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Editor:
Greg Clarke

Production:
Amber Holder

Student Editor:
Balqees Mihirig

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For information about subscriptions and back issues, contact:

Amber Holder
aholder@law.ualberta.ca
(780) 492-5681

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Centre for Constitutional Studies
448D Law Centre
University of Alberta
Edmonton, AB T6G 2H5
Canada
(780) 492-5681 (phone)
(780) 492-9959 (fax)
ccs@law.ualberta.ca
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Greg Clarke, PhD
Centre for Constitutional Studies
448E Law Centre
University of Alberta
Edmonton, AB T6G 2H5
Canada

gclarke@law.ualberta.ca
(780) 492-8281

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table of contents

81 **Intergovernmental Relations, Legitimacy, and the Atlantic Accords**

Jennifer Smith

99 **Equalization, Regional Development, and Political Trust: The Section 36/ Atlantic Accords Controversy**

James Bickerton

113 **Constitutional Change to Address Climate Change and Nonrenewable Energy Use**

Lynn McDonald

123 **The Applicability of Section 7 of the *Charter* to Oil and Gas Development in Alberta**

Nickie Vlavianos

Constitutional Forum constitutionnel
Volume 17, Number 3, 2008

Intergovernmental Relations, Legitimacy, and the Atlantic Accords

Jennifer Smith*

Introduction

Are the Atlantic Accords regarded as legitimate agreements in Canada? If not, why not? And does it matter? The purpose of this article is to answer these questions.

Legitimacy resides in the eyes of the beholder. Who is the beholder? Initially, one thinks mainly of citizens in this respect. However, another beholder is government — other governments. In federations, governments often deal directly with one another, a sphere of activity called executive federalism. When the central government negotiates agreements with one or more (but not all) regional governments, the rest are relegated to the status of observers. As observers, they might well have ideas on the legitimacy of the activity, including the process used and the resulting agreement that is reached.

In this article I propose to examine the legitimacy of the Atlantic Accords from the standpoint of citizens and other governments. The accords are agreements reached between the federal government and Newfoundland and Labrador (NL) in 1985,[1] and the federal government and Nova Scotia (NS) in 1986.[2] In 2005, supplementary agreements were reached on the relationship between the accords and equalization payments. In 2007, further adjustments of that relationship were made for NS.

In the first section of the article, there is a discussion of legitimacy in connection with the practice of executive federalism. It is followed in the next section by an account of the establishment of the accords. In the third section there is an analysis of the renegotiation of the accords that took place between the federal government and each of the two provinces in 2004-7 — twice. In the conclusion, the questions about legitimacy posed at the outset of the article are addressed.

Executive Federalism and Legitimacy

Canadian political scientist Donald Smiley devised the phrase executive federalism to describe the "relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial interactions."[3] By government, he meant the elected representatives in the legislature who are also members of the cabinet and their officials (the executive), not the elected representatives who are not members of the cabinet. By interactions, he meant the panoply of meetings in which the business of the federal system is conducted by the aforementioned individuals.

The zenith of these meetings are the so-called "summit" meetings, which are attended by the political leaders themselves. These meetings include the first ministers' conference (FMC) of the prime minister and the provincial premiers, and sometimes the territorial leaders. There are also regional conferences of the provincial premiers, like the Western Premiers Conference, the Conference of the New England Governors and Eastern Canadian Premiers (which includes Québec and the Atlantic provinces on the Canadian side), and the

Atlantic Premiers Conference. At the next level are the meetings of ministers, for example the ministers of finance of all the governments, or the provincial and territorial ministers of education. Finally, the public servants who staff the intergovernmental meetings just mentioned hold intergovernmental meetings of their own.

There is no doubt that such meetings are important venues for the development of public policy, as well as useful occasions for participants to sort through difficult administrative issues. They are also elite exercises. As such, intergovernmental meetings raise concerns about legitimacy from the standpoint of their democratic credentials, and from the standpoint of the fairness of the process and the outcomes. On the democratic front, certainly executive federalism is not an inclusive phenomenon. The attendees are a slice of the governmental elite, a combination of elected and unelected officials. As well, the organized public is represented in the form of interest groups and even some public advocacy groups that have brought their influence to bear on the thinking of the officials on the agenda items of the day. Such groups have done their work in the preparation for the meetings. However, the unorganized public, or the vast majority of citizens, is not a participant.

The rejoinder is that the unorganized public is represented by the elected officials, which is a correct statement. And for some analysts, this form of representation — indirect democracy — is standard practice in liberal democracies today, and therefore takes care of the democratic concerns about executive federalism.[4] The record of executive federalism since Confederation indicates that Canadians agree. Students of federalism still comment on this, particularly in connection with meetings that produce major public-policy decisions. Recent examples include the Agreement on Internal Trade (AIT),[5] signed in 1995 by all governments, and the Social Union Framework Agreement (SUFA),[6] signed in 1999 by all governments except Québec — and Québec was closely involved in the discussions. Richard Simeon and David Cameron point out that the negotiations on the AIT and SUFA were conducted with "minimal public involvement" and "very little public reaction."[7] On the other hand, there is the rare occasion on which the public has communicated serious concerns about the decision-making process, and governments have responded directly to those concerns. The Meech Lake Accord[8] and the Charlottetown Accord[9] — both multilateral agreements — are cases in point.

In 1987, the first ministers negotiated the Meech Lake Accord, a set of proposed amendments to the Canadian Constitution. Agreement was unanimous. Under the amending formula, the next step was for first ministers to gain support for the accord from their respective legislatures. Some did, but others ran into opposition, not just to the terms of the accord but also to the way in which it was negotiated, that is, by eleven "men in suits" — the phrase of opprobrium *du jour* — behind closed doors. There developed widespread public concern that the Constitution, only recently amended in 1982 by the addition of a popular *Charter of Rights and Freedoms*,[10] was being manipulated somehow by political leaders who had failed to consult broadly about their purposes. In short, from the standpoint of the public the legitimacy of the process was questionable from a democratic point of view.

In response, some governments retreated from their earlier enthusiasm for the project and instead decided to consult with their respective provincial communities on the advisability of the accord. In the end, there simply was not enough public support for it, and the Meech Lake Accord collapsed.[11] When the federal government launched the next or Charlottetown round, all of the governments fell into line on the need to avoid the "governments only" route of executive federalism and instead pursued broad-based consultation with the Canadian people. The process produced the Charlottetown Accord, another set of proposed constitutional amendments that was presented to Canadians in a referendum. They voted it down. Nevertheless, the episode shows that executive federalism can generate public concerns about the democratic legitimacy of the process that are strong enough to influence governments to alter their usual decision-making routine.[12] What about perceptions of the fairness of the

process and the outcomes of the process?

In executive federalism, a fairness norm has to do with the choice of players included in the process. For example, it has come to be regarded as fair to include territorial governments as well as provincial ones in these meetings. Similarly, in constitutional matters, Aboriginal leaders have long argued that they must be included as principal players along with the others. What I call a fairness norm of inclusiveness is not a hard and fast one. For example, the Aboriginal claim is not always honoured. But there is an exception — of sorts — that proves the importance of the norm. It occurred in a round of negotiations that brought the country the *Charter of Rights and Freedoms*. In November 1981, at a dramatic FMC, the prime minister and nine provincial premiers reached agreement on a set of amendments to the Constitution, including the *Charter*. The tenth participant, the Premier of Québec, unexpectedly found himself and his officials offside in the negotiations, the final decisions having been made without their participation.[13]

The Québec government did not simply take a dim view of the proceedings in November. It gained a resolution from the National Assembly denouncing the agreement. It went to court to argue that historically Québec had and continues to have a veto over constitutional amendments that affect it, an argument rejected by the Supreme Court of Canada (SCC). To this day, it holds that its exclusion from the critical moments of the decision-making process made the entire process an illegitimate one, and it has refused to sign on to the result of the process — the *Constitution Act, 1982*.[14] Its refusal is symbolic because the document applies to Quebeckers as much as anyone else in the country. Nevertheless, it is a clear example of a process tainting the outcome in the eyes of some of the participants. The subsequent Meech and Charlottetown constitutional rounds were initiated in large part to respond to Québec's constitutional concerns.

In the examples canvassed thus far, the negotiations have been multilateral affairs involving proposed amendments to the Constitution. However, this is a small subset of the work of executive federalism. What about bilateral agreements? At the constitutional level, the federal government has concluded constitutional amendments with particular provinces on subjects peculiar to them. A recent example is the case of denominational schools in Newfoundland and Labrador.[15] No one questioned the legitimacy of the process by which that amendment was accomplished.

Governments have also pursued a combination of multilateral and bilateral approaches in public policy fields. The federal government might outline an approach to be used in a particular field, and then proceed to negotiate agreements with as many of the provinces and the territories as is possible. Such a process was used in the negotiation of the labour market training agreements in 1996-7.[16] Alternatively, governments might reach agreement on the principles guiding a public policy, and then proceed to a bilateral phase in which the federal government negotiates separate agreements with each of the provinces and territories under the umbrella of the general document. This path was followed in 2004-5 in the effort to establish a national early learning and child care system.[17]

In their account of the early learning and child care initiative, Martha Friendly and Linda White state that while some provincial officials prize the flexibility that bilateral agreements offer, others are less enamoured with them. They prefer the multilateral approach because it makes for more robust, national policy making.[18] However, there is no indication that the participants or the public find such approaches to be unfair. Of course, there are bilateral agreements and bilateral agreements. In the cases of labour market training and child care, all of the governments were involved in the action even if, in the end, they declined to sign an agreement with Ottawa, as Ontario did in labour market training. *What about bilateral agreements that are related to or have an impact on existing multilateral agreements, and yet are open only to some provinces to pursue?* Here we approach the rarified universe of the Atlantic Accords. As we shall see, one of the many interesting features of these accords is that other (envious) governments attacked their legitimacy, and then made

a point of communicating their concerns to their respective publics.

The Atlantic Accords

Background

The accords capped decades of regional economic and demographic decline in the Atlantic provinces relative to the central and western regions of the country. In the years following the Second World War, when government intervention in the economy to promote economic development was widely held to be the thing to do, political leaders in the region pursued various initiatives, none too successful. Therefore, it is easy to understand the excitement in Newfoundland and Labrador in 1979 when oil was discovered in the Hibernia field in the continental shelf 170 miles east of St. John's, at the very time when the global supply of oil and the demand for it turned in favour of producers over consumers.

The Hibernia find triggered a heated battle between NL's Progressive Conservative government, led by Premier Brian Peckford, and Ottawa over the ownership and control of minerals in the seabed under the waters off its coast, a battle with a pedigree. In 1965, Ottawa had referred exactly this issue in relation to the waters off the coast of British Columbia (B.C.) to the Supreme Court of Canada, and the Court ruled in favour of Canada over the province.[19] In the years following the decision, the federal government took the position that the provinces with an offshore interest should benefit from the revenues that might accrue from the resources there, as do the provinces with onshore resources. It held that Canada has an interest as well, and that sound administration of the offshore requires that the federal government maintain final decision-making authority in the field. However, its efforts to negotiate agreements along these lines with the Atlantic provinces failed. In this pre-Hibernia period, the Atlantic provinces continued to hold out for the bigger prize of ownership of the resources.[20]

Post-Hibernia, of course, the stakes were rising in step with the upward shift in the world price of oil, a resource now thought to be scarcer than previously assumed. The federal government made a concerted effort to come to terms with Nova Scotia and Newfoundland and Labrador by offering more generous shares of the expected revenues and a system of joint administration of the resources. It agreed that these "have not" provinces ought to receive the lion's share of the benefits from the resources, at least until they reached the status of the "have" provinces. Both sides considered the offshore to be, among other things, a promising tool of economic development.

In 1982, the federal government finally reached an agreement with NS, the *Canada-Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*.[21] As the title implies, the agreement set aside ownership considerations and focused instead on the issues of revenue sharing and joint management. NL, however, remained offside. Peckford argued that NL should have the same control and ownership of offshore resources as the provinces do in relation to the resources within their onshore boundaries, in order to propel itself from the ranks of the have-not provinces to the haves — and keep it there. His model was Alberta, then embarking on a petroleum bonanza. Ottawa, too, envisaged a bright future for the province and the end of its reliance on equalization payments. But it disagreed with Peckford on the issue of ownership, expected a substantial share of revenues from the resources for itself, and had no plans to cede control of the pace of their development to the province.[22]

In the end, the NL government asked the Newfoundland Court of Appeal to determine the issue of the ownership of the offshore resources. The federal government then sent its own, narrower question about legislative control of the Hibernia oil field to the Supreme Court of Canada. The NL court issued a split decision, finding for the province on the three mile territorial seabed, where there is no oil, and for the federal government on the continental shelf.[23] The SCC reached the same decision as the Newfoundland court on the continental shelf.[24]

Newfoundland and Labrador clearly lost the offshore jurisdictional round. Worse, in

1984 the SCC upheld the contract signed between Newfoundland and Québec in 1969, that for sixty-five years gives Québec the lion's share of the power and the profits from the electrical power development in Churchill Falls, Labrador.[25] The province's fortunes took a turn for the better, however, when the PC party led by Brian Mulroney won the 1984 general election. The Peckford government negotiated the Atlantic Accord with the Mulroney government in 1985. Eying this development, NS abandoned its 1982 agreement and instead took advantage of the option to negotiate its own accord with the federal government a year after NL did. It is now time to summarize the key provisions of the accords.

The content of the accords

The two accords were similar in content and organization. Each opened with a statement of the overall objectives of developing the offshore resources for the benefit of Canada in general and the province in particular ("chief beneficiary" in the case of NL; "principal beneficiary" for NS). There followed a list of objectives couched in somewhat different wording but ranked in the same order, the only exception being a final, additional objective in the Nova Scotia list on the subject of Crown shares of the resources. The themes of the objectives were: management policy, revenue-sharing policy, and development policy.

On management policy, the operative terms were "equality," "joint," and "stable." In both documents there were references to the use of systems of joint management, in which the federal and provincial governments are equal partners. There was also reference to the desirability of establishing a stable, administrative regime for the offshore petroleum industry. On revenue sharing, the objective was that the provinces receive the lion's share of the revenues, just as they would if the resources were on the land within their boundaries, until they reach a specified level of fiscal capacity, after which Canada's share of the revenues was expected to increase. In the case of NS, there was also provision for the province to acquire revenue (Crown payments) that might have been gained by owning a share of a project, a share that the province could have purchased, but did not.

It was anticipated that there would be a decline in equalization payments to the provinces in the wake of revenues flowing from the offshore. Accordingly, there was provision for equalization offset payments. In the NL accord, Canada agreed to make payments for a period of twelve years that would "offset" the expected decline in equalization payments. In other words, there was an agreement to shelter offshore oil and gas resource revenues from a clawback through the equalization program. In the NS accord, the same commitment was made for a ten-year period by continuing the equalization offset provisions in the earlier but now superseded *Canada-Nova Scotia Oil and Gas Agreement (Nova Scotia) Act*.[26] The period of the offset payments was later extended for both provinces.

It should be noted here that under the equalization program itself, provision was made in 1994 to shelter the resource revenues of have-not provinces from the treatment they would otherwise receive. Called the "generic solution," the idea was to use only 70 percent of the revenues gained from a particular revenue source (in which source an equalization-receiving province has more than 70 percent of the total revenue base of the country) for purposes of calculation, rather than 100 percent. For such a province, this meant that the remaining 30 percent was sheltered from a clawback. Under the accords, in any given year NS and NL could choose the generic solution or the newly-negotiated offset provisions.

Finally, there was the theme of economic development in the accords. The statement of objectives referred to the need to pace the development of the industry so as to enhance the economic and social benefits (NL), and employment and industrial benefits (NS) of the offshore for the provinces and Canada. Each province received a development-fund payment that was intended to assist in financing infrastructure costs associated with the establishment of the industry. In the NL accord, there was a section entitled "Economic Growth and Development," the aim of which was to ensure that the province and its residents get "first con-

sideration" for contracts for goods and services as well as employment training programs and employment generally. In the NS document, the section was entitled simply "Benefits," and the content was similar.

