

Harper's Legacy on Federalism: "Open Federalism" or Hidden Agenda?

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During the 2005 federal electoral campaign, Conservative leader Stephen Harper announced what he called a "Charter of Open Federalism" to guide relations between his future government and the provinces, offering to put an end to what he described as centralizing federalism.

However, ten years later, once three consecutive Conservative governments had elapsed, the state of intergovernmental relations in Canada was precarious. The Conservatives may have used the "open federalism" promise as a cover for a vast program of federal withdrawal from social policy, and centralization of economic and security policies. This doublespeak stressed relations with the provinces and minority nations to the point that the Liberal government formed in November 2015 has taken explicit distance from this legacy to re-establish healthy intergovernmental relations. Confirmation of this project is still a work in progress. The Liberals first year in office was crucial to assess whether continuity or change will prevail.

Pendant la campagne électorale de 2005, le chef conservateur Stephen Harper a annoncé ce qu'il appelait une « Charte du fédéralisme d'ouverture » pour guider les relations entre son futur gouvernement et les provinces, offrant ainsi de mettre fin à ce qu'il décrivait comme un fédéralisme centralisateur.

Pourtant, dix ans plus tard et après trois gouvernements conservateurs, l'état des relations intergouvernementales au Canada était précaire. La promesse d'un « fédéralisme d'ouverture » a peut-être servi de couverture à un vaste programme visant le retrait du gouvernement fédéral de la politique sociale et la centralisation des politiques économiques et les politiques de sécurité. Ce double langage de la part des conservateurs a rendu les relations avec les provinces et les minorités nationales tendues, à un point tel que le gouvernement libéral formé en novembre 2015 s'est distancié de cet héritage de façon explicite afin de rétablir des relations intergouvernementales saines. La confirmation de ce projet devra attendre. Il est essentiel d'observer la première année du gouvernement libéral pour confirmer si c'est la continuité ou le changement qui l'emportera.

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1 Throughout this article, the expression "open federalism" will be written between quotation marks to indicate that I refer to a specific government strategy and not literally to an unlimited form to put federalism into practice.

Dans l'article, l'expression « fédéralisme d'ouverture » apparaît entre guillemets afin d'indiquer que je parle d'une stratégie précise du gouvernement et non pas littéralement (c.-à-d. une forme illimitée pour mettre en pratique le fédéralisme).

Introduction

In December 2005, during the federal electoral campaign, then-leader of the Conservative Party of Canada Stephen Harper announced what he called a "Charter of Open Federalism" to guide relations between his eventual government and the provinces. He offered to put an end to what he portrayed as centralizing federalism, respecting provincial autonomy and powers as originally defined by Canada's constitution. He also promised to establish a collaborative federal-provincial working relation, based on the acknowledgement of existing fiscal imbalances, avoiding one-off deals with some provinces while respecting Quebec's unique responsibilities in the cultural domain. In June 2008, his government issued an apology to Indigenous nations for their treatment under the residential school system and oversaw the launch of an extensive Truth and Reconciliation Commission to shed light on the consequences of this historical wrongdoing and the ways to address them.

However, 10 years later, after three consecutive Conservative governments, the state of intergovernmental relations in Canada was precarious. No First Ministers Conference had been held since January 2009, and the Council of the Federation had been consistently snubbed by Ottawa. That same year the federal government imposed a five-year ceiling on fiscal transfers to the provinces. In 2012, Ottawa unilaterally imposed another fiscal ceiling, limiting federal transfers for health care while encouraging provincial experiments in private health care delivery. The Conservative governments also attempted to reform the Senate unilaterally, backing off only after Quebec's Court of Appeal found the project unconstitutional, and Canada's Supreme Court agreed in a reference. Relations with Indigenous peoples had been strained, in particular after the emergence of the "Idle No More" movement in November 2012, in response to the Conservative governments' attempts to promote the natural resource economy on their traditional lands.

