, un espace de communication efficace? La connaissance est la clé, tout comme l'éducation, afin de réduire le fossé idéologique, de même que la peur et parvenir à trouver cet équilibre (Baillargeon, Le Devoir, 2015).

Cadrage ou propagande?

Les risques que les discours public abordant l'Autre prennent une tournure populiste sont assez élevés, d'autant plus, considérant la couverture médiatique, surtout considérant la représentation des arabes, des musulmans ou des femmes arborant le hijab ou le niqab dans la presse québécoise. Le fossé ne peut que se creuser davantage lorsque des questions locales se transforment en crise suite à une couverture médiatique laissant à désirer. Par exemple, à maintes reprises, des périodiques comme Le Journal de Québec ou Le Journal de Montréal parlent de la composante religieuse (l'islam), plutôt que la dimension ethnique (arabe), qui est liée dans le discours médiatique, à la notion de danger, car les musulmans sont vus surtout à travers le prisme de la remise en question de la laïcité de la société québécoise. Effectivement, les pratiques journalistiques de ces quotidiens, fondées sur le sensationnalisme, ont pour conséquence une stigmatisation des immigrants, une focalisation de l'altérité sur les signes religieux, et, une représentation de l'islam comme altérité absolue et comme un danger qui est en train d'envahir l'espace public et de menacer l'identité nationale (Antonius, p. 33, 2010). Malheureusement, le discours populaire ne laisse aucune place aux nuances.

Pour ce qui est de la dichotomie entre urbanité et ruralité, les nuances ne peuvent être apportées que si le citoyen moyen d'une région éloignée des grands centres, est motivé à varier ses sources journalistiques et à chercher plus loin. Il doit faire le travail lui-même, puisque la principale source de diversité, Montréal par exemple, n'est pas à sa portée. Dans l'espace public régional, les sources sont limitées : les restaurants, les centres commerciaux proposent bien souvent gratuitement ce genre de périodiques aux clients...en plus de divertir ceux-là en agrémentant l'ambiance de la salle à manger du doux son d'une télévision en trame de fond, laquelle est condamnée à l'infini à répandre la bonne nouvelle de LCN (Le Canal Nouvelles) . Ce n'est évidemment pas dans la couverture de ces chaînes

que le contexte international est évoqué le plus souvent. Plus souvent qu'autrement, quand la référence est faite deux thèmes reviennent : le terrorisme et la violence irrationnelle, thèmes qui ne sont pas liés à un conflit particulier mais au Moyen-Orient en général et à l'islam, et à la soumission des femmes, qui est soutenue par un courant orientaliste ancien, nourri et ravivé par les situations en Irak, en Afghanistan ou en Syrie (Antonius, p. 34, 2010). D'ailleurs, quelle est la différence?

Le pouvoir des médias est incomparable. La brièveté des nouvelles télévisées, par exemple, ainsi que les impératifs du marché qui promeut le sensationnalisme, favorisent la propagation d'amalgames réducteurs qui ne permettent pas de comprendre la complexité des processus politiques qui secouent les sociétés arabes et musulmanes. De fait, si le citoyen moyen ne consomme que ces genres de nouvelles, très brèves, comme celles retrouvées sur les réseaux sociaux par exemple, il est pratiquement impossible de réduire le fossé subsistant avec l'Autre. La couverture des évènements du 13 novembre dernier confirme le paradigme. Les gens ont peur, et avec raison! Parfois, c'est à se demander si la rapidité avec laquelle la population peut maintenant être mise au courant des nouvelles, grâce aux nouvelles technologies de l'information, ne devient pas plutôt néfaste. Néfaste dans la mesure où la population n'est plus en mesure d'étudier, de lire et de se forger une opinion réfléchie à propos d'un sujet clé, aussi chaud et délicat puisse-t-il sembler. Les médias devraient s'inspirer de cela, eux aussi. Brièvement, de par la méconnaissance, de par la prolifération d'une vision populiste, réductrice du débat exercé par le cadrage de certains médias locaux, le citoyen moyen des régions québécoises ne peut que demeurer dans cette distance face au niqab, face au multiculturalisme et bien entendu, face aux musulmans.

L'émission Tout le monde en parle du 6 décembre 2015 accueillait à sa table un couple de réfugiés syriens, Feras Hariri et Reem Makkia, arrivé tout récemment avec leurs enfants à Montréal, pour débuter leur nouveau départ. Les premiers avions transportant des réfugiés syriens installés dans des camps outremer devraient atterrir, à Montréal notamment, sous peu (Le Devoir, 2015). Certes, cette arrivée « massive » ne fera pas que des heureux, au contraire. D'un côté, depuis les attentats du 13 novembre 2015, à Paris, le nombre de réfugiés ayant obtenu leur approbation est maintenant altéré. Tout est à recommencer; les décisions ont changées, bien que cela puisse paraître injuste. Les gens dans le besoin n'ont pas changé, eux. De l'autre côté, les Québécois s'inquiètent, la haine envers les musulmans s'installe de plus bel, la population se questionne sur ce qu'il ad-

viendra de ces gens une fois arrivés ici : se résorberont-ils à la radicalisation une fois arrivés dans notre « chez Nous », notre paisible pays? La crainte est certainement justifiable, puisque tel qu'abordé précédemment, qu'il s'agisse de la question des réfugiés syriens ou du niqab, les gens des régions québécoises sont floués par l'inconnu. La distance installée entre une population et tous ces nouveaux aspects qui arrivent en même temps, qui pourraient devenir d'importants vecteurs sujets à changer toute une société, attisent cette peur.

Évidemment, pour diminuer le risque, il est préférable d'éviter de percevoir le voile ou le niqab comme un « fourre-tout ». Par exemple, le discours véhiculé nous conditionne à croire que si l'homme est violent avec sa femme, c'est à cause du voile. Si telle personne ne trouve pas un travail, c'est à cause du voile. On met tout sur la question d'un bout de tissu (Truchon, 2012). Une vision répandue d'un « féminisme occidental athée » fait culminer ce genre de réflexions. Assurément, accepter d'autres formes de féminisme permet aux femmes de diverses sociétés et de groupes minoritaires de faire entendre leurs voix dans le mouvement des femmes. Aller vers l'Autre, aller vers ces femmes réduiraient considérablement ce fossé, surtout celui qui règne entre les Québécois des régions, forcément éloignés physiquement des réalités multiculturelles.

Les médias, réitérons-le, contribuent eux aussi à attiser cette haine des musulmans, des réfugiés syriens et surtout, du niqab. Le discours médiatique actuel prend facilement un tournant très populiste surtout conséquemment au cadrage et au sensationnalisme, trop souvent privilégiés. Les nouvelles sont brèves, les gens ne se fient qu'à ce qu'ils survolent rapidement sur les réseaux sociaux ou suite à un balayage rapide du quotidien qui traîne sur une table de restaurant. La façon sensationnaliste avec laquelle les nouvelles sont traitées incite également l'installation d'un climat de peur et, de surcroît, creuse un fossé encore plus profond. La distance inquiète, puisqu'elle est souvent synonyme de démagogie et de cynisme. Au lieu de comprendre, et de chercher à comprendre, la haine devient plus grande et les possibilités d'installer un « vivre ensemble » serin et riche, diminuent. Limiter la méconnaissance face à une réalité inconnue passe pourtant par les médias, ces derniers ayant un important rôle à jouer, en ce qui trait d'informer une population.

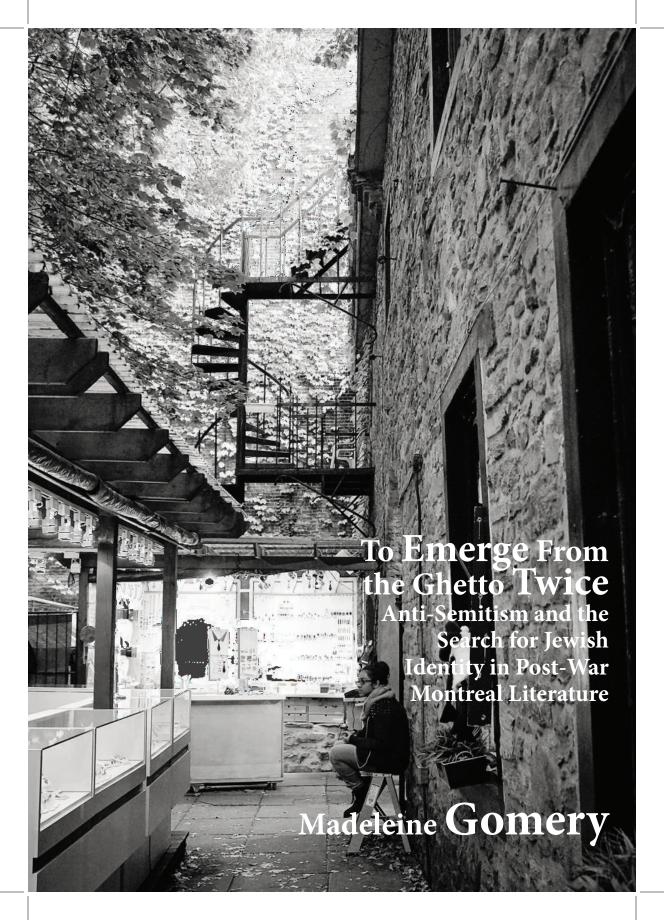
L'édition de Tout le monde en parle du 6 décembre 2015 accueillait non seulement des réfugiés, mais aussi des personnalités publiques, politiques ou artistiques relativement bien connues par le public. Parmi celles-ci, le sociologue Daniel Pinard a fait des interventions bien songées sur la question des réfugiés

syriens, plaidant en faveur de leur accueil. Bien qu'il se soit effacé légèrement de l'espace public ces dernières années, quelques uns l'auront certainement reconnu...ou bien l'auront reconnu pour les émissions de cuisine qu'il animait. Alors, à quoi bon écouter son intervention et y accorder une si grande crédibilité? Kim Thúy, écrivaine québécoise d'origine vietnamienne, clairement plus connue au sein du grand public grâce à son excellent ouvrage Ru, remontait le fil de ses origines et relatait des similitudes entre ce qu'elle a vécu et ce que les réfugiés syriens s'apprêtent à vivre. Déjà là, un peu plus de compassion risquait de s'installer au sein du public, des sentiments sont évoqués. Enfin, c'était au tour de Marie-Mai Bouchard, auteure-compositrice-interprète très connue au Québec et bien installée depuis plus de dix ans. Ouvertement, Marie-Mai s'est permise d'intervenir en disant haut et fort qu'on « se doit d'accueillir les immigrants, à bras ouverts, ces gens-là ont besoin d'aide ». Son intervention fut chaudement applaudie (TLMEP, 6 décembre 2015). Les figures médiatiques de renoms joueront peut-être un rôle plus prometteur auprès de la population pour limiter cette distance et pousser les gens à lire un peu plus. Les mots sont puissants, ils sont des évènements, car ils en provoquent. D'ici-là, Donald Trump croit qu'il faudrait plutôt fermer complètement la porte aux immigrants musulmans et les pousser en camps d'internement (Hétu, La presse, 2015). En vain.

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To Emerge From the Ghetto Twice: Anti-Semitism and the Search for Jewish Identity in Post-War Montreal Literature

t is commonly held that the end of the Second World War signalled the end of overt anti-Semitism in Canada, especially among young people. According to this line of thought, Canadian anti-Jewish sentiment became less socially acceptable following revelations of the pogroms and concentration camps of the Shoah, and active persecution subsided into a more general sense of displacement, exemplified by Irving Layton's characterization of "the wandering...suffering Jew." An analysis of Canadian public policy and political speech supports the claim of a rapid decline of anti-Semitic thought expressed in the Canadian public realm following the War. However, what such a narrative fails to take into account is the words of Jews themselves, few of whom had a meaningful political voice.² Although no one person can entirely speak on behalf of a community, artists are often assigned this voice, particularly when they embody a communal spirit or identity. This has frequently been the case with Canadian-Jewish authors. This paper aims to examine the Montreal-Jewish writing and poetry of the postwar years through the words of four of its most prominent authors: A.M. Klein, Irving Layton, Leonard Cohen, and Mordecai Richler. I use these sources to establish the character of gentile sentiment towards Jews in order to determine whether experiences of anti-Semitism truly declined in the eyes of the Jewish community. Subsequently, I analyze the contribution of perceived anti-Semitism towards the creation of a modern-day Jewish identity in Montreal, ultimately arguing that a perception of isolation and unease following the war, more so than a sense of anger or fear, was a key element of its origin and nature.

Although public anti-Semitism certainly existed in Canada prior to the 1930s, it began to flourish in this decade as the result of demographic unease and of a global antagonism that saw the rise of anti-Semitic and fascistic political movements across Europe and North America. This was felt especially in Québec, where strained English-French political and linguistic relations meant that there was little room for intrusion in an already tense job market.³ The situation intensified due to the establishment of dozens of anti-Semitic organizations and

¹ Irving Layton, "For my Sons, Max and David" in *Canadian poetry, 1920 to 1960*, ed. Brian Trehearne (Toronto: McClelland & Stewart, 2010), 344.

² There were exceptions to this, especially among wealthy professionals and entrepreneurs such as Samuel Bronfman.

pamphleteering campaigns in the province, as well as the government internment of over 2,000 German and Austrian refugees – most of them Jewish – in a prison camp outside of Sherbrooke for two years. The effect of socially accepted, widespread, and virulent anti-Semitic rhetoric on the experiences of Jews in Montreal during WWII – and on the relationship between gentile and Jewish Canadians following the War – cannot be underestimated. In particular, it is the *perception* of continued anti-Semitism at this time that I examine herein.

With the exception of Toronto, Montreal contains a higher Jewish population than every other Canadian city combined,⁴ and the literary exports of Montreal's Jewish community have been tremendous. Though reasonably representative of the Canadian Jewish community, it does have a discrete geographic and linguistic influence when compared with other Jewish-Canadian writing. Jewish writing in Montreal has been largely influenced by the city's cultural and geographic proximity to New York. The presence of such an active and distinct Jewish artistic community nearby has forced Montreal to come to terms with its own heritage in the shadow of a city with an established and recognized literary culture. "Looking down on the cultural life of New York from here," wrote A.M. Klein, "it appears to be a veritable *yeshiva* [...] The Jewish writers seem to call each to each, editing, praising, slamming one another's books, plays, and cultural conference appearances." New York's literary domination has therefore become a marker against which Montreal's Judaic literary community struggles to define itself.

Language, too, has had an influence on the development of Jewish literature in Montreal, particularly because of the literary rift between Francophones and Anglophones, which existed long before any significant Jewish settlement. In the first part of the twentieth century, the Jewish ghetto lay squarely between the poor Francophone communities east of St-Denis and the wealthier Anglophones settlements of McGill and Westmount. The ghetto, as the symbolic dividing line between these two linguistic and cultural regions, absorbed elements of both while being welcomed by neither. Indeed, some tensions even existed between Ashkenazic Jews, who spoke in Yiddish and Slavic tongues upon arrival, and Sephardic Jews, who had their own Judeo-Spanish and Judeo-Arabic languages. While the

^{4 &}quot;Basic Demographics of the Canadian Jewish Community," *The Centre for Israel and Jewish Affairs*. http://www.cija.ca/issues/basic-demographics-of-the-canadian-jewish-community/, 14/03/14 March 14, 2014).

⁵ A.M. Klein in Michael Greenstein, *Third solitudes: tradition and discontinuity in Jewish-Canadian literature* (Kingston: McGill-Queen's University Press, 1989), 4.

second- and third-generation children of both groups grew up speaking both French and English, Ashkenazim were more partial to the latter, while Sephardic Jews encouraged more French education and integration. 6 This historical dynamic is more or less unique to Montreal among major North American cities and could indeed make integration difficult for various other linguistic groups, such as Italian, Greek, and (later) Chinese and Arabic speakers.⁷ Klein wrote and practiced law in two languages, and he, Richler, and Cohen all knew French and used it in their writings. Nonetheless, the development of contemporary culture in Québec has occurred, for the most part, independently of Jewish culture, and in ignorance of it. So while Montreal Jewish literature and poetry is written almost exclusively in English, its nonexistent position in a broader provincial culture "has played a [large] role in reinforcing a sense of Jewish marginality in Québec,"8 which is another factor that contributes to the population's unique creative voice. This voice, exemplified in the work of Klein, Layton, Richler, and Cohen, shows proof of isolation, but also of community solidarity – diaspora, but also reunion. It is the voice of a historically marginalized people expanding their identity to a new province and a new country. It both adopts and emphasizes the Canadian literary sense of loneliness and ambiguity.

A.M. Klein's voice pre- and post-War remains one of the most definitive in the Jewish-Canadian literary tradition. Subsequent writers would emulate his style, and sometimes even argue that he was both the root and pinnacle of Jewish poetry in Canada. Leonard Cohen took this approach, arguing during a 1963 symposium entitled "The Future of Judaism in Canada" that Klein was "the last great poet who had tried to be both prophet and priest." In his mind, Klein's later silence and death had signalled a loss of Jewish values to the ambition of businessmen. Klein, born in Ukraine on February 14th, 1909, is a key figure in understanding anti-Semitism post-1945 because he was already active as a poet and lawyer by that time. His perspective, therefore, includes the experience of a Canada – and a world – that was largely anti-Semitic, and gives him a good basis for comparison between the two.¹⁰

⁶ Robert J. Brym, William Shaffir, and M. Weinfeld, eds., The Jews in Canada (Toronto: Oxford University Press, 1993), 176.

⁷ Charles Boberg, The English Language in Canada: Status, History, and Comparative Analysis (New York: Cambridge University Press, 2010), 24, 98.

⁸ Morton Weinfeld in Jews, 180.

⁹ Ira Bruce Nadel, Various Positions: A Life of Leonard Cohen (New York: Pantheon Books,

¹⁰ Miriam Waddington, "Introduction," The Collected poems of A.M. Klein (Toronto: McGraw-16

Klein's only novel, *The Second Scroll*, was published 1951. Its major theme is overcoming loss of identity following the Second World War, as symbolized in the unnamed Montreal narrator's search overseas for his estranged uncle, a Holocaust survivor named Melech Davidson. The main text's occasional references to Canada are telling, especially in a work considered as symbolic autobiography.¹¹ As he travels from new world to old, the narrator attempts to find a fabled city in order to "break the routine of ghetto regionalism" that has defined his life in Montreal up until that point. 12 As he does so, he frequently recalls his childhood in Montreal, "a city in which saints meet at every street corner," making it ironically fit to contain that "parcel of Holy Land" that is the Israeli consulate. 13 Despite his acknowledgement of the Catholicism at the core of the city, as well as his characterization of himself as a man "of the ghetto streets [...] a Jewboy," his associations with Montreal are largely positive. 14 He asserts his faith in a Canada that has not demonized him for his Jewishness, "praising Canada as the true north, strong and free."15 Although his search constitutes a search for a supranational Jewish identity, it by no means negates his ties to Canada; he acknowledges multiple times that his life "was, and is, bound to the country of my father's choice, to Canada."16 At the end of the book, he thinks he has found a common Jewish identity in a sort of unspoken poetry, in the "shared role as chroniclers of Jewish history." ¹⁷ He also expresses a wish to return to Montreal, the home of his youth. Although The Second Scroll is proof of a crisis in Jewish identity following the War, it does not contain any particular proof of a sense of Canadian wrongdoing. In fact, the narrator praises Canada as a kind of secular Jewish homeland, a commentary that can be ascribed to Klein himself when the semi-autobiographical nature of the work is taken into account.

Likewise, Klein's post-War poetry, while exemplifying his lack of belonging as a Jew, suggests that this feeling is due exclusively to the Holocaust rather than to exclusion in Canada. In poems such as "Childe Harold's Pilgrimage," he evokes the European anti-Jewish sentiment of the Second World War: "Rejoice

Hill Ryerson, 1974).

¹¹ Linda Rozmovits, "A Narrative Messiah: The Redemptive Historiography of A.M. Klein's Second Scroll," *Prooftexts* 11 (1991), 25.

¹² Greenstein, Solitudes, 23.

¹³ A.M Klein, The Second Scroll (New York: Alfred A. Knopf, 1951), 30.

¹⁴ Ibid 123.

¹⁵ Ibid 47.

¹⁶ Ibid 20.

¹⁷ Rozmovits, "Messiah," 32.

Judaeophobes / The brew you brewed and cellared is not flat! [...] Sieg heil! / Behond, against the sun, familiar blot: / A cross with claws!"18 In "Job Reviles," he pleads, "How long, O Lord, will Israel's heart be riven?/How long will we cry out to a dotard God/To let us keep the breath that He has given?"19 But none of these sentiments are associated with Montreal, which Klein seems to view as a safe haven. "The Rocking Chair" is full of comforting imagery of a Québec disconnected from the persecution Klein associates with the international Jewish experience. Towards the "biblic birds" of the Hôtel-Dieu, the very emblems of Montreal Catholicism, "who fluttered to me in my childhood illnesses/me little, afraid, ill, not of your race,"20 Klein holds nothing but good will. Even in 1948, following a war that saw vocal anti-Semitism in Canada, Klein considered Montreal his spiritual homeland: the home that would "in these beating valves / for all my mortal time reside!"21 For A.M. Klein, Canada was a country sufficiently free of anti-Semitism as to make him satisfied, and even proud of his identity as a citizen.

Irving Layton came from a similar ethnic and geographic background as Klein. However, he had a very different outlook on Canada, which he nonetheless qualified as "a good country, [that I] think is going places."²² At the same time, he believed Canada was in desperate need of a soul and identity separate from that of the English-speaking majority. In Layton's poetry, he, like Klein, attempts to "find a language for [the] nightmarish, valueless world" of post-War Jewry that he navigated. But unlike Klein, Layton's Jewishness "manifests itself more in his approach to a subject than in the subject itself."24 In this sense, Layton is a better target for an analysis of Canadian anti-Semitism, because he is less forgiving than Klein, and more bound up in cultural roots of the urban ghetto in Montreal. Although the Montreal of Layton's poems is sometimes "an Arthurian landscape, a Biblical scene," it is just as often a sort of "holocaust for Mordecai Richler novels."25

One notable characteristic of Layton's poetry is its bitter, accusatory tone, which it owes in equal parts to the horrors of the Second World War and the ex-

¹⁸ Klein, Poems, 115.

¹⁹ Ibid 139.

²⁰ Ibid 300.

²¹ Ibid 317.