The accords were bilateral political agreements between Canada and each of the two provinces, and the parties to the agreements passed detailed implementation legislation to give effect to the provisions of the accords. But they were bilateral agreements that implicated the equalization program, itself a core multilateral agreement among Canadian governments, established in 1957 and despite changes made from time to time in the formula, in effect ever since. Indeed, in 1982 the commitment to equalization was entrenched in the Constitution. The purpose of the program is to enable Canadians to count on reasonably comparable public services at reasonably comparable levels of taxation, no matter where in the country they choose to live. Thus, it is widely held to be a hallmark of fairness and equity in the federation.

Equalization and the "fair shares" campaign

In due course, the expectations generated by the prospect of a robust offshore petroleum industry looked to be overly enthusiastic. There were fewer large finds than anticipated initially. The price of oil declined from a high of $37.42 in 1980 to a low of $11.91 in 1998, although thereafter it began to climb.[27] As well, the offset payments negotiated in the accords, diminishing each year, were due to expire altogether by 2012 for NL and 2004 for NS. The fallback was the generic solution, but as indicated above it sheltered only 30 percent of the revenues from the resources, thereby exposing the remaining 70 percent to a clawback. The size of the clawback was the straw that triggered the fair shares campaign.

John Hamm's Progressive Conservatives gained office in NS in 1999, while Roger Grimes succeeded Brian Tobin as premier of NL in February 2001. Hamm launched Nova Scotia's "Campaign for Fairness" in January 2001. According to the government's website, the purpose of the campaign was to procure the province's "rightful share" of revenues from offshore oil and gas developments so that it could maintain a stable economy and reduce its dependence on transfers from the federal government.[28] This was the perspective of the offshore as a major tool of economic development. There was also a reference to the provision in the accord that NS be the principal beneficiary of the offshore.[29] The clear implication was that in seeking its rightful share of the revenues flowing from the offshore, the province was asking the federal government to keep its promise. In a speech to the Canadian Club in Toronto later that year, Hamm observed that, contrary to the accord, Ottawa was turning out to be the principal beneficiary instead of NS, gaining 80 cents of every dollar of revenue flowing to the governments.[30] Such was the argument and it was pretty straightforward.

Hamm's fairness campaign initially was an exercise in public education, both for the province and the country. Nova Scotians could read the arguments online, and if they did were invited to fill in an online form as a show of support. For his part, the premier undertook a series of public-speaking engagements in the province and in Ottawa, Toronto, and Calgary. It was not without some success. His campaign garnered a supportive editorial in the *National Post* in June,[31] and the endorsement of Premier Ralph Klein of Alberta in the same month.[32] Adding punch to the effort, Grimes joined forces with Hamm in August 2001.

In a move that signaled his government's unhappiness with the offshore-equalization conundrum, Grimes established a royal commission on NL's place in the federation in 2002.[33] The terms of reference of the commission included any arrangements between the province and Canada that proved counterproductive to the province's quest for prosperity and self reliance, in particular, federal jurisdiction over the offshore resources.[34] In its 2003 *Report*, the commission noted the 2012 expiration of the offset provisions of the accord. Thereafter, the province's share of the revenues was expected to decline substantially, while the federal government's share was to rise. In the words of the *Report*, "over the life of the existing projects [Hibernia, Terra Nova, and White Rose], the net

amount of revenue that the provincial government retains will pale in significance when compared with the combined impact of the federal government's savings from reduced equalization payments and its federal corporate income tax."[35] The commission drew the comparison between this state of affairs and the words of the accord, under which NL is to be the primary beneficiary of the offshore petroleum resources. Accordingly, it made the recommendation that the accord be revised to assign NL a much larger share of its own provincial revenue (meaning the continuation of the shield from the equalization clawback), and a larger net share overall (meaning that the federal government should take comparatively less), as long as it remains a have-not province.[36]

Despite glimmers of support elsewhere, the fair shares campaign cut little ice in Ottawa, where the majority Liberal government was enjoying a third term under Prime Minister Jean Chrétien. However, party leadership and electoral changes were afoot and they would transform the prospects of the campaign. In November 2003, long-time aspirant for the leadership of the Liberal party, Paul Martin, managed to orchestrate the departure of Chrétien and take over the helm of the governing party and therefore the country. Meanwhile, a month earlier in the general election in NL, Progressive Conservative leader Danny Williams secured a convincing win over the Grimes government by taking 34 of the 48 seats in the province's legislature.

A successful businessman before entering politics, Williams took no time at all to pick up where Grimes left off on the fair shares theme. He forcefully articulated the view that offshore revenues are tantamount to a windfall from a nonrenewable resource and ought to be treated separately from equalization payments, that is, not included in the calculation of the payments. The equalization payments, he argued, should stop only when the province's fiscal capacity was high enough to make it ineligible to receive them. He got nowhere, of course, until Prime Minister Martin called a federal election for 28 June 2004. Then he hit pay dirt.

Although many had expected Martin to produce the fourth Liberal majority in a row, the campaign began to falter in the wake of revelations about the misuse of public funds used to advertise the support of the federal government for community activities in Québec. The scandal came to light in February, and Martin quickly established a public inquiry to deal with it. Nevertheless, an unending string of news reports implicating the Liberal party in the scandal weakened public support for the Liberals during the campaign, and opinion polls began to forecast another minority Liberal government. Now every seat counted, and in an effort to pick up an extra one in NL, Martin promised Williams to end the clawback of 70 percent of the province's offshore revenue share under the equalization scheme — apparently in the course of a 5 June telephone call.[37] This extraordinary development bought the Liberals an additional seat in NL, but also the start of a rancorous feud with Williams over the content of the promise made over the telephone.

Minority Government Politics and Bilateral Agreements: Round 1

The Martin government was politically vulnerable to provincial demands for more cash, not simply because it was a minority government but because it *had* the cash. It was running record annual surpluses. In light of Martin's insistence during the election that there was an urgent need to shorten "wait times" for health care services, in September the government held a health care summit with the provinces and the territories, and agreed to a significant increase in transfers to them for health care over the next ten years. The provinces and territories were happily united in this effort. The next meeting set for October promised to be much trickier, since the subject was an equalization "top up," and the provinces were divided in their views on the subject.

During the health care meetings, Ottawa had announced that it was prepared to deliver an additional $1.7 billion in equalization funds (for a total of $10.9 million in 2005-6, rising by 3.5 percent per year after that) to the have-not provinces at the time, meaning the four Atlantic

provinces, Québec, Saskatchewan, Manitoba, and B.C. The Atlantic provinces preferred to see the money doled out along the same lines as the main program, while Québec advocated that it be distributed on a per capita basis.[38] Then, a few days before the meeting, the media reported that Québec, Manitoba, and New Brunswick had drafted a discussion paper in which they argued for a change in the equalization formula to include the tax bases of all ten provinces in the calculations, including Alberta's rich natural resource tax base. The effect would be to increase the size of the equalization pot by 50 percent, from $10 billion to $15 billion,[39] an amount that Québec regarded as a down payment on what it termed the "fiscal imbalance," that is, the imbalance between provincial and territorial expenditures and the money to pay for them. The proposal was not well received by the wealthier provinces. Ontario Premier Dalton McGuinty issued a warning that there were limits to the province's generosity in the redistribution program.[40]

Meanwhile, there were reports that Ottawa was close to a deal with NS and NL to end the clawback of offshore resource revenues — in other words, to fulfill Martin's telephone promise to Williams. If accomplished, it was speculated, the deal would keep these two have-not provinces from joining the Québec-led campaign for more equalization dollars and thereby lessen the pressure on Ottawa to respond to it.[41] Williams repudiated the speculation, pointing out that the accords needed to be fixed on their own and had nothing to do with the equalization question *per se*. As matters transpired, however, there was no deal before the meeting of the first ministers on equalization that was set for 25 October 2004. Instead, on the eve of the meeting Ontario's McGuinty noted the province's pride in backstopping equality of opportunity across the country, and then warned that it would not support the efforts of the have-not provinces to wring more equalization money out of Ottawa. There were "limits," McGuinty said, to Ontario's capacity and willingness to contribute more to the country than it received back, and he remarked that the province's net contribution for the year was some $23 billion.[42]

Before the meeting on equalization got underway on 25 October, Williams caused a ruckus by boycotting it. Before flying back to NL, he told the media that he and his officials had been holed up in Ottawa all weekend waiting in vain for the prime minister to call to seal the deal on the 5 June telephone promise to eliminate the equalization clawback of offshore resource revenues. Instead, they found themselves contending with federal officials who were trying to change the promise by introducing caps on the amount to be protected by the clawback.[43] Therefore, it was in the absence of NL that the first ministers reached an agreement on equalization that was largely the offer that Ottawa had made to them during the health care meetings a month earlier. The federal government also planned to establish an independent panel of experts to review the equalization system.[44]

The drama over the accords intensified. Nova Scotia was still talking to federal officials, but not Newfoundland and Labrador. A war of words erupted between St. John's and Ottawa over the exact content of the infamous promise, Williams saying it was unconditional, the federal government saying it included a cap, which it now defined as a fiscal capacity equivalent to that of Ontario. That definition, easily understood, appeared to put the matter in a different light for some in the media. As the controversy dragged on, the press began taking sides. In the West and Ontario, journalists perceived Williams to be asking too much, as indicated by this statement from Don Martin, a columnist with the Canwest newspaper chain: "[Prime Minister] Martin correctly counter-argues Newfoundland should be cut off from the trough as soon as it reaches the fiscal level of Ontario, one of the two richest provinces in Canada."[45] The positive reaction to the earlier fair shares campaign was turning sour. In NS and NL, on the other hand, journalists took the other side, inveighing against the conditions Ottawa sought to place on its offer.[46]

The fight escalated throughout the remaining months of 2004, causing the prime minister not a little discomfort. NL Liberal MPs, cross-pressured, criticized their own government as well as Williams. The minister of natural re-

sources, John Efford, NL's only federal cabinet minister, found himself alone in defending the government's offer. At its convention in NL, the province's Liberal party backed the position of the premier, a Progressive Conservative.[47] Even Brian Mulroney, the Progressive Conservative prime minister under whom the accords were established, waded into the affair, urging the federal government to deal with NL and NS on their terms.[48] In addition, NS Premier John Hamm, whose officials continued to talk to federal officials about the situation, stood by the intransigent Williams. Federal Conservative opposition leader, Stephen Harper, was quoted as expressing "great admiration for Premier Hamm in sticking by Newfoundland and not allowing the federal government to play this game of divide and conquer."[49]

Faced with a deteriorating situation over which he had lost control, Martin publicly stated his desire to reach a satisfactory agreement with the two provinces, and the officials involved continued the negotiations, although it was clear that Ottawa was still insisting on caps in the form of a time limit on the deal, and a clause that would link the resumption of the equalization clawback to Ontario's fiscal capacity. The last meeting of the year attended by the two premiers and Finance Minister Ralph Goodale, in Winnipeg, proved to be a disaster. Unhappy with the negotiations, Williams stormed home and ordered that the Canadian flags on provincial buildings be taken down, a symbolic move of the first order that was not especially well received elsewhere in the country.[50] Martin refused to reopen the talks until the Canadian flags were flying again in NL, and Williams refused to fly them until Martin publicly agreed to address the province's grievances. Meanwhile, one of the country's national newspapers sternly advised Williams to carefully consider Ottawa's offer to the province and put an end to the flag gambit.[51]

Ottawa and the two provinces finally reached a deal at the end of January 2005. Setting aside the complicated details, the main provisions were these: first, the provinces would receive all of the revenues from the offshore resources to which they were entitled; second, Ottawa would offset any reduction in equalization payments charged against the resource revenues until the provinces no longer qualified for equalization, and in that event they would receive transitional payments for another two years; third, the provinces would be understood not to qualify for equalization if they met a particular five-province standard of fiscal capacity then in use; and four, the offset payments were available, if required, for sixteen years (defined as two eight-year periods). The deal was estimated to be worth some $1.1 billion for NS ($830 millions upfront) and $2.6 billion for NL ($2 billion upfront). Amidst the general cheer, John Hamm pointed out that four years had passed since the start of his fair shares campaign.[52]

Negative reaction

Any sympathy initially expressed outside Atlantic Canada for the fair shares campaign evaporated, to be replaced by a growing chorus of criticism of the outcome — the two deals. Or, rather, the "side deals" as they were quickly dubbed by commentators. Influential journalist Margaret Wente said she wanted "Danny Billions" on her side in a column in which she managed to sound each of the points developed in public discussion of the deals over the next two years: Williams behaved badly, albeit successfully, in holding out for more than he should have; Martin showed no spine in the face of provincial special pleading; the principle of equalization was in tatters; and people in the "mainland" — read Ontario — felt "ripped off" by the side deals.[53] The first two are fascinating for those who enjoy the gamesmanship of political life. The latter two are critical in the discussion of the effect of the accords on intergovernmental relations.

On the first point, commentators quickly framed the deals — and the deal makers — as *saboteurs* of equalization rather than as instruments of economic development. The idea of equalization is to ensure that the provincial and territorial governments can offer their residents access to reasonably comparable public services at reasonably comparable levels of taxation. The Martin government had already compromised the execution of the principle in the eyes of many analysts by taking the existing pot and

capping it by a specified annual rate of growth, rather than letting it ebb and flow in response to the circumstances of the provinces from year to year. To be fair, however, as noted above the government had also appointed a commission to examine the equalization scheme, and so the cap decision could be viewed as a holding operation until the commission issued a report and recommendations of change, if any, to the scheme. By contrast, according to some writers the accords skewered the very heart of equalization.

The argument was simple enough. From its inception in 1957 until 2004 and the Martin cap, the equalization program was formula-driven. Whether or not a province or a territory was an equalization recipient was an outcome of the application of the formula in use at the time, not an *ad hoc* outcome of a bilateral deal with the federal government. Further, being formula-driven meant that the outcome in any given year would reflect the province's fiscal capacity. In theory, the greater its relative tax yields, the less the province receives in equalization. A bonanza in the form of lucrative offshore revenues might mean no equalization at all unless, of course, a province negotiated a deal with the federal government to set aside the rules that applied to everyone else. *The Globe and Mail* was prepared to buy the exceptional treatment of NL (and by implication NS) "as an investment in a very poor province." However, it was decidedly upset by the transitional payments that would continue to be paid to the province when it attained "have" status (stating that in this respect Martin had "exceeded his brief"), by the fact that there were no strings attached to the upfront payments, and by the fact that Williams' "flag antics" had succeeded in getting the province a better deal. Martin, according to the newspaper, "is clearly willing to give away the store to buy provincial peace."[54] And Saskatchewan was waiting in the wings to press a "side deal" of its own.

The Saskatchewan case alerted everyone to the difficulty involved in getting the equalization scheme back on track. Premier Calvert said that as long as Saskatchewan was a "have" province it was content to forego equalization payments, meaning he was not demanding anything like the terms negotiated with NL and NS. On the other hand, he argued, should the province fall back to "have not," equalization-receiving status, then its oil and gas revenues ought to be protected from federal clawbacks: it should have its natural resource revenues and equalization cake, too. In his initial public pitch, Calvert suggested that he would take a determined, yet civil approach to the issue rather than the approach adopted by Williams.[55]

Ontario's opening shot in the debate followed shortly on Calvert's comments, and it goes to the second point Wente made about people feeling "taken" by the deals with NL and NS. Premier McGuinty made the claim that Ontario taxpayers would be paying for the deals, and that this was "patently unfair" to them. (Since Ottawa doles out equalization payments from general revenues, which means that every taxpayer in the country contributes to the program, McGuinty's claim was misleading.) He added that the province annually contributed some $23 billion more to the federal treasury than it received in services, while his own government was running a budget deficit. McGuinty also pointed out that NL's fiscal capacity would soon surpass Ontario's, an unacceptable outcome in his view for an equalization-receiving province. He planned to launch a campaign to persuade the federal government that the arrangements with NL and NS had thrown the equalization scheme off course.[56] Meanwhile, New Brunswick and B.C. said they were looking for side deals, too.

At least one of the national newspapers supported McGuinty. It argued that the equalization program can have the perverse effect of penalizing economic growth that threatens the receipt of equalization payments — apparently the problem for NL and NS. This, in turn, has negative effects for the provinces that underwrite equalization. "By starving Ontario of $23-billion per year so that other provinces and cities can keep unproductive regions on economic feeding tubes," the newspaper opined, "the country is depriving its economic engines of the infrastructure and services they need to compete internationally."[57] In the end, McGuinty

succeeded in negotiating a five-year deal with Ottawa worth $5.7 billion for programs in areas like postsecondary education and immigration, which he called a "downpayment" on the $23 billion, thereby signaling his expectation of more to come.[58]

Minority Government and Bilateral Agreements: Round 2

The second round of the Atlantic Accords implicated the equalization formula more closely than the first. On equalization, provinces like Saskatchewan as well as Newfoundland and Labrador argued for the removal of natural resources revenue from the formula altogether, for the obvious reason that the change would benefit them. If this were to happen, their own high natural resource revenues would not work against them in equalization terms. Since the equalization formula was due for an overhaul, the issue became a highly controversial one, beginning with the next general election.