These are only some examples, which will be developed below, of the ironic realities of the Conservative "open federalism" agenda and their doublespeak. Conservative practices in the area of federalism put so much stress on intergovernmental relations that the Liberal government, in place since November 2015, is being able to revamp them even with simple symbolic gestures.

After reviewing Harper's legacy on federalism, this article will argue that while the new federal government could take advantage of the Conservative doublespeak to preserve its grip over the provinces and minority nations, this development is not likely. The Liberal government has already given some

indications of its willingness to change course, thereby rejecting Harper's legacy on federalism.

Minority nations in Canada: why they matter for federalism

Comparative political studies identify Canada as a specific kind of federal system.² In particular, the Canadian system belongs to the family of multinational federalisms, along with countries such as Belgium, Russia, and Spain.³ This means that on top of the division of powers among the federal government and the country's federal subunits — provinces in Canada — there is another layer of difference, resulting from the presence of two culturally distinct communities: the French Canadian and Indigenous nations. Their difference has been historically, politically, and legally acknowledged repeatedly; to the point where these communities behave as minority nations within the country, and are entitled to self-government and control over some specific territory as tools to preserve their cultural distinctiveness.

To the extent that the claims of minority nations include territorial and intergovernmental dimensions, they overlap and sometimes compete with the standard federal-provincial division of powers. A full understanding of Canada's federal relations thus necessitates a discussion of interactions with minority nations.

Multinational federalisms must be open to granting a higher degree of autonomy to minority nations if they are to preserve some level of stability. Minority nations are thus entitled to a larger share of sovereignty than other subunits showing the cultural features of the majority. As a consequence, multinational federalisms must accept a certain degree of asymmetry among its constituent parts in their intergovernmental relations; an asymmetry that is necessary to allow minority nations to exercise powers not available to other subunits.⁴

2 Thomas O Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Peterborough: Broadview Press, 2006) at 85-111.

3 Will Kymlicka, "Federalism, Nationalism, and Multiculturalism" in Dimitrios Karmis & Wayne Norman, eds, *Theories of Federalism: A Reader* (New York: Palgrave MacMillan, 2005) 269.

4 Ronald L Watts, "A Comparative Perspective on Asymmetry in Federations" (2005) Institute for Intergovernmental Relations, Queen's University, Working Paper, online: <www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/WorkingPapers/asymmetricfederalism/Watts2005.pdf>.

Although minority nations in Canada are not formally recognized as such, neither in official discourse nor in the written Constitution, their difference is nonetheless protected both by the customary constitution and *de facto* political practice. In contrast to other federations in which minority nations are not present, their presence of course adds a layer of complication to Canadian intergovernmental relations, which politicians constantly struggle to manage.

Stephen Harper was no exception to this trend. He could not afford to ignore these communities' distinct nature, and he accepted this reality. However, during his tenure as Prime Minister he tried to manage relations with minority nations to make them fit with his government agenda, usually with mixed results, as we will discuss later in this article.

"Open federalism": the background

While Stephen Harper coined the term "open federalism," the ideas behind the principle of a balanced power relationship between Canada's federal government and the provincial and territorial governments have a long pedigree within this country's conservative tradition. The precedent most directly related to the current Conservative Party was crafted thirty years ago, with the emergence of the Reform Party.

The Reform Party was born in 1987, as a reaction to the federal government's efforts at reconciling the province of Québec with the 1982 constitutional reform. The party expressed the frustration of voters in Western Canadian provinces, who saw themselves as passive onlookers of Ottawa's desperate attempts to please Québec, launched with the Meech Lake Accord in 1987. Reformers would prefer a more balanced approach, where the voices of all provinces would be equally heard. For instance, the party championed the initiative of Senate reform, to make that institution "equal, elected, and effective," thus underlining the party's concern with provincial power and equality.