²² Irving Layton, Irving Layton, the Poet and His Critics, ed. Seymour Mayne (Toronto: McGraw-Hill Ryerson, 1978).

²³ Greenstein, Solitudes, 35.

²⁴ Klein, Poet, 5.

²⁵ Eli Mandel, *Irving Layton* (Toronto: Forum House Pub. Co., 1969), 10.

perience of growing up in the Montreal ghetto. Layton's picture of Montreal is far less idyllic than that of his contemporary Klein, as his work is characterized by a less benign attitude towards wartime anti-Semites. In "Ex-Nazi," he describes his game of "blind man's bluff" with his Polish neighbour, whose countenance, "innocenter than his bounding mastiff," struggles to hide "the yammering guilt" that he feels when beholding his Jewish peer.²⁶ Likewise, in "Das Wahre Ich," written twenty years after the War, he describes a woman who "tells me she was a Nazi; her father also." With a thrill, he wonders: "At this moment, does she see my crumpled form against the wall, / blood on my still compassionate eyes and mouth?"27 Indeed, Layton seems to take particular joy in the pathetic nature of post-War anti-Semites, their public racism harder to justify after the Holocaust. Yet, he also touches on a note of general public apathy. He carefully notes a number of stereotypes about Jewish men that he urges his sons to avoid - "the despoiled Jew: the beaten Jew [...] the Jew every Christian hates, having shattered his self-esteem," and even "the alienated Jew cultivating his alienation/like a rare flower."28 He also makes reference to the gentiles of Montreal in such poems as "Early Morning in Côte-St-Luc," living in such wilful ignorance of the poverty of most Jewish Montrealers that Layton finds it difficult, when he sees them, "to make room/in my mind for these [...] my kin/the inconsolable, the far seeing."29

It is clear from Layton's poems that although his sense of isolation is the result of involuntary "normal human vileness [and] racial prejudice," he and the Jews of Montreal were still not fully welcome either among "the hostile French-Canadians living on and beyond St. Denis Street." Nor were they at home in Anglophone Westmount, where "at any moment [I felt] mastiffs would be loosed on me or someone [...] would say to me with cold but perfect English diction, 'Get away from here." Life as a Montreal Jew was for Layton tolerable, but also profoundly isolating. Layton attributed his loneliness not to vocalized expressions of anti-Semitism, but rather, to a silent prejudice firmly engrained in much of the Canadian public.

"If Klein belongs to the first generation and Layton the second," writes <u>Michael Green</u>stein, "then Leonard Cohen represents the third generation of Ho-26 Irving Layton, *Collected Poems*, (Toronto: McClelland and Stewart, 1965), 24-25.

27 Ibid 318.

²⁸ Layton, Poetry, 344.

²⁹ Layton, Poems, 55.

³⁰ Irving Layton, *Engagements: the prose of Irving Layton* (Toronto: McClelland and Stewart, 1972), 147.

locaust poets," using Nazi crimes as "pretexts for a more generalized probing of the evils of modern society."32 Cohen, perhaps the gloomiest of Canada's Jewish writers, is also very different from the artists examined thus far for various reasons. He did not grow up in the slums of Montreal, but rather in Westmount, in a traditional, respectably middle-class Jewish family. In addition, Cohen's poetic works lacks the unified perspective of Klein or Layton. He instead approaches his subjects from a variety of perspectives, many of them distinctly irreverent, in a tone strikingly different from that of his more conservative predecessors.³³ In his books, Cohen draws from a strikingly similar well of experiences as Mordecai Richler, using his position within the insularity of Westmount to shed light on the Jewish perspective in a city with a white, culturally Anglophone past.

Of course, Cohen's poetry, despite its spiritual agnosticism, is not lacking in a culturally Jewish perspective. He strikes a note similar to Layton's "Das Wahre Ich" in his poem "The Music Crept by Us," in which he resignedly notes: "I would like to remind/the management/that [...] the band is composed/of former SS monsters [...] However since it is/New Year's Eve/I will place my/paper hat on my/concussion and dance."34 He also makes note of gentile guilt – and avoidance - in "Morocco," which simply reads, "I brought a man to dinner/He did not wish to look into my eyes/He ate in peace."35 However, he sets off on a different path in "Montreal," a criticism of those gentiles who ignore the isolation and poverty of the city's immigrants: "Beware of what comes out of Montreal [...] it is a force corrosive to all human institutions. It will bring everything down [...] We who belong to this city have never left The Church. The Jews are in The Church as they are in the snow. The Church has used the winter to break us."36 These themes are closer to the ones expressed in The Favourite Game, Cohen's first novel, which deals closely with the contemporary Jewish-Canadian experience.

The Favourite Game is an autobiographical Künstlerroman (artistic coming-of-age novel) that examines the life of its hero, Montrealer Lawrence Breavman, as he emerges from his Jewish-Canadian heritage to come into his own in the New York creative scene. As a cultural expatriate, Breavman learns to identify himself by his "exile from society," ultimately concluding that this isola-

³² Greenstein, Solitudes, 41.

³³ Nadel, Positions, 19.

³⁴ Leonard Cohen, Stranger Music: Selected Poems and Songs (New York: Pantheon, 1993), 58.

³⁵ Ibid 191.

³⁶ *Ibid* 265.

tion is what makes him an "authentic Jew." The historical Jewish experience is characterized by marginality, and this element remains constant in a Montreal that "like Canada itself, is designed to preserve the past, a past that happened somewhere else."38 Cohen, in fact, is arguing that a truly "Canadian" experience does not exist, and it is the attempt to emulate glories of past empires - as exemplified by Westmount's chilly insularity and highbrow Anglicanism - that makes it difficult for dispossessed Jewish immigrants to form a cohesive culture. Montreal Jews cannot exist as a cultural unit within Canadian society because Canadian heritage does not exist as such: "The past is preserved [...] in the minds of her citizens. Each man speaks with his father's tongue [...] Just as there are no Canadians, there are no Montrealers. Ask a man who he is and he names a race."39 Breavman's ambiguous identity is the result of a sense of detachment from mainstream society taken to its logical extreme. This is the same sentiment described at various points by Layton, and in Cohen's work it is made all the more impactful because the protagonist exists within "Westmount heights designed to humiliate the underprivileged."40 Breavman cannot fully enter into the society of his wealthy white contemporaries, and abandons the pursuit of a Canadian identity that refuses to include him.

Mordecai Richler's heroes face similar circumstances, in that they seek success in a society that continuously alienates them because of their race. But Richler's novels are generally marked by two key differences from Cohen's. First, the protagonists, like Richler himself, come not from Westmount, but from the traditionally Jewish Saint-Urbain neighbourhood. Second, they repeatedly face active and aggressive post-War anti-Semitism while growing up in the ghetto. Richler, in this case, had insight into a certain vein of Canadian sentiment that Klein and Layton did not experience in the same way: to them, it was much less violent a sentiment than in the pre-War years. Cohen, although a generational contemporary of Richler, grew up in a setting that at least allowed him to escape some of the confines of classism that define Richler's characters.⁴¹

From *The Acrobats* (1954) to *Barney's Version* (1997), Richler's protagonists are all extremely flawed men who yearn for material achievement and symbols of societal recognition. Richler once proclaimed that "to be a Jew and a

³⁷ Greenstein, Solitudes, 126.

³⁸ Leonard Cohen, The Favourite Game (Toronto: McClelland and Stewart, 1970), 117.

³⁹ Ibid 118.

⁴⁰ Greenstein, Solitudes, 131.

⁴¹ Ibid 142.

Canadian is to emerge from the ghetto twice,"⁴² and was a genius interpreter of both gentile and Jewish hypocrisies. In *The Apprenticeship of Duddy Kravitz*, he examines the casual anti-Semitism that permeates all levels of society, from the schoolteacher Mr. Feeney's friendly but misplaced jokes with Jewish students – "'Do you know how the Jews make an S?' […] Mr. Feeney would go to the board, make an *S*, and draw two strokes through it"⁴³ – to the alcoholic Mr. MacPherson, who exclaims one day in a fit of rage, "The trouble with you Jews is that you're always walking around with a chip on your shoulder."⁴⁴ Notable, too, are Jewish characters' worries of being seen as a stereotype, and dislike of those people, such as the greedy and ambitious Duddy, who "almost give anti-Semitism a good name."⁴⁵

Statements like this are reflective of some private writings of the time. In a 1948 diary entry, then-Prime Minister William Lyon McKenzie King, despite his self-assurances that he himself had "never allowed [anti-Semitism] to be entertained for a moment," nonetheless wrote, "Evidence is very strong [...] that in a large percentage of the race there are tendencies and trends which are dangerous indeed."46 The worries of Richler's character Irwin Schubert and other like-minded cosmopolitan Jews were not, then, ill founded. Although the anti-Semitism in Richler's stories rarely escalates to the point of physical violence, it is extremely pervasive. Segregation, though not law, is still unofficially legal in some cases. In Son of a Smaller Hero, protagonist Noah Adler steals a sign that reads "This Beach is Restricted to Gentiles" from a resort in the Laurentians. 47 Pierre Berton corroborated this incident in an investigative article for Maclean's in 1948. Berton was surprised to find that when he called ahead to resorts to ask about summer reservations, he was much more successful (and treated more civilly) when he went by names such as "Smithson," instead of "Greenberg." ⁴⁸ In applying for jobs, he encountered similar prejudices, being told variously that Jews did not have the right "temperament" for certain companies, that "they didn't know their place,"

⁴² Arnold E. Davidson, Mordecai Richler (New York: F. Ungar Pub. Co., 1983), 27.

⁴³ Mordecai Richler, *The Apprenticeship of Duddy Kravitz: A Novel* (Boston: Little, Brown, 1959), 22.

⁴⁴ Ibid 59.

⁴⁵ Ibid 81.

⁴⁶ Irving M. Abella and Harold Martin Troper, *None is Too Many: Canada and the Jews of Europe*, 1933-1948 (New York: Random House, 1983), 228.

⁴⁷ Mordecai Richler, Son of a Smaller Hero (Toronto: McClelland and Stewart, 1966).

⁴⁸ Howard Adelman and John H. Simpson, *Multiculturalism*, *Jews, and Identities in Canada* (Jerusalem: Magnes Press, the Hebrew University, 1996), 40.

and simply that various organizations just "didn't employ Jews." 49

However, Richler's characters do not universally experience this kind of racism, and in fact, tend to encounter much more of it upon leaving Canada. While Richler's Canada might abound with comically absurd anti-Semitic stereotypes, the sentiment is not hateful so much as ignorant. Furthermore, it is generally only found among the elderly characters. In Joshua Then and Now, the titular protagonist has an encounter with virulent anti-Semitism in Spain, in the form of the Jew-hating Dr. Mueller.⁵⁰ Cocksure's gentile Mortimer Griffin, when faced with the temptation of professing anti-Semitism in order to ingratiate him with some ex-Nazi businessmen, "protests and wants to be, simply, Mortimer Griffin, Canadian, man of decent conscience."51 So it would seem that ultimately, although they face prejudice on an everyday, individual level, Richler's characters do not have to face anti-Semitism at its institutional worst. In fact, in Canada, they have a better living situation than many of their international peers. Like Klein, Richler's characters often conclude that they are "at ease in Canada, as did Richer himself, who ultimately characterized Canada as "a society well worth preserving" and Montreal as "the most agreeable city in Canada."52

The Second World War and the revelation of the Holocaust were insufficient to immediately end all traces of anti-Semitism in Canada. However, from the 1950s onwards, Jewish expatriates finally overcame their status as "the second-least desirable of immigrants," ⁵³ and anti-Semitism became less and less acceptable in public opinion. This occurred due to increased immigration, but also due to a demographic shift that saw the cultural takeover of a generation more removed from the pre-War Jewish bias than its predecessors. However, Jewish exclusion from culturally elite Anglophone societies marked more by tradition and ancestry than by wealth did engender a community built on a sense of isolation, particularly in Montreal. This isolation is present in the works of all the Montreal writers examined in this paper. Although no individual can claim to represent a community as a whole, writers are privileged to be able to tap into cultural pools of heritage and feeling. One thematic legacy of the Jewish literary tradition – a

⁴⁹ Ihid 44

⁵⁰ Mordecai Richler, Joshua Then and Now (New York: A.A. Knopf) 1980.

⁵¹ Mordecai Richler, Cocksure (New York: Simon and Schuster, 1968), 128.

⁵² Mordecai Richler, *St. Urbain's Horseman* (New York: Alfred A. Knopf, 1971), 5; Richler, "Canada: 'An Immensely Boring Country '– Until Now," *Life*, 9 April 1971, 62; Richler, "The Stanley Knowles Lecture" (University of Waterloo, Waterloo, Ontario, 23 March 1999)

⁵³ Abella and Troper, None, 224-225.

sense of exclusion and purposelessness that originated long before the Holocaust – was heightened by continued prejudice, even after World War II. But the basis of this suffering is the cultural isolation sustained due to quiet public prejudice, not to the institutionalized ghettoization of the World War II years. What is more, it facilitated the growth of a unique literary tradition in Montreal, which even now continues to meaningfully contribute to the creation of Canadian identities, both among Canadian Jews, and among the Canadian Anglophones who increasingly claim it as part of a broader national identity.

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Fighting on the Home Front The National Hockey League in Canada

During the Second World War

Liam Mather

Fighting on the Home Front: The National Hockey League in Canada During the Second World War

"Hockey captures the essence of Canadian experience... In a land so inescapably and inhospitably cold, hockey is the chance of life, and an affirmation that despite the deathly chill of winter, we are alive."

- Stephen Leacock¹

"Dear Foster, I have just been listening to the hockey game that was played last night in Maple Leaf Gardens. It was the most enjoyable time I have had since I left home."

-a soldier writing from a war zone²

t a meeting of National Hockey League executives on September 7, 1939—three days before Canada officially entered the Second World ■War on September 10—league President Frank Calder pledged support for Canada's war effort: "We will, just as in the last Great War, patriotically assist the Government in every possible way. Any of our players who wish to volunteer will be assisted in doing so. We feel that well-conducted sport will be of great benefit to the national morale in these days of worry and mental stress." Popular histories of the NHL - most of which are authored by sportswriters and intended for fan entertainment – affirm that the league and its players made great sacrifices for the war, but they do not examine the nature or scope of these sacrifices.⁴ Few professional historians have studied the wartime role of the league, reflecting a broader absence of sport in Canadian historiography.⁵ This paper utilizes the limited scholarly literature, biographies of key individuals, and wartime newspapers to assess the NHL's contribution to Canada's war effort, and the war's impact on the NHL.

¹ Bruce McIntyre, "Which Uniform to Serve the War: Hockey in Canada Versus Military Ser vice During World War Two," Canadian Journal of History of Sport 24, no. 2 (December 1993): 68.

² Scott Young, Hello Canada! The Life and Times of Foster Hewitt (Toronto: Seal Books, 1985),

³ Andrew Ross, "Arenas of Debate: The Continuance of Professional Hockey in the Second World War," in Coast to Coast: Hockey in Canada to the Second World War, ed. John Chi-Kit Wong (Toronto: University of Toronto Press, 2009), 88.

⁴ For example, see: Brian McFarlane, 50 Years of Hockey: An Intimate History of the National Hockey League (Toronto: Pagurian Press Limited, 1968).

⁵ Panunto, "For Club or Country," 34.

On the eve of the war, as today, the NHL was the most-followed professional sports league in Canada. Only two of the league's seven clubs—the Montreal Canadiens and the Toronto Maple Leafs—were located in Canada, but ninety-five percent of its players were Canadians, and Foster Hewitt's *Hockey Night in Canada* radio broadcasts brought the action to living rooms across the country. During the war, the NHL served a crucial role on the home front by entertaining civilians and troops and contributing to Canada's war economy. In doing so, the league confirmed its importance to Canada's culture and national identity. However, in contrast to the claims of popular histories, this did not occur because of patriotic sacrifices by the league or its players. Rather, the NHL operated business-as-usual: with the tacit approval of the federal government, the league largely evaded the wartime restrictions that were placed on other non-essential industries.

This paper first examines the series of political decisions and the shrewd maneuvering of NHL executives that ensured the league's continuance. This will illuminate the wartime role of hockey, the effects of more restrictive manpower policies, and the capitalistic nature of the league and its clubs. Second, this paper examines the war record of NHL players. Their enlistment rate mirrored that of the Canadian public, but few players served overseas. This occurred because base commanders kept enlisted NHL players in Canada to compete in a quasi-professional military hockey circuit, which emerged during the war.

Throughout the war, the NHL's supply of labour – Canadian hockey players – was contingent on Canada's manpower policies. But the league was not significantly interrupted by the war, even as manpower policies became more restrictive as the war progressed. Initially, Canada's attitude towards the war was complacent. Prime Minister Mackenzie King opposed conscription and intended to limit Canada's military involvement.⁶ By the time the government suspended most of its recruitment in late September 1939, only a single NHL player had enlisted: Bill Cowley of the Boston Bruins.⁷ The first phase of the war, known as the "phoney war", saw little military engagement between the Western Allies and Germany, providing King with no incentive to increase Canada's manpower commitment.⁸ Consequently, the NHL's first wartime season, which ran from November 1939 to April 1940, was unaffected by the war.

⁶ J.L. Granatstein and J.M. Hitsman, *Broken Promises: A History of Conscription in Canada* (Toronto: Oxford University Press, 1977), 134.

⁷ Ross, "Arenas of Debate," 88.

⁸ Granatstein and Hitsman, Broken Promises, 135.

The phoney war ended with the fall of France in May and June of 1940. Parliament responded by passing the National Resources Mobilization Act (NRMA) on June 21, which granted the government sweeping powers to conscript men for home defense, but overseas service remained voluntary. Under the NRMA, all eligible men would be forced to undergo a thirty-day training period with the non-permanent active militia (NPAM) before October 21, 1941. Voluntary enlistment for the NPAM was to end on August 15, 1940.

In response to this legislation, NHL clubs encouraged their players to enlist with NPAM units before the August 15 deadline so that they would not be called-up for training mid-season. Conn Smythe, the owner of the Toronto Maple Leafs, wrote the following letter to his players: "It is my advice...that you sign up immediately with some non-permanent militia unit and get military training in as soon as possible. The advantages are obvious. In case you are honoured with a call to the Canadian forces, you will be ready. If you are not called, you will have complied with the military training regulations and be free to play hockey until called on." Other club moguls did the same—they were concerned more with their business interests than the war effort—and "practically all" NHL players joined the NPAM before August 15. Consequently, no players were lost to the military during the 1940-1941 season.

At age forty-six, Smythe founded a battery in the fall of 1941, but he did not encourage Maple Leafs players to join. He was prepared to sacrifice his life for his country and empire, but not the solvency of his hockey club. Only four NHL players enlisted during the league's third wartime season, including the three all-stars on Boston's Kraut Line—Woody Dumart, Milt Schmidt, and

⁹ Ibid., 142.

¹⁰ Ibid., 143.

¹¹ Ibid., 145-146.

¹² Ross, "Arenas of Debate," 89.

¹³ Conn Smythe and Scott Young, Conn Smythe: If You Can't Beat 'Em in the Alley (Markham: Paper Jacks, 1982), 139.

¹⁴ Dick Sheridan, "Many Canadian Athletes Enlisted In Non-Permanent Militia Units." *Ottawa Citizen*, August 7, 1940.

¹⁵ Panunto, "For Club or Country," 217-220.

¹⁶ Smythe founded the 30th Battery, a sportsmen's artillery battery with the 7th Toronto Regiment. He was also a staunch advocate for conscription, and a letter he penned to the Globe and Mail in September 1944 ignited the conscription crisis. For an astute analysis of his ostensibly contradictory positions throughout the war, see: Andrew Ross, "The Paradox of Conn Smythe: Hockey, Memory, and the Second World War," *Sport History Review* 37, no. 1 (2006).

Bobby Bauer—who joined the Royal Canadian Air Force.¹⁷ The NHL was largely unaffected during the first three years of the war because Canada's initial military involvement was limited, and clubs took prudent action to keep their players out of the military.

The situation changed in 1942 when King intensified Canada's war effort, bringing the demands of total war home to Canadians and to the NHL. 18 To meet Canada's increasing manpower needs, the newly created National Selective Service (NSS) expanded the number of men liable for service under the NRMA and imposed restrictions on employment in non-essential industries, including entertainment. 19 An order in council passed in June mandated that all employment contracts had to be approved by an NSS board, which effectively enabled the NSS to determine the work situation of every Canadian. 20 After an April plebiscite indicated majority support for conscription, King passed Bill 80 in July, which removed the NRMA clause that disallowed conscription for overseas service. 21

These policy changes jeopardized the NHL's wartime operations. On August 6, 1942, Calder met with the director of the NSS, Elliot Little, to lobby for the NHL's continuation and request permission to enter into contracts with players. Afterwards, Little issued the following statement, recognizing the NHL's contribution to morale: "it may be necessary to give some consideration to maintaining the NHL in some form, or on some basis, or else we would face the problem of replacing what it at present means to hundreds of thousands of Canadians in entertainment and maintenance of morale." On September 15, the NSS and US War Manpower Commission released a joint statement on professional hockey's wartime continuance: "While neither country has any intention of granting exemption from military service to hockey players or other athletes, there is no objection to allowing any men who are not subject to military service to continue their professional athletic activities unless and until they are requested to engage in some nonmilitary war duty." This meant the league could operate, but it had

¹⁷ Ross, "Arenas of Debate," 122. The nickname owed to Dumart, Schmidt, and Bauer's Kitchener origins and German backgrounds. During the war, their nickname was changed to the "Kitchener Kids." Brian McFarlane, 50 Years of Hockey, 74.

¹⁸ Desmond Morton, *A Military History of Canada*, 5th ed. (Toronto: McClelland & Stewart, 2007), 185.

¹⁹ Granatstein and Hitsman, Broken Promises, 190-191.

²⁰ Ibid., 190.

²¹ Ibid., 172, 179.

²² Ross, "Arenas of Debate," 97-99.

^{23 &}quot;Wartime Fate of Pro Hockey Hangs on Case By President." Ottawa Citizen, August 8, 1942.