By the fall of 2005, it was clear that the days of the Martin minority government, beset by indecisiveness and scandal, were numbered. On 23 November the opposition parties passed a vote of want of confidence in the government and the scene was set for an election on 23 January 2006. In its campaign platform, the Conservative Party called for changes to the equalization formula to ensure that "non-renewable natural resource revenue is removed from the equalization formula to encourage economic growth," adding that no province would be "adversely affected" by any such changes.[59] In addition, on 4 January 2006 the Conservative leader, Stephen Harper, sent a letter to Premier Williams in which he reiterated the plank, using practically the same words.[60] The campaign plank and letter were consistent with the position Harper had articulated in a letter to Williams two years earlier when he was running for the leadership of the Conservative Party.[61]

The election produced a Conservative minority government, and one of its tasks was to figure out what to do about equalization in the context of a budget surplus. There was no shortage of advice. One national newspaper urged the new government to drop the Conservative campaign proposal. "The situation [would be] so farcical [under it]," it wrote, "that Ontario residents could end up paying for transfers to Newfoundland and Saskatchewan and eventually British Columbia, even though those provinces would actually have a higher fiscal capacity per capita when all revenues were taken into account."[62] Ontario opposed an enrichment of the equalization program, instead demanding extra money from the federal government in the form of transfer payments for various social programs.[63] By contrast, in March a panel appointed by the Council of the Federation recommended an enriched equalization program based on a ten-province standard that included 100 percent of natural resource revenues.[64] Québec too urged the federal government to provide more equalization monies — it is an equalization recipient — in order to repair the so-called fiscal imbalance, a concept which it had been hawking for months. Alberta's Premier Klein threw a real clanger into the discussion by threatening to pull the province out of the equalization program if it was enriched by the inclusion of natural resource revenues.[65] Then, the federal government released the much-awaited report of its Expert Panel on Equalization and Territorial Formula Financing, generally known as the O'Brien panel after its chair, Al O'Brien.[66]

The panel recommended an enriched equalization program that uses a ten-province standard of revenue-raising capacity, and the inclusion of 50 percent of natural resource revenues. It also proposed a cap on potential payouts to provinces, so that "no [equalization-]receiving province ends up with a fiscal capacity higher than that of the lowest non-receiving province."[67] The cap would have the effect of clawing back natural resource revenues in NL and eventually NS. And the 50 percent inclusion rate was not what the Conservative party had promised to do before — and during — the election campaign just past.

However reasonable the panel's recommendations were in total, it was impossible to please everyone. In the weeks following the release of the *O'Brien Report*, the political actors and their supporters made their pitches to one an-

other and to the attentive public following the debate. The federal government shrewdly bided its time, playing up the lack of consensus on the appropriate equalization "fix," while one of Prime Minister Harper's long-time supporters, Ken Boessenkool, praised the O'Brien panel's work: "by proposing a middle ground on resource revenues and by designing a clever cap to prevent the program from becoming unaffordable, the panel has both given impetus to critics and provided a compromise on two instractable issues."[68] Boessenkool's article was a signal of the government's positive view of the report.

Ontario economists weighed in on McGuinty's side, arguing that in the light of its economic travails, including a manufacturing sector faltering in the face of a strengthening dollar, the province could ill afford to finance an enriched equalization program.[69] Following a tour of Atlantic Canada in an effort to explain his government's position, McGuinty himself took a more conciliatory line on the eve of a meeting of the premiers in St. John's, NL on equalization, offering to accept a richer equalization program in return for higher federal transfers for health care and social programs.[70] However, the premiers were unable to reach a consensus on any aspect of fiscal federalism, let alone equalization, in what appeared to have been rather acrimonious discussions. According to the host of the meetings, Williams, it was now up to each province to convince Ottawa of its point of view.[71]

Williams crossed swords with Harper in the fall, when the prime minister traveled to NL in October to attend the annual Progressive Conservative convention there. He tried to get Harper to repeat his pledge to keep nonrenewable energy resources out of the equalization formula, which he now declined to do, an obvious signal that he was reconsidering his position.[72] While Williams publicly berated the prime minister's hesitation and threatened to campaign against him in the next federal election if he abandoned his pledge, the new Progressive Conservative premier of NS, Rodney MacDonald, pointedly stuck to the art of persuasion.[73] The prime minister maintained that the decision would be made in the spring budget of 2007.

Other resource-rich provinces were just as concerned about the treatment of natural resource revenues, and by the beginning of 2007 Alberta, Saskatchewan and B.C. had lined up behind Nova Scotia and Newfoundland and Labrador in calling for their exclusion from the equalization formula, all of them being better off under the exclusion option. The crucial difference, however, was on the have-not side between Saskatchewan and the two Atlantic provinces. Saskatchewan had no deal with the federal government to shield its natural resource revenues from an equalization clawback.

In March, the Conservative government brought down its second budget, including a revamped equalization program clearly based on the *O'Brien Report*. It opted for a ten-province standard, 50 percent exclusion of natural resource revenues, and a cap under which equalization payments could not move a recipient province's total per capita fiscal capacity above that of any non-receiving province. Further, the federal government made the claim that NL and NS would maintain the benefits of the accords, but it offered them a choice. They could choose the new equalization program, and enjoy richer equalization payments immediately flowing from the ten-province standard than they would under the existing program with its five-province standard; but 50 percent of resource revenues would count for the clawback, and there would be a cap on the overall size of equalization payments. Alternatively, NL and NS could choose the existing system with its lower payments and the benefits of the accords.[74] It was a clever move that enabled the federal government to say that it continued to honour the accords. It also backfired, producing an epic battle between the federal and two provincial governments. For a time, intergovernmental affairs were out of control.

It is hard to exaggerate how negative the reaction was to the budget decision in NL and NS. It was far more bitter than opinion during the previous set-to of the two provinces with the Martin government, and drew the attention of the public as well as governmental actors. Although few could grasp the complex calculations involved, everyone understood the claim

of the province that the federal government essentially was reneging on the accords. In Halifax, the *Chronicle Herald* produced an editorial entitled "Harper locks Nova Scotia in new ice age," and scoffed at the prime minister's insistence that he was keeping his promise to the province rather than getting around it.[75] In NL, the decision was immediately branded a betrayal by the premier and the government took out a full-page ad in major newspapers across the country to say as much.[76]

There followed a long period of negotiations between officials of the federal government and the two provinces, punctuated by openly warring political actors, each side in competition for public opinion in the region. They took out ads in the newspapers, denouncing one another's positions. They fought the battle on governmental websites. They threatened legal action against one another. They even argued the facts. The federal finance minister published what amounted to an editorial in a Halifax newspaper in which he called the claim that his government was abandoning the Atlantic Accords an "urban myth."[77] Then, two economists in NL and NS entered the fray with analyses to demonstrate that the option of the new equalization program (plus the cap) — contra the federal finance minister — would leave the provinces worse off than the status quo.[78]

The open political fighting was chaotic. Moreover, the parliamentary context was tenser than usual because the federal government's decision on equalization and the accords, being part of the budget, was a matter of confidence. While Williams conducted a war of words against the federal government from St. John's, MacDonald tried to negotiate his way out of the dilemma. He also resorted to an array of tactics, like pressuring Nova Scotia MPs to vote against the government on the budget vote — Bill Casey did, and was ejected from the Conservative caucus for doing so.[79] MacDonald pled his case in the media, broke off negotiations with the federal government and then re-entered them, took his case to the Senate, and threatened court action. Apparently to no avail.

Parliament passed the budget, but the need for implementation legislation meant that there was still room to negotiate the issue. Fully aware of that fact, McGuinty warned the prime minister not to make any "special deals" with the two provinces that would confer on them a greater per capita fiscal capacity than Ontario.[80] Boessenkool wrote another column in which he praised the federal government's effort to return to a formula-driven equalization program and warned NS and NL that in "hankering" after special deals, they were undermining the legitimacy of the program in the eyes of the wealthy provinces.[81] One national newspaper penned the same themes in an editorial that concluded with this bit of advice to the two Atlantic provinces: "The mice should be careful not to bite off more than the country will let them chew."[82] Picking up on the flavour of these sentiments, one local columnist warned Atlantic Canadians that "Ontarians overwhelmingly believe the equalization system, unless reformed, will be a permanent drain on their pocket-books."[83] Interestingly, a public opinion poll on equalization conducted during the contretemps showed that nationally there was more support for the two Atlantic provinces than the prime minister — although that was not saying much — and in Atlantic Canada almost none for Harper's position.[84]

In the end, and following a summer of noticeably sour behaviour on the part of the prime minister towards the two Atlantic premiers,[85] the federal government reached an agreement with NS in October 2007. The parties agreed that NS would do at least as well under the new (and better) equalization formula than it would have done under the formula in place at the time of the 2005 accord — and for the lifetime of the 2005 accord. In other words, should NS choose the new equalization formula (as it clearly meant to do), and thereby give up the protections of the 2005 accord, it would not be penalized for that choice. In return, the province agreed to accept less money in the near term in return for more generous payments down the road. In addition, the two sides also agreed to establish an independent panel to resolve the matter of the Crown shares, that is, the size of the payments owing to NS for shares in offshore energy developments to which it was entitled under the terms of the 1986 Atlantic Accord.[86]

The agreement did not produce an enthusiastic chorus of approval. Nationally it was reported as a compromise under which NS got less than it demanded but more than it was initially offered in the March budget.[87] In Nova Scotia, it was described as a "wimpy deal," a "gamble" and a special deal, the later, generous payments of which might prove difficult, down the road, to defend against jealous provinces.[88] Fresh from his huge election win in NL,[89] Williams said that Ottawa had taken advantage of MacDonald's weakness as leader of a minority government to get the deal, while Premier Calvert derided it as a special deal and immediately called a provincial election in which he clearly planned to campaign on the unfairness of the whole thing.[90] No one seemed to be able to find the deal anyway. There was a published exchange of letters between the federal finance minister and his NS counterpart, but it was weeks before the required implementation legislation appeared.[91]

Mindful of the next federal election and the futility of Conservative prospects in NL should the premier campaign against the government, the prime minister sought to mend fences with Williams. According to Williams, the price of peace was $10 billion paid over 15 years, an amount he said the province would lose in equalization under the offer made to it in the federal budget.[92] In December, the province's finance minister announced a "record-shattering $882-million surplus" for the fiscal year, most of which would be set against the crippling provincial debt, but he was quick to add that this surplus had no bearing on the equalization issue.[93]

That same month, there were suggestions in the media that Williams had "quietly" made the same deal with the federal government as MacDonald.[94] He quickly repudiated the idea in a news release, stating unequivocally that the government had not signed any equalization deal but instead was confronted with the same unpalatable choice made available to it all along, a choice it would eventually be forced to make.[95] Evidently, the prime minister had not come to terms with William's demand for $10 billion. In April, the NL's finance minister announced the decision to stay with the old equalization formula and the Atlantic Accord. From the standpoint of the long term financial interest of the province, he said, it was a better bet than the new equalization formula.[96]

Conclusion

The first question posed at the outset of this article is whether the Atlantic Accords are regarded as legitimate agreements in Canada. The concept of legitimacy itself has been elaborated in terms of democracy and fairness. Throughout the epic struggles of the accords, no one launched an attack on the intergovernmental proceedings for being undemocratic. Instead, it was all a matter of fairness. Critics attacked the procedure, and then the outcome of the procedure. On procedure, they said that the renegotiated accords were unfair because they were bilateral agreements that implicated multilateral agreements affecting all of the players. The term continually used to describe them, "side deals," implies that they were unsavoury, backroom, political deals in which one side was able to take advantage of the political weakness of the other side. On content, the critics said that the renegotiated accords unfairly gave two have-not provinces special treatment not made available to other have-not provinces. Worse, they violated the principle of the equalization program by securing for two provinces ongoing equalization payments, alongside rising revenues from the offshore resources. To the extent that they were perceived to be unfair, then, the renegotiated accords were regarded as illegitimate.

The second question is whether any of this matters for NL and NS in particular, and for the health of the federation in general. I would say yes on the first count simply because the critics are unlikely to forget about the accords for a long time. One of them, the federal government, relentlessly sought to undo the Martin telephone promise from the day it was made in June 2004. Moreover, it must have found the open conflict with NS and NL trying, to say the least. Such conflict is the sort of experience that could cloud the relationship between it and the two provinces for years. Then there is Ontario, the most prominent of the provincial

critics. The media based in Ontario have been running a steady series of reports and commentaries to sound the alarm on the province's declining economic prospects.[97] The equalization program itself is now a target of criticism, and not just by business columnists and the Ontario Chamber of Commerce.[98]

Premier McGuinty is campaigning to overhaul the equalization program, saying that Ontario is picking up more than its fair share of the tab for equalization. Referring to reports that it is on the brink of becoming a have-not province, he wants to keep more of the money at home. The idea of Ontario as a have-not province — an equalization taker — has been until very recently unthinkable;[99] it also implies a smaller pot of equalization dollars. This strikes some as a worrying prospect for NS, since equalization makes up almost one-fifth of the province's budget.[100] In the future, the province might well face an unsympathetic audience should it need to lobby for better equalization treatment. On the other hand, NL is heading towards "have" status, and in sticking with the accord and the old equalization formula, might have wound up making a better choice than NS anyway.

As for the federation, it is tempting to think that it will weather the storm. Certainly the changing economic circumstances of the regions of the country are driven by forces more powerful than the accords and equalization. On the other hand, the equalization program has long been a symbol of the commitment of Canadians and their governments to horizontal fiscal equity, that is, the capacity of individual provinces and territories to deliver comparable levels of services at reasonably comparable rates of taxation. Arguably any weakening of that commitment is a weakening of the ties that bind the federation.

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* Jennifer Smith, Department of Political Science, Dalhousie University.

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Equalization, Regional Development, and Political Trust: The Section 36/Atlantic Accords Controversy

James Bickerton*

Introduction

The controversy generated by the federal government's unilateral alteration of the Atlantic Accords,[1] and the subsequent bitter political standoff between the federal government and the provinces of Nova Scotia and Newfoundland and Labrador, was the initial stimulus for this article. The agreements, the alleged breach of trust involved in their unilateral alteration, and the political fallout, manoeuvrings, and negotiations that followed, raise a number of issues about the mechanisms and pathologies of executive federalism in Canada. This episode also provides some insight into a continuing source of misunderstanding and grievance that persists in centre-periphery relations in Canada — the issues of equalization and regional development. The purpose of this article is to use the controversy as a case study to inquire into these issues, with a view to making an incremental contribution to the critical literature on the institutions of Canadian federalism.

This study begins with an examination of the intergovernmental agreements known as the Atlantic Accords, but expands inevitably beyond this to inquire into the broader constitutional, fiscal, and political context for the accords. In particular, this article focuses on section 36 of the *Constitution Act, 1982*, which addresses equalization and regional development.[2] The major commitment to regional equity in section 36 has proven to be both a powerful mechanism of integration in the Canadian federation and a continuing source of frustration, representing as it does a form of social contract at best imperfectly observed or fulfilled. After examining the problems associated with the implementation of section 36 and its connection to the controversy surrounding the Atlantic Accords, this article will conclude with some reflections on the factors affecting trust in intergovernmental relationships and offer some strategies for coping with these factors with a view to avoiding, limiting, or better managing politically destabilizing and regionally alienating controversies and conflicts within the federation.

It seems clear that a key variable in the Atlantic Accords controversy, as well as the longer term problems associated with the implementation of the commitments embodied in section 36 of the Constitution, is *political trust*. Trust is an important element in federations, and particularly in intergovernmental negotiations and agreements. As a political variable, trust can be seen to have both a moral and a strategic dimension. Daniel Elazar sees federal unions as based on moral covenants which bind the partners together in mutual respect and recognition. Samuel LaSelva has inquired into the moral foundations of Canadian federalism. In both cases, the morality of federalism — its ethos or ethic — relies heavily on trust ties between the federating partners. Whether the federating partners are peoples or distinct regional communities, the spirit of federalism — a union based and continually renewed upon the mutual consent and agreement of the partners — will be observed.[3]

Stephan Dupré, writing on the role of trust as it affects the workability of interstate or "executive" federalism, has stressed the importance of honouring the norms of intergovernmental relations rather than just the strict legalities. These norms are reinforced through the establishment and maintenance of trust ties among intergovernmental decision makers and officials, generated over time through the mutual recognition and honouring of negotiated agreements. Dupré also notes that these trust ties are most likely to be the product of ongoing functional relations among officials rather than "summit relations" among political executives, due to the fact that the former generally operate more smoothly and predictably. In particular, Dupré notes that the inherently quantifiable character of fiscal relations in Canada, the common vocabulary and network formation of finance officials, and the fixed maximum five-year term of fiscal arrangements ("nothing is forever"), make it an area where the mechanisms of executive federalism have perhaps the best chance of generating successful outcomes. While this may indeed be true of negotiated agreements that address problems and manage or moderate intergovernmental conflict, even here the workability of the model can be rendered inoperable by the intrusion of political factors.[4]

Trust is essential to building and utilizing a form of social capital in federations. It makes possible the more effective and efficient operation of intergovernmental consultative and decision-making processes, in short, the functional mechanisms of intergovernmentalism. As well, in a more generic sense, trust is a central factor in the realm of contracts as a basic prerequisite of good-faith negotiations and agreements between individuals or institutional actors. Contractual relations involve a continuum of measures and mechanisms that can be used to enable and enforce agreements, ranging from the negotiation of trust-based oral agreements to legally binding contracts with detailed requirements.[5]

An expected political consequence of broken trust ties, especially in the case of repeated occurrences, is the erosion of federal norms and assumptions that underlie a federal culture or ethic; a pronounced contraction in the reservoir of social capital that both relies upon and contributes to cooperation and trust; and lower levels of legitimacy, initially for political authorities, but eventually for the political regime or even the political community as a whole. Such consequences certainly will make future intergovernmental cooperation and negotiation less likely and more difficult. It will also make it more prone to negative outcomes, especially where nonjusticiable, open-ended, or flexible agreements are concerned. This is the case because negotiations in the context of low levels of trust, if they are to be successful, generally require agreements featuring verifiable commitments and therefore require the inclusion of strict enforcement mechanisms.[6]

In this connection, it has been recognized that institutional development can reduce the need for and the role of political trust. In effect, the fewer institutions there are, the more is trust needed. One reason for this is that routinization (a byproduct of institutionalization) makes it less likely that diversions from established understandings and practices will occur. Higher levels of institutionalization also generally involve the greater prevalence of, and accepted recourse to, decision rules, dispute resolution mechanisms, procedures for clarifying accountabilities, and other bureaucratic supports, all of which can make trust less central or essential to intergovernmental relations. On the other hand, as noted by Arthur Benz, one of the consequences of increased institutionalization in federations can be reduced flexibility and the accumulation of rigidities in intergovernmental relations, with the courts used more regularly to resolve conflicts and ultimately to act as the arbiter of intergovernmental relationships.[7]

Section 36 of the *Constitution Act, 1982*

Section 36 of the *Constitution Act, 1982* entrenches a commitment on the part of Parliament and the Government of Canada to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably compa-

rable levels of public services to all Canadians at reasonably comparable levels of taxation (36-2). It also contains a commitment on the part of Parliament and the provincial legislatures, together with their governments, to further economic development to reduce regional disparities (36-1). These constitutional commitments can be understood to embody trust that the federal spending power will be used to advance regional equity.

Experts in fiscal federalism generally acknowledge that while equalization payments have dramatically reduced the discrepancies in fiscal capacity among provinces, the equalization commitment in section 36 has never truly been fulfilled, primarily because of the inadequacies of the formula used between 1982 and 2007 to determine payments. A formula based on fiscal capacity rather than actual costs or need, the construction of a national average based on a five-province standard which excluded Alberta and its resource revenues, and later the employment of a cap on equalization payments, all contributed to federal transfer payments to poorer provinces that were less generous than they needed to be if the federal government's section 36 commitments were to be fully realized. The inevitable result of this, not surprisingly, was somewhat lower levels of public services at somewhat higher levels of taxation, along with higher levels of public debt in recipient provinces, all of which indicates a greater fiscal effort for services of equal or lesser quality.[8]

As for reducing regional economic disparities, understood to be the underlying cause of differing provincial fiscal capacities, the federal commitment to this principle has been downplayed and progressively defunded since its constitutional entrenchment in 1982, with declining regional development spending arguably reflecting a fading federal commitment to advancing regional equity.[9]

However, it also should be noted here that it may not be just the federal government that has fallen somewhat short of its constitutional commitments under section 36. A recent lawsuit involving the Government of Nova Scotia and Cape Breton Regional Municipality (CBRM) raises both the question of whether the commitments in section 36 (with regard to both equalization and regional development) are legally binding on governments, and also whether provinces have an obligation to distribute equalization funds to municipalities based on a provincial variation of the same fundamental principle propounded in section 36 — in this case ensuring reasonably equivalent public services to all Nova Scotians at reasonably equivalent levels of taxation. The Nova Scotia Supreme Court has rendered an initial decision on the case, rejecting the CBRM's legal action on the basis that the question on which it seeks a judicial ruling is nonjusticiable.[10] Regardless of the final outcome in this matter, the underlying political problem provoking the municipality to seek redress through the courts is basically one of trust, specifically the lack of trust or the perception of broken trust in terms of the intergovernmental relationship between the province of Nova Scotia and its second largest municipality.[11]

The Atlantic Accords

The 2005 Atlantic Accords were bilateral agreements negotiated between Prime Minister Paul Martin, Premier Danny Williams of Newfoundland and Labrador (NL), and Premier John Hamm of Nova Scotia (NS). The negotiations were conducted in the context of an announced "new framework" for equalization that would have resulted in reduced and capped payments, and ongoing provincial discontent over the 70-80 percent federal clawback of provincial offshore resource revenues. Both of these federal initiatives were perceived by the affected provinces as breaches of trust, the first related to the section 36 equalization commitment, and the second to a federal government undertaking in the original 1985-6 Atlantic Accords that the two provinces would be the principal beneficiaries of the development of offshore oil and gas resources.[12] This was recognized at the time as an important step in advancing the goals of regional development and equity.

The political context for bilateral agreements in 2005 was a politically weakened federal government in a precarious minority situa-

tion, which revalued the political leverage of the periphery and enabled small provinces to wring concessions from Ottawa that no doubt would not otherwise have been forthcoming. Certainly finance department officials, the guardians of the federal treasury and managers of federal-provincial fiscal arrangements, were unhappy with the deal. The new Atlantic Accords gave the provinces in question 100 percent of their offshore revenues without any corresponding reduction in (or cap on) their equalization entitlements; indeed, the deal included an automatic 3.5 percent increase in equalization payments until 2009-10. This effectively delinked equalization payments to NL and NS from the national formula. If these provinces did not reach the average equalization fiscal capacity standard by 2012, the agreement would be extended for another eight years; should they reach the standard during that period and therefore no longer qualify for equalization, then they would get transitional payments for two years. Furthermore, the two provinces were granted upfront advance payment against their future revenue streams. This last concession reflects these provinces' immediate fiscal need, the limitations of their trust in the federal commitment, and the softening of the federal government's bargaining position during the course of the negotiations, primarily due to Martin's personal intervention. This, of course, spawned the inevitable opposition and resentments from political and bureaucratic actors outside the region, who saw the deal as containing a generous "no strings attached" grant component at odds with the basic rationale of the equalization program.[13]

It is worth noting here that both the federal commitments in section 36, and the federal undertaking in the Atlantic Accords, can be understood to involve questions of *trust* rather than *legality* because they ultimately rested on the use of the federal spending power, which placed the federal government in a strong if not unassailable legal position as confirmed by the Supreme Court of Canada in its 1991 decision *Reference re Canada Assistance Plan (B.C.)*:

> the Supreme Court made it clear that the doctrine of parliamentary sovereignty trumps intergovernmental agreements, and that any "legitimate expectations" on the part of the provinces that such agreements could not be altered unilaterally had no legal effect.[14]

In effect, the federal Parliament (and therefore government) has the discretionary power to spend or not to spend, and it can neither be required to nor prevented from doing so by an intergovernmental agreement to that effect.[15]

Overturning the Accords

Soon after the defeat of the Martin Liberal government by the Harper-led Conservatives in 2006, the recommendations of a number of ongoing government-commissioned and private sector studies on equalization and fiscal federalism were released. Most important of these was the federal government's own *O'Brien Report*,[16] which recommended changes to the equalization formula that would broaden and enrich the program's fiscal base. This recommendation would simultaneously act on the concern that the equalization program should be placed on a principled national basis, and also address provincial complaints about a vertical fiscal imbalance that was fattening federal budgetary surpluses, while straining provincial finances. The O'*Brien Report* proposed a ten-province standard in place of the five-province formula in place since 1982, while including 50 percent of all natural resource revenues in the formula for calculating entitlements. A further recommendation was that equalization payments to any receiving province be capped to ensure that the fiscal capacity of a recipient province did not exceed that of the lowest nonreceiving province (Ontario), regardless of its entitlement under the new formula.[17]

In its March 2007 budget,[18] the Harper government adopted the main recommendations of the *O'Brien Report*, which effectively killed the federal commitment in the Atlantic Accords to delink the offshore oil and gas revenues of Newfoundland and Labrador and Nova Scotia from their equalization entitlements. This decision was heavily criticized by the two provincial governments as a direct and specific breach of trust, and both embarked on political campaigns to have the accords reinstated in their original form and intent. In the course of this campaign,

the provincial governments, both Conservative, called on Conservative MPs in Ottawa to join them in demanding the reinstatement of the accords. One Nova Scotia MP, Bill Casey, did so, and was promptly expelled from the Conservative caucus. The popularity of his stance put intense political pressure on the two remaining Nova Scotia Conservative MPs, one of whom was Minister of Foreign Affairs Peter MacKay. Eventually, the federal government and Nova Scotia negotiated a new alternative deal, which both sides claimed repairs the fiscal damage done to the province by the equalization provisions in the 2007 federal budget.[19] However, this new deal was greeted with widespread scepticism from the Nova Scotia public and political commentators.[20] Typical was the observation of the banished Conservative MP Casey, who, continuing to call for the restoration of the original accord, claimed the issue was primarily one of broken trust rather than dollars and cents. Meanwhile, no negotiations took place with an embittered, truculent, and highly popular NL premier, who consistently refused to consider anything less than the reinstatement of the 2005 Atlantic Accord. [21]

Explaining the Trust Involved and the Politics of its Breach

What exactly was the basis for the trust broken by this chain of events and developments in fiscal federalism? The most proximate and glaring was the decision to adopt new equalization measures that would effectively overturn the accords. What two provinces assumed were hard-won victories sealed into intergovernmental agreements that would be respected by any subsequent federal government, very quickly proved to be illusory. This sent political shock waves through the affected provinces, and quickly eroded trust and confidence in the honesty and fairness of the federal government in its dealings with the region. Behind the ensuing public and governmental outrage, however, was a longer-term regional grievance over the distribution of the benefits of offshore development. In the set of original Atlantic Accords from the 1980s,[22] NS and NL had been promised that they would be the principal beneficiaries of offshore oil and gas, and yet the federal government had persisted in imposing a clawback of 70-80 percent of offshore revenue through the equalization program; furthermore, Ottawa remained the main beneficiary of the profits from offshore oil because of its direct share in offshore oil developments, as well as revenue derived from various federal taxes. For instance, as of 2007 Ottawa has received four times more revenue from Hibernia than the province of Newfoundland and Labrador ($4.8 versus $1.2 billion).[23] As well, the 1986 offshore agreement with Nova Scotia contained a promise to financially compensate the province for giving up its claim to ownership of the offshore (referred to as the "Crown share"), a promise that had never been fulfilled.[24] It was this long-simmering dispute that motivated Nova Scotia Premier John Hamm's "Campaign for Fairness," which he patiently yet persistently flogged at political and business gatherings across the country during Paul Martin's prime ministership.[25]

To fully understand the anger and resentment in the reaction of Nova Scotians and Newfoundlanders to this particular episode of federal deal breaking, one must go beyond the immediate broken trust argument (essentially, "a deal is a deal"), and even beyond the longer-term broken trust related to changes in the federal commitment in the original 1985-6 Atlantic Accords that these provinces would be the "principal beneficiaries" of offshore oil and gas development. Beyond this, it is worth noting that the accords were negotiated in the context of, and partially in response to, the longstanding partial or nonfulfillment of the commitments set out in section 36 of the *Constitution Act, 1982*.

It cannot be forgotten that in 1982 the federal government committed itself to furthering economic development to reduce regional disparities, and to an equalization program that would provide all provinces with the fiscal capacity to provide their residents with reasonably comparable levels of public services at reasonably comparable levels of taxation. If it is to be understood just why the generous provisions of the 2005 Atlantic Accords were not viewed as excessive or unfair by the governments and

publics of the two Atlantic provinces involved (in contrast to much of the reaction elsewhere in Canada), at least part of the explanation lies in the continuing perception within these provinces that the section 36 constitutional commitments have never been properly upheld or acted upon, and that federal efforts with regard to regional development in the region have been sorely lacking. This lingering dissatisfaction with past federal performance has been fused with a widespread sense that the economic returns to the provinces — promised by the rising value of nonrenewable offshore resources — was perhaps their last, best chance to break out of their perpetual "have not" status. If the resource were to be depleted without any discernible gain in economic advantage because of the federal government's policy of clawing back equalization payments, then this would not only be a blatant injustice and inequity, but also a historic opportunity forgone. In this sense, the accords were seen as belated federal acknowledgement of the need to somehow compensate the region for longstanding federal shortcomings in fulfilling its section 36 equalization commitments, and its outright failure in the area of regional development.