^{24 &}quot;Hockey Clubs Plan For New Campaign." New York Times, September 16, 1942. ProQuest

to rely on military-exempt men, who included: teenagers, such as Ted Kennedy; older married men; those who received medical deferments; and those who worked in vital war industries and played hockey on the side, such as Maurice Richard, who worked in a munitions factory.²⁵ This was the government's policy towards the NHL for the duration of the war.²⁶

The primary consequence of these heightened manpower restrictions was a decline in the quality of league play. Before the 1942-1943 season, twenty-one regular NHL players, and sixty-nine minor leaguers who were contracted to NHL teams enlisted.²⁷ Twenty-six NHL regulars joined before the 1943-1944 season.²⁸ These numbers were substantial, as the six franchises needed approximately seventy-four players collectively.²⁹ Players lost to the military included offensive stars such as Syl Apps, Doug Bentley, and Bryan Hextall, and most of the league's starting goaltenders.³⁰ Many of the military-exempted players called up from the minor leagues were known as "war scabs," as they were not skilled enough to make the NHL under normal circumstances, and they did not stay in the league after better players returned from the war.³¹ The lower quality of play prompted the league to introduce the centre red line rule (or two-line offside pass) in 1943. This rule opened up the game and remained in place until the 2004-2005 NHL lockout.³² Nonetheless, the NHL's quality of play was significantly lower for the last three wartime seasons.

An important question remains: why did the government permit the NHL to continue? The twofold answer illustrates the NHL's contributions to the war. First, as quoted, Little recognized that the NHL boosted morale. So did his successor at the NSS, Arthur MacNamara. Canadians were ambivalent and divided about the war; they "[were] not willing to submit either its economy or its national social identity entirely to the war's demands," and the NHL was central to both.³³ The government allowed the league to operate because it maintained a de-

Historical Newspapers.

²⁵ Panunto, "For Club or Country," 170. Hunter, War Games, 115, 215. Richard also had a medical deferment. Hunter, War Games, 90.

²⁶ Ross, "Arenas of Debate," 97-111.

²⁷ Panunto, "For Club or Country," 162-163.

²⁸ Ibid., 163.

²⁹ Ibid., 162. The Brooklyn Americans folded in 1942, bringing the league to six teams.

³⁰ Douglas Hunter, War Games: Conn Smythe and Hockey's Fighting Men (Toronto: Viking, 1996), 302-303.

³¹ Panunto, "For Club or Country," 162.

³² Ken Dryden, The Game (Toronto: HarperCollins Ltd, 1983), 247.

³³ Ross, "Arenas of Debate," 113.

gree of normalcy on the home front, even as total war demands increased.³⁴ The league's value as a wartime entertainment source is evidenced by the increase in attendance during the war, which occurred despite the diminished quality of play. The last three wartime seasons set attendance records, with Toronto and Montre-al consistently attracting sell-out crowds.³⁵ Not only did hundreds of thousands of Canadians attend the NHL games each season, millions listened to *Hockey Night in Canada* on the radio, a show that journalist Scott Young described as "the greatest single national once-a-week get-together Canada had ever known."³⁶

The NHL also boosted the morale of Canadian soldiers overseas. Foster Hewitt - the famed Hockey Night in Canada broadcaster - voluntarily shortwaved condensed versions of Saturday night games to the British Broadcasting Corporation (BBC) for rebroadcast around the world.³⁷ These were hugely popular with the troops. Lieutenant-Colonel Arthur Fraser, commanding officer of the Royal Regiment of Canada, told a civilian audience that "more than anything else, the men in England want the hockey broadcasts, then cigarettes, then your parcels."38 One member of Smythe's battery wrote that "part of the battery's sense of togetherness was the time we would share listening to Foster call the games, although we were thousands of miles from home, some of us could see ourselves in our living rooms...Foster's voice made it all a little more bearable."39 Hewitt received thousands of similar letters from Canadian soldiers, highlighting the importance of the NHL to the military's morale. His shows were so popular that the Nazis re-broadcasted them throughout Europe as a propaganda tool. Their announcer, whom Allied troops nicknamed Calamity Jane, would conclude these hijacked broadcasts by telling Canadians to give up the war and watch hockey from home. 40 Hewitt responded by giving "an extra big hello to Calamity Jane" at the beginning of his highlight packages.⁴¹ Even the Nazis recognized the NHL's importance to Canadian morale and identity.

The NHL also made financial contributions to the war effort. Canada's

³⁴ Ibid,. 112.

^{35 &}quot;NHL May Set Attendance Mark." *The Globe and Mail* (Toronto), December 4, 1943. Pro Quest Historical Newspapers. "Turnstile Spin Dizziest In Years Around NHL." *The Globe and Mail* (Toronto), November 15, 1944. ProQuest Historical Newspapers.

³⁶ Young, Hello Canada, 88.

³⁷ Ibid., 90.

³⁸ Ibid., 95.

³⁹ McIntyre, "Which Uniform to Serve the War," 83.

⁴⁰ Panunto, "For Club or Country," 131.

⁴¹ Ibid.

wartime industrial expansion (which involved large purchases from the US) and war loans to Great Britain drained its reserves of foreign currency, especially of US dollars. 42 The War Measures of Act of 1939 preemptively addressed this problem by creating a Foreign Exchange Control Board (FECB) to manage Canada's foreign exchange reserves. Under the act, "all foreign exchange received by Canada [had to] be sold to an authorized dealer or other agent of FECB" so that Canada could finance its war effort.⁴³ An additional stipulation of the act was that Canadian citizens needed permission of the FECB to travel to the US, which affected the Canadians who played for American NHL clubs and were paid in US dollars.44 To address this issue, Conn Smythe developed a program that was mutually beneficial for the league and the Canadian government, and it was adopted by the FECB. In return for lifted travel restrictions from the FECB, Canadians playing in the US received a small stipend for living expenses, and sold the rest of their American income to the board.⁴⁵ For the duration of the war, Ross estimates that the FECB took in \$250,000 in US dollars through this program.⁴⁶ Additionally, the Maple Leafs and Montreal Canadiens generated revenue for the government through the Special War Revenue Act of July 1941, which levied a twenty percent tax on amusement.47

The NHL therefore served an important wartime role, boosting morale and adding to Canada's wartime economy. However, the Canadian clubs did not make any notable patriotic sacrifices in performing this role. The Maple Leafs and the Canadiens conducted their wartime operations "in a predictable capitalistic manner," prioritizing their bottom-lines over the war effort.⁴⁸ The Maple Leafs did not hold a single charity game, and they did not give any free tickets to servicemen, a policy for which they were heavily criticized in the press.⁴⁹ The Canadiens played several exhibition games for the Chinese War Relief Fund, but did not make any monetary contributions to war charities.⁵⁰ The government-mandated amusement tax was passed onto customers.⁵¹ In contrast, the British Football As-

⁴² Ross, "Arenas of Debate," 90.

⁴³ Ross, "The Paradox of Conn Smythe," 23.

⁴⁴ Ibid.

⁴⁵ Ross, "Arenas of Debate," 91.

⁴⁶ Ross, "The Paradox of Conn Smythe," 24.

⁴⁷ Ross, "Arenas of Debate," 91, 98.

⁴⁸ Ibid., 111.

⁴⁹ Ross, "Arenas of Debate," 27. Panunto, "For Club or Country," 88.

⁵⁰ Panunto, "For Club or Country," 88.

⁵¹ Ross, "Arenas of Debate," 92.

sociation and America's Major League Baseball donated significant wartime proceeds to their country's war efforts. The Canadian clubs actually benefited from the war years because they provided one of the country's sole forms of entertainment, and they reaped significantly higher profits due to higher attendance. Aside from the personal patriotic contributions of Smythe and Hewitt, the league and its clubs did not make any sacrifices—financial or otherwise—for Canada's war effort.

Despite the claims of league hagiography, NHL players as a group also did not make exceptionally large sacrifices for Canada's war effort. They enlisted at roughly the same rate as other Canadian men, but relatively few players saw active service due to the emergence of a quasi-professional military hockey circuit.⁵⁴ At the outset of the war, the military founded hockey teams on bases for physical training and for boosting morale. These teams competed in regional senior leagues sponsored by the Canadian Amateur Hockey Association, and were therefore eligible for the Allan Cup, the national amateur championship.⁵⁵ As more NHL players enlisted, military teams dominated the amateur competition, and served as a source of inter-branch rivalry. The Ottawa RCAF Flyers captured the 1941-1942 Allan Cup, and the team included aforementioned Kraut Line of Woody Dumart, Milt Schmidt, and Bobby Bauer, which was the NHL's best forward line the previous season.⁵⁶ The Ottawa Army Commandoes, also stacked with NHL all-stars, won the 1942-1943 Allan Cup.⁵⁷

In October 1943, military hockey became the subject of a national controversy when the Montreal Army team was caught paying Leafs' goaltender Turk Broda \$2,400 above his base pay to enlist in Montreal instead Toronto. ⁵⁸ It was revealed that military hockey had been operating as a "shadow professional league," with player trades (base transfers) and under-the-table salaries for NHL stars. ⁵⁹ Public outrage prompted the Army and the RCAF to withdraw their teams from Allan Cup competition. ⁶⁰ Additionally, it was revealed that military commanders

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid., 164.

⁵⁵ Ibid., 138.

⁵⁶ Ibid., 135.

⁵⁷ Ibid., 136-137

⁵⁸ Hunter, War Games, 103.

⁵⁹ Panunto, "For Club or Country," 152.

⁶⁰ Hunter, War Games, 107-108

had been keeping NHL players on the home front to play for military teams.⁶¹ As a consequence, less than ten NHL players fought overseas, and only two were killed in action.⁶² The competitive military hockey system therefore benefited both NHL clubs and players. The vast majority of players were not put in harm's way overseas, and played high-level hockey during their absence from the NHL. The narrative presented in popular histories, which stresses the great sacrifices of NHL players, is flawed.

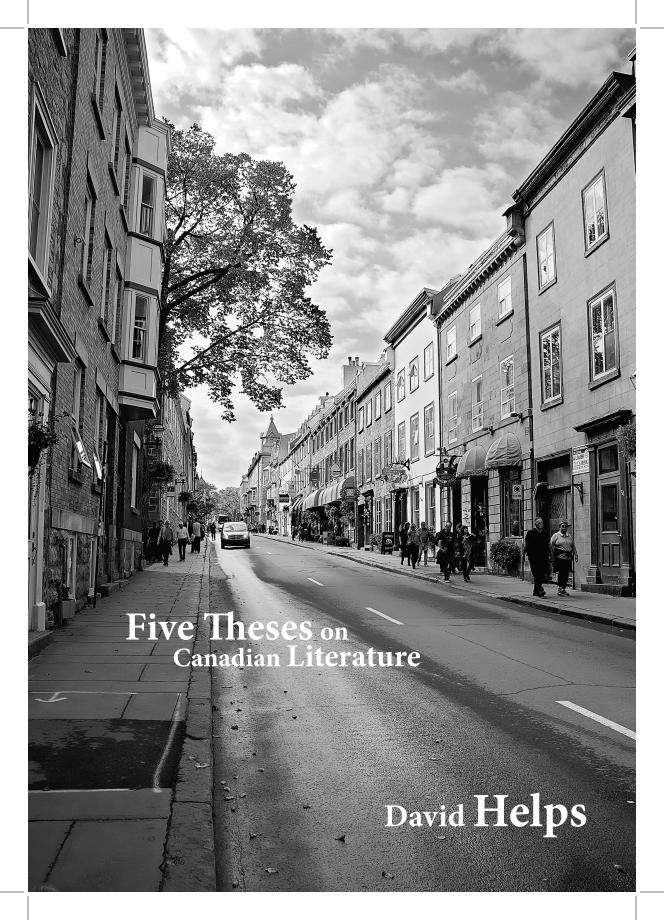
This paper has evaluated the war record of the NHL and its players during the Second World War. The NHL served an important role on Canada's home front, offering a valued source of entertainment for civilians and troops, and contributing to Canada's wartime economy. However, this role did not require the NHL's clubs or players to make significant sacrifices—and they did not. An examination of Canada's manpower policies revealed that even as war demands increased, an intersection of government, business, and civilian interests ensured the NHL's continuance. Before 1942, Canada's military involvement was limited, and clubs took measures to keep their players from enlisting mid-season. Canada's intensified mobilization that began in 1942 put the NHL's wartime operations in jeopardy, but the NSS permitted the league to continue for the rest of the war because of the league's social importance on the home front. Heightened manpower restrictions lowered the league's quality of play, but the league maintained its popularity and reaped higher profits than before the war. This paper then examined the development of quasi-professional military hockey during the war, for which commanders kept NHL players on Canadian bases. As a result, few players saw frontline combat, and they collectively did not make a meaningful military contribution to the war. Today, commentators and coaches frequently use war as a metaphor for hockey; during the Second World War, NHL players kept to the on-ice variety.

⁶¹ Ross, "Arenas of Debate," 107.

⁶² Joe Turner and Dudley Garrett. Neither were established players; they played one and twenty-three games respectively. Panunto, "For Club or Country," 168.

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Five Theses on Canadian Literature

1. By half-light:

the sapling skin, torn where you stumped your cigarette. I felt the woolen night stretch and nearly tear.

Fledgling candles on cement, not auguries, but totems.

Domed by translucent hands, another bearing lit wicks.

2. Ochre embers:

the gory aftermath of wood split open in sanguinary lust. A Gothic romance of jack-pines and Canadiana— Shield territory, knife accidents, false pride.

3. Voyageur blood:

generations of settlers without erasure: places like Germany and Lebanon, Scotland and Holland. Us a twentieth-century tapestry, praying the corners don't fray as the dogs of fear close in. A myth set in a curiously remote metonym for the nation: I've heard to be Canadian is to be terrified. Survival first, pride if we have time for it.

But even this is naïve.

The whitewashed names of these places remind me
I am a cosmic visitor in my homeland.

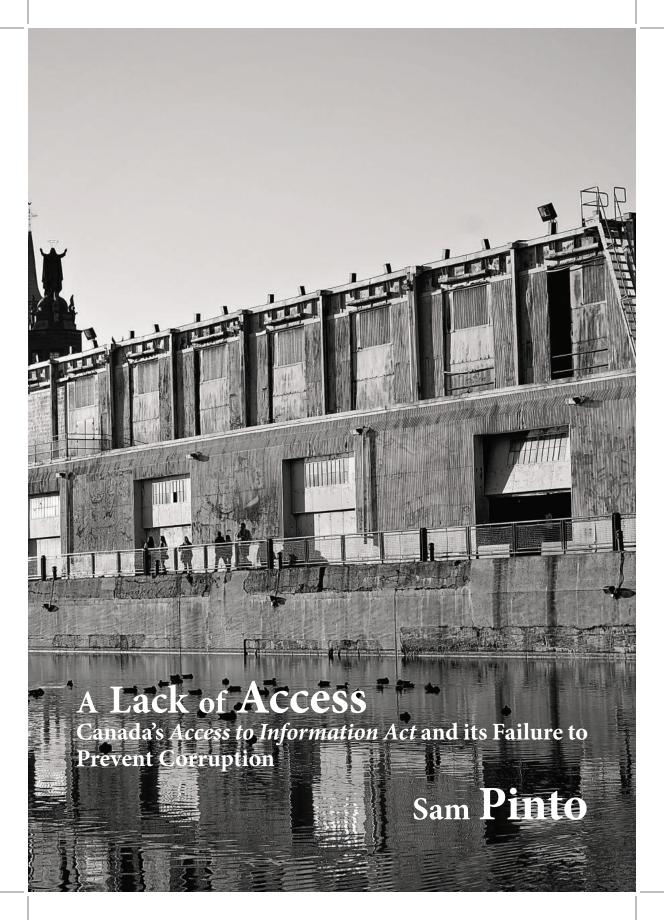
4. The night reads like a poem:

the trees have a certain meter:
one here there,
but I am unable to make out where it ends
or begins. The lapping water under paddle
fights for its time in memory with snakes dark as ash
and the verbal scorn of a baby turkey-vulture.

5. These rites:

mending old wounds sustained in menial battlegrounds. Reading Earle Birney in my head as I wash trickling blood from my shin, snap the components of a utility knife in and out of its cherry-coloured shell.

Tomorrow we will go back to our adoptive cities, dream of August nights in cool waters, and bronze flames at our mercy.



A Lack of Access:

Canada's Access to Information Act and its Failure to Prevent Corruption

n 2012, Canada's Access to Information Act (ATIA) turned 30 years old. Its purpose, according to the Office of the Information Commissioner, is to "to Lafacilitate democracy, by allowing citizens to participate meaningfully in the democratic process and by holding the government to account." Cite But after 30 years and no major reforms, the Act appears to have faltered on its duties. When Canadians needed it most, the Act has been unable to provide them with the information they need to ensure that their government is acting responsibly, transparently, and in the country's best interest. The Act has failed to keep up with the digital age, and tricky politicians and bureaucrats have discovered methods to largely exploit the legal loopholes of the Act. Canada's ATIA has taken an even bigger tumble when compared to the new era of freedom of information laws that have been implemented throughout the world in the last 15 years, ones that put the public interest first by broadening their scope, limiting exemptions, and, most importantly, take into account the use of 21st century technology.

This paper seeks to examine how the weaknesses within the existing Access to Information Act failed to prevent some of Canada's largest corruption scandals, particularly the Senate Expense Scandal. If the Act were more robust, more frequently reviewed, and updated for the digital world, it is likely that these corruption scandals would not have occurred, or at the very least limited in their impact.

Purpose of FOI Laws

In order to understand where Canada's Access to Information Act falters, the first step is to know what freedom of information laws are designed to do. It's been widely acknowledged by advocacy groups, academic scholars, and increasingly by government officials, that the public's right to access to information is a crucial component for the functioning of a healthy democracy. In order to allow the public and the media to hold the government accountable for its actions, and ultimately help the public determine how they will vote, it is necessary for the public and the media to have all the relevant policy information available to them. The right to information allows for such transparency to exist. Freedom of Information (FOI) laws can therefore seen as the bridge between government transparency and accountability.

As public institutions, at their core, function in the purpose of serving the people, it seems only appropriate that information the governments generate and gather be accessible to those they serve. According to Greg Michener, FOI laws are crucial to influencing governments to operate transparently, making them more predictable, accountable, professional, and allow citizens to be more involved in public life.²

Canada's Access to Information Act

Canada enacted its *Access to Information Act* (*ATIA*) in 1983, one of the first countries to do so. However, unlike many countries, access to information is not considered a constitutional right in Canada. The *ATIA* follows a framework that's similar to other FOI laws around the world, and in fact influenced the development of other countries' legislation.

In terms of scope, the *ATIA* initially covered 132 different federal institutions. Due to Canada's highly decentralized federalist system, the *ATIA* is limited in comparison to its counterparts to only cover institutions under federal jurisdiction (this excludes the majority of the health and education sectors, which are under provincial control). The number of institutions within the scope of the *ATIA* expanded in 2006 following the enactment the *Federal Accountability Act* to include Crown corporations, and today totals 250 institutions.³ While the *ATIA* applies to all ministries and federal government institutions, it does not apply to the Prime Minister, the Cabinet, the legislature, or the judiciary.⁴ Only Canadian citizens and residents are permitted to make ATI requests.

The *ATIA* has four broad exemption four categories that detail what information is immune from right of access.⁵ These include mandatory exemptions, discretionary exemptions, class test exemptions, and injury test exemptions. Mandatory exemptions are used on information that will automatically be refused disclosure. These primarily include information obtained from a foreign government, the government of a province or municipality, an international organization, or an aboriginal government. Discretionary exemptions are those where government institutions have the right to choose to disclose or withhold information. These exemptions are related to military, intelligence, and security secrets, crime and law enforcement, and trade secrets. Class test exemptions de-

² Mitchener, Greg, FOI Laws Around the World (Journal of Democracy, 2011), 146

³ Bill C-2, The Federal Accountability Act (39th Parliament of Canada, S.C 2006)

⁴ Global Right to Information Rating, (Centre for Law and Democracy and Access Info Europe, 2014), Canada

⁵ Access to Information Act (33rd Parliament of Canada, 1982), 13

scribes various types of categories that information can fall under, such as trade secrets. If information falls into one of these categories, then an exemption can be enforced. Finally, Injury test exemptions include information that can be withheld if it is deemed to be harmful to a public or private interest, or an individual. The Office of the Information Commissioner has the authority to enforce the *ATIA*. The Information Commissioner has the power to investigate complaints related to the *Act* and makes recommendations to Parliament. While the Information Commissioner does have access to all information and records held, he or she is limited in that they do not have the power to disclose information, but rather must file an application for judicial review by the Federal Court of Canada. Thus there is no internal appeals process. Those who do not abide by the *Act* and fail to disclose information are charged a one-thousand-dollar fine.

Flaws in Canada's Access to Information Act

While Canada's *Access to Information Act* was innovative when first enacted, the *Act* currently ranks 59^{th7} amongst FOI laws, according to a study conducted by the Centre for Law and Democracy and Access Info Europe. A number NGO's, politicians, civil servants (including the Information Commissioner), academics, and members of the media have called for reforms to the *ATIA* over the last 30 years. These demands, however, have only accumulated into one major reform in the form of the *Federal Accountability Act*. According to Stanley Tromp, the *ATIA* fails to meet international standards for FOI laws on 12 key points⁸ based on the priorities set by human rights organization Article 19.⁹ Several organizations, a Parliamentary committee, and the Information Commissioner, have published reports detailing the holes within the existing Act, and have made a series of recommendations for reform. In particular, substantial flaws and loopholes have been found in the primary FOI organizational areas detailed above.

Limited scope: While the *ATIA* covers 250 government institutions, there are still over 100 publicly-financed entities that are beyond its scope. ¹⁰ Many of 6 Racicot, Marc-Auréle, *The Access to Information Act: A Canadian Experience*, (Commonwealth Human Rights Initiative, 2005), 11

- 7 Global Right to Information Rating, (Centre for Law and Democracy and Access Info Europe, 2014), Canada
- 8 Tromp, Stanley, Fallen Behind: Canada's Access to Information Act in the World Context, 2008, 10
- 9 Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, (Article 19, 1999)
- 10 Tromp, Stanley, Fallen Behind: Canada's Access to Information Act in the World Context, 2008,

these institutions play a fundamental role in Canada's democratic process, including the House of Commons, the Senate, the judicial branch, the Prime Minister's Office and the Cabinet offices. Several countries that have enacted their laws in the last 15 years such as India, Mexico, and to an extent, the United Kingdom, have these institutions under the scope of their FOI laws.

The Canadian Government's increasing use of quasi-commercial entities and public-private partnerships to conduct business has formed a large vacancy within the *ATIA*, as these entities are not covered by the *Act*. These bodies include the Canadian Pension Investment Board and NAV Canada. While there's an ongoing debate as to whether or not information held by these entities would be in the public interest, as they become more involved in government affairs, private bodies will have an increasingly direct impact on public life. ¹² In contrast, both India and the United Kingdom have added amendments to include private bodies within the scope of their FOI laws.

Weak enforcement body: The powers of the Information Commissioner currently lag behind those of other enforcement bodies around the world. The Information Commissioner does not have binding power to legally demand that an institution to disclose information. ¹³ Rather, the Commissioner, must apply to have the Federal Court review situations where an institution refuses to cooperate. Furthermore, due to confidentiality requirements, the Information Commissioner is unable to accurately publish his or her findings and recommendations in their reports.

Overbroad exemptions: The sweeping exemptions within the *ATIA* are considered by experts to be the *Act's* most debilitating flaw. The categories of exemptions that currently exist, particularly mandatory and class-based exemptions, create blanket exclusions over vast amounts of information. One such example is s.16.3 of the *Act*, which allows the Chief Electoral Officer to refuse disclosure of any records regarding the investigation, examination or review in performance under the *Canada Election Act*. ¹⁴ In addition to blanket exemptions, no

¹¹ Legault, Suzanne, Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act, (Office of the Information Commissioner of Canada, 2015), 8

¹² Daruwala, Maja, Nayak, Venkatesh, Ferguson, James, Yadav, Namrata, *Recommendations for Strengthening the Access to Information Regime in the Government of Canada*, (Hu man Rights Initiative, 2008), 13

¹³ Tromp, Stanley, Fallen Behind: Canada's Access to Information Act in the World Context, 2008, 70

¹⁴ Daruwala, Maja, Nayak, Venkatesh, Ferguson, James, Yadav, Namrata, Recommendations

public interest override clause exists, which would allow information to be disclosed if it was believed that that information would more beneficial to the public than to the select individuals that it would protect.¹⁵ The lack of a harm test on the majority of exemptions also greatly expands the amount of information that can be withheld. According to the Information Commissioner, only 26.9% of all access requests received full disclosure between 2002 and 2007, which perfectly demonstrates how overly broad exemptions can greatly weaken the effectiveness of an FOI law.¹⁶

Record creation: Currently, in Canada no laws exist that enforce a duty to create and preserve records that would document the decision-making processes, procedures, or transactions of a public institution. ¹⁷ As a result, it is likely that not all information related to those processes are being recorded, and thus accessible for an access to information request. Such documentation includes ¹⁸ audiotapes, films, drawings, maps, microfilm, photographs, CDs, and printouts of emails and blackberry messages. Since the enactment of the *ATIA*, it has been widely noted that public officials often try to conduct certain aspects of their work, discussions, and meetings orally in order to prevent information from being retrieved. ¹⁹

Corruption and Access to Information

One of the main arguments for enacting FOI laws is their ability to prevent and unveil corruption. With strong FOI laws in place, citizens and the media are able to obtain information that could provide insight into whether or not elected officials are misusing their position in public office. Having accessible and transparent documentation of all government activities readily available could also work as a deterrent to corruption, as public officials and civil servants would be more reluctant to abuse their powers if it .²⁰ While there is some consensus amongst academics and scholars that FOI laws can be effective at reducing cor-

for Strengthening The Access to Information Regime in the Government of Canada, (Human Rights Initiative, 2008,9

¹⁵ Tromp, Stanley, Fallen Behind: Canada's Access to Information Act in the World Context, 2008, 107

¹⁶ ibd, 37

¹⁷ Legault, Suzanne, Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act, (Office of the Information Commissioner of Canada, 2015), 14

¹⁸ ibd,182

¹⁹ ibd, 184

²⁰ Samia Tavares, *Do Freedom of Information Laws Decrease Corruption?*, (Rochester Institute of Technology, 2007), 3

ruption, the extent to which they are able to do so is still debated.²¹

While there has been limited study at the macro level on how FOI laws have impacted corruption, cases studies do exist on how citizens in countries across the world have used FOI laws to fight corruption locally. Brazil's FOI law, for example, requires that the government proactively publish budgetary information online, which is used by the media to review government programs and attempt to expose corruption and wrongdoings through inconsistencies.²²

According to Greg Mitchener, often times FOI laws suffer from "window dressing," meaning that they might look good from afar but are poorly developed or lack the teeth to actually be effective.²³ This is often because politicians are hesitant to enact laws that could force them to face heavy public scrutiny, but are willing enact some form of FOI law to score political points. For FOI laws to be more than just "window dressing," and thus able to curb corruption, they must have: a strong legal framework, be effectively implemented and enforced, and must be supported by a strong level of NGO or grassroots activism, and media that's willing to support them.²⁴

Canada does not have a high level of corruption, ranking 10th most clean country in Transparency International's Corruption Perceptions Index 2014. ²⁵ However, this does not mean that corruption does not exist, and corruption often becomes the centre of national attention when it does occur (Senate Expense Scandal, most recently).

This paper has already described the substantial shortcomings of the *ATIA*. Such gaps leave the Canadian government susceptible to widespread corruption. In recent decades, the government has in fact the seen its share of scandals, all of which have led to significant public outcry and allowed for the misuse of millions of taxpayer dollars. In some cases, they have even caused governments to lose their grip on power. Because of this, it is right to question whether or not Canada's access to information laws are actually effective at curbing corruption, or are just another example of "window dressing." Would a stronger *ATIA*, that met international standards of scope, exemptions, enforcement, and record creation, have been able to prevent such corruption scandals from occurring? At the

²¹ U4 Help Desk, *Right to information laws: Impact and implementation*, (Transparency International, 2014), 1

²² ibd, 3

²³ Mitchener, Greg, FOI Laws Around the World (Journal of Democracy, 2011), 146

²⁴ ibd, 149-150

²⁵ Corruption Perceptions index 2014, Transparency international

very least, would a robust *ATIA* have limited the damage caused by these scandals?

It's impossible to know for sure. However, by looking at the following case studies, it is possible to determine where the *ATIA*'s deficiencies allowed for the exploitation of government power, and ultimately what reforms are necessary to ensure that the *Act* is able to follow its mandate.

Case Study: The Senate Expense Scandal

Senate reform has been a topic of considerable debate in Canada for decades, but the Senate Expense Scandal—which saw over 30 appointed senators abusing their public spending powers on personal expenditures—brought the issue back into the public spotlight and has left the Upper House grappling with the aftermath for the last three years. The scandal has forced Canadians to question whether it is possible to hold the Senate accountable. As a result, several politicians, including former Prime Minister Stephen Harper and NDP Leader Thomas Mulcair have proposed abolishing the Upper Chamber. The scandal has also demonstrated how opaque the body is, and how the government, even at the height of the senate reform debate, has failed to even address how Canada's tool for promoting transparency, the *ATIA*, could have been used to prevent the expense scandal, and could be amended to prevent another such instance in the future.

The Senate Expense Scandal began to unfold following a June 2012 audit report by Auditor General Michael Ferguson.²⁶ The report noted that "the [Senate] Administration does not provide the Internal Economy Committee with complete reports on all contracting activity." In particular, the audit found that expense claims did not adequately explain the intended purpose of transactions. For example, Senators who own a secondary residence in the National Capital Region are reimbursed for each day that the residence is available for occupancy to the Senator, and the Senator must provide annual proof that they owned the secondary home. However, due to vague expense claims, it was difficult for the Auditor General to ensure that the Senators were complying with the policy.²⁷

Several media outlets chose to investigate. A November 2012 CTV News investigation found Senator Patrick Brazeau was claiming \$20,000 for taxpayer-subsidized housing allowance for his principle residence in Maniwaki, Que-

²⁶ Report of the Auditor General of Canada to the Standing Senate Committee on Internal Economy, Budgets and Administration (Office of the Auditor General of Canada, 2012)

bec.²⁸ After travelling to Maniwaki and interviewing residents, CTV News found that Brazeau was rarely ever there. In December 2012, questions emerged regarding how much time Conservative Senator Mike Duffy was spending in his declared primary residence in Prince Edward Island, as he was claiming expenses for living in his longtime Ottawa home.

May of 2013 was a lightning round of new revelations, and pulled the Prime Minister's Office into the mix. First, the Deloitte report was released, which demanded that Brazeau and Harb repay \$51,000 and \$48,000, respectively. Not long after, the RCMP confirmed it would be conducting its own investigation into the senators' expense claims. On May 15th, it was revealed that Nigel Wright, the Prime Minister's Chief of Staff, had written Duffy a personal cheque of over \$90,000 in order to pay off his expenses. Questions emerged as to whether or not the Prime Minister was also involved in the scandal. On May 22nd, Harper claimed that he did not know that Wright had agreed to pay for Duffy's expenses.

Canadian reporters from various media outlets filed 24 different access to information requests, all related to email correspondence between the Privy Council's Office (PCO), Nigel Wright, Pamela Wallin, and Patrick Brazeau.³² However, every single request, according to the PCO, yielded zero results. The Canadian Press finally received a response from the PCO in September 2013. The PCO was able to identify 28 pages of relevant results, but would only disclose one of them.³³ The PCO argued that disclosure of that information would violate solicitor-client privilege. The PCO was also accused of deleting and throwing away the majority of the documents related to the expense scandal. The case was taken to the Information Commissioner, who found that their appeal was appropriate. The Information Commissioner requested that the PCO disclose the documents, but still the PCO refused. As of writing, the PCO still has not released the other 27 documents.

A June 2015 report by the Auditor General found that "oversight, accountability, and transparency of Senators' expenses was quite simply not adequate."³⁴

²⁸ CTV News Staff, Senator who lives near Ottawa gets \$20K housing allowance, (CTV, 2012)

²⁹ CBC News, Read the Senate expense audits and reports, (CBC, 2013)

³⁰ The Canadian Press, RCMP confirms it's looking into Senate expense claims, (CBC, 2013)

³¹ CBC News, Harper 'not consulted' about Duffy Senate expense repayment, (CBC, 2013)

³² Greg Watson, Senate scandal creates no paper trail in PM's own department (CBC, 2013)

³³ Allison Jones, Information commissioner taking PMO to court over withholding Senate documents (Canadian Press, 2015)

³⁴ Michael Ferguson, Report of the Auditor General of Canada to the Senate of Canada (The

In addition, the report found that over 30 Senators had overstepped the Senate's expense rules and policies.³⁵

On September 11th, 2015, Information Commissioner Suzanne Legault filed a notice of application against the Prime Minister of Canada, to be heard by the Federal Court, for refusing to disclose the files.³⁶ Analysis:

The Senate Expense Scandal highlights several significant flaws within the existing *ATIA*, some of which could have prevented the abuse of senate spending claims. First and foremost, the Senate is exempt from the *Access to Information Act*, and senators are not legally obligated to publicly disclose their expenses. This illustrates a clear limitation of the scope of the *ATIA*, since if senator expenditures were more easily accessible to the public and the media, it would have likely worked as a deterrent in preventing at least some of the spending abuses that occurred. Rather, it took extensive resources and taxpayer dollars—three audits and an RCMP investigation—to reveal that Senators were overstepping themselves.

In addition, the fact that there were only 28 records revealed by the PCO to be related to the senate expense scandal led many to speculate that the majority of the files had been deleted. Considering the high degree of media coverage that the scandal was receiving, and the ferocity of opposition party criticism, one would assume that the PCO would have discussed the matter in more detail than they are claiming. This controversy is evidence of problems related to record creation within the *ATIA*. First, there is no legal requirement for the institutions to preserve documentation of their decision-making process. As a result, we may never know the true depth of the conversations that took place throughout senate expense scandal within the PCO, or why Nigel Wright agreed to provide Duffy with a gift of \$90,000. Second, this scenario proves how outdated the *ATIA* truly is, as it does not make any clear reference to emails, or Blackberry messages, which are much easier to delete and are likely the primary method of conversation amongst staff in the PMO, and in other government institutions.

The Senate expense scandal also demonstrates the weaknesses in the *ATIA*'s enforcement body. The Information Commissioner was unable to directly demand that the PCO release the relevant documents from the access to informa-

Office of the Auditor General of Canada, 2015), 1

³⁵ Senators Repayment Status, (Report of the Auditor General of Canada to the Senate of Canada: Senators' Expenses, 2015)

³⁶ Information Commissioner files a notice of application against the Prime Minister of Canada, (Office of the Information Commissioner of Canada, 2015)

tion request. Rather, it took two years, in August 2015, for Nigel Wright's emails to be made public during Mike Duffy's trial. If the Information Commissioner was able to use binding power to force government institutions to disclose information, this would be, according to Professor Alasdair Roberts, the enforcement model "most conducive to achieving consistent compliance and a robust culture of access." ³⁷

The scandal does in fact have one silver lining. The case that the Information Commissioner brought to the Federal Court could potentially lead to new reforms for the *ATIA*, depending on the decision of the court. While the case itself would not directly reform the *ATIA*, it could highlight the holes that persist within the *Act*, and force politicians to take action.

Conclusion

When comparing the *ATIA* to freedom of information laws around the world, the *Act* can easily be described as a "window dressing" law. In response to a 2009 *ATIA* reform proposal from the Standing Committee on Access to Information, Privacy and Ethics, the Attorney General, Rob Nicholson, argued that there would "challenges in implementing" such reforms, that they would interfere with Parliamentary privilege and judicial independence, and that the *ATIA* was already "a strong piece of legislation.³⁸" Thus, the government rejected all 12 of the much-needed reform proposals. This clearly shows the government's indifference towards reforming the *Act*, as it does more to protect government wrong-doing than it does for ensuring that the public is able to hold the government accountable.

The case reviewed in this paper demonstrates the *ATIA*'s inability to hold the government to account, contributing to an environment that perpetuates large-scale corruption. In each case, public officials abused their powers for personal gain, and were able to elude discovery due to the *ATIA*'s well-documented flaws. As has been described, the *ATIA* does not meet international standards in four primary FOI law organizational areas, including limited scope, overly broad exemptions, poor record creation mechanisms, and a weak enforcement body. These problem areas are significant, and as has been proven, are the primary rea-

³⁷ Tromp, Stanley, Fallen Behind: Canada's Access to Information Act in the World Context, 2008, 69

³⁸ The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, Government Response to the Eleventh Report of the Standing Committee on Access to Information, Privacy and Ethics entitled *The Access to Information Act: First Steps Towards Renewal*, (2009)

son as to why corruption can go unsolved for years in Canada. What makes the extent of these scandals all the more puzzling is that they were not the brainchild of a sole public official or bureaucrat, or by small public body that could easily slip beneath the public gaze. Instead, these scandals went unchecked within Canada's most powerful and democratic institutions and amongst an alarming number of high level officials (For example, of the 83 currently sitting Senators, during the Senate Expense Scandal just over 30 of them were found to be exploiting their spending powers). None of the relevant institutions— specifically the Prime Minister's Office and the Senate—are under the scope of the *ATIA*. Whether its avoiding record creation, or actively preventing the disclosure of crucial information based on the broad exemption clauses, the *ATIA* has in some way or another allowed public officials to continue

Reform to the *ATIA* follows an unequivocally Canadian political pattern—where countless proposals, reports, and recommendations have all zeroed in on the same problem areas of the *Act* and made it unmistakably clear how to address such problems, but the government fails to obtain the political will to actually achieve the necessary changes. In fact, after many scandals, commissions have been struck and official reports have been published to outline ways to prevent similar scandals from occurring. For example, the Gomery Report, following the Liberal Sponsorship Scandal, proposed implementing mandatory record creation laws and increasing powers of the Information Commissioner. Neither of these reforms have been made, and both of these loopholes played a role in future corruption scandals, including the Senate Expense Scandal and the Afghan Detainee Issue.

While the new Liberal Government has proposed some reforms to the *ATIA* that should be applauded, such as increasing the powers of the Information Commissioner, ensuring that government data and information is made open by default, and increasing its scope to include the Prime Minister's Office and Cabinet offices, it does not go far enough.³⁹ The platform does not address overly broad exemptions, and does not propose to increase the scope of the *Act* to include the Senate or the House of Commons. Doing so would largely reduce the opportnity for corruption to occur.

The failure of the Canada's new government, as well its previous one, to address real access to information reform points back to a culture of government

³⁹ Liberal Party of Canada, Access to Information. (Liberal Party of Canada, 2015)

secrecy that plagues Canada. The *ATIA* could be a key tool in fighting corruption and has shown promise in doing so in countries around the world. but without reversing these inadequacies, bringing the *ATIA* into the 21st century, and reforming it to meet international standards, it is entirely possible for scandal and abuse of power to continue as the status quo.

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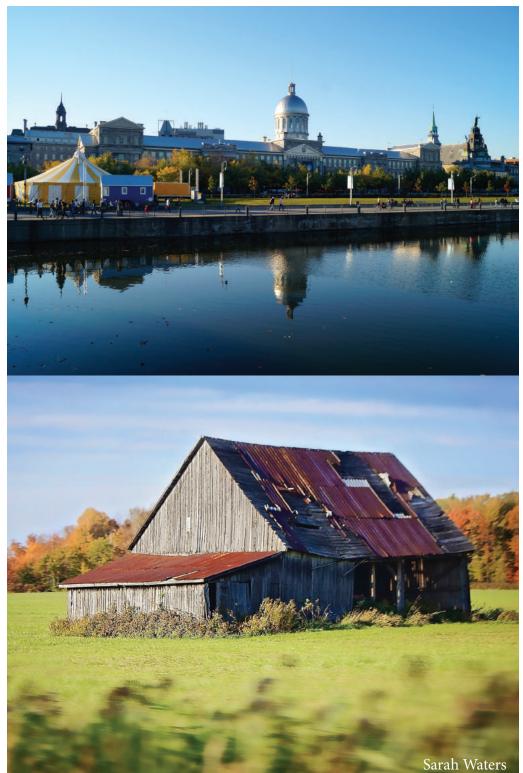


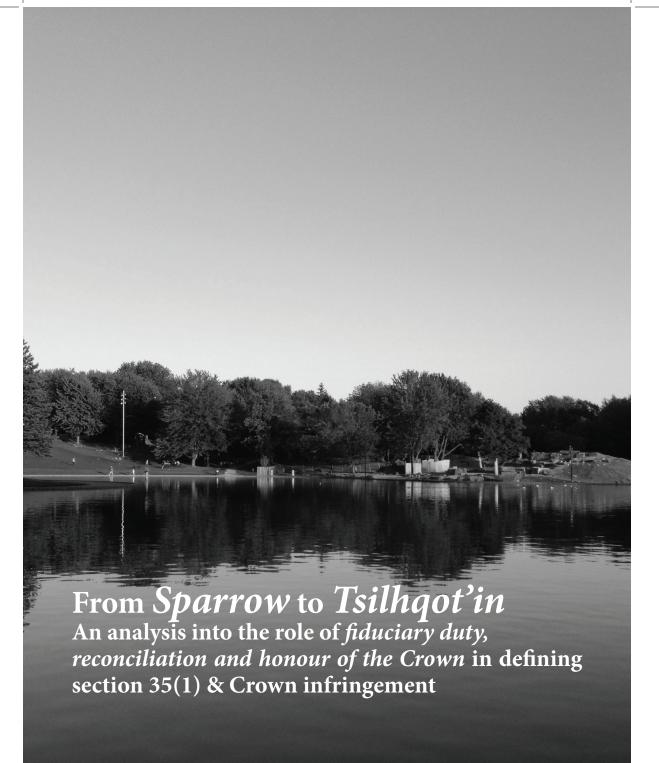












Jeff Baillargeon

From Sparrow to Tsilhqot'in: An analysis into the role of fiduciary duty, reconciliation and honour of the Crown in defining section 35(1) & Crown infringement

n undertaking an analysis into the ways in which the Supreme Court of Canada has employed the terms fiduciary duty, honour of the Crown, and recon*ciliation* in defining the extent to which section 35(1) (Aboriginal and Treaty Rights)¹ can be infringed, it becomes evident that tensions exist within the Court as to how it is to be approached and defined. The Court has not been consistent in its use of these terms, and as a result, has not been consistent in defining the extent to which the Crown can infringe upon section 35(1). Thus, this paper aims to build a narrative seeking to demonstrate the volatile nature of Aboriginal rights as defined in the Supreme Court of Canada. The six cases analyzed herein are by no means exhaustive of the Court's history in Aboriginal rights litigation, but represent the most authoritative cases on the matter. The Court began using the terms fiduciary duty, honour of the Crown, and reconciliation in the Sparrow decision as to increase the weight of section 35(1), placing a greater, but ambiguous constitutional limit on the Crown in right of Canada. Following this, the Court proceeded to reduce the scope of section 35(1) in a series of rulings throughout the 1990s, increasing the authority of the Crown via-à-vis Aboriginal peoples protected by the Constitution. In doing so, the Court used the aforementioned terms in a manner that brought little meaning to the value of section 35(1) as a constitutionally protected right, a position taken by many legal and political scholars alike.² However, the more recent judgments, primarily *Haida Nation* and Tsilhqot'in Nation, have increasingly employed these terms as to import greater restraint on the Crown in a manner that is much more consistent with the Court's first interpretation of these rights in the Sparrow decision. In doing so, the Court

^{1 35. (1)} The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

² Barsh, Russell Lawrence & Henderson, James Youngblood. "The Supreme Court's Van der Peet Triology: Native Imperialism and Ropes of Sand," McGill Law Journal 42. (1997): 993-1009.; Borrows, John. "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia." Osgoode Hall Law Journal 37.3 (1999): 537-596; Dufraimont, Lisa. "From Reconciliation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada." University of Toronto Faculty of Law Review Volume 58 Number 1. (2000): 1-30; McNeil, Kent. Defining aboriginal title in the 90's: Has the Supreme Court finally got it right? Toronto: Robarts Centre for Canadian Studies, York University. (1998)

has increased the scope of section 35(1) by placing a greater restraint on both the federal and provincial governments, raising important questions about the role of Aboriginal and treaty rights and the division of powers in Canadian federalism.