The Harper government decided to adopt a new equalization formula that would effectively negate the Atlantic Accords, despite this strong regional sentiment that the benefits conferred by the accords were both justifiable and overdue. This decision can be explained by a number of proximate and strategic political and bureaucratic factors. Since Harper had promised to maintain the accords prior to his elevation to prime minister in the federal election of 2006 (as loudly proclaimed by Premier Williams), reneging on this commitment constituted, in effect, a double breach of trust (personal and governmental). Presumably, this was not a decision to be taken lightly or without some foreknowledge of the likely political consequences in the affected provinces. In fact, there were a number of good reasons for the federal government to act as it did, if viewed from the point of view of strategic political calculation or party ideology. To begin, there was the hostility of the federal Department of Finance to Martin's deal on equalization, and the clear recommendation of the *O'Brien Report* to cap equalization payments at the level of the lowest nonrecipient province. Also important was the Government of Ontario's vehement criticism of the Atlantic Accords and its opposition to any enrichment of the equalization formula.[26] Likely the most important consideration, however, was the political need to craft a response acceptable to Québec and Ontario on the issue of the fiscal imbalance, the resolution of which was another promise of the Harper Conservatives. This imperative was accomplished mostly with the adoption of the O'Brien formula on equalization, which benefited Québec more than any other recipient province, and with the adoption of strictly equal per capita social transfers (excluding the health transfer, which for the time being will continue to be determined by its own separate accord). As Doug Brown remarks: "This essentially ended a long-term bias in favour of fiscally-challenged provinces — what Ontario and others somewhat misleadingly termed equalization outside the equalization program."[27]

Essentially, the Atlantic Accords were sacrificed to accomplish these broader political objectives, a decision made easier by the political isolation of Newfoundland and Labrador and Nova Scotia. Whereas in the past the Atlantic provinces could count on Québec's influence and coincident interest in equalization to augment and reinforce their own weak political situation, in this instance it was in Québec's interest to support implementation of the *O'Brien Report*. Finally, and in a more ideological vein, the Harper Conservatives' Reform-Canadian Alliance lineage instils in the government an aversion to differentiated treatment for provinces in the context of its embrace of equality as the same treatment for all (ergo, one national formula), its long-standing priority of advancing the goal of provincial autonomy over the redistribution required by regional equity, and in this connection its neoliberal hostility toward regional-development spending of the sort traditionally associated with section 36 commitments.[28]

These observations on the factors explaining the federal about-face on the Atlantic Accords raise yet again the question of how interparty

coalition politics comes into play in the conduct and institutional makeup of intergovernmental relations. In the absence of brokerage parties operating within an integrated national party system, and with the Canadian aversion to interparty legislative coalitions, "the party governments of Canada have of necessity played a game of intergovernmental coalition politics, but it is a game that does not appear to be as effective for managing the federation as either brokerage parties or coalition governments."[29]

As argued by Ken Carty and Steven Wolinetz, the competitive dynamics of Canadian party politics often work to aggravate rather than ameliorate regional tensions, though this may begin as an attempt to manage federal-provincial issues through bargaining and accommodation. This is generally played out in a number of

> under-institutionalized forums which are poorly integrated and seek to obfuscate the partisan face of the interests involved … Coalition activity emerges around issues, not programs … ongoing policy making is not governed by consistent partisan orientations or coherent electoral mandates ... The party coalitions are constantly changing … [with] no guarantee that those who begin a decision-making cycle will be around to see it through.[30]

This is an apt description of the competitive partisan dynamics, interparty coalitions, and accommodative intergovernmental bargaining of the Martin-Harper period, as they pertain to the section 36/Atlantic Accords controversy. And not surprisingly, building alliances and creating obligations in the world of federal-provincial accommodation can lead to a competitive outbidding that is corrosive of national politics. This concern is made all the more pressing by the fact that federal-party governments are by necessity engaged in a "big tent" process of interest aggregation, while provincial-party governments benefit from the articulation of provincial interests. The two partners in the coalition are therefore frequently working at crosspurposes. In short, the "fleeting, shifting, and oversized" coalitions that governing parties build across the federal-provincial divide to manage the federation tend to be "unresponsive, fragile and electorally unaccountable … Locked into this syndrome, Canadian parties hardly seem the instruments that a democratic citizenry can use for managing its federation."[31]

Remedies and "Coping Strategies"

This review of the section 36/Atlantic Accords controversy — a case study of broken trust ties in intergovernmental relations — identifies the complexity of the intertwined issues at play, simultaneously rooted in the exigencies, biases, and pathologies of executive federalism, regionalism, regional development, and the national party system. Of course, the inevitable question arises: what can or should be done? There are a range of possible remedies that might be applied, or strategies devised, for coping with the factors that contribute to eroding trust ties in this area of intergovernmental relations. Consideration of remedies and strategies is worthwhile because limiting negative outcomes, or making future instances of trust breaches less likely, might avoid the political damage such instances inflict on the capacity of the intergovernmental relations system to effectively manage the federation. As a subset of proposed reforms that address the systemic deficiencies of executive federalism, these remedies and strategies can be seen to fall into the three general categories first identified by Richard Simeon in the late 1970s: disentanglement of the two orders of government, reforming federal institutions to better represent provincial concerns and interests within those institutions, and changes to improve the machinery of intergovernmental relations.[32]

Some of the measures discussed below pertain directly and specifically to the political situation of the federation's smaller provinces, as illuminated by the section 36/Atlantic Accords controversy. Other proposed "remedies" are, in fact, reforms which address more broadly the shortcomings of executive federalism as practiced in Canada, and the "federalism deficit" that hampers and distorts the regional representativeness, responsiveness, and accountability of the political regime.

1) Disentanglement

"In some ways," Richard Simeon and Amy Nugent have argued, "the remedy for the dysfunctions of intergovernmentalism is to have less of it."[33] It can be argued that the disentanglement of federal and provincial governments in Canada has been occurring over the past two decades and is now fairly well advanced, thus reducing the need for intergovernmental coordination. Certainly in the area of fiscal relations, provincial budgets are now far more reliant on own-source revenues than they once were, with federal transfers declining in significance and the federal government far more judicious in using its spending power to leverage provincial government expenditures.[34] One idea to further disentangle federal and provincial orders of government — in the process reducing the need for intergovernmental transfers or agreements — is to follow the reasoning of Québec's *Seguin Report*,[35] and agree to an exchange or redivision of tax jurisdiction and revenues that would simplify the system and provide the provinces with sufficient revenue for their program needs, without recourse to federal transfers (for example, give the federal goods and services tax [GST] to the provinces, in exchange for provincial corporate taxes and the phasing out of the Canada Social Transfer). This would further remove the federal government (and its spending power) from provincial jurisdiction.[36]

While disentanglement may be an appealing device for reducing intergovernmental conflict, it is often difficult in the extreme to achieve in practice. Certainly this would appear to be the case for the equalization-offshore resources conflict. Federal and provincial levels of government are incapable of disengagement, yet they are resistant to any solution to their conflict that would require their further entanglement. Thus, one solution to the equalization-offshore conundrum is for offshore revenues to be sequestered by the legal owner of the resource (the Government of Canada) and placed in a special federal regional development fund. Doing so would remove this revenue stream from provincial equalization calculations, while keeping it available for regional development purposes (broadly defined). However, this "solution" would also reinstate a major regional development role in Atlantic Canada for the federal government. While this may or may not be a prospect relished by federal governments (either now or in the future), it can be surmised that there would be stiff resistance from the affected provinces, not least because of their own bitter experience with federal governments failing to fulfill their section 36 commitments ("once burnt, twice shy"). This makes the prospect of an expanded federal role in provincial economic development — using what otherwise would have been provincial resource revenues — unsavoury in the extreme, and in the end completely unacceptable as a way out of the equalization-offshore problem.

For other observers, the whole idea of disentanglement at a time of growing global interdependence is considered an unwise strategy for Canadian intergovernmental harmony. Virtually all important problems cut across jurisdictional lines, creating interdependence and necessitating intergovernmental machinery "to assist in multilevel governance or achieve coordination on matters of common concern."[37] Certainly, with regard to fiscal relations a number of public finance economists oppose the cession of further tax room to the provinces as a remedy to intergovernmental conflict. Robin Boadway, for example, bases his opposition to ceding further tax room to the provinces on tax-harmonization considerations, and the importance of federal transfers as a means of accomplishing national objectives of economic efficiency and equity. In effect, federal dominance in revenue raising leads not only to a more harmonized tax system, with advantages for the efficiency of the national economy, but also

> allows for the use of the spending power as an instrument for inducing national standards in provincial programs in accord with the principles set out in Section 36 of the *Constitution Act*. Given the division of legislative responsibilities, the use of the spending power is arguably the *only* effective policy instrument available for the federal government to fulfill these commitments [emphasis added].[38]

2) Reforming federal institutions

This solution would involve institutional reforms aimed at improving the regional representativeness, responsiveness, and accountability of the federal Parliament and government. In particular, proposed reforms to the Senate and the electoral system in the House of Commons could go some way toward accomplishing these ends. A reformed Senate might be a more legitimate chamber for representing and protecting the interests of the smaller provinces, and electoral reform might create a more stable partisan environment and produce multiparty coalition governments, which generally result in more consensual and incremental, less precipitate decision making and policy change. While comprehensive Senate reform or other previously proposed constitutional changes (such as the section 36 changes included in the 1992 *Charlottetown Accord*[39]) seem unlikely to happen anytime soon (if ever), and momentum for electoral system change seems once again to have stalled, such fundamental reform remains the best long-term strategy for addressing the democratic and federal deficits of the current Canadian political system.

Despite the formidable political obstacles to institutional reform that goes beyond mere tinkering (such as minor changes in the role of parliamentary committees), there are still possibilities for constructive institutional evolution that fall short of constitutional amendment. One example is the Harper government's attempt to use simple legislation and changes to the executive's power of appointment to progressively install elected senators with limited terms of office. If successful, this initiative might well result, over time, in a politically legitimate and regionally responsive Senate that could be invaluable for representing and protecting the interests of smaller provinces in the federation. Another possibility is an expanded role for the Supreme Court of Canada in intergovernmental relations. As noted by Johanne Poirier, if the Court were to begin to make intergovernmental agreements "legally more robust" by giving greater weight in their rulings to the federal principle involved in such agreements, the contractual concept of legitimate expectations, and the idea that constitutional conventions have emerged around such agreements, the Court might begin to place limits on parliamentary sovereignty in recognition of claims flowing from intergovernmental agreements.[40]

3) Improving intergovernmental relations machinery

As noted by Ron Watts, "as long as Canada continues to combine parliamentary and federal institutions, it will be difficult to eliminate 'executive federalism' and therefore, the focus should be on harnessing 'executive federalism' in order to make it more workable."[41] However, the current situation appears to range from poor to abysmal. In its 2006 *Report on Fiscal Imbalance*, the Council of the Federation described intergovernmental relations as "corrosive."[42] The provincial governments interviewed for the report

> identified an across-the-board decline in trust which they attributed to irregular federal-provincial meetings, called on an ad-hoc basis; last minute negotiations on major issues; wedge strategies used by the federal government to divide and rule; intergovernmental agreements … ignored at will … There is little permanence, predictability or consistency when intergovernmental agreements, many of which are achieved only with great difficulty, can be cancelled or altered unilaterally.[43]

Moreover, it seems likely that this pattern of interaction is being worsened by the progressive shift from departmentalized to institutionalized cabinets, and now to prime ministerial government (what Donald Savoie calls "Court government") in which cabinet has joined Parliament as an institution being bypassed by the prime minister's office. This "doubtless [has] exacerbated intergovernmental tension and served to weaken Cabinet as a mirror of Canada's regional diversity."[44]

One change that could improve the situation is for governments in Canada to agree to use legally binding contracts, backed up by legislation, in place of loose intergovernmental agreements. This would give the parties greater assurance that an agreement will be judicially enforced and not unilaterally altered or termi-

nated. However, this proposal would be difficult to execute in many cases due to the complexity of the policy field involved; a necessary degree of indeterminacy and flexibility in intergovernmental agreements might also be lost. It is often the case that regional development agreements are very complex arrangements, though there are instances where legally binding contracts work well. One example is the gas tax transfer agreements that funnel federal tax revenue through the provinces to municipalities. These agreements take the form of highly formalized, legally binding contracts. Another impediment to this "remedy" is provincial resistance to the level of federal oversight and accountability that the federal government incorporates into many intergovernmental agreements. The more these federal mechanisms appear in intergovernmental agreements, the less likely are provinces to agree to them.[45]

There are also some modest proposals that have been put forward from time to time to improve the performance of Canada's intergovernmental machinery. First, an often repeated recommendation has been to regularize and properly institutionalize first minister's conferences (FMCs), such that they would no longer be hostage to the political needs of the incumbent prime minister. They should be held annually and at fixed times. As noted by Martin Papillon and Richard Simeon, "a more highly structured FMC might help build trust and cooperation and transform the culture of confrontation."[46] A corollary of this change would be to develop a formal process for concluding, ratifying, and modifying intergovernmental agreements. Finally, creating legislative standing committees on intergovernmental relations at both federal and provincial levels might improve scrutiny and transparency by giving both legislators and citizens a greater role in the process. Legislatures might also be asked to ratify major intergovernmental agreements like the Social Union Framework Agreement or the Atlantic Accords.[47]

As Dupré argued a quarter-century ago, what is most lacking in Canada's system of intergovernmental relations is mutual trust. Over time, "the extent of distrust seems to have increased as relations moved from line officials, to central agency officials, to ministers, and then to first ministers. Institutional reform cannot create trust if the basic sense of common purpose and federal 'comity' is missing."[48] The section 36/Atlantic Accords controversy is only the latest confirmation of this; it represents yet another illustration of what is a worsening systemic problem for Canadian federalism.

Notes

* James Bickerton, Department of Political Science, St. Francis Xavier University.

1 Canada, *Arrangement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Revenues* (14 February 2005), online: Government of Newfoundland and Labrador <http://www.gov.nf.ca/atlanticaccord/agreement.htm>; Canada, *Arrangement between the Government of Canada and the Government of Nova Scotia on Offshore Revenues* (14 February 2005), online: Department of Finance Canada <http://www.fin.gc.ca/FEDPROV/PDF/nsae.pdf>.

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 36 reads as follows: "36 (1) Without altering the legislative authority of Parliament or the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments are committed to a) promoting equal opportunities for the well-being of Canadians; furthering economic development to reduce disparities in opportunities; c) providing essential public services of reasonable quality to all Canadians. 36 (2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."

3 Daniel Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987); Samuel LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal: McGill-Queens University Press, 1996).

4 J. Stephan Dupré, "The Workability of Executive Federalism in Canada" in Herman Bakvis &

William M. Chandler, eds., *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987) 236. Dupré cites as an example the last Trudeau government's decision to pursue its counter-offensive against provincialism into the fiscal domain.

5 Organization for Economic Co-operation and Development (OECD), *Linking Regions and Central Governments: Contracts for Regional Development* (Paris: OECD Publishing, 2007).

6 *Ibid.* at 9-20.

7 Arthur Benz, "Trust and Mistrust in Intergovernmental Relations – The Case of Germany" (a presentation to the 8th CREQC Symposium entitled La dynamique confiance/méfiance dans les Etats fédéraux ou en voie de federalisation at the Université du Québec à Montréal, 23 November 2007) [unpublished].

8 Robin Boadway, "Should the Canadian Federation be Rebalanced? A Memo for Paul Martin" (Prepared for University of Windsor Faculty of Science Seminar Series, 18 November 2003) [unpublished], online: <http://www.econ.queensu.ca/pub/faculty/boadway/windsor.pdf>; Harvey Lazar, "Opening Statement before the Senate Standing Committee on National Finances" in Proceedings of Standing Senate Committee on National Finance, No. 5 (31 March 2004).

9 Donald Savoie, *Regional Economic Development: Canada's Search for Solutions*, 2d ed. (Toronto: University of Toronto Press, 1992); Donald Savoie, *Visiting Grandchildren: Economic Development in the Maritimes* (Toronto: University of Toronto Press, 2006). Of course, there are a number of factors that contribute to an explanation for this federal failure to fulfill its regional development commitment: the embrace of the neoliberal paradigm by the federal government, the imposition of stern fiscal discipline on federal spending in the 1990s, the general political weakness of the Atlantic region and the inability of its federal representatives to protect regional interests, and the steadily diminishing political legitimacy for regional development spending after 1982.

10 *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2008 NSSC 111 (CanLII). As of June 2008, the municipality is mulling over the pros and cons of launching an appeal.

11 Laura Fraser, "C.B. lawsuit on hold for 60 days" *The Chronicle Herald* (24 May 2008) B1.

12 Canada, *Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing* (11 February 1985), online: Canada-Newfoundland and Labrador Offshore Petroleum Board <http://www.cnlopb.nl.ca/pdfs/guidelines/aa_mou.pdf>; Canada, *Canada-Nova Scotia Offshore Petroleum Resources Accord* (26 August 1986), online: Government of Nova Scotia <http://www.gov.ns.ca/energy/resources/RA/offshore/1986-Canada-NS-Offshore-Petroleum-Resource-Accord.pdf>.

13 Jennifer Smith, "Canada: a noisy squabble over offshore oil and equalization" (2005) 4:3 *Federations* 19. Famous among the bargaining tactics used by Premier Danny Williams to jolt stalled negotiations was the calculated use of rhetorical and symbolic flourishes, through his populist stoking of Newfoundland and Labrador neo-nationalist sentiment and the dramatic gesture of lowering Canadian flags outside government buildings in the capital, St. John's.

14 Richard Simeon & Amy Nugent, "Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions" in Herman Bakvis & Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy*, 2d ed. (Don Mills, Ontario: Oxford University Press, 2008) at 96; *Reference Re Canada Assistance Plan (B.C.)*, 1991 SCC 74 (CanLII).

15 This probably explains PM Harper's initial "so sue me" reaction in Parliament to charges from Nova Scotia and Newfoundland that he blatantly had breached the Atlantic Accords.

16 Canada, Expert Panel on Equalization and Territorial Formula Financing, *Achieving a National Purpose: Putting Equalization Back on Track*, (Ottawa: Department of Finance, 2006) online: EQTFF-PFFT <http://www.eqtff-pfft.ca/epreports/EQ_Report_e.pdf > [*O'Brien Report*].