R. v. Sparrow, 1990

In R. v. Sparrow, the first section 35(1) case, the Court stated that the words "recognition and affirmation" effectively incorporated the Crown's fiduciary duty within the Constitution, and thereby imported some restraint on the sovereign's power in its dealings with Aboriginal peoples.³ It is in *Guerin v. The* Queen, 1984, that the Court established that the crown was indeed a fiduciary for Aboriginal peoples. It found that s. 18(1) of the Indian Act conferred upon the Crown a discretionary power in deciding « where the Indians' best interests lie, » and as such, the Crown had become a fiduciary.⁴ This requires that the Crown act responsibly, and in the interest of the beneficiary, Aboriginal peoples. The court then asserted that section 35(1) rights are not absolute — thus subject to infringement — but that section 35(1) effectively requires the Crown to reconcile its sovereign power with its *fiduciary duty*. This, the Court argued requires justification for infringement. In 1984, Ronald Sparrow of the Musqueam Band — located in the Greater Vancouver area of British Columbia — was charged under the Fisheries Act for 'fishing with a drift net' longer than permitted under the Indian Food Fishing license issued to his band.⁵ Sparrow did not dispute the facts, but instead, argued that the terms of regulation were invalid by virtue of their inconsistency with section 35(1) of the Constitution Act, 1982.⁶ Although the Court sent the case back to trial, it created a test for identifying infringement and establishing justification upon which the case was to be retried.

In determining a *prima facie* infringement, the Court stated that it must address if the limitation is unreasonable, imposing undue hardship, and denying the holder of the right their "preferred means of exercising that right".⁷ Once a prima facie infringement has been established, the Court must then ask that the

³ R. v. Sparrow. 1 SCR 1075. Supreme Court of Canada. 1990. 1077

⁴ Guerin v. The Queen. 2 S.C.R. 335. Supreme Court of Canada. 1984. 336; 18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band. Indian Act (R.S.C., 1985, c. I-5)

⁵ R. v. Sparrow. 1076

⁶ Ibid.

⁷ R. v. Sparrow. 1112

infringement be supported by a 'compelling and substantial' legal objective.8 In this case, the Court established that anything beyond issues of conservation, "such as the general public interest", was insufficient and too broad in providing any justification for the limitation of a constitutionally protected right. 9 If the legislative objective is found to be valid, the test then moves on to the second stage where, as stated by the Court, it refers back to the "guiding principle" derived from Taylor and Williams and Guerin (1981 and 1984 respectively). 10 This guiding principle requires that the government uphold the honour of the crown in its dealings with Aboriginal peoples. In the case of Sparrow, this means that in justifying infringement, the government's responsibility to the Aboriginal peoples in question be of primary concern in establishing the procedure through which the right is to be infringed. Thus, the Court enacted a 'doctrine of priority', stating that after issues of conservation, Aboriginal peoples must be given priority over non-Aboriginal peoples in accessing the fisheries. 11 The Court also included matters such as, but not limited to, minimal impairment, duty to consult, and fair compensation, but did not expand further than this.¹²

In conclusion, Sparrow stated that the federal government, on the behalf of the Crown, by virtue of section 91(24), has the power to infringe upon section 35(1), but it is the discretion that arises from that *fiduciary duty*, that limits the extent of the infringement. As such, Sparrow established that section 35(1) is about reconciling federal power with federal duty, but that reconciliation requires justification for infringement. Justification must be connected to a legal objective that is consistent with the honour of the Crown in light of its fiduciary duty. However, *Sparrow* does have some inherent problems: it did not define what an Aboriginal right is, nor did it define what is a 'compelling and substantial' legal objective beyond issues of conservation. By not expanding on this *fiduciary duty*, it begs the question as to whether all dealings — specific or non-specific — with Aboriginal peoples invoke the same *fiduciary duty*. As a result, *Sparrow* suggests that the rights protected under section 35(1) do not have to be grounded in a specific land right or title, but that it is something much greater; as such, greatly expanding the Crown's liability. Therefore, Sparrow effectively used reconciliation

⁸ R. v. Sparrow. 1113

⁹ Ibid.

¹⁰ R. v. Sparrow. 1108; R. v. Taylor and Williams. 62 C.C.C. (2d) 1981. Leave to appeal refused, 2 S.C.R. xi 1981; Guerin v. The Queen.

¹¹ R. v. Sparrow. 1114

¹² R. v. Sparrow. 1079-80

as the purpose of section 35(1) for placing an inherent limit on the government's ability to legislate or regulate in regards to Aboriginal peoples. This stems from the Crown's *fiduciary duty*, which in turn, requires that it act in a manner that is consistent with upholding the *honour of the Crown*.

R. v. Van der Peet, 1996

The 'integral to a distinct culture test' established in the Van der Peet decision, and the two separate dissenting opinions, together demonstrate the very tensions that exist within the Court in addressing section 35(1) and the approach it requires. Dorothy Van der Peet, the appellant, a member of the Stó:lō First Nation in British Columbia was charged under the province's Fisheries Act for selling salmon caught under a food-fishing license. Van der Peet challenged the charges, claiming to have an Aboriginal right to sell fish that is protected by section 35(1).¹³ In addressing this claim, the Court reiterated that section 35(1) is to be approached in a purposive manner, thus resolving any ambiguity as to the scope and definition of the right in favour of the Aboriginal peoples in question. 14 The Court then followed the former assertion with the following passage: "[s]ection 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown."15 Furthermore, "[t]he substantive rights which fall within the provision must be defined in light of this purpose." ¹⁶ It is in this light that the Court proclaimed that in defining Aboriginal rights, the Court must give equal weight to both the Aboriginal perspective and the common law, establishing a three-part test to be employed by the lower courts. An Aboriginal right is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."17 To be considered integral, it must be part of what makes the community distinct from others. Thus, the right being claimed cannot be an element of practice, custom or tradition that is common to all human societies, arguing that it is those distinctive features for which the Constitution mandates recognition and protection. 18 Lastly, there must be some aspect of con-

¹³ R. v. Van der Peet. 2 SCR 507. Supreme Court of Canada. 1996. 507-8

¹⁴ R. v. Van der Peet. 508

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ R. v. Van der Peet. 509

¹⁸ Ibid.

tinuity that existed prior to contact with Europeans. ¹⁹ In short, the claimant must prove that the right claimed is not only integral to his or her society, but that it is what makes it distinctive from non-Aboriginal rights while retaining an element of continuity from pre-contact.

Justice L'Heureux-Dubé and McLachlin's concurring dissents provide some critical insight into the tensions that are inherent to this 'integral to a distinct culture test' which affects the ways in which section 35(1) can be infringed. Although the case does not speak explicitly of infringement, it is nonetheless important because the Court used reconciliation as a way to define the rights that can be infringed by virtue of the *Sparrow* test. This particular point has led some scholars, such as Russell Lawrence Barsh and James Youngblood Henderson, to argue that the Crown can now extinguish rights at the point of definition.²⁰ In her dissent, Justice L'Heureux-Dubé commented on this dangerous aspect, providing an alternative 'dynamic rights' approach to what she understood as a 'frozen-rights' approach. She argued that "aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives."21 By giving the common law equal weight, and asserting that the right cannot be something that is common to all human societies, it effectively diminishes the scope of what section 35(1) protects, and thereby grants the Crown a greater discretion in its dealings with Aboriginal peoples.²² Justice McLachlin, on the other hand, using a similar rationale, provided what she called the "historical-empirical approach," arguing that history and tradition are important, but that they should not restrict the way in which the right is exercised today. As such, if a community proved that they had sustained themselves from the sea, independent of a particular fish, they had a right to continue doing so.²³ Therefore, the 'integral to a distinct culture test' allows the Crown to limit the exercise of section 35(1) at the point of definition, which in theory, renders the *Sparrow* test unnecessary, all in the name of *reconciliation*. This means that from Sparrow to Van der Peet the scope of section 35(1) is di-

¹⁹ R. v. Van der Peet. 510

²⁰ Barsh, Russell Lawrence & Henderson, James Youngblood. "The Supreme Court's Van der Peet Triology: Native Imperialism and Ropes of Sand," McGill Law Journal 42 (1997), 998.

²¹ Van der Peet. 513

²² Ibid.

²³ Van der Peet. 519

minished using the concept of *reconciliation* at the point of definition, without having to delve into the issue of justification. Thus, it effectively broadens the scope of the Crown's ability to infringe upon Aboriginal interests.

R. v. Gladstone, 1996

The same year, in R. v. Gladstone, the Court specifically modified the first part of the justification test, refuting the 'doctrine of priority' established in Sparrow, asserting that the Crown can justifiably infringe on Aboriginal rights where the purpose of the legal objective is that of reconciling Aboriginal societies with the broader community of which they are a part.²⁴ The appellants, Donald and William Gladstone of the Heiltsuk Band of British Columbia, were charged in April of 1988 under s.61(1) of the Fisheries Act for selling fish caught with an Indian Food Fishing license. The appellants challenged the regulations on the basis that they violated their Aboriginal rights as recognized and affirmed by section 35(1).²⁵ Writing for the majority — Chief Justice Lamer, Gonthier, Cory, Iacobucci and Major — Lamer CJ reiterated the Van der Peet test, but challenged the 'doctrine of priority' established in *Sparrow* on the basis that where no internal limit exist, the doctrine of priority effectively grants the Aboriginal right-holder exclusive use of the resource in question, and thereby, excludes non-Aboriginal participants. However, the Court did find that the commercial exchange of herring indeed was an integral and defining aspect of the Heiltsuk culture, and that it had maintained a degree of continuity from pre-contact, thus meeting the requirements for constitutional protection.²⁶

Having identified that an infringement of the right did occur, the Court moved on to the justification part of the *Sparrow* test. Here, the Court stated: "[w]here the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in Sparrow, makes sense." However, where no internal limits exist, the Court also stated that "[t]he purposes underlying aboriginal rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable." It is here that the Court expanded on the purpose of *reconciliation*, stating that Aboriginal

²⁴ R. v. Gladstone. 2 SCR 723. Supreme Court of Canada. 1996. 730

²⁵ R. v. Gladstone, 735

²⁶ Ibid.

²⁷ R. v. Gladstone, 730

²⁸ Ibid.

societies exist within a broader social, political and economic community, over which the Crown is sovereign, and as such, section 35(1) requires the Crown to reconcile the Aboriginal interest with the interest of the broader community in which it exists.²⁹ After expanding the scope of reconciliation, as part of what makes a legal objective 'compelling and substantial', the Court then ruled that the evidence presented in this case was insufficient in proving whether the infringement was justified. The question that remained post-Gladstone is how far exactly can the government go in infringing Aboriginal rights protected by section 35(1) of the Constitution, using this expanded definition of reconciliation as a 'compelling and substantial' legal objective. By stating that section 35(1) is effectively about reconciling Aboriginal rights with the interests of the broader community of which they are a part, the Court refuted Sparrow's assertion that the 'public interest' was too broad. In doing so, the Court greatly diminished the constitutional value of section 35(1) and expanded, yet again, the Crown's power in its dealings with Aboriginal peoples.

R. v. Delgamuukw, 1997

The following year, in R. v. Delgamuukw, the Court further expanded on what constitutes a 'compelling and substantial' legal objective for the purpose of reconciliation. Delgamuukw was also the first Aboriginal title case since Calder v. British Columbia of 1973, a decision upon which the Court had been split in deciding whether title had been extinguished or not. At issue was a claim by the Gitksan and Wet'suwet'en hereditary chiefs to a portion of British Columbia consisting of 58,000 square kilometres. Through trial the claim of ownership was altered into a claim of title to the land, both refuted by the provincial government.30 Lamer CJ, once again, wrote for the majority on the behalf of Justices Cory, McLachlin and Major, with Justice L'Heureux-Dubé and La Forest dissenting. The majority began by establishing that Aboriginal title is collective and sui generis, thus distinguished from other proprietary interests. It is also 'inalienable' — meaning it cannot be transferred, sold, or surrendered to anyone but the Crown. In contrast to Aboriginal rights, rooted in pre-contact practices, title is rooted in the Royal Proclamation of 1763 — the Crown's assertion of sovereignty — which recognizes under common law prior occupation and systems of Aboriginal law as proof of possession.³¹

²⁹ Ibid.

³⁰ R. v. Delgamuukw. 3 SCR 1010. Supreme Court of Canada. 1997. 1011

³¹ R. v. Delgamuukw. 1015

In order to prove Aboriginal title, the Court stated that the claimant needs to provide proof that it exclusively occupied the lands in question at the time of assertion of Crown sovereignty. In determining occupancy, the claimant must provide reference to prior systems of social organization that occurred on the land in question, thereby establishing a 'special bond' between the land and the group identifying to it. 32 Although the Court explained that "[t]he exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture,"33 it then asserted that "[t]he content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."34 In an apparent contradiction, the Court explained that Aboriginal title is not restricted like Aboriginal rights, but that there is an inherent limit on what title-holders may do with the land, and more importantly, one that is rooted in the social organization that effectively proved title to the land. For example, activities such as mining, which prevent future generations from enjoying the land in the way in which title was proven, are effectively prohibited. Moreover, if a title holder wishes to develop the land for economic purposes that are inconsistent with the practices that grounded the title, it must surrender the title to the Crown so that it may be converted into fee-simple land. 35 Before moving on to justification for infringement, the Court established yet another limit on the exercise of section 35(1) at the point of definition.

In the next section, the Court expanded further from *Gladstone* on what it considers a 'compelling and substantial' legal objective for the purpose of justifying infringement. It did so by enumerating the following objectives as consistent with the reconciliatory purpose of section 35(1): "[t]he development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infra-structure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose." Thereby greatly expanding the ways in which the Crown can justifiably infringe upon Aboriginal title. Concerning the second part of the justification test, involv-

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ R. v. Delgamuukw. 1021

ing the Crown's fiduciary duty, the Court then established that the title-holders may be consulted and compensated in the process of choosing the uses to which the lands in question may be put.³⁷ In regards to the constitutional separation of powers through which, by virtue of section 91(24), the federal government holds the power to legislate in respect to "Indians and Lands reserved for Indians", the Court stated that the provinces are also able to legislate in regards to Aboriginal peoples, "so long as it is a law of general application and not one that affects their Indianness, their status, or their core values."38 In doing so, Delgamuukw reinforced the fact that the federal government is the paramount authority in dealings with Aboriginal peoples, but confirmed that in laws of general application, provinces hold the discretion to legislate in matters related to Aboriginal peoples so long as it follows the framework established through section 35(1). However, the verbiage used in Lamer CJ's expansion of government infringement is nonetheless ambiguous as to how the provinces may legislate within the scope of the above listed terms, without damaging the relationship the Aboriginal group in question has to the land, that which effectively provides ground for proving title.

As identified in Gladstone, the Lamer Court effectively narrowed the scope of section 35(1) under the pretext of reconciliation, endorsing the 'public interest' of the broader community in which Aboriginal peoples exist as a justification for infringement. In Delgamuukw, the Lamer Court addressed the ambiguous standing regarding the scope of reconciliation and the 'public interest' as a 'compelling and substantial' legal objective going as far to state that "the general economic development of the interior of British Columbia [...] and the settlement of foreign populations to support those aims" effectively supports the legal objective of reconciliation that section 35(1) demands.³⁹ By defining Aboriginal title as having an inherent limit due to the relationship that grounds the title, the Court added what this paper refers to as a 'procedural limit' on the exercise of section 35(1), that is further supported by an expansion of what constitutes a legal objective consistent with the purpose of section 35(1). After the *Delgamuukw* decision, many scholars such as Lisa Dufraimont, Kent McNeil and John Borrows commented on the Chief Justice's expansion of justifiable Crown infringement, arguing that it has seriously undermined the status of section 35(1) as a constitutionally protected right and how exactly it is protected. Going further, Borrows argues that the word infringement has simply become synonymous with "mod-

³⁷ Ibid.

³⁸ R. v. Delgamuukw. 1044

³⁹ R. v. Delgamuukw. 1021

ern-colonialism" — arguing that it is a continuation, and perhaps a consolidation, of imperialism's legacy.⁴⁰

Haida Nation v. British Columbia, 2004

In *Haida Nation v. British Columbia*, the Court placed on the Crown a 'duty to consult and accommodate' where Aboriginal title has been asserted but not yet been proven. In the context of the narrative this paper is constructing, the *Haida Nation* ruling is witness to what this paper refers to as the 'union of *reconciliation* and *honour of the Crown*' in establishing a 'procedural limit' on the sovereign's power in its dealings with Aboriginal peoples. To this point, *Gladstone* and *Delgamuukw* had effectively amplified the ways in which the Crown could justifiably infringe upon Aboriginal rights and title, but it had not addressed the ambiguous standing of Aboriginal title asserted, but not yet recognized. The Court ruled that where title is asserted but not yet proven, the *honour of the Crown* cannot ask that it act as a fiduciary, but that it does mandate a 'duty to consult and accommodate' as a way to further the process of *reconciliation* that s. 35(1) demands via negotiation.⁴¹

In 1961 the province of British Columbia issued a Tree Farm License (T.F.L 39) to a large forestry firm, granting it permission to harvest trees in an area over which the Haida Nation has been explicitly asserting title for over a hundred years. In this particular case, the Haida Nation challenged the 1999 transfer of T.F.L 39 to the Weyerhaeuser Co., by virtue of the Minister of Forest's failure to consult with the nation. The Lower Court judge had argued that the government was by no means legally bound by a duty to consult, that it was only moral, if anything. The Court of Appeal, on the other hand, had found that both the government and the Weyerhaeuser Co. had a legal duty to consult and accommodate. The Supreme Court, ruling unanimously under Chief Justice McLachlin, found that the government of British Columbia was indeed bound by a duty to consult where title has been asserted but not yet proven, but that the *honour of Crown*, that in which the duty to consult is grounded, could not be delegated to third parties. 42

Prior to *Haida Nation* the concept of *honour of the crown* had been effectively used in *Sparrow* as to impose some degree of restraint on the sovereign's

⁴⁰ Borrows, John. "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia." Osgoode Hall Law Journal 37.3 (1999) : 537-596. 538

⁴¹ Haida Nation v. British Columbia. 3 SCR 511. Supreme Court of Canada. 2004. 513

⁴² Haida Nation v. British Columbia. 512

power by holding it to a relatively high standard in its dealings with Aboriginal peoples. Reconciliation, on the other hand, had been used sparingly in Sparrow, but strongly in Van der Peet, Gladstone, and Delgamuukw. It was used in a manner as to limit the Aboriginal exercise of section 35(1) by expanding the ways in which the Crown could justifiably infringe upon Aboriginal rights. Haida Nation brings together these two concepts in a manner that is more consistent with imposing a limit on how the government may proceed in infringing upon section 35(1). It is this which this paper refers to as the 'union of reconciliation and honour the Crown.' The Court asserted that the duty to consult and accommodate Aboriginal interest was grounded in the honour of the Crown, established in the assertion of sovereignty, and always at stake when dealing with Aboriginal peoples. Moreover, the Court asserted that the Crown is held to a very high standard because "nothing less is required if we are to achieve '[t]he reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" as established in Delgamuukw (emphasis added).⁴³ In short, the Court established that the duty to consult is part of a much bigger process that not only involves the honour of the Crown, but that which also furthers the reconciliatory objective that section 35(1) demands. Therefore, the Court effectively imported the duty to consult and accommodate, even where title is asserted but not yet proven, into the constitution via section 35(1) by establishing that reconciliation is a necessary component for upholding the honour of Crown.

On the latter, the Court also asserted that the *honour of the Crown* leads to different duties dependent on different circumstances. Where specific interest has been established, the *honour of the Crown* requires that it act as a fiduciary, where title is asserted, but not yet proven, the *honour of the Crown* requires that it act in a reconciliatory manner, which entails fair negotiation.⁴⁴ In short, "[i]t is a corollary of s.35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."⁴⁵ The duty to consult arises when the Crown has knowledge of the claim being asserted, and the degree of consultation and accommodation is to be determined by the strength of the claim being made. In other words, the *honour of the Crown* requires that each case be determined on its own terms. In this particular case, the Court ruled that the Minister of Forests was well aware of the claim asserted by the Haida Nation and of its strength, and

⁴³ Delgamuukw para 186 quoted in Haida Nation v. British Columbia. 522

⁴⁴ Haida Nation v. British Columbia. 523-4

⁴⁵ Haida Nation v. British Columbia. 524

therefore, found that it was acting in a manner that was both inconsistent with the *honour of the Crown* and the process of *reconciliation* that section 35(1) mandates.⁴⁶

Concerning the assertion made by the Court of Appeal that third parties are legally bound by a duty to consult, McLachlin CJ refuted the argument on the basis that the honour of the Crown, that in which the duty is grounded, cannot be delegated. The Crown remains responsible for the consequences of its actions, as well as those of third parties acting under its sovereign rule, in its dealings with Aboriginal peoples. 47 The Lower Court of British Columbia had argued that the duty to consult or accommodate was not applicable to provinces as a result of the doctrine of inter-jurisdictional immunity. Inter-jurisdictional immunity is a federalism doctrine, which recognizes each order of government as having a 'core' which the other order is prohibited from infringing in the enactment of legislation. 48 As such, provincial laws of general application are allowed to impair the federal government's section 91(24) power (Indians and Lands reserved for Indians), so long as it does not impair that which makes an 'Indian' an 'Indian'. McLachlin CJ also refuted this argument, explaining that the assertion of Crown sovereignty, that which invokes the honour of the Crown, existed prior to union, and as a result, the provinces were subject to it by virtue of section 109 of the Constitution Act, 1867 (Property in Lands, Mines, etc.). 49 The problem with this statement is that if Aboriginal title is considered to be grounded in the claimant's relationship to the land in question (Delgamuukw), provincial laws of general application that have the potential of affecting the ways in which that relationship is grounded (the core of 'Indianness'), effectively infringe upon the doctrine of inter-jurisdictional immunity. The issue at stake in this case is the province's granting of a license to harvest trees on lands the Haida Nation claims title to. As a result, the relationship to the land that grounds the Haida Nation title may be seriously impaired by the company's actions to the degree that it irreversibly modifies the land. Therefore, the actions of the province, by virtue of issuing the harvesting license, affects the core of what is considered to be 'Indianness', and thereby infringes on the federal government's powers. Effectively, if the doctrine of inter-jurisdictional immunity is to be upheld, the province's argument that it

⁴⁶ Haida Nation v. British Columbia. 514

⁴⁷ Haida Nation v. British Columbia. 537

⁴⁸ Hogg, Peter W. & Godil, Rahat. "Narrowing Interjurisdictional Immunity". Supreme Court Law Review 42 (2008): 623–638. 624

⁴⁹ Haida Nation v. British Columbia. 540

would "undermine the balance of federalism" is a valid one.⁵⁰ This issue would remain unaddressed until Tsilhqot'in Nation v. British Columbia a decade later.

In summary, Haida Nation resolved a long-standing question as to the constitutional standing of unresolved Aboriginal title claims and the protection section 35(1) grants them, if any. In what this paper refers to as the 'union of reconciliation and honour of the Crown' the Court effectively imposed a 'procedural limit' on the sovereign's power, binding it by duty to consult and accommodate prior to infringement. The Court has also placed this duty on the provincial governments, placing the doctrine of inter-jurisdictional immunity on shaky grounds in regards to its application to section 35(1) of the Constitution. Although *Haida Nation* does not refute the expansive list of legal objectives consistent with section 35(1) as established in *Delgamuukw*, it does place a limit on the sovereign's power before it reaches the first step of the Sparrow justification test. By asserting that the process of reconciliation established under section 35(1) requires the Crown to negotiate as to define Aboriginal title where no treaties have been concluded, the Supreme Court has effectively used reconciliation in a manner consistent with the *Sparrow* principle in importing greater restraint on the sovereign's power.

Tsilhqot'in Nation v. British Columbia, 2014

It is in Tsilhqot'in Nation v. British Columbia that the Court issued the first declaration of title for an Aboriginal claimant, where it expanded on the Crown's fiduciary duty in the second part of the justification test, and removed the doctrine of inter-jurisdictional immunity from its ambiguous application to section 35(1). At issue was a claim by the Tsilhqot'in Nation, a semi-nomadic group of six bands, to a territory in central British Columbia. The Tsilhqot'in Nation had been objecting and seeking a declaration of title to the land since 1983 when the Province of British Columbia had issued a commercial logging license to the area claimed by the nation.⁵¹ The provincial and federal governments had both opposed the claim, as well as the Supreme Court of British Columbia, by virtue of its use of a 'site-specific' test in proving exclusive and sufficient occupation of the land at the time of assertion of Crown sovereignty. The Supreme Court of Canada, on the other hand, ruled unanimously that the Tsilhqot'in Nation does indeed possess title to the territory claimed, and that the Crown had breached its duty to consult in granting a commercial logging license over land being disputed.⁵²

⁵⁰ Crown's factum, at para. 96 quoted in Haida Nation v. British Columbia. 540

⁵¹ Tsilhqot'in Nation v. British Columbia. 2 SCC 44. Supreme Court of Canada. 2014. 260 52 Ibid.

The Court upheld the occupation requirement established in *Delgamuukw*, reiterating that it must be sufficient, continuous, and exclusive, but asserted that these are not ends in of themselves.⁵³ In what it considers sufficient occupation, the Court established that Aboriginal title is not confined to 'site specific' settlements, a site of exclusive human occupation, but rather, that it extends onto lands regularly used for activities such as hunting, fishing and the general exploitation of resources on said lands.⁵⁴ Concerning how the Crown may justifiably infringe upon Aboriginal title, the Crown took a moment to reiterate the principles in which section 35(1) is grounded, clarifying the test of justification in its evolution from Sparrow to Delgamuukw, and expanding on the Crown's fiduciary duty. First, as established in Sparrow, the onus of proving infringement rests on the claimant alone. The government, on the other hand, has a duty to prove: "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: Sparrow."55 Once the government has proven that infringement is justifiably supported by a 'compelling and substantial' legal objective that is consistent with the goal of reconciliation, it must then prove that its actions are consistent with the Crown's fiduciary duty towards the Aboriginal peoples in question. In expanding on what the Crown's *fiduciary duty* requires of the government in justifying infringement, as demonstrated below, this paper argues that the Court has reinvigorated this doctrine in importing some degree of restraint on the sovereign's power, as it did in Sparrow. First, by establishing that Aboriginal title is a collective and communal interest, incursions on Aboriginal title lands cannot be justified if they are to affect the ways in which future generations may benefit from the land.⁵⁶ Second, the Court stated that implicit in the Crowns' fiduciary duty is a component of proportionality. This requires that the government's actions be rationally connected to its goal; that it act in a manner that minimally impairs the right being infringed; and lastly, that the impact be proportionally measured as to ensure that the costs of such actions not outweigh the benefits.⁵⁷ This concept, the Court asserted, is not new, but rather implicit in Delgamuukw and echoed in Haida Nation in the requirement that consultation be proportionate to the strength of the claim being

⁵³ Tsilhqot'in Nation v. British Columbia. 279

⁵⁴ Tsilhqot'in Nation v. British Columbia. 286

⁵⁵ Tsilhqot'in Nation v. British Columbia. 295

⁵⁶ Tsilhqot'in Nation v. British Columbia. 298

⁵⁷ Ibid.

made.⁵⁸ In this case, the Tsilhqot'in Nation was asserting title over a region which the Crown was aware, and therefore, was required by the *honour of the Crown* to consult on the uses of the land and accommodate their interests; the government did neither and thereby breached its duty owed to the Tsilhqot'in Nation.⁵⁹

Prior to this case, provincial regulation of Aboriginal rights was constitutionally limited in two ways, by section 35(1) of the Constitution Act, 1982 and by section 91(24) of the Constitution Act, 1867. However, the jurisprudence concerning infringement was less clear. The Court had touched upon this subject, but had never explicitly addressed the standing of a federalism doctrine and its relation to section 35(1) explicitly until this case. Reiterating that the purpose of section 35(1) is to impose a degree of restraint on both the federal and provincial governments, as to provide a framework through which Aboriginal and non-Aboriginal interests can be reconciled, the court asserted that there is effectively no role left for the doctrine of inter-jurisdictional immunity to play.⁶⁰ In doing so, the Court compared Part II (Aboriginal rights) of the Constitution to Part I (Canadian Charter of Rights and Freedoms), asserting that both operate as to limit the power of the provinces and the federal government. These limits prevent both orders of government from enacting certain types of regulations they would otherwise be free to enact; these limits, in the words of McLachlin CJ, "have nothing to do with whether something lies at the core of the federal government's powers."61 The purpose of the doctrine of inter-jurisdictional immunity is that of constructing separate spheres of jurisdiction for the provinces and the federal government as to avoid potential conflicts. As McLachlin CJ argued, the issue at stake is not rooted in a conflict between the two levels of governments, but rather a "tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province."62 McLachlin CJ continued, asserting that "[t]his carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the Constitution Act, 1982 and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of inter-jurisdictional immunity."63 Therefore, the Court argued that section 35(1)

⁵⁸ Ibid.

⁵⁹ Tsilhqot'in Nation v. British Columbia. 301

⁶⁰ Tsilhqot'in Nation v. British Columbia. 314

⁶¹ Tsilhqot'in Nation v. British Columbia. 315

⁶² Tsilhqot'in Nation v. British Columbia. 316

⁶³ Tsilhqot'in Nation v. British Columbia. 318

is a constitutional right, like those of the Charter, that operates as a limit on both levels of government, and as a result of the issue at stake, the doctrine of inter-jurisdictional immunity cannot apply to the matter at hand. The issue is specifically one that concerns itself with providing that section 35(1) rights are "recognized and affirmed" by both levels of governments, and therefore, requires that it be approached under the constitutional framework established by section 35(1), and not a doctrine of federalism.

Therefore, the unanimous ruling in *Tsilhqot'in Nation v. British Columbia* had a severe impact on the ways in which government, federal and provincial, can justifiably infringe upon Aboriginal rights. The Court's use of the Crown's *fiduciary duty* in adopting a doctrine of proportionality in the second and final part of the justification test, effectively reduces the scope of the government's ability to justifiably infringe upon section 35(1). By displacing the doctrine of inter-jurisdictional immunity and its role in regards to section 35(1), the Court has ultimately placed on the provinces what it has called in the past a rather 'heavy burden.' Therefore, *Tsilhqot'in Nation* is read to have effectively amplified the scope of section 35(1) in protecting Aboriginal rights by placing a liability on the provinces that requires it to act in a manner that is both consistent with the framework and purpose of section 35(1) — that of reconciling Aboriginal and state interests. In other words, the Court has opened up another avenue for *reconciliation* in displacing the doctrine of inter-jurisdictional immunity.

Conclusion

Before moving on to concluding thoughts, a summary of the narrative presented in this paper is of value. First, the *Sparrow* decision effectively constrained the scope of the government's power in infringing upon Aboriginal and treaty rights using the *honour of the Crown* and its *fiduciary duty*, stating that section 35(1) is about *reconciling* that power with the duty that comes with it. Thus, reconciliation was primarily about Crown power and duty, not Aboriginal interests *per* se, since it had yet to define the latter. Six years later, in *Van der Peet*, the Court employed *reconciliation* in a manner that limited the scope of section 35(1) at the point of definition. By stating that the common law be given equal weight in defining Aboriginal rights, it gave the Crown a greater discretion in defining what can be infringed; stating that *reconciliation* is about reconciling Aboriginal customs, practices, and traditions with Crown sovereignty. The same year, in *Gladstone*, the Court used *reconciliation* once again to expand beyond

Sparrow in what consists of a 'compelling and substantial' legal objective; endorsing the public interest as a justifiable legal objective consistent with upholding the honour of the Crown and its fiduciary duty. The following year, in Delgamuukw, this expansion was further amplified, defining reconciliation as consisting of the general economic development of British Columbia and the settlement of foreign populations to achieve those ends. This greatly diminished the scope of what section 35(1) protects, and significantly amplified the scope of the Crown's power in infringing upon Aboriginal interest. Seven years later, in Haida Nation, the Court reinvigorated the honour of the Crown, requiring a duty to consult and even accommodate where title is asserted, but not yet proven. The Court then employed the term reconciliation in manner more similar to that of Sparrow, stating that nothing less is required for the reconciliation of Aboriginal societies with that of Crown sovereignty. By establishing a 'procedural limit' on the Crown in its power to infringe upon section 35(1), the Court effectively diminished the scope and ways in which the Crown can justifiably infringe upon Aboriginal title. Lastly, ten years later in Tsilhqot'in Nation, the Court expanded on the Crown's fiduciary duty for the first time since Sparrow, importing a proportionality component into the justification test, effectively decreasing the scope of the Crown's power in infringing upon Aboriginal rights. Moreover, by stating that the framework established under section 35(1) is much more conducive to reconciling Aboriginal societies with Crown sovereignty than the 'blanket inapplicability' imposed by the doctrine of inter-jurisdictional immunity, it effectively displaced an integral doctrine in Canadian federalism. Asserting instead that section 35(1) has as a purpose, like that of the *Charter*, the power to impose restraint on both the federal and provincial governments, since Aboriginal title land is not a matter of competing provincial-federal jurisdictions.

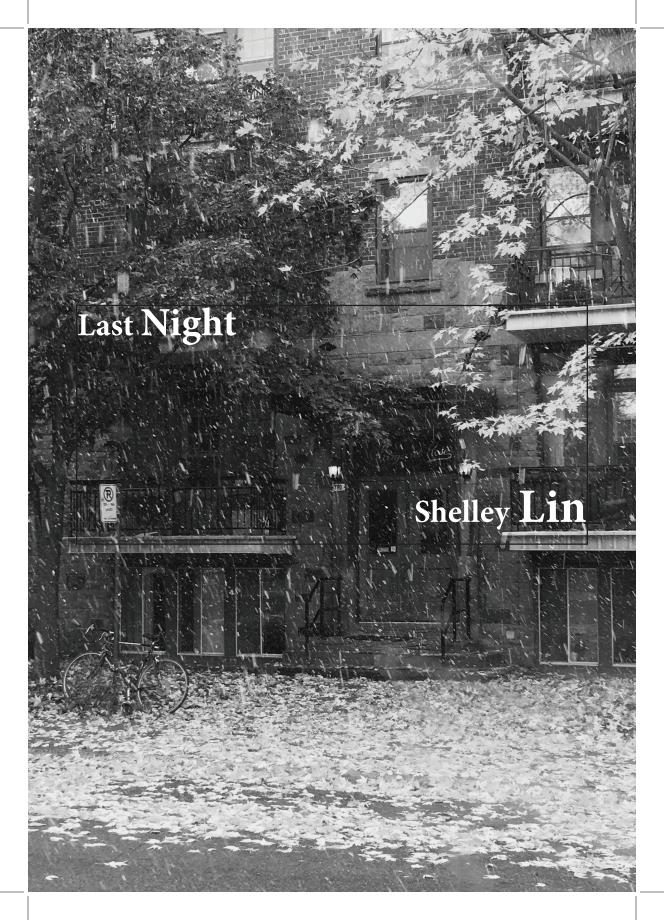
In conclusion, through this analysis it is evident that the Supreme Court's use of the terms *fiduciary duty, honour of the Crown*, and *reconciliation* in defining the extent to which section 35(1) can be infringed has not been consistent, and as a result, nor has the defining of section 35(1) itself. At times the Court has employed these terms in a manner that brought little meaning to section 35(1), amplifying the ways in which the Crown can justifiably infringe upon Aboriginal rights. However, *Haida Nation* and *Tsilhqot'in Nation*, employed these terms in a manner much more consistent with the *Sparrow* decision, importing greater restraint on the Crown in its dealings with Aboriginal peoples — amplifying the scope of this constitutional limit on Crown sovereignty.

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Growing up, I moved around a lot. I've called twenty two places home and have lived by the three largest metropolitan cities in Canada. I've travelled extensively throughout Canada and have come accustom to the feeling of being on the road for a while when all the places begin to feel the same. You never sleep right. I lived in Hamilton, Ontario when I wrote this, however, the story is set in my experience of the ubiquitous Canadian city. As we are so closely intertwined with American culture, there are many similarities to the "City" as perceived in American culture. However, our popularity density is low, so the cities are not as big. The Canadian city is emptier, especially at night, and too cold in half the year to do much. There is more sense of the unexplored, the yet-to-be-built, and a constant reminder of the scale and force of nature. While both are young countries, the USA has larger international culture presence. Thus, the Canadian city feels a little like the younger, teenaged sibling: a butterfly nymph. Enough unique history to establish a sense of self, but at the same time it has vast possibilities.

LAST NIGHT

Il I can see is a fluid line. It is dark and curving, and I seem to be floating and rotating around it through empty space, watching the line grow at every angle. It is forming letters. Tom Petty plays in the background, and I have a strange sense of being in an elevator. I discover I have feet as I realize I am staring down at them in their ballet shoes. How strange tonight's dream is.

Looking up again, I see an elevator panel, each button a city light. The fluid line is the display above the door: it has spelled out the word 'street.' I step outside onto the sidewalk, breathe in the bitter air, and decide to go left, where the road will take me to the sea. Everybody seems to be in costume tonight, although nobody is paying the slightest attention to it. I watch an angel pass me and enter a bar; the Canucks game is on.

Downtown has always held a strange sense of glamour for me, despite the seediness, the scumminess. Avoidable, of course, if one sticks to the nicer parts of town, but where's the fun in that? Tonight however, even in my fluid, dreamy sense of "reality," lacks the dark brilliance I have always loved so much. The streets are not nice tonight. I shiver and walk a bit faster, looking upwards to the sky and finding it moonless. The wind picks up a little more, and stopping in an alleyway to light up my cigarette, I watch a legion of insects scuttle away into the dark.

"Disgusting."

"Well, I find that a rather impolite thing to say."

I turn with a start, not realizing anyone else had been in the alley. A demon grinned back at me with a mouth full of rotting teeth. At first, I hadn't noticed, but as a passing car lit up the space better, I realized his face is the stuff of nightmares- completely horrifying. I restrain a gasp. He looks like he crawled straight out of Hell itself. I am not sure if it is a costume.

A clipped smile in return later, I gladly step back under the streetlights and continue down the sidewalk. Where is all this vermin coming from? I step around a rat, around bugs, around road kill. The closer I get to where I'm going, the more scum teems around my feet, until I am jumping from space to space on my toes. I look up, seeing a shadow, and it's the demon again.

"You haven't got very good manners, Miss. Leaving me standing there without a word. The least you could have done is said hello." He steps closer to me. "Prospect, pay attention. When you finally catch them, you want to wring out

every last bit of living you can."

I look around for someone to call to for help, whimpering, feeling sick. The nausea rises: the only people around me all look just like him, and they're coming closer.

"Look in her eyes, man! How do you kill the dead?" asks the presumed apprentice, an ungodly laugh.

The bugs have started to scuttle their way up my body, their little feet crawling onto my legs. I didn't want to scream, but I can't help it anymore. I scream and scream and shut my eyes hard as the demons close in around me. One yanks me backwards by my hair and I fall.

I land in bed. Shaking a little, I open my eyes and breathe in the familiar scent of my bed. The clutter of glass bottles on my desk; lotions and powders and creams littering every surface. Books, books, magazines, books. Coke baggies from three years ago, filthy white Balenciaga bags. The lights shining through the dark into my window; all the lights in the city, that someone once said to me, "All shine for you tonight." Old pajama pants in that ubiquitous thin, cornflower blue fabric, the cornflower blue on the walls in a time of smiling and your mother loving you. Those walls which held a safe haven, where nothing can happen if only your parents hold you close. Home.

I sit up and close my eyes. No, I don't. I can't. Why can't I sit up? I can't even move! I begin to struggle and the answer leers: my blankets are way heavier than they should be. Kicking, clawing, nothing is helping. In fact, I seem to be making it worse. Hair begins to tangle at my neck, getting in my face and grazing my shoulder. My down comforter, my solace and warmth, my white knight is sinking, tangling, tying me up. I am thoroughly exhausted and pulled into uncomfortable sleep for a while. I resurface some time later and kick away the mess of blankets, swinging my feet off the bed and onto the cold floor with a yawn. I wander to the bathroom without bothering to flick any light switches, barely opening my eyes. I know my way around this mess of an apartment, even mostly asleep. I crawl back into bed and doze for a while, dreaming things vaguely disturbing and decidedly glamourous. Bottle blondes and beetles, et cetera.

I sigh and turn over, and then I realize I'm not going anywhere at all. I can't move. My breathing quickens as I try to struggle. I want to cry; why can't I move? Why is this happening to me? And of course, naturally, because this is the way all things in this vein go, I see something in the shadows moves: something,

or someone, is watching in the dark. Of course. I begin to cry in earnest, and it soon becomes hysterical screaming. I scream and holler and kick and the more I fight, the harder it is to move. I sob for my mother, calling her name as if I'll never hear her again. But eventually, after forever, after what is hours of screaming for help and crying for someone to save me, I realize that I haven't moved an inch; I haven't shed a tear. I am still laying in the exact same position, on my side and staring out through my window into the cold, cold streets.

The vile truth begins to sink in, and somehow, it's almost worse. I just about killed myself trying to escape just now, and nothing worked. Nothing will work, there's nothing I can do. I don't even know what I'm fighting. I give up, and I'm falling asleep.

Good God, what is that? What is that! I get out of bed faster than I have in the last six months, jump to my feet and check the window. Remember to breathe. There isn't anything there. No, I can't say that with certainty; tonight has been too trying for that sort of faith. All I can say is that I don't see anything there, anymore at least. I climb back into bed, and close my eyes for a bit. An indiscernible amount of time later, my chest falls and does not rise again. I can't breathe. I can't breathe, why can't I breathe, why why why? Why is this happening? My panic swells, threatening to crack me open. A wetness drips onto my face. God, what? It casually falls; slow, warm, and just barely. Running down my face until a drop slides into the corner of my mouth, metallic and coppery; probably the very last thing I'd choose to be dripping onto my face right now. I'd choose anything but blood. I'm trying to get away, please, all I want is to call 9-1-1, please, why can't I get up? I need to breathe. I convulse, and decide I'm beyond reaching 9-1-1 when everything starts to go dark like this. I'll settle for living.

Smokers have this nasty habit of losing their lighters. God knows how many I own, but I think it's some kind of metaphysical law: lighters must only appear to the owner when he does not want them around, and must without exception be nowhere to be found when the owner should want to use it for its intended purpose. I settle for the flame on my gas stove, set my back against its oven, and slide slowly to the floor. I set the cigarette in my mouth, pull air through it and examine my hands: they seem real enough. I exhale. I've pinched myself, I've washed my face, I drank a coffee I found in the fridge. I certainly look and feel awful enough to be awake; nobody ever says you 'look tired' when you're dreaming. I think I've actually gotten out of bed, finally.

I need to go out. The city will bring me back to life again. I stand up and finish smoking, leaning my forearms on the edge of the sink. Thinking about how many past loves I've watched late at night, finishing their cigarettes this exact same way. I walk to my bathroom and tease my hair into some semblance of a style. Where should I go tonight? I'd planned on staying in, and that's why I'd gone to bed fairly early, but that hadn't worked out very well. I think I'll stop in and get a drink at Undercurrent. It's Wednesday, maybe Hate or Same will be there and one of them will sell me something that actually will get me to sleep. Maybe I'll find Diesel, and then I definitely won't be going to sleep.

"Hey sweetheart, how are you?" Big arms give me familiar hugs; they pass me around one to the next.

"How's our princess?"

"Hi, kitten."

"Hey there, sweetie."

So on and on and on.

Like a family of overgrown boys, all reeking of up-to-no-good: my law-breaking Lost Boys. We dance, we sing, we smoke four joints. One by one, we slip away into the night. I walk down the sidewalk, the streets almost bare by now. That unholy hour of five AM when the light does funny things, and the dark underbelly of the city calls, both beckoning and threatening. I'm nervous. I keep seeing things move out of the corners of my eye, mistaking anything, everything for evil. Corpses instead of cats, rotting souls instead of rats. Bugs instead of stray hairs on my arm, and how I wish I'd just taken Pine's jacket when he told me to. There are goosebumps crawling up my legs. The sound of my shoes click-clacking on the ground echoes nastily.

"Hello."

I don't recognize the voice, but I stop and turn. After all, it's late and I've been wrong before.

"Who is that?" I squint. I've got to stop doing that, it's going to ruin my skin.

"Don't you know me? Because I could swear we've met." A smartly dressed man approaches me, stopping and smirking when he arrives. "Cigarette?"

"No, I've not an idea who you are, thanks. It's cold, I'm on my way home." I tell him and begin to walk briskly towards home, determinedly letting the sound of my heels drown out anything else I might have to listen to. I stop and shift on the balls of my feet for a little bit. Waiting for the red light to change, out of habit,

while I pull out a Newport.

"I thought you weren't smoking?"

"Why are you still following me? If you're doing it on purpose, you're making me uncomfortable. Stop, or you're gonna be having a conversation with the business end of a knife." I look right as I'm walking across the intersection. There's one car, in the distance.

"Now come on, baby, no need to be like that," he calls, following my steps still. "Momma always told me to follow my dreams."

It is never a good sign when a strange man starts to call you 'baby' at night. Run. I throw away my cigarette and start to run as fast as I can, but my feet hurt, it's late, and I'm all sorts of messed up. I'm rounding home plate, I'm almost home, I'm going to have to turn corners. This alleyway looks small and dark enough that he'll run right past it looking for me. Right?