17 Al O'Brien, "Strengthening Canada's Territories and Putting Equalization Back on Track: The Report of the Expert Panel on Equalization and Territorial Formula Financing" (Paper presented at the Fiscal Federalism and the Future of Canada Conference delivered at the Institute of Intergovernmental Relations, 28 September 2006), online: Institute of Intergovernmental Relations <http://www.queensu.ca/iigr/working/fiscalImb/Obrien.pdf>. A further change to fiscal arrangements announced in the 2007 budget was a switch from variable cash transfers to the provinces under the CST and CHT, with some poorer provinces receiving an additional compensatory component in the transfer, to a system of unalloyed per capita payments, a change demanded by Ontario and highly beneficial to the larger, wealthier provinces.

18 Canada, Department of Finance, *Budget 2007: Aspire to a Stronger, Safer, Better Canada* (Ottawa: Department of Finance, 2007), online: Department of Finance <http://www.budget.gc.ca/2007/index_e.html>.

19 Though the specifics of this new deal with Nova Scotia are complicated, the key elements are the federal promise of a back-end "insurance payment" in 2020 that will guarantee Nova Scotia suffers no financial penalty as the result of the 2007 budget changes. Stephen Maher, "Accord deal's value shrinking?" *The Chronicle Herald* (6 May 2008) A1.

20 Roger Taylor, "Nova Scotia accepts Wimpy deal, hopes for something later" *The Chronicle Herald* (12 October 2007) C1.

21 Campbell Clark, "Williams fumes at PM's deal with Nova Scotia" *The Globe and Mail* (11 October 2007) A8; "PM – no return to caucus for Casey" *The Chronicle Herald* (11 October 2007).

22 *Supra* note 12.

23 "The Hibernia Offshore Oil Project" *The Sunday Herald*, Nova Scotian supplement (18 November 2007) 4.

24 *Supra* note 12. As part of the Harper government's negotiated settlement with Nova Scotia in the wake of the Atlantic Accord controversy, a panel was established to adjudicate the dispute over the "Crown share" issue arising from federal nonfulfillment of the original Atlantic Accord. An agreement on the Crown share was reached in July, 2008, resulting in an award of $870 million to the province, to be paid out over 15 years. Davene Jeffrey, "$870m for Crown share" *The Chronicle-Herald* (14 July, 2008) 1.

25 "Campaign for Fairness" launched by Premier John F. Hamm (January 2001), online: Government of Nova Scotia <http://www.gov.ns.ca/fairness/>.

26 In fact, the rise of Ontario regionalism which has asserted itself in federal-provincial relations since the 1990s, can itself be traced to unilateral federal cuts to social transfers to the provinces in that decade, beginning with the "cap on CAP" in 1991, which discriminated against the better off provinces and in a recessionary period added to Ontario's rapidly expanding fiscal deficit at that time. Thenceforth, a more "Ontario first" stance has been adopted by the provincial government in the Canadian federation, particularly with regard to fiscal relations.

27 Douglas Brown, "Integration, Equity and Section 36" (2007) 37 Supreme Court Law Review (2d) 24.

28 *Ibid.* at 30.

29 J. Peter Meekison, Hamish Telford & Harvey Lazar, "The Institutions of Executive Federalism: Myths and Realities" in J. Peter Meekison, Telford & Harvey Lazar, eds., *Canada: The State of the Federation 2002: Reconsidering the Institutions of Executive Federalism* (Montreal and Kingston: McGill-Queen's University Press, 2004) 3 at 12.

30 R. Kenneth Carty & Steven B. Wolinetz, "Political Parties and the Canadian Federation's Coalition Politics" in J. Peter Meekison, Telford & Harvey Lazar, *ibid.* at 67.

31 *Ibid.* at 74.

32 *Supra* note 29 at 7.

33 *Supra* note 14 at 105.

34 Peter Leslie, Ronald H. Neumann & Russ Robinson, "Managing Canadian Fiscal Federalism" in J. Peter Meekison, Hamish Telford & Harvey Lazar, *supra* note 29, 213 at 246.

35 Commission of Fiscal Imbalance, *A New Division of Canada's Financial Resources* (Québec: Bibliothèque nationale du Québec, 2002) [*Seguin Report*], online: Commission on Fiscal Imbalance <http://www.councilofthefederation.ca/pdfs/Report_Fiscalim_Mar3106.pdf>.

36 Garth Stevenson, "Fiscal Federalism and the Burden of History" (Paper presented at the Fiscal Federalism and the Future of Canada Conference at the Institute of Intergovernmental Relations, Queen's University, Kingston, 28 September 2006) at 15, online: Institute of Intergovernmental Relations <http://www.queensu.ca/iigr/working/fiscalImb/Stevenson.pdf>.

37 *Supra* note 14 at 94.

38 *Supra* note 8 at 8-9.

39 Canada, *Charlottetown Accord: Draft Legal Text* (Ottawa: Queen's Printer, 1992).

40 *Supra* note 29 at 15. See also Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in J. Peter Meekison, Telford & Harvey Lazar, *supra* note 29, 225.

41 As sited in J. Peter Meekison, Telford & Harvey Lazar, *supra* note 29 at 7.

42 Council of the Federation, Advisory Panel on Fiscal Imbalance, *Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance* (Ottawa: Council of the Federation Secretariat, 2006) at 17, online: <http://www.councilofthefederation.ca/pdfs/Report_Fiscalim_Mar3106.pdf> [*Report on Fiscal Imbalance*].

43 *Supra* note 14 at 99-100 [quotation marks removed].

44 *Supra* note 29 at 13. See also Donald Savoie, *Court Government and the Collapse of Account-*

ability in Canada and the United Kingdom (Toronto: University of Toronto Press, 2008).

45 *Supra* note 5 at 188-191.

46 Martin Papillon & Richard Simeon, "The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations" in J. Peter Meekison, Telford & Harvey Lazar, *supra* note 29, 113 at 132.

47 *Supra* note 14 at 106.

48 *Supra* note 46 at 134.

Constitutional Change to Address Climate Change and Nonrenewable Energy Use

Lynn McDonald*

Climate change, or climate breakdown, is arguably the greatest challenge we now face. The need to address it seriously has been widely accepted by all national political parties in Canada, if only lately and grudgingly. Yet Canada is far behind European countries in turning to low-carbon energy sources — we remain the world's highest per capita energy user and carbon emitter. We signed the Kyoto Protocol,[1] but far from meeting our obligations under it, we have increased our greenhouse gas emissions. Our record is worse than even the Americans, who did not sign Kyoto.

The problem of climate change has a twin demon that must be considered at the same time: fossil fuels, the nonrenewable energy source that has fueled the industrial revolution and has largely caused the global heating at issue. Not only do fossil fuels cause greenhouse gas emissions and otherwise pollute the environment, but we have been using them up, especially the most efficient and least polluting oil and gas (coal will be around for longer, but is still a nonrenewable resource). Oil and gas are valuable resources, indispensable for such uses as airplane flight, as far as we know. (Renewable fuels might well power airplanes, but it would be unwise to have confidence in such a technological advance.) The debate about "peak oil" misses the crucial point. Peak oil occurred millions of years ago. On both climate, and many other issues of environmental deterioration, the science has been done — the recommendations are comprehensive and there are successful models from other similarly prosperous, industrialized countries, but yet we fail to act.

Political constraints, it will be argued here, are part of the reason for Canadians' inaction on these urgent matters. Change is needed, from the broad level of the Constitution to the more mundane level of corporation and election acts, and policies directed at taxation, transportation, the armed forces, immigration, municipal governance, and government procurement. Space travel and Arctic exploration should probably be added to the list. Change is needed in all government jurisdictions, and coordination among them is crucial; but the focus in this article is Canada's federal Constitution,[2] which is an obstacle to the revision of key statutes and to the development of practical programs of remedy.

It would be grossly premature to suggest any particular set of new constitutional sections or clauses, or any particular amendments. The purpose here rather is to explain why full-scale revision of the Constitution is needed — when ours is so young — and to provide direction and criteria to be met. A process of radical rethinking and exploration of alternatives is needed before specific drafting of constitutional proposals can be undertaken. We need no less than a "green Enlightenment" akin to that of the eighteenth-century Enlightenment, which stimulated and shaped the democratic constitutions of the following centuries.

We are faced today with a major moral challenge — a few generations, comprised largely of rich Westerners, have nearly extin-

guished an extremely valuable resource at the expense of vast numbers of people and other species. This deprivation is a consequence of our extravagant, industrial way of life. Future generations will inherit a deforested landscape, dead oceans, polluted cities, and will have to live with higher temperatures, tornados, floods, fires, and storms. The Canadian Constitution lacks any facility for dealing with a crisis of this magnitude. In particular, the Constitution does not have any mechanisms for dealing with the use of key scarce nonrenewable resources such as fossil fuels. The only relevant constitutional consideration has been the determination of the level of government with authority to regulate. Conservation of one-time resources is not mentioned, nor are the needs of future generations, regardless of what province they may live in. Canada's constitutional documents have not been written with future citizens, let alone geological time, in mind.

A Constitution is Grounded in Time and the Problems of its Age

In order to understand why our Constitution is so far from being adequate for the challenges of our day, we have to look at the conditions of its time of formulation in Britain, effectively the 1860s. After all, the *British North America Act* (renamed the *Constitution Act, 1867*) remains the core of the present federal Constitution. The more recent *Constitution Act, 1982*, and in particular the *Canadian Charter of Rights and Freedoms* is, in fact, the work of a remarkably short period of time, effectively 1980-81.[3] These additions to the constitutional framework reflect not only the constitutional predilections of the then prime minister, Pierre Elliott Trudeau, but also the eighteenth-century Enlightenment, the principles of which guided him and most constitutional thinking of the Western world in the nineteenth and twentieth centuries.

The great problems of the eighteenth century in Europe were poverty, disease, ignorance, intolerance, and vast inequalities of class, race, and gender. Economic downturn meant actual starvation for the poorest members of society, so greater productivity was an aim of social justice during this time. The rising use of fossil fuels to increase production meant a better standard of living for vast numbers of people, although terrible misery for many in the course of their development. Scientific knowledge and technological application to reduce poverty and disease, alas, have had the unintended consequence of increasing global temperatures and pollution.

The enunciation of the principles of the sovereignty of the people (as opposed to the divine right of kings), liberty and equality (when ordinary people were largely bereft of rights), and universalism (against the great divisions of class, race, and gender) led, in time, to great advances for the vast majority of the population. Enlightenment thinking provided the moral and intellectual energy that nourished the great reform movements of the nineteenth (and twentieth) centuries: the abolition of slavery, the right to vote for all citizens, equality rights for women, tolerance for different religious and political views, rights for workers, and eventually rights for persons of a different sexual orientation, the disabled, and others. The collective right to self-determination of peoples, recognized by the United Nations, similarly derives from this earlier thinking.[4] By the time of the *Constitution Act, 1867,* pollution from industrialization was evident, especially in the manufacturing towns of England.[5] But oil had only just been discovered (in the United States) and gas had not yet come into use. Coal seemed to be plentiful, and the ecological problems it produced were still unknown. That no attention was given to intergenerational justice in the 1867 Constitution reflects the obvious fact that no resource was seen to be limited; no one considered that their use (and depletion) might deprive others of their rights. The Enlightenment notion of an individual's right to be limited only at the point where one's actions impinge on the rights of others seemed to apply only to those in the here-and-now. That understanding, of course, was well articulated by John Stuart and Harriet Taylor Mill in *On Liberty* in 1859, the period just prior to the framing of the *Constitution Act, 1867*:

> That the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their

> number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[6]

This principle would come to inform such debates as that over private morality, notably in the legalization of homosexual acts between consenting adults. That future generations might be harmed by the sale and use of our energy resources was simply not widely considered at that time. We know better now; fossil-fuel use, along with other harmful industrial practices, should be approached from the point of view of the harm it inflicts.

Who counts in the consideration of harm remains, of course, a divisive question. Enlightenment thinking radically extended the circle of consideration. Jeremy Bentham's writing on utility theory suggested several levels at which consideration of harm should be engaged: from particular individuals to "the whole nation" (thus including both sexes and all classes), "humankind in general" (including all races), and even possibly "the whole sensitive creation" (other species).[7] With climate breakdown and the depletion of nonrenewable resources, we need to add another category to Bentham's Enlightenment framework: future generations.

Thomas Malthus, in his *Essay on the Principles of Population* written in 1798, did provide early caution of the importance of the notion of limits. Indeed, the "limits to growth" movement of the 1970s is often called neo-Malthusian in recognition of this, although the original theory was limited to addressing the tendency of population growth to outstrip food production. The availability of new farmland in the New World, and the later use of fossil fuels, pesticides, and fertilizers, however, resulted in vastly increased food production, apparently disproving Malthus's theory. We should be less confident now, recognizing the finitude of fossil fuels used in food production, and the severe pollution effects of fertilizers and pesticides, etc. In turn, increases in our capacity to increase food production — the green revolution — increases our water consumption needs; some think access to fresh water is a concern as serious as climate change itself.

By the time of the *Constitution Act, 1867*, industrialization had gone far enough to cause greenhouse gas emissions beyond the Earth's capacity to absorb them. But this was not widely known. In 1895, the Swedish scientist Svante Arrhenius hypothesized an increase in ground temperatures from the "carbonic acid effect" of burning coal in his now famous paper: "On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground."[8] The potential for a greenhouse effect had been argued even earlier, in 1824, by the French chemist Jean-Baptiste Joseph Fourier, but it was Arrhenius who took the next step of predicting how much temperatures would rise. These predictions have turned out to be remarkably accurate. Arrhenius later won the Nobel Prize, but not for this work.

Scientific consensus on the occurrence of potentially serious global heating emerged only in the late 1980s, not long after the coming into effect of the *Charter of Rights* in 1982. The Intergovernmental Panel on Climate Change (IPCC), which released its first report in 1988, would become the major source of information about global heating. In Canada, the House of Commons Standing Committee on Environment began issuing (unanimous) reports arguing for urgent action to reduce greenhouse gas emissions. In 1990, there was *No Time to Lose: The Challenge of Global Warming*, in 1991, *Out of Balance: The Risks of Irreversible Climate Change*. Paul Martin was an alternate member of that committee, yet as finance minister he provided subsidies for the tar sands project, the major source of Canada's increased emissions, and as prime minister he allowed greenhouse gas emissions to soar after the signing of the Kyoto Protocol.

The Canadian reports provided concrete measures, formulated by experienced political actors including former cabinet ministers, for implementing action on climate change. The first report had seventeen recommendations, ending with the requirement that all federal departments and agencies, as part of their budget submissions, 1) report on direct and indirect impacts of their operations on global warming, and 2) set annual targets for reductions in green-

house gas emissions.[9] The second report recommended that environment ministers develop policies, programs, and regulations to span the full range of activities of the federal government, analogous to those of the finance minister, and to report annually to Parliament on the environmental impact of all federal activities.[10] This was not done. The recommendation that the auditor general establish an environmental audit function was acted upon,[11] but not at the level sought, which was to ensure a truly comprehensive response to global warming.

By 1997, this parliamentary committee, renamed the Standing Committee on the Environment and Sustainable Development, again unanimously recommended that the prime minister, along with a small team of senior officials, assume responsibility for implementing Canada's Kyoto climate change commitment. Furthermore, the committee recommended, naively as we now see, that if greenhouse gas reductions exceeded the mandated target or schedule, then the target should be raised or the timetable shortened, or both.

The science of the problem is now known, a whole host of practical solutions have been advanced over the past few decades, and considerable attention has been given to the administrative structures needed to facilitate action on climate change. To understand why these efforts have not resulted in action we detour to the principles at the base of our constitutional thinking.

Sovereignty of the People: its Rise and Decline

One of the great legacies of the Enlightenment is the principle that people have the right to determine their collective affairs. In Canada, democracy is founded on this principle in the form of a constitutional monarchy. But since the *Constitution Act, 1867*, the rights of the people have been diminished in ways pertinent to action on climate change and other forms of environmental deterioration. While the original federal Constitution did not give corporations rights equivalent to individuals, corporations have acquired them by judicial interpretation. Arguably, this phenomenon has contributed to the diminution of human rights and the health of the environment.

The *Charter of Rights* is grounded in Enlightenment principles that were oriented entirely towards individuals, but, as entities analogous to individuals, corporations have been deemed to possess freedom of speech, including the freedom to advertise lethal products like cigarettes and energy sources like the tar sands. Individual human beings concerned about health, life and death, now see their sovereign right to government action impeded by these corporation rights. Measures to ensure "liberty of expression" were intended to keep the likes of Voltaire and Diderot out of prison for their writings on social reform. That these rights should be used to guarantee the ability of corporations to advertise hazardous products seems a grotesque distortion of such a lofty Enlightenment principle.