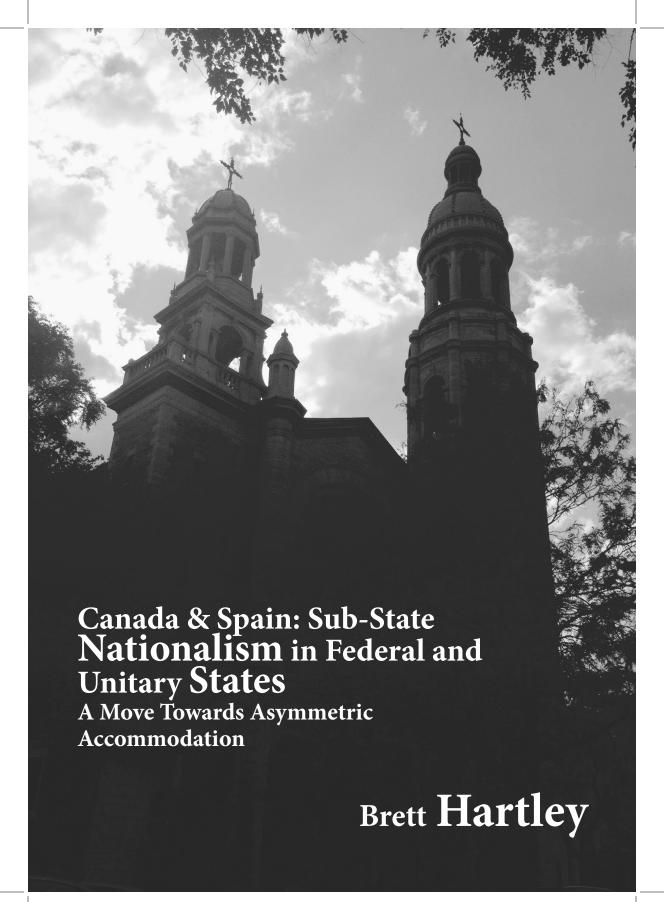
No dice. He grabs me from behind and slams my body into the bricks. My head makes contact hard against the wall, and my nerves try their very best not to notice. I slide onto the ground, laying immobile in the filth. His gloved hand over my face smelled like chemicals and sweet death; all I can think about is that these pants were Giambattista Valli and I'm never ever going to get the slime out of them. He pulls off those white gloves by the fingertips, staring me in the face. He drops them to the ground like a man going to his execution-like he'll never need them again.

"Please. No, our Father who art in-" I begin to mewl meaningless prayers to a God I didn't believe in, eyes shut tight, the faith disappearing into the dirty city air before I'd finished delivering the sentences. My head pounds, my vision is swimming.

"Prayer isn't going to save you, no matter how many Hail Marys you whimper," he interrupts, stepping in and bending towards my face, hands on his knees. "Will the Lord deliver you from evil?"

I cry out, and open my eyes: the city waking up greets me through my window. I'm home, in bed how I always am. I turn to reach for my morning cigarette, and my skin touches a body behind me.

"Good morning, love. I'm back."



Canada & Spain: Sub-State Nationalism in Federal and Unitary States A Move Towards Asymmetric Accommodation

he foundations of federalism are rooted in ideas of accommodation – addressing regional needs in countries of vast size – and resolving collective-action problems in multinational democracies. Federalism, in its most general sense, refers to a system of government in which sovereignty is constitutionally shared between a central governing authority and constituent political units¹. Throughout the literature, it has widely been asserted that federalism, inherent to its design, is a solution for addressing regional needs and national minorities. In this sense, federalism is viewed as a vital tool for quelling secessionist movements and regional nationalism. However, unitary forms of government are equally as effective in suppressing sub-state nationalism, with the degree of asymmetric application of power the key variable of accommodation.

This paper looks at two multinational constitutional monarchies to serve as models in exhibiting the effectiveness of (Canadian) federal and (Spanish) unitary forms of government, with respect to their ability to accommodate national minorities and restrict the prevalence of secessionist movement. A qualitative comparative analysis between Canada and Spain demonstrates that institutions are not politically neutral devices, offering real explanatory powers as to why a country does (or does not) face high-prevalence nationalisms and secessionist movements. Beyond institutional considerations, this paper proceeds to encourage the application of official languages and associated economic grievances to the measure of sovereignty demands. Finally, this paper asserts that although a multitude of policy choices may limit or increase sub-state secessionist movements, the governing institutions play the most important role in determining satisfactory outcomes for all 'nations' involved. And despite what the literature might suggest, the existence of federal or unitary structures matter less when compared to the degree of asymmetrical accommodation exerted from either governing model.

Research Methodology

This study will use a qualitative analytical approach to assess whether the concept of federal or unitary institutional design has better accommodated re-

¹ Fenna, Alan & Thomas Hueglin. "Comparative Models of Federalism: A Systematic Inquiry, 2nd Edition", University of Toronto Press, (2015).

gional tensions, viewed through the effective suppression of secessionist movements. Active secessionist movements serve as the dependent variable (DV), where the prevalence of such movements is contingent on federal or unitary institutional design. This paper recognizes that an independent variable (IV) of governing structures may objectively fail to account for 'extra-institutional factors' – here explored through (1) *linguistic* and (2) *economic* considerations – which may too help explain for a decreased (or increased) prevalence in secessionist movements in one case and not the other. Accordingly, extra-institutional factors refer to independent variables that exist outside the purview of federal or unitary institutional design.

After an analysis of these two extra-institutional factors, the study concludes that institutional design continues to play a more important role (as an IV) in quelling (DV) secessionist tendencies among national minorities than either *linguistic* or *economic factors*. However, the concept of federal or unitary forms of governance play less of an explanatory role than expected – rather, it is the degree of accommodation through asymmetric arrangements, in either model, that provides the best account as to why some secessionist movements succeed, and why some whither and die.

Literature Review

Federalism refers to the constitutional diffusion of power so that constituting elements in a federal arrangement "share in the processes of common policy making and administration by right". Federal systems do this by constitutionally distributing power between general and constituent governing bodies in a manner designed to protect the existence and authority of each constituent unit In contrast, a unitary system is governed as a single unit in which the central government is supreme and subnational units only exercise the power delegated to them by the central government. The "right to rule" over areas of jurisdiction is not constitutionally protected, and although central governments may devolve areas of competencies to local governments by statute, it may abrogate legislation or curtail powers, often through a mere parliamentary majority. At first glance,

² Elazar, Daniel. "Exploring Federalism", The University Of Alabama Press, (1987).

³ Encyclopedia Britannica. "Constitutional Law", Encyclopedia Britannica Online Academic Edition, (2013).

⁴ As an important distinction, 'areas of jurisdiction' must be constitutionally protected in order to be considered as a federal model. Think: Section 92(10) of the Constitution Act, 1867, which grants provincial legislatures "local works and undertakings", such as the authority to legislate on "Lines of Steam or other Ships, Railways, Roads, Telegraphs" etc.

"supreme central power" seems not conducive to effective accommodation of national minorities, nor does it appear to serve as an adequate tool to restrain and control secessionist tendencies. Indeed, an overwhelming amount of literature has pointed to federalism in having a greater capacity for accommodation among subnational units and regional minorities than unitary forms of government.

According to Fillipo Sabetti, the polycentric nature of federalized systems of government makes them less likely to overload with problematic situations⁵. Furthermore, greater advantages exist when dealing with diverse economies of scale with regards to the provision and production of public goods. Under federalism, a larger set of actors and participants are granted a voice in decision-making than in unitary systems, which enhances political participation and the protection of human rights⁶. Its institutional design allows for constant adjustment and reform towards new methods of federal association, expressions of self-governance and constitutional choice⁷. For Sabetti, citizens from all governed 'nations' can more actively participate in the conduct of public affairs thanks to a greater number of institutional remedies to address grievances. But Sabetti speaks of federalism in a general sense: in both Canada and Spain, to test institutional effectiveness, we must look towards multinational federalism: a system of governance wherein the federation is divided territorially among constituent 'nations'. In both Canada and Spain, the Québécois and Catalonian nation are territorially based, representing the majority population in Québec and Catalonia respectively. For the purpose of this paper, minority French language communities such as maritime Acadians or Manitoban Métis are excluded, as they pose little secessionist threat.

As a result of their distinct culture and institutional completeness, Kymlicka ascribes to nations certain collective aspirations, suggesting that their members 'typically' share a desire for some form of self-determination for their group⁸. Accordingly, constitutions (in the division of power, federal sense) should not to be imposed on self-determining groups, as fixed and unchanging guides for social and political behaviour. Yet for Kymlicka, self-determination is a matter of freedom and legitimacy, not outright sovereignty. Along these lines, no dominant

⁵ Filippo Sabetti, "Types of Federalism: Achieving Self-governing Capabilities in Societies with Federal Potentials" (2007), pp. 27.

⁶ Ibid, 70.

⁷ Ibid, 29.

⁸ Kymlicka, Will. "Finding Our Way: Rethinking Ethnocultural Relations in Canada", Oxford University Press, (1998), pp. 127.

political entity ought to unilaterally impose a particular 'vision' or representation in order to keep the country together – much less so if this involves forging a national project to achieve ends at the expense of a national minority. In this critique lies one of the key strengths of the federal model: the ability to implement degrees of self-rule. For Catt and Murphy, the successful accommodation of Quebec nationalism in the context of Canadian federalism has entailed both territorial self-rule in the province of Québec, and shared rule at the centre through representation of Quebec MP's in the federal parliament, allowing for a duality of 'national freedom' and central cooperation¹⁰. As such, federalism recognizes Quebec as a partner in the determination of constitutional outcomes, not a target for policy. Scholars of unitarism have at times failed to account for an 'imposing view' of government policy onto regional, linguistic, and cultural minorities, when in fact a duality of cooperation exists.

However, support for federal structures in accommodating minorities and limiting sub-state secessionist movements is by no means unanimous. In contrast to the views of Sabetti and Catt et al, Anderson & Erk recognize the "Paradox of Federalism". The argument follows that although territorial recognition through the adoption (or strengthening) of federalism may intuitively seem to be the best way to manage ethno-linguistic conflict, in the long run, such recognition perpetuates and strengthens the differences between the groups and provides minority nationalists with the institutional tools for eventual secession¹¹. Further, federalism provides opportunities for conflict between regions and centres that might otherwise not exist¹². In many ways, the paradox is part of a broader set of questions regarding the recognition of diversity: institutions, policies and practices that are designed to manage (ethnic, racial, social, linguistic, religious and economic) divisions may also ensure the perpetuation of those very divisions. In opposition to Catt & Murphy, self-rule tends to reinforce and strengthen the divisions by institutionally 'freezing' them in various forms. In Riker and Schaps'

⁹ Gagnon, Alain-G. & Raffaele Iacovino, "Canadian Federalism and Multinational Democracy. 'Pressures' from Quebec on the Federation", *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, Don Mills: Oxford University Press (2008), pp. 337.

¹⁰ Catt, Helena and Michael Murphy. "Sub-State Nationalism: A comparative analysis of institutional design", *Routledge Research in Comparative Politics*, (2002), pp. 97.

¹¹ Anderson, Lawrence & Jan Erk, "The Paradox of Federalism: Does Self-rule Accommodate or Exacerbate Ethnic Divisions?", *Regional and Federal Studies*, Vol. 12, No. 2 (2009), pp. 192.

seminal work on the "Disharmony in Federal Government", they recognize the merits of the unitary state as it is not prone to "divisive bickering", stating the lack of integration of policies between the centre and the periphery is an almost universal feature of federal governments, and that political parties magnify rather than minimize this problem^{13,14}. Lastly, in Donald Horowitz's Ethnic Groups in Conflict, he warns that federalism may be little more than a resting point on the oad to secession¹⁵.

However, this rather pessimistic view of federalism continues to be widely challenged. Nancy Bermeo, in her analysis of federalism and unitarism in divided societies, stated she expected to find that federalism exacerbated ethnic conflict, in line with the 'paradox of federalism' view brought forth by Anderson & Erk¹⁶. Instead, Bermeo found that "federal institutions promote successful accommodation"17. According to her analysis, this conclusion is borne out both in advanced democracies in which "federalism has helped to keep states unified and democratic in the face of possible secession by territorially based minorities", and in less developed countries, which "have all evinced the positive effects of federal structures"18. Bermeo claimed that "no violent separatist movement has ever succeeded in a federal democracy", painting federalism as an unmitigated success as a method of ethnic conflict resolution¹⁹.

As a last point of contention, we must recognise that both federal and unitary states function in many shapes and sizes, largely contingent on constituent demographics. Yet K.C. Wheare's 'federal principle' describes a method of dividing power so that regional and federal governments are each within a sphere that are separate and coordinate (i.e. co-equal)²⁰. In this view, the very foundation of federalism implies all sub-state actors must be afforded equal rights in their jurisdictions of governance. Daniel Elazar further notes that "the federal model

¹³ This problem is particularly acute when the political party in power (in the central government) is different or in opposition to the political power in government in one of the varying federal sub-units.

¹⁴ Riker, William & Ronald Schaps. "Disharmony in Federal Government", Behavioral Science, Vol. 2, No. 4, (1957) pp. 278.

¹⁵ Horowitz, Donald. "Ethnic Groups in Conflict", University of California Press, (1985), pp.

¹⁶ Bermeo, Nancy. "The Import of Institutions", Journal of Democracy, Vol. 13, No. 2, (April 2002), pp. 98.

¹⁷ Ibid, 97.

¹⁸ Ibid, 98.

¹⁹ Ibid, 108.

²⁰ Wheare, K.C. "Federal Government", Royal Institute of International Affairs, (1946).

reflects a polity compounded of arenas within arenas held together by common framing institutions..." and where "...its origins are to be found in the deliberate coming together of *equals* to establish a mutually useful government framework within which all can function on an *equal* basis" ²¹ (italics mine). This account of necessitate equality among constituent parts as a prerequisite of federal governance fails to recognize the needs and ambitions of distinct national minorities, that may warrant greater cultural protection and accommodation.

The literature puts too large an emphasis on recognizing federal or unitary forms of government as superior to one another, rather than highlighting their flexibility in accommodating regional needs through asymmetric arrangements. In practice, K.C. Wheare's 'federal principle' of equality cannot function as an effective governing model, when far too often, a form of "quasi-federalism" is needed. As we will find in Canada and Spain, constituent nations are fundamentally different from one another, and therefore warrant fundamentally different protection in their areas of jurisdiction.

On Regional Tensions in Canada and Spain

Canada

The Canadian fathers of Confederation ended the deadlocked union between Upper (Ontario) and Lower (Québec) Canada by employing the principles of federalism, establishing a constitution outlining the division of powers between Federal and Provincial governments, entrenched in Section 91/92 of the British North America Act, 1867²². Viewed through the lens of 'compact theory'²³, federalism served as a key factor in uniting these two nations, building a central state to initiate a countrywide railway and generate vast economic benefits, while each level retaining degrees of sovereignty. Under this perspective, Canadian federalism was adopted to accommodate a linguistic duality of English and French, among other considerations of vast geography and government access..

Federalism found in the Constitution of 1867 was not in stark contrast to

²¹ Elazar, Daniel. "Contrasting Unitary and Federal Systems", *International Political Science Review*, Vol. 18, No. 3, (1997), pp. 239.

²² Later renamed Constitution Act, 1867.

²³ Compact theory views Canadian federalism as a partnership between English and French Canada, which can be *re-negotiated* whenever one party is displeased. This implies special regard to both nations, notably that Quebec should have a constitutional veto. This is in contrast to 'contract theory', by which all provinces *gave up certain powers* to a new national government of their creation. Both theories maintain that the federal bargain cannot be changed without the mutual consent of those who agreed to it.

forms of government implemented in British North America since the conquest of New France in 1762. Provincial delegations met in Charlottetown and Quebec City (both in 1864) to devise a strategy to end the stalemate (of unification) that was seen to plague the developing colony. While many elites saw immense value in a federal concept, the first prime minister of Canada and father of Confederation John A. MacDonald preferred a unitary state, in which provinces were subordinate and acquired authority from the central government. According to Sabetti, without the Francophone community, the union would have proceeded along centralized lines since MacDonald favoured, "one government and one parliament legislating for the whole of these peoples... the cheapest, the most vigorous, and the strongest system of government we could [have] adopt[ed]"²⁴.

However, he was by no means rigid in this belief; in a 1965 speech to Parliament on 'Quebec Resolutions', MacDonald recognized the inherent advantage of federalism in a multination state, noting that, "In the proposed Constitution, all matters of general interest are to be dealt with the General Legislature; while the local legislatures will deal with matters of local interests, which do not affect the Confederation as a whole, but are of the greatest importance to their particular sections.²⁵" For MacDonald, the adoption of federalism was a compromise rooted in diversity of language and culture, rather than a genuine acknowledgment as an optimal form of governance. He faced federalist opposition from across the colonies, realizing the immense difficulty of implementing British-style unitary government in the newborn Dominion.

It is important to note that through MacDonald's position, the terms of the 1867 Constitutional settlement retain a distinct unitary quality, combining federal separation of powers and unitary hierarchical principles of organization. Again in his 1865 speech, MacDonald states that "in order to prevent a conflict of authority, that where there is concurrent jurisdiction in the General and Local Parliaments... and that when the legislation of the one is adverse or contradictory of the legislation of the other, in all such cases the action of the General Parliament must overrule, *ex-necessitate*, the action of the Local Legislature" Here, he is referring to the notion of residual powers, where the federal government may execute its authority in areas not specifically laid out in the Constitution, ensuring the central government retains its 'supreme' institutional status.

²⁴ Sabetti, "Types of Federalism: Achieving," pp. 30.

²⁵ MacDonald, John A. "Speech on the Quebec Resolutions (1865)", in H.D. Forbes, *Canadian Political Thought* (1985), pp. 72.

Despite nearly a hundred years of cohabitation under the BNA framework, during the Quiet revolution, Quebec nationalists largely rejected federalism and pushed to achieve an independent Quebec state, seen through the creation of the Parti Québécois (PQ) in 1968. This period was characterized by effective secularization of society, the creation of the welfare state (état-providence), and a political realignment into federalist and sovereignist factions²⁷. Referendums concerning the question of sovereignty-association (1980) and outright sovereignty (1995) both failed by close margins²⁸. The particularly close 1995 referendum was the culmination of failed constitutional amendments intended to persuade the government of Quebec to symbolically endorse the Constitution Act, 1982. The Meech Lake Accord (1987) and Charlottetown Accord (1992) exposed the rigid constitutional amending formula²⁹, with the latter defeated in a national referendum³⁰, which advocated for greater decentralization and recognition of Quebec as a 'distinct society'. Federalism failed to effectively address the grievances of Quebec, encouraging subsequent sovereignty movements, highlighted through the challenging demand of altering constitutionally guaranteed separation of powers post-1982 for the purpose of asymmetrical accommodation. The demands from provinces seeking equal accommodation, yet not constituting a national minority akin to the Québécois people, further compounded this failure.

Despite the perceived deficiencies of federalism during this period, failing in the effective accommodation of Quebec due to a rigid constitutional structure and its strong desire for asymmetrical arrangements, a stark contrast can be made in contemporary Canadian politics towards a 'federal resurgence', serving as a viable tool in minimizing modern Quebec nationalism. In multinational democracy, a constitution cannot be neutral if it disregards its constitutive (compact) partners in the name of a 'higher procedural standard' from which to adjudicate political conflict. Pierre Trudeau understood this notion, and ensured the Charter gave rights and freedoms a marked 'national' quality, seen on a pan-Canadian level through strengthening the ties of citizens to Canadian institutions and

²⁷ Dickinson, John & Brian Young. "A Short History of Quebec", McGill-Queen's University Press, (2003), p. 372.

²⁸ Quebec referendum of 1980 (40.44% yes; 59.56% no) and 1995 (49.42% yes; 50.58% no)

²⁹ The "general amendment formula" is outlined in section 38 of the Constitution Act, 1982.

Most amendments can be passed only if identical resolutions are adopted by the House of Commons, the Senate, and two thirds (i.e. seven) or more of the provincial legislative assemblies, representing at least 50 percent of the national population. This is known colloquially as the "7+50 formula".

³⁰ The Charlottetown Accord, 1992: (45.03% yes; 54.97% no).

emphasizing symmetry rather than entrenching federal identity as the primary normative principle upon which citizens relate to central institutions and to each other across the federation³¹.

In many respects, federalism has become more than a method of governance; the federal model now forms an integral part of the Canadian identity. Donald Smiley views federalism as a form of political nationality, forming a "pact of understanding" where Canadians have "reciprocal moral and legal claims upon one another"32. McRoberts notes that the symmetry found in current political institutions have become a "powerful new force of Canadian nationalism", as equality among the provinces becomes an essential condition of the Canadian identity³³. Indeed, federalism is now viewed as an important condition of what it means to be Canadian. Under the current framework of symmetrical federalism, Quebec has all the tools to protect its distinct identity, free to formulate cultural protectionist policy viewed through official bilingualism and the universal application of individual liberty, autonomy, justice and equality - despite persistent calls for greater asymmetrical arrangements. Accordingly, despite its failures of the late 20th century, federalism has re-emerged as a meaningful force in contemporary Canadian politics, minimizing sub-state nationalism through the establishment of a new identity – the identity of federalism. <u>Spain</u>

The modern Catalonia seccesionst movement dates back to the Spanish Civil War. After the Spanish Civil War, in which 3,500 died and many more exiled at the Battle of Ebro for control of the region, the Francoist dictatorship (1939-1975) implemented widespread repressive measures, abolishing Catalan institutions and banning the use of the Catalan language³⁴. After Franco's death in 1975, the country underwent a transition to democracy, culminating with the adoption of the Spanish Constitution in 1978. The *Constitución Española* established the current Spanish institutions and unitary model of governance. For the purpose of this analysis, all events concerning Spanish-Catalan nationalist tensions occurring prior to the adoption of the modern constitution are regarded as 'extra-institutional' factors, in addition to *ex-post* considerations occurring outside

³¹ Gagnon & Iacovino, "Canadian Federalism and Multinational," 335.

³² Smiley, Donald. "Interstate Federalism in Canada", *Canadian Journal of Political Science*, Vol. 20, No. 1, (March 1987), pp. 189.

³³ McRoberts, Kenneth. "English Canadian Perceptions of Quebec", *Quebec: State and Society*, (2001).