The cases themselves are shoddy: in the United States an 1886 Supreme Court decision, *Santa Clara County v. Southern Pacific Railroad*,[12] declared that corporations were legal "persons," and thus protected under the U.S. Constitution's Fourteenth Amendment, the very amendment that was used to free slaves. The 1989 ruling of the Supreme Court of Canada (SCC) on a Québec law prohibiting the advertising of toys to children under thirteen, while less outrageous, is also perverse.[13] The SCC drew on the "large and liberal" interpretation its earlier decisions had given to *Charter* rights, to decide that "there was no sound basis on which commercial expression can be excluded" from the *Charter* protection of free expression.[14] Decisions like this one narrow and reduce the right of actual people, through their legislators, to make public policy on matters of life and death, such as cigarette advertising.

Canadian measures taken to curb greenhouse gas emissions can also be countered by foreign governments prompted by their own corporations, thanks to commitments made in the 1992 North American Free Trade Agreement, and in 1994 by the World Trade Organization.[15] Both corporation rights and trade agreements trump the gains made through

democratic reform of domestic government institutions.

The Impediment of Divided Jurisdiction

On top of the problem of diminished sovereignty, those seeking action on the climate crisis in Canada come up against the thorny problems of our federal structure of government, as illuminated by the division of legislative jurisdiction in the *Constitution Act, 1867*.[16] Climate change is a global matter, and the federal government has jurisdiction over international matters generally. But matters of private property, including nonrenewal natural resources, are under provincial control. Oceans and fisheries are federal matters, while agriculture is a joint federal-provincial matter. The list goes on. In any case, while the federal level retains the power to regulate to advance the "peace, order and good government" (POGG) of the country, this wording was not devised with polar melting, rising oceans, and deforestation in mind. Indeed, Alistair Lucas has argued that there is no "federal pre-emption of legislative authority in relation to national environmental protection," though there is a possibility that measures for greenhouse gas control "could meet the peace, order and good government criteria."[17] Nevertheless, the scale of impact of any such federal scheme on core provincial powers over property, natural resources, and local industry weighs against federal jurisdiction. While views among constitutional experts are divided on the validity of a national emissions trading scheme led by the federal government,

> none have concluded that the federal government has constitutional jurisdiction broad enough to permit an optimal scheme to be tailored. Consequently, there is at least a likelihood that the federal government lacks constitutional authority to legislate national standards and the necessary framework for a national emissions trading system.[18]

But the "optimal" scheme might be precisely what we need. Federal-provincial agreement on climate change action would have to be reached for a concerted scheme to deal with the climate crisis, and Canada's federal Constitution does nothing to facilitate this.

There is no reason to blame federalism. Germany, of course, is a federal state, but it has done much more than Canada has to reduce greenhouse gas emissions. Europeans, generally, express greater and more immediate concern regarding energy use, availability, and security, and their thinking about climate change is less clouded by the erroneous belief that some countries are fortunate "producers" of oil. Norwegians, who still extract North Sea oil and gas, realize the limited nature of their good fortune. They require higher royalties and as a result have a much richer heritage fund than Alberta. (Related to this point is the argument in favour of replacing the word "production" with "extraction," and "heritage fund" with "heritage depletion fund" when nonrenewable resources are at issue.)

The Scope of Response Needed

The magnitude of the response required to address climate change necessitates that we be clear about the extent of the change we need in available political tools. That the ozone crisis was met successfully (at least apparently) should give no cause for comfort. Scientific opinion makers alerted politicians to the problem, and action was taken in time. Brian Mulroney's Progressive Conservative government even played a vital role in the achievement of the Montreal Protocol for the reduction of ozone-depleting substances.[19] But these substances were few in number and, it turned out, cheaper alternatives were available. Consumers could make their displeasure known by simply not buying certain devices and containers, with minimal inconvenience. Consumers were not told to stop driving their SUVs or taking cheap flights.

In its 2007 report, the Intergovernmental Panel on Climate Change stated that the amount of reduction in greenhouse gas emissions required to deal with the climate crisis is 85 percent.[20] George Monbiot argues that a 90 percent reduction is the average required for industrial countries. Canada, in Monbiot's estimation, must reduce greenhouse gas emissions

by 94 percent.[21] These figures are based on the objective of keeping the average global temperature increase to 2 degrees, the amount beyond which there is good reason to believe that vast, swift, and unpredictable climate disasters could occur. Nevertheless, Canada has failed to meet its 1997 Kyoto goal of a 6 percent reduction.

Unless these figures can be refuted, and lower, easier-to-reach targets set, we have a long way to go. The goal of a 50-60 percent reduction in greenhouse gas emissions, set by some European countries, American states, and Canadian provinces and cities, is still inadequate if our best experts are correct (and not too optimistic in their predictions). The necessary reductions of greenhouse gas emissions cannot be achieved by technological advances within our current political and economic system.

Monbiot offers a feasible strategy the British public could use to achieve 90 percent carbon reductions in such key sectors of the economy as transportation, manufacturing, government, retail sales, and housing — no equivalent attempt has been made for Canada, where most of Monbiot's proposals would require legislative changes that squarely face the impediment of our federal Constitution. Still, we have to consider both constitutional revision and legislative rewriting, as well as changes to our regulatory framework, our government procurement practices, and so on.

In arguing for massive system-level change to meet the climate crisis, let it be made clear that no current socioeconomic model is exempt. If capitalism is a culprit, so too are communism, socialism, and Chinese-style communism-capitalism. Industrialism, in fact, is the culprit in whatever type of state it exists. This is the case whether the state is capitalist, social democratic, or has a centrally organized economy. Mixed European social democracies seem to have done, so far, the best job of acting on the climate crisis, but they too have a long way to go to meet IPCC targets.

Can a largely capitalist, democratic country with a significant welfare state (such as Canada) make the adaptations necessary to meet the climate crisis before it's too late? Can other, larger, more important countries adapt their political forms? We have reason for hope, as we have seen massive changes in capitalist economies with the incorporation of welfare state measures for income security, and social programs like medicare, counter-cyclical economic measures, and so forth.

Modern capitalism, even as promoted by its far right-wing advocates in Canada, differs greatly from its laissez-faire nineteenth-century ancestor. It has been argued that the threat of Bolshevism was the great stimulator of social reform in nineteenth-century capitalist economies, with the Russian Revolution convincing capitalists that a measure of reform would be better than risking property confiscation and exile. As Marxist historian Eric Hobsbawm has argued, the Russian Revolution "proved to be the Saviour of liberal capitalism, both by enabling the West to win the Second World War against Hitler's Germany, and by providing the incentive for capitalism to reform itself."[22] Many Russian property owners did go into exile and became living examples of the threat of Bolshevism to the wealthy in the West. The equivalent threat, with regard to global warming, is not so immediate or obvious.

Principles of a Green Enlightenment

Instead of "life, liberty, and the pursuit of happiness," or even "peace, order and good government," we need "caution, accountability and respect for unintended consequences" to be our governing watchwords. Rather than "more is better," we need "make your mistakes small." Activities both in the public and private sector must be monitored for their effects on worsening climate change and other forms of environmental deterioration. We need a healthy respect for the potential of the principle of unintended consequences to act as a counter to our intentional actions.

Do no harm. Enlightenment optimism and confidence in progress must be tempered with the great principle of the Hippocratic school of medicine (5th century BCE), which is above all to do no harm. Florence Nightingale famously argued that this should be applied to hospitals

and not just doctors. We might now want to apply the same principle to holders of political power (prime minister and cabinet, mayors, and municipal councillors), economic power (corporate executives, directors, and trade union officials), and leaders in other areas (health care, media, sports, culture, etc.).

Avoid old binaries. Left-right politics have little relevance to the climate crisis and the environment generally, however important they may remain for traditional conflicts between haves and have-nots and other dimensions of social justice. Some of the worst projects around the globe, as far as environmental deterioration and climate change are concerned, have been initiated in the name of development and human betterment. The massive water diversion projects of the old Soviet Union are a case-in-point. The public-private divide is also irrelevant to grappling with the climate crisis. Indeed, some of our greatest environmental disasters — overfishing leading to vast losses of fish stocks in Newfoundland and Labrador, or tar sands development in Alberta — were not only permitted by governments but subsidized by vast quantities of tax dollars. In the same vein, the federal-provincial divide should be revisited with a view to facilitating action on the climate crisis. The significant dichotomy today is not which level of government, but rather what type of resource is at issue — renewable or nonrenewable? Different mentalities, moralities, and modes of governance are needed for each of the two types, and debate over the choice of resource should not proceed without engaging the moral rights of future generations.

Successful Models

The change scientific authorities deem necessary to deal with the climate crisis is enormous, but it is important to remember that human societies have managed to make massive change before, sometimes doing so in a short period of time. The abolition of slavery and apartheid, the achievement of equality rights for women, and the introduction of measures of democracy in many countries, international cooperation among members of the United Nations and its organizations, are all examples of enormous social change. Change happens rapidly at times, as it did when the Berlin Wall fell and the Soviet bloc collapsed, leading to some measure of disarmament and *détente* among military superpowers.

On the environment itself there is the example of the ozone crisis. In response, Canada played an important role in getting an international treaty — the Montreal Protocol — off the ground. On climate change, Canadian scientists and the Canadian government have provided key input at several (early) stages. We do not have to start at zero, even if we have a long way to go.

First Nations peoples in Canada and elsewhere have traditions and principles that could be enormously helpful as models for action in dealing with the climate crisis. The long time span with which Aboriginal peoples frame deliberations — seven generations hence — is far better than a focus on the next election. First Nations' concepts of communal land ownership, in perpetuity, are more conducive to conservation than the industrial land-as-commodity notion prevalent in western capitalist societies. First Nations' respect for other species might be similarly more conducive to good practice than western instrumentalism. Their concept of the Earth-as-entity — Mother Earth — might again be better than the industrial approach, which views the Earth as an inert repository of "natural resources."

Judicial activism in Canada has extended the rights of First Nations *peoples* and stimulated important legislative changes and financial settlements. The next challenge our constitutional thinkers face is the incorporation of First Nations *principles* into the Constitution itself.

A host of other structural changes is needed to facilitate action on climate change and resource conservation. Electoral system reform, resulting in more proportional representation in Canada's legislative bodies, would result in the election of more environmentalists, notably from the Green Party. It would also likely result in frequent minority governments, which have been good for the achievement of social justice measures such as the old age pension, and con-

trols on election spending and reportage. Constitutional change to bring in proportional representation should be a priority item in dealing with the climate crisis.

International conventions also have to be revisited in the light of the climate crisis. From its inception in 1864, the Geneva Convention[23] has aimed to reduce harm to ordinary people by limiting the "right" of states to make war. War and the preparation for it are major contributors to greenhouse gas emissions, and to the release of other toxic substances into the atmosphere, oceans, and soil. Yet "national defence" has traditionally been exempted from environmental assessment; even the idea of its inclusion seems ridiculous, since war is intended to be harmful. Yet Canada's military, for decades now, has been engaged in activities justified as peace making — neither territorial aggrandizement nor vanquishing the Queen's enemies has been the stated aim of military action. Our own Constitution keeps the decision to go to war within the executive; Parliament need not be consulted. (Any democratic control over such a decision is, unhappily, no guarantee that thinking about war will be different, as was seen when the United States Congress ceded its power to the president in the case of the Iraq war.)

Environmental bills of rights have been adopted in some jurisdictions, but there will be no argument here for such a tactic. Much more fundamental change is required. The very notion that people have a right to a healthy environment, when we make the lifestyle choices we do, is ludicrous. Rather we need to conceptualize some way of securing rights for future generations. This reconceptualization requires the curtailment of rights for individuals and corporations in the here and now. Town hall meetings across the country, with citizen participation, and with input from specialists in values and ethics, would be a helpful step towards rethinking fundamental principles.

Such a process produced excellent results in the refinement of the *Charter of Rights* between 1980-82. Women, notably, made great gains in advancing a shift in rights conceptions relating to women, surprising the federal government in the course (and indeed themselves), for there were few women constitutional lawyers to draw upon and there was virtually no academic literature to assist in justifying *Charter*-rights protection for women.

Revision of the Constitution and other statutes to deal with climate change will be divisive. Pessimists will point out that the French Enlightenment was followed by revolution, The Terror, and the Napoleonic wars. Slavery was ended in the United States only after a devastating civil war. If we do not act vigorously and promptly, however, we must expect unprecedented environmental breakdown. Scarce resources themselves are causes of war. Realists must rise to the occasion, and the sooner we start the better for all.

Al Gore found an example in Abraham Lincoln's ability to see opportunity in all the difficulties of the American Civil War: "As our case is new, we must think anew and act anew. We must disenthrall ourselves and then we shall save our country."[24] Gore argues that Americans of our day have also to "disenthrall" themselves from the "sound-and-light show" that has diverted attention "from the important issues and challenges of our day."[25] Our issues and challenges surely include climate change. Gore quotes the proverb: "Where there is no vision, the people perish" (Proverbs 29:18), optimistically adding that there is another side: "Where there is vision the people prosper and flourish, and the natural world recovers and our communities recover."[26] Gore insists, and rightly I believe, that the knowledge of what to do is available. What we need is political will, which Gore described as "a renewable resource in a democracy."

My concluding point is that the political will to deal with the climate crisis has to be directed to revising our constitutional framework, as well as dealing with the substance of the climate crisis as such. We must change the Constitution, and numerous statutes and policies, to make action on climate change possible. Let's agree that a crisis also brings with it opportunity, and let's get on with that greatly needed creative thinking.

Notes

* Lynn McDonald, university professor emerita, University of Guelph, former MP and environment critic; for her work on climate change see: online, <www.justearth.net>. As president of the National Action Committee of Canada she gave that organization's brief to the Senate-Commons committee on the *Charter of Rights and Freedoms*, and has written and worked on obtaining equality rights for women, notably for First Nations women.

1 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997. UNFCCC COP 3d Sess., UN Doc FCCC/CP/1997/7/Add.1, 37 ILM 22 (1998) [Kyoto Protocol].

2 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No.5.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

5 United Kingdom, *Alkali Act, 1863. Fourth Annual Report by the Inspector of his Proceedings During the Year 1867* (London: Eyre & Spottiswoode, 1868) at 4; and see Robert Angus Smith, *Air and Rain: the Beginning of a Chemical Climatology* (London, Longmans, Green, and Co., 1872).

6 John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society Part I*, John M. Robson, ed. (Toronto: University of Toronto Press, 1977) at 223.

7 Jeremy Bentham, "Introduction to the Principles of Morals and Legislation" in John Bowring, ed., *The Works of Jeremy Bentham,* reprint of 1838 ed., (New York: Russell & Russell, 1962) 1:25.

8 Svante Arrhenius, "On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground" (1896) 41 London, Edinburgh and Dublin Philosophical Magazine and J. of Science. 237.

9 House of Commons, Standing Committee on Environment, *No Time to Lose: The Challenge of Global Warming* (October 1990) at 15, 19.

10 House of Commons, Standing Committee on Environment, *Out of Balance: The Risks of Irreversible Climate Change* (March 1991) at 83-4.

11 House of Commons, Report of the Standing Committee on Environment and Sustainable Development, "The Commissioner of the Environment and Sustainable Development" (May 1994). In 1995 a Commissioner of the Environment and Sustainable Development was created within the Office of the Auditor General of Canada.

12 *Santa Clara County v. Southern P.R. Co.*, 118 U.S. 394 (U.S. 1886).

13 *Irwin Toy Ltd. v. Quebec* (Attorney General), 1989 SCC 87, [1989] 1 S.C.R. 927 (CanLII).

14 *Ibid.* at 977.

15 Alastair R. Lucas, "Legal Constraints and Opportunities: Climate Change and the Law" in Harold Coward & Andrew J. Weaver, eds., *Hard Choices: Climate Change in Canada* (Waterloo: Wilfred Laurier University Press, 2004) 179.

16 The division of powers was altered with the addition of Section 92A to the *Constitution Act, 1867.* This section addresses provincial jurisdiction over "Non-Renewable Natural Resources, Forestry Resources, and Electrical Energy," and came into force as part of the *Constitution Act, 1982*.

17 *Supra* note 15 at 186.

18 *Ibid.* See also Stewart Elgie, "Kyoto, The Constitution, and Carbon Trading: Waking a Sleeping *BNA* Bear (Or Two)" (2007) Review of Constitutional Studies 67.

19 United Nations Environment Programme, *The Montreal Protocol on Substances that Deplete the Ozone Layer* (Nairobi: UNEP, 2000) [Montreal Protocol].

20 Intergovernmental Panel on Climate Change, Summary for Policymakers in B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, & L.A. Meyer, eds., *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, U.K. & New York: Cambridge University Press, 2007) at 15.

21 George Monbiot, *Heat: How to Stop the Planet from Burning* (Toronto: Doubleday, 2006) at 15-16.

22 Eric Hobsbawn, *The Age of Extremes* (New York: Pantheon, 1994) at 84.

23 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864 [Geneva Convention].

24 Al Gore, *The Assault on Reason* (New York: Penguin, 2007) at 212.

25 *Ibid.* at 213.

26 *Ibid.*

The Applicability of Section 7 of the Charter to Oil and Gas Development in Alberta

Nickie Vlavianos*

Introduction

When Albertans think about human rights in the context of oil and gas development, many think of Africa, and for good reason. Indeed, the tragic events that have unfolded in Sudan in recent years may come to mind. Few, however, will turn their minds to the possibility of human rights violations occurring in their own province. And yet, in at least three court applications over the past year or so, landowners have raised the spectre of the applicability of human rights law in the context of oil and gas development in Alberta. Specifically, the possibility of the application of section 7 of the *Canadian Charter of Rights and Freedoms* is at issue.[1] Arguments have been based on both aspects of section 7 — the right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice (or procedural fairness), including rights to a fair hearing, to reasonable notice, and to reasons for a decision. Although no definite ruling has yet emerged, in none of these cases was it suggested that section 7 is inapplicable in the context of the actual and potential environmental and health impacts of oil and gas development (or other industrial development for that matter). Where there might have been doubt about this issue before, there does not appear to be any now.

The *Graff* Leave to Appeal Application

In *Graff v. Alberta (Energy and Utilities Board)* Barbara, Larry, and Darrel Graff (the "Graffs") applied to the Alberta Court of Appeal for leave to appeal a decision by the province's energy regulator, now the Energy Resources Conservation Board (ERCB).[2] Decisions from the ERCB may be appealed to the Court of Appeal on a question of law or jurisdiction, with leave of the court. Leave will be granted where the applicant demonstrates that the question of law or jurisdiction raises a serious, arguable point. Subsumed in this test are four factors: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious; and (4) whether the appeal will unduly hinder the progress of the action.[3]

The Graffs' leave to appeal application was related to an ERCB decision in which the board had refused the family's request for a review of a prior board approval authorizing the drilling of a gas well near their property. In their letters to the board, the Graffs stated that the proposed well would have adverse effects on their health and safety. Elsewhere, the Graffs have explained that their worries about further oil and gas activity near their home stem from concerns about the potential adverse effects of the activity on their already compromised medical condition (known as chemical encephalopathy). This condition is akin to asthma and is exacerbated by emissions from the venting, flaring, and incineration of natural gas; it also involves excessive sensitivity to chemicals.[4] Among other things, the Graffs submitted to the board that approval

of this well without allowing their concerns to be heard by the board would amount to a violation of their rights protected by section 7 of the *Charter*.

The board denied the Graffs' request for a review of the well approval on the basis that the family had failed to demonstrate that it was directly and adversely affected by the proposed well. Section 26 of the *Energy Resources Conservation Act*[5] grants standing to be heard by the board on a well application to anyone whose "rights may be directly and adversely affected" by a board decision. In this case, the board noted that there was no hydrogen sulphide (sour gas) expected to be produced by the proposed well and that the Graffs' land was 18.7 kilometres away. According to the board, for participatory rights to be triggered there must be a reasonable connection between a party with special needs and the proposed application, and there was no such connection here. Responding to complaints about a possible breach of section 7 of the *Charter*, the board stated that the Graffs had not provided sufficient information to substantiate how their rights had been directly and adversely affected by the well.

Before the Court of Appeal, the Graffs sought leave to appeal the board's decision on a number of grounds including the claim that the board had erred in law or jurisdiction

> by jeopardizing the lives of Barbara and Darrell Graff by permitting proposed activities authorized by the well license such that their only opportunity for survival is to abandon their source of livelihood, in violation of their rights to life and security of the person guaranteed to them by section 7 of the *Charter*.[6]

During oral argument before Justice Hunt, counsel for the board acknowledged that its decision had been based on misinformation about the distance between the Graffs' land and the proposed well. Rather than 18.7 kilometers, the actual distance was 2.5 kilometers. Especially (but not only) because of this error, Justice Hunt granted leave to appeal the board's decision. Leave was granted on the grounds of the need to determine whether the ERCB had erred in law or jurisdiction: (a) by concluding that the Graffs were not directly and adversely affected by the proposed well; (b) in the board's interpretation and application of Directive 056 to the Graffs (regarding public consultation requirements); and (c) in failing to take into account the cumulative effect on the Graffs of the proposed well along with other wells near their property.

Although leave was granted to the Graffs to appeal the board's decision, leave was not granted specifically on the section 7 ground; nor did the court comment directly on the viability of section 7 in this context. Still, it was not explicitly rejected as lacking merit. Rather, with respect to the other grounds advanced (including that based on section 7 of the *Charter*), the court commented that it "was not satisfied that the test for leave has been made out in regard to some of the other proposed questions, and some are subsumed by the above three questions in any event."[7]

The *Kelly* Leave to Appeal Application

Kelly v. Alberta (Energy and Utilities Board) began with two applications to drill two sour oil wells, which had been approved by the ERCB. Interveners in the board's proceeding applied to the Court of Appeal for leave to appeal the board's decision.[8] Before Justice Berger, the applicants successfully raised two grounds of appeal. First, they argued that the board had acted without jurisdiction and erred in law by misconstruing and failing to apply its own directive (Directive 056) with respect to well-licensing applications, and in particular the requirements for public consultation that applicants must meet prior to submitting applications to the board.

Section 7 of the *Charter* was argued as the second ground of appeal. As summarized by Justice Berger, the thrust of the applicants' argument was that, in approving these wells, the board had acted without jurisdiction and erred in law by requiring residents to voluntarily relocate or to continue to live in their homes, while exposed to an unacceptable level of risk during the drilling and completion of the proposed wells. The company's evidence before the board was that at least eight families lived in an area of above-average risk.

Justice Berger noted that the board had reached a number of critical conclusions about the level of risk involved in this case. In particular, the board had concluded that: (a) drilling the wells presented an inherent hazard for the residents in the area; (b) the company had an obligation to inform those living in the area of the risk posed by its operations; and (c) relocating residents was the best option to reduce the risk to them. Nonetheless, the board did not impose a condition on the well approvals that the residents who live in the areas of unacceptable risk be required to leave before drilling proceeds; nor did the board address the issue of compensation for those who chose to leave.

In these circumstances, the court concluded that it is at least arguable that the applicants should be entitled to advance an argument, on appeal, that section 7 of the *Charter* may be invoked, and that an infringement of section 7 has been made out if the applicants can establish three things. These are: (a) that there has been a real or imminent breach of the life, liberty, or security of the person; (b) that there are relevant principles of fundamental justice that apply; and (c) that the deprivation of the life, liberty, or security of the person has not been in accordance with relevant principles of fundamental justice. Citing the Supreme Court of Canada decisions in *Charkaoui v. Canada (Citizenship and Immigration)*, *Chaoulli v. Quebec (Attorney General)*, and *Godbout v. Longueuil (City)*,[9] Justice Berger concluded that the *Charter* argument satisfied the test for leave, namely, that it raised a serious arguable point which has a "reasonable prospect of success."[10]

In granting leave to appeal on this ground, Justice Berger acknowledged that the applicants had not raised section 7 of the *Charter* before the board, nor had proper notice of an intention to raise a constitutional question been given.[11] In Justice Berger's view, this was of no consequence because, as he stated, it is in part the board's findings of fact that had given rise to the section 7 argument in this case. Justice Berger's approach on this procedural point is correct. One cannot give advance notice of a *Charter* issue which arises *after* the board has exercised its discretion and has rendered its decision in a particular case. Indeed, parties are entitled to presume that statutory delegates like the ERCB will exercise their discretionary powers in ways that do not violate the *Charter*.[12]

The *Domke* Leave to Appeal Application

In *Domke v Alberta (Energy Resources Conservation Board)*, a group of landowners sought leave to appeal a decision by the ERCB approving the drilling of two level-two critical sour wells.[13] Before the board, the landowners had objected to the wells because of concerns about health and safety, air and water quality, environmental impacts, effects on property value, and the adequacy of emergency response planning.

Invoking section 7 of the *Charter*, the landowners had argued that the inherent health and safety risks involved in the drilling and operation of these two wells meant that board approval would result in a violation of the right to life, liberty, and security of landowners living near the wells. This would occur because the landowners would be placed in a situation of unacceptable and unnecessary risk. Before the board, the landowners had also argued that breaches of the second part of section 7 (the principles of fundamental justice or procedural fairness) had occurred in a number of ways. As a result of these breaches, they did not have all of the relevant information necessary to adequately understand the risks associated with these wells, and to participate fully and effectively in the hearing before the board. In particular, the landowners submitted that a lack of procedural fairness had occurred (or would occur) because: (a) the board had not compelled the company to answer certain information requests by the landowners; (b) the board had failed to provide the landowners and the public with a complete list of the hydrogen sulphide (sour gas) content of wells drilled in the area; and (c) the company had invoked section 12.150 of the *Oil and Gas Conservation Regulation* (*OGCR*),[14] which authorized the company and the board to keep information about these wells confidential for a period of one year. The landowners said this regulation violated section 7 of the *Charter*.

Rejecting each of these arguments, the ERCB approved the well applications and the landowners applied to the Court of Appeal for leave to appeal the board's decision. The landowners did so on a number of grounds including the board erring in law by concluding that there was no section 7 *Charter* violation in this case, and by misapplying the test for determining whether section 12.150 of the *OGCR* violates section 7 of the *Charter*. Unlike prior landowners' leave to appeal applications, Justice Ritter refused to grant leave to appeal in this case.

With respect to the alleged section 7 violation, Justice Ritter concluded that the board's analysis was "unassailable."[15] In his view, the board had articulated the correct test for a section 7 analysis and it had applied this test to the facts correctly. Although Justice Ritter acknowledged that future risk of infringement can constitute the basis for a breach of section 7, he noted that in this case the ERCB had considered the potential risk to be minimal. Moreover, said the court, the board had considered that the required emergency planning zone would further minimize the risk and that those who lived close to the wells had the option of temporarily relocating during drilling. According to Justice Ritter, what the landowners disagreed with was the board's assessment of risk, which is a fact-laden exercise involving the board's expertise. It would be granted substantial deference on any appeal, rendering the appeal *prima facie* without merit.

On the issue of whether section 12.150 of the *OGCR* has the effect of breaching the landowners' section 7 *Charter* rights, Justice Ritter also concluded that this was not a meritorious ground of appeal. Section 12.150 allows well information required by the ERCB to be kept confidential for one year to give operators a period of time during which they enjoy an advantage over competitors. Before Justice Ritter, it was argued that because the landowners would not have the right to access the company's records for one year they would not know if they were facing potential risks that were higher than the anticipated rates of sour gas. The landowners submitted that this constituted a future-risk type of section 7 *Charter* breach, and that the principles of fundamental justice demanded disclosure of this information.

Justice Ritter disagreed. He noted that the landowners had not adduced any evidence to show any likelihood that gas volumes would be greater than projected volumes. To his mind, in the absence of such evidence, a prospective breach could not be established. But, he said, the evidentiary burden is not an impossible one for landowners to meet. Coupled with expert evidence, it might be possible for landowners to show that all wells in a given area, or drilled in a particular formation, result in gas volumes well beyond those projected in the initial licensing process.

Although leave to appeal was not granted in this decision, from the point of view of the applicability of section 7 of the *Charter*, it is noteworthy that neither Justice Ritter (nor the ERCB for that matter) suggested that section 7 has no application in the context of oil and gas operations. Previously, the question of whether section 7 might apply in the context of the health and environmental risks associated with oil and gas development was an open one. Now we know that it does apply and that it might provide a remedy in an appropriate case.

Concluding Remarks

There is something troubling about Justice Ritter's analysis in the *Domke* case (discussed above). On the one hand, he concludes that landowners might be able to meet the evidentiary burden required to establish a section 7 *Charter* breach if they have the right evidence. On the other hand, Justice Ritter condones the fact that in that particular case, necessary well information was either not provided to the landowners or was not available. One wonders how landowners could ever meet the evidentiary burden Justice Ritter refers to if they are not given the pertinent information, or if they receive it too late to make meaningful use of it. Also discomforting is the discussion in the case about voluntary relocation. Justice Ritter stated that this option was something the ERCB took into account in deciding that the risk was minimal in that case. But it is counterintuitive to say that the risk is minimal because people can simply move

out of their homes if they want to. Of course the risk is minimal if there is no one around to experience it. But how easy is it for people to simply relocate, even temporarily? There was also no discussion in the case about compensation for this "voluntary" relocation.

Clearly, there are significant issues lurking behind these cases of landowners in Alberta feeling the impact of intensifying oil and gas development near or on their land. That these are very real concerns is obvious given the resort to section 7 of the *Charter*. There is no doubt that people tend to resort to mechanisms of human rights protection when the current process is failing them, or when they believe that what is at stake is something critically important, something which speaks to the intrinsic worth and dignity of human beings.

That said, section 7 of the *Charter* may not be a panacea in all cases for landowners looking for ways to deal with the increasing pressures of oil and gas development. There are several causal and factual hurdles that will have to be overcome in any given case. In particular, it remains to be seen whether a court would accept that it is the ERCB's approval of particular oil and gas facilities, and not the subsequent operations by the company, which may result in the imminent infringement of life, liberty, and security of the person. The law is clear that the *Charter* applies only to government and not to private actors. A court will also have to consider the principles of fundamental justice in this context. These principles typically afford procedural protections before a deprivation of life, liberty, or security of the person will be justified. Whether a court would find that these procedural guarantees were not met in situations where landowners were given an opportunity to be heard by the ERCB remains to be seen. All eyes are now on the pending *Kelly* appeal.

Notes

* Assistant Professor, Faculty of Law, University of Calgary, and Research Associate, Canadian Institute of Resources Law, University of Calgary, e-mail: nvlavian@ucalgary.ca.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 246 (CanLII) [*Graff*]. The ERCB replaced the Energy and Utilities Board (EUB) in January 2008.

3 *Atco Electric Limited v. Energy and Utilities Board (Alberta)*, 2002 ABCA 45 (CanLII).

4 See *Graff v. Alberta (Energy and Utilities Board)*, 2007 ABCA 20 (CanLII).

5 R.S.A. 2000, c. E-10.

6 *Supra* note 2 at para. 11.

7 *Ibid*. at para. 17. Ultimately, the appeal by the Graffs was dismissed by the Court of Appeal on the basis that the family had failed to provide the board with sufficient medical evidence to make out their claim of being "directly and adversely affected" by the decision on the well application. The panel hearing the appeal emphasized that parties requesting standing before the ERCB must provide at least some relevant evidence to support their claim of being "directly and adversely" affected. The court made no comment on the applicability of section 7 of the *Charter* in this context. See *Graff v. Alberta (Energy and Utilities Board)*, 2008 ABCA 119 (CanLII).

8 *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 52 (CanLII) [*Kelly*].

9 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007, SCC 9, [2007] 1 S.C.R. 350 (CanLII), *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (CanLII), and *Godbout v. Longueuil (City)*, 1997 SCC 335, [1997] 3 S.C.R. 844 (CanLII).

10 *Supra* note 8 at para. 2.

11 See *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, s. 12.

12 At the time of writing, the appeal in *Kelly* had yet to be heard. However, the company involved had withdrawn its well applications to the ERCB, leaving the status of the appeal uncertain. The company has also been removed as a party to the appeal: see *Kelly v. Alberta (Energy and Utilities Board)*, 2008 ABCA 410.

13 *Domke v. Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232 (CanLII) [*Domke*].

14 A.R. 151/71 [the *OGCR*].

15 *Supra* note 13 at 27.