³⁴ Nogué, Joan. "Landscape and National Identity in Catalonia", *Political Geography*, Vol. 23, No. 2, (February 2004), pp. 116.

the purview of unitary governance, later viewed namely through a linguistic and economic understanding.

In Spain, federalism was viewed as a viable option in the transition to democracy following 40 years of highly centralized fascist rule. The Padres de la Constitución³⁵ had to strike a balance between the centralist view inherited from Franco's regime, and the 'pluralistic federalist' view, framing modern Spain under the Canadian model: as a 'nation of many nations'. Peripheral nationalist parties wanted a multinational state under a federal model, supported in Madrid by the *Partido Socailista Oberero Español* (PSOE) worker's party as the best mode of accommodation³⁶. However, the centre-right *Unión de Centro Democrático* (UCD) advocated for limited decentralization and a strong central state, winning a minority government in the 1977 general election³⁷. As one would expect, the peripheral regions (including the Basque Country, the Valencian Community, and Andalusia) voted largely against the UCD unitary proposal, feeling as though continued centralization would pose a threat to their distinct culture and identity. The base of UCD support was in Madrid and its surrounding communities. The politically significant right-wing People's Alliance (AP), in addition to King Juan Carlos - who played a pivotal role in Spain's transition to democracy - campaigned further on behalf of the unitary cause.

Despite the choice for a unitary state, where powers were vested centrally in Madrid, the Constitution of 1978 guaranteed the right to autonomy or self-government among "nationalities and regions" through a process of asymmetric devolution. Unitary governance was thought to embrace the insoluble unity of the Spanish nation, pre-emptively outlined in Article 2 in opposition of federal structures, yet allowing for degrees of self-governance through devolution to 17 autonomous communities. As a key characteristic of the unitary model, further devolution or return of transferred competencies to Madrid is always a possibility – for devolution is not constitutionally protected and remains politically sensitive. The flexible nature of unitarism was always regarded as an advantage rather

³⁵ The "Fathers of the Constitution" were seven political leaders who participated in the writing of the Spanish Constitution of 1978. They represented leaders from a broad set of Spanish political actors, including the hard-right (AP), centre-right (UCD), the 'working-left' (PSOE), and Catalan nationalists (CDC).

³⁶ It is important to recognize the strong support for the establishment of a federal government at the time. The PSOE is a highly influential political party, serving as the governing party between 1982 and 1996, and again between 2004 and 2011.

³⁷ In many respects, the election of 1977 was viewed as a plebiscite in how Spaniards were to govern their renewed democracy – choosing between the federal and unitary models.

than a defect; in the wake of the 2008 global financial crisis, many autonomous communities called for greater recentralization of powers to offset the risks of financial pressures³⁸.

Originally, the goal was to achieve a 'symmetric' disposition of power: by extending decentralization to all regions that demanded it, the potentially 'disruptive' impact of peripheral nationalism could be held in check³⁹. However, this wide gamut of possibilities also allowed the more nationalist and mobilized regions (such as Catalonia) to achieve the greatest leaps forward towards autonomy⁴⁰. Article 143 (Section 1) outlines the principles of devolution, stating: "In the exercise of the right to self-government... bordering provinces with common historic, cultural and economic characteristics... may accede to self-government and form Autonomous Communities..." where jurisdictional powers are outlined in individual 'statues of autonomy'. Rather than imposing it, it *enabled* a process towards a decentralized structure under the initiative of each community, as the constitution created a process for eventual devolution that was voluntary in nature. According to Luis Moreno, this ultimately resulted in the emergence of a highly asymmetric *quasi-federal* system⁴¹.

However, John McGarry mentions centralist attempts to 'equalize' federations or standardize federalizing processes⁴². In 1982 Madrid attempted to pass a law to 'harmonize' the devolution process (LOAPA – *Ley Orgánica de Armonización del Proceso Autonómico*), in an effort to appease the military and the centralist 'right'. Denounced as a 'covert plot' to curtail the powers of Catalonia and Euskadi, it attempted to introduce greater recognition of symmetry within unitary devolution via the back door by standardizing the political representation of each community⁴³. Because it stirred popular protests, the law was abandoned in August 1983 after the Constitutional Court pronounced it *ultra vires*.

Overwhelmingly, the key actor in deflecting separatist movements is the

³⁸ Taylor, John. "The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong", *National Bureau of Economic Research*, *NBER Working Paper Series*, Working Paper 14631, (January 2009), pp. 14.

³⁹ Conversi, Daniele. "Asymmetry in Quasi-federal and Unitary States", *Ethnopolitics: Formerly Global Review of Ethnopolitics*, Vol. 6, No. 1, (2007), pp. 122.

⁴⁰ Ibid, 123.

⁴¹ Moreno, Luis. "The Federalization of Spain", London: Frank Cass Publishing. Translation of: Veintiuno, Siglo. "La federalización de España: Poder poltico y territorio", (2001).

⁴² McGarry, John. "Northern Ireland and the Divided World: The Northern Ireland Conflict and the Good Friday Agreement in Comparative Perspective", Oxford University Press, pp. 2.

unitary constitution of 1978. Despite a pro-independence Catalan government in power, in a 2015 ruling, the Spanish Supreme Court ruled unanimously in opposition to a motion to commence the secession process as unconstitutional, as it "ignores and infringes" on principles of 'insoluble' unity⁴⁴. The central government's argument states that because secession of Catalonia would affect all of Spain, it must be a choice for *all* Spaniards, not just Catalans⁴⁵. This argument is rooted in Spain's unitary form of governance. Under a federal structure, Quebec already enjoyed areas of jurisdictional sovereignty – therefore, a referendum could be organised under the leadership of its provincial legislature. However, as Spanish unitarism is anchored in the centre, and devolution is not constitutionally protected, secessionist movements become a matter for the entire country to resolve.

In this sense, Spain's unitary form of government is viewed as a strong actor in extinguishing secessionist movements due its infallible commitment to the country's territorial integrity. However, this unwavering stance in lack of meaningful accommodation may only prove to further increase support for the separatist cause.

'Extra-Institutional' Factors

Through a qualitative analysis of Canadian federal and Spanish unitary models both governments have proven equally effective in quelling sub-national secessionist movement. While the rigid nature of constitutional federalism was thought to have strengthened Quebec nationalism during the latter half of the 20th century, its development as an integral form of political identity, strengthening the attachment of citizens to institutions, provides a tailored account as to why secessionist tendencies are seemingly on the decline. In the Spanish case, we have viewed unitary devolution through a lens of accommodation; yet recognize that continued centralist policies, although effective in maintaining the structural integrity of the country, may produce increased levels of regional resentment and nationalist sentiments.

According to David Cameron, although political institutions are not neutral devices and can play a role in accommodating or aggravating regional tensions, "the institutional structure of federalism is a distinctly secondary matter when it comes to understanding why a country is or is not facing secession"⁴⁶.

⁴⁴ Kassam, Ashifa. "Catalan Secession Bid Ruled Unconstitutional by Spanish Court", *The Guardian*, (December 2nd, 2015).

⁴⁵ Ibid.

⁴⁶ Cameron, David. "The Paradox of Federalism: Some Practical Reflections," Routledge

This is to say, that beyond considerations of federal and unitary models, 'extra-institutional' factors play a very significant role in the expression of nationalist sentiments and secessionist movements. As discussed above, explaining the prevalence of secessionist movements through a lone independent variable of both federal and unitary institutional design provides far too narrow an account as to why such nationalisms occur. , *Linguistic* and *economic* considerations have further explanatory power as to why such movements may or may not be salient.

<u>'Extra-Institutional' Variable 1 – The Language</u>

In Canada, language has historically been the dominant political division. The distinct difference between the English and French languages has shaped the federal institutional structure, just as the economic cleavages of this division have chartered the success of Canadian federalism. In contrast, Spain is far more regionally fragmented than Canada, containing at least 10 distinct main linguistic groups, which roughly correspond with territorial subdivisions. Despite a high prevalence of minority language groups⁴⁷, the institutions of the Spanish unitary state are not designed to accommodate such immense linguistic diversity. Indeed, Spanish (known as Castilian) remains the sole official language, with regional languages holding symbolic 'co-official' status, with no constitutional or legal protection from Madrid. The challenge here is to explain that despite fundamentally different models of government, why does language continue to hold immense explanatory power in describing the prevalence of secessionist movements? The answer lies in the difference between (official) language, dialects, and linguistic minorities, and how language is a powerful variable that defines national identity.

In 1838, when Lord Durham was sent by the colonial government to investigate conditions in the British North American colonies, he discovered "two nations warring in the bosom of a single state" Consequently, language was a major reason why Canadian federalism developed in a relatively decentralized manner. According to Charles Taylor, "the singling out of linguistic nationality as the paradigm pole of self-identity is part of this modern drive to emancipation. It connects naturally with the demand for self-rule" For Quebec, the primary

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⁴⁷ While Spanish (Castilian) is spoken as a first or second language by 99% of Spaniards, regional languages and dialects remain prominent: Catalan (or Valencian) is spoken by 17%, Galicia by 7%, and Basque by 2% (CIA World Factbook).

⁴⁸ John George Lambton, 1st Earl of Durham. "Report on the Affairs of British North America." *The Durham Report.* (1838).

⁴⁹ Taylor, Charles. "Why Do Nations Have to Become States?" *Philosophers Look at Canadian Confederation*, (1979), pp. 49.

issue was the power to preserve its own language and culture in the face of an English-speaking majority; indeed, the creation of new provinces within Canada further reduced the overall weight of Quebec within the federation. Differential treatment based on language reshaped Francophone identities, from the original *Canadiens* settlers, to *French-Canadians*, defined primarily by language and religion, to the contemporary *Québécois* national identity, centered on the high concentration of French-speakers within the Quebec state.

As in Quebec, language is central to the understanding of Catalonia identity. Having survived three centuries of repression from Spain, it maintains a vibrant and sophisticated cultural scene, and the language is used by eight million, known by ten million, and widely spoken at all levels of society⁵⁰. It is spoken not only in Catalonia, Valencia and the Balearic Islands (Autonomous Communities where it has 'co-official' status in addition to Spanish), but also in the eastern part of Aragón, the Principality of Andorra (where it is the sole official language), the historically Catalan territories of southern France, and the city of Alguer (Alguerho, Italy)⁵¹. In fact, Catalan is more widely spoken than a number of official European Union languages, such as Danish, Finnish, Slovak, Slovenian, Latvian, Lithuanian and Maltese⁵². Yet it does not enjoy recognition by E.U. institutions, as all Spanish governments have consistently ignored Catalonian demands.

The overwhelming difference between Quebec and Catalonia is recognition of French as an official language at the federal level. Although once a source of grievance for French-speaking Canadians, bilingualism has since become constitutionally entrenched, and language rights no longer play centre-stage in the Quebec sovereignty debate. The failure of Madrid to recognize Catalan as an integral language of the Spanish state, despite its usage and prevalence in autonomous communities even eclipsing Catalonia's borders, remains an important explanatory variable in accounting for separatist movements.

'Extra-Institutional' Variable 2 – The Economy

Geoffrey Carliner, in analyzing Canadian census data of 1971, presents a fascinating account on English-French wage disparities during the time period. He notes that in Quebec, substantial economic rewards existed to learning

⁵⁰ CIA World Factbook. "Catalonia: Languages". Web.

⁵¹ Desquens, Josep. "Europe's Stateless Nations in the Era of Globalization: The case for Catalonia's Secession from Spain", *The Bologna Center Journal of International Affairs*, (Spring 2003).

English for native French speakers⁵³. Even after learning English, however, and holding other factors constant, native French-speaking men earned lower wages than monolingual English men. In addition, in a province where the vast majority spoke French, there was no significant wage premium for native English speakers who learned French⁵⁴. As the Royal Commission on Bilingualism and Biculturalism (1969) observed, "Formal linguistic equality is of little importance to those living under a system that always places them in inferior social and economic conditions. Such a partnership is not only unequal, but may in the long run imperil Confederation"55. The Commission found a strong hierarchy had emerged: nationally, bilingual men of British ethnic origin had the highest average incomes, followed by monolingual British men, bilingual French-origin men, and monolingual French men⁵⁶. However, curiously in Quebec, monolingual British men received far more economic rewards than the bilingual British⁵⁷. In a similar study, Kuch and Haessel concentrated on ethnic rather than language differences, finding that all things equal, ethnic French men earned less than ethnic British men⁵⁸.

Given this data, a clear understanding is presented in how Quebec nationalism and secessionist movements could have resulted from economic considerations alone. The recommendations of the Royal Commission culminated in a series of reforms, including the Official Languages Act (1969) and Charter of the French Language, a.k.a. Bill 101 (1977) – largely seen as a success story in the preservation of the French language and the promotion of French commerce. As a result, the representation of Québécois in positions of power throughout the province and country is now the norm, with French-Canadians enjoying access to all government services in their own language. Accordingly, economic factors may no longer be an accurate variable in explaining the prevalence of separatist movements in Canada.

The Catalan experience follows almost the opposite argument, with Catalonians enjoying a relative high standard of living compared to the rest of Spain. The Catalan region has long been the industrial heartland of Spain – first for

⁵³ Carliner, Geoffrey. "Wage Differences by Language Group and the Market for Language Skills in Canada", *The Journal of Human Resources*, Vol. 16, No. 3 (Summer, 1981), pp. 387.

⁵⁴ Ibid, 388.

⁵⁵ Royal Commission on Bilingualism and Biculturalism (1969), pp. 3.

⁵⁶ Royal Commission on Bilingualism and Biculturalism (1969), pp. 21.

⁵⁷ Ibid.

⁵⁸ Kuch, Peter & Walter Haessel. "An Analysis of Earnings in Canada," Statistics Canada, (1979).

its maritime power and trade in goods such as textiles, but recently for finance, services and hi-tech companies. In contrast to Quebec, Catalan remains one of Spain's richest and most highly industrialized regions. Despite only accounting for about 16% of the Spanish population, Catalonia represents about 25% of all Spanish exports, and accounts for 23% of all Spanish industry⁵⁹. An independent Catalonia would have a gross domestic product of \$314 billion according to calculations by the OECD, which would make it the 34th largest economy in the world, bigger than Portugal and Hong Kong⁶⁰. Its GDP per capita would be over \$35,000, which would make the (theoretical) country wealthier than South Korea, Israel, and Italy.

Spain's central government controls tax collection and decides the distribution of the fiscal revenues throughout the country – in effect, Catalans pay taxes to Madrid in exchange for public expenditure in the region. As one of the most crucial points of contention, it is estimated the Catalan fiscal imbalance⁶¹ with Spain to be between 7.5% and 10% of the Catalan GDP (i.e. for every 100 euros of income created yearly in Catalonia, between 7.5 and 10 never return). In absolute terms, the deficit is between about 6.7 billion and 9 billion euros annually⁶² (or around 1,240 annually per capita)⁶³. Catalan companies pay high taxes (which dampens competiveness), only to receive few public services and low levels of infrastructure investment (which lowers productivity). When compared to regions in other EU countries with similar levels of GDP per capita, we find this to be by far the largest fiscal imbalance among its EU peers⁶⁴.

According to Columbia University professor Xavier Sala-i-Martín, the fiscal imbalance "is the major challenge facing the Catalan economy for its development in the next 25 years" In his research, Sala-i-Martín has shown that if the Catalan fiscal imbalance had been reduced buy one-third over the last 25 years,

⁵⁹ Government of Catalonia. "FDI Statistics". http://www.catalonia.com/en/catalonia-barcelona/attractive.jsp

⁶⁰ OECD. "Catalonia, Spain", Review of Higher Education in Regional and City Development, (2014).

⁶¹ The difference between what is paid by the region to the central government and what is received back in the form of public spending is known as the 'fiscal balance'.

⁶² Desquens, "Europe's Stateless Nations".

⁶³ For this calculation, the medium of the two estimates is used: $(6.7)+(9)\div 2=7.9$

⁶⁴ In nine of the fourteen comparable regions (e.g. Aquitaine in France; Scotland in the UK; Umbria in Italy; and the southern region of Sweden) we find such regions enjoy fiscal surpluses in their respective states. In those carrying a fiscal imbalance (e.g. Lisboa-Vale de Tajo in Portugal), it is nowhere higher than 3%.

⁶⁵ Desquens, "Europe's Stateless Nations."

assuming the freed funds had been fully invested in infrastructure and education (leading to a higher growth rate), Catalonia would be a frontrunner for per capital income – second only to Hamburg, London and Luxembourg.

Furthermore, a fiscal imbalance in Spain's 'solidarity system' can in many ways be related to equalization payments from 'have' and 'have-not' provinces across the Canadian federation⁶⁶. However, Canada's equalization payments are rooted in equality - in Spain this logic does not apply. Sala-i-Martín again points to a curious discrepancy in Spanish taxation transfers. In 2010, the GDP per capita in Catalonia was 21.9% higher than the Spanish average; in comparison, the GDP per capita in the Autonomous Community of Castilla y León was 7.6% lower than the Spanish average. On the basis of this income differential, it is not unreasonable for one to argue that there is a need for some kind of interregional transfer. However, after redistributions, Catalonia's income per capita was 4.3% higher than Spain's average, while Castilla y León's was 9% higher. In other words, despite producing 30% more, the redistribution system results in Catalans ending up with a lower income per capita than the Castillian-Leonese people⁶⁷. This supports the argument that the Spanish inter-regional transfer system is neither fair nor economically beneficial, but more importantly, invokes a worthy call for greater autonomy over fiscal and monetary policy, often cited as a key factor behind one's support for the Catalonia secessionist movement.

A Move Towards Asymmetry

Although we have found degrees of success in explaining the prevalence of secessionist movements under federal, unitary, and 'extra-institutional' considerations, this paper asserts the greatest explanatory factor is rooted in flexibility towards asymmetrical forms of governance and accommodation. In this account, the dependent variable (DV) of active secessionist movements is contingent on an independent variable (IV) of governing structures, where federalism and unitarism become less important, and the degree of asymmetrical accommodation serves as our desired measure.

The principle of multinational federalism paves the way for various constitutional asymmetries, structuring the most salient socio-political cleavages around national groupings as the very *raison d'être* of federalism. Whereas

⁶⁶ Perhaps serving as a further deterrent to secessionist tendencies, Quebec received the most from equalization payments in the 2013-2014 fiscal year (Stats Can).

⁶⁷ Desquens, "Europe's Stateless Nations".

pan-Canadians tend to favour a 'symmetrical' form of federation, in which all territorial subunits (i.e. provinces) are treated equally, Québécois nationalists, at the very least, favour an 'asymmetrical' form of federation, in which different units (i.e. Quebec) are accorded different rights (e.g. over immigration and language policy) to account for their distinct culture⁶⁸. The constitutional game proceeds through negotiations about the substance of jurisdictional conflicts, but once settled and accepted by all, a dualist version of Canadian asymmetry is not incompatible with a limited, procedural constitution⁶⁹.

From a Quebec sovereigntist perspective, asymmetric federalism is viewed as a strategy to demobilize nationalist forces and as paltry compensation for frequent central intrusions in the fields of jurisdiction exclusive to Quebec⁷⁰. Outside the Constitution Act of 1867 (e.g. sections 93 A, 94, 98, and 133) and the Constitution Act, 1982 (e.g. sections 23[1] and 59), the scope of asymmetrical federalism has been effectively limited to agreements of a non-constitutional nature. They include, for example, the Quebec Pension Plan (1964)⁷¹, agreements on immigration (Cloutier and Lang Agreement, 1971; Bienvenue and Andra Agreement, 1975; Cullen and Couture Agreement, 1978; Gagnon-Tremblay and McDougall Agreement, 1991)⁷², manpower training (1997)⁷³, and the more recent health agreement (2004)⁷⁴ and UNESCO designation (2006)⁷⁵.

But from the Québec federalist view, asymmetric federalism is presented as a 'last hope', allowing for a revival of Quebec's confidence by pointing to the flexibility that can characterize this model. As exhibited, asymmetrical arrangements are possible without rigid constitutional changes that destroyed Meech Lake and Charlottetown – and Quebec can flourish as a distinct society, enjoying 'special' accommodation as a founding partner of confederation while remaining an integral part of a united Canada.

As for Spain, its success *depends* on its willingness to adopt asymmetrical arrangements. Asymmetry has become the inevitable outcome of increasing 68 Gagnon & Iacovino, "Canadian Federalism and Multinational," 350.

69 Ibid, 347.

70 Ibid, 350.

71 Régie des Rentes du Québec, 1964

72 Kostov, Chris. "Canada-Quebec Immigration Agreements (1971-1991) and Their Impact on Federalism", *American Review of Canadian Studies*, Vol. 38, No. 1, pp. 91-103.

73 Gazette Officielle du Québec, Vol. 129, No. 24, (June 18, 1997).

74 Chaoulli v Quebec (AG) [2005] 1 S.C.R. 791

75 UNESCO. "Agreement between the Government of Canada and the Government of Quebec, concerning the United Nations Educational, Scientific and Cultural Organization" (May 5th, 2006).

leverage at the negotiating table. In the 1990's, the Catalan and Basque bargaining power was enhanced by their electoral weight in both the lower and upper houses, when the Spanish parties needed nationalist support to obtain full majorities. Yet asymmetrical arrangements should not be based through political necessity, but rather formulated as meaningful policy of accommodation for its most important linguistic and cultural minorities. Through its unitary government, Spain has the constitutional tools to reel-in peripheral nationalism and retain the Catalan Autonomous Community. However, linguistic and economic grievances remain a challenge, and any further increase in support may result in an unviable outcome for Madrid. As a start, Spain 'ought to adopt Catalan as an official language and reform a broken fiscal system. The divisive plurality of smaller nations will resent them for it, but such asymmetrical arrangements (proven successful in Canada) in genuinely their last hope.

Conclusion

A qualitative comparative analysis between Canada and Spain demonstrates that institutions are not politically neutral devices, offering *real explanatory* powers. As such, this paper concludes that institutional design continues to play an important role (as an IV) in quelling (DV) secessionist tendencies among national minorities. However, the existence of federal or unitary institutions alone cannot explain the prevalence of such movements. Accordingly, the recognition of official languages and associated economic grievances hold significant explanatory power outside the purview of federal or unitary 'institutional' considerations. Finally, the concept of federal or unitary forms of governance play less of an explanatory role than expected – rather, it is the degree of accommodation through asymmetric arrangements, in either model, that provides the best account as to why some secessionist movements succeed and why some are extinguished.

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