Stephen Harper himself acted as the party's first critic for intergovernmental affairs. During the campaign leading to the 1995 referendum on Québec sovereignty, Harper proposed a series of reforms that would give more powers to the provinces, arguing that stronger provinces would reinforce national unity by creating a more solid consensus.⁵ He favoured the withdrawal of the federal government from areas of provincial constitutional responsibility, including refraining from using Ottawa's spending power, while increasing the

⁵ Brooke Jeffrey, *Dismantling Canada: Stephen Harper's New Conservative Agenda* (Montreal: McGill-Queen's University Press, 2015) at 275-302.

provinces' ability to opt out with full compensation from federally-sponsored programs.

Besides matters of consistency with their ideological roots, in 2005 Harper and the Conservative Party were motivated in adopting the "open federalism" program by pure pragmatic reasons, related to electoral strategy. From a pan-Canadian perspective, support for the Conservative party was particularly weak in Québec, a province that was considered crucial if the party was to ever form a majority government. The Conservatives then offered "open federalism" as a lure to Québec nationalists who might find appealing the prospect of a hands-off federal government, respectful of the province's jurisdictions and autonomy.⁶

"Open federalism" in theory: the Conservative promises

Réjean Pelletier identified as follows a number of concrete steps that Stephen Harper spelled out as pragmatic ways of implementing the "open federalism" agenda:⁷

1. Circumscribe the federal spending power in areas of provincial jurisdiction,⁸
2. Correct the fiscal imbalance existing between Ottawa and the provincial governments,
3. Reformulate the federal-provincial transfer payments, making sure that income originating from non-renewable natural resources is not included in the calculation of provincial revenue,
4. Leave room for provincial participation in international agreements that may affect their areas of jurisdiction. In particular, allow Québec to play a role at UNESCO similar to the one the province plays within *La Francophonie*,
5. Embrace the Council of the Federation — a permanent forum for provincial-federal dialogue created in 2003 — and fully participate in it,

6 Chantal Hébert, *French Kiss: Stephen Harper's Blind Date with Quebec* (Toronto: Knopf Canada, 2007).

7 Réjean Pelletier, "Les relations fédérales-provinciales sous le gouvernement Harper: de l'ouverture à l'unilatéralisme" in Julián Castro-Rea & Frédéric Boily, eds, *Le fédéralisme selon Harper. La place du Québec dans le Canada conservateur* (Quebec City: Les Presses de l'Université Laval, 2014) at 113.

8 See also Harvey Lazar, "The Spending Power and the Harper Government" in John R Allan et al, eds, *Canada: The State of the Federation 2008: Open Federalism and the Spending Power* (Kingston: Institute of Intergovernmental Relations, 2012) 119.

6. Implement the federal-provincial Health Care Agreement adopted in 2004 in order to bring down waiting times for certain medical interventions (cancer and heart issues in particular), increase the number of service-delivering professionals, and produce regular status reports.

These offers were made in the 2005 electoral campaign, and reiterated somewhat more vaguely before the fall 2008 elections. How well were they actually put into practice?

“Open federalism” in practice: the Conservative record

These offers were not put into practice very well, in fact. Most promises made during the electoral campaigns did not survive the combined effect of incumbency and ideology. Indications of this two-pronged approach abound, and they are enumerated below:

1. The Harper governments did acknowledge the existence of a fiscal imbalance between the provinces and the federal government, although they did little to correct it. The provincial governments were still left vulnerable to federal whims regarding transfers, in the end not attaining more fiscal autonomy. Instead, within the 2007 budget, the Conservative government included an increase of transfer payments, and announced a new formula to calculate provincial revenue for equalization purposes. This new formula incorporated half the income generated by non-renewable natural resources, instead of completely excluding this income from the calculation, as the original campaign promise stated.
2. Regarding federal-provincial transfers for health care, the Conservative government initially preserved the financial aspect of the 2004 agreement, guaranteeing a 6% yearly increase for ten years. However, in the 2012 budget Ottawa announced that the 6% increase would be replaced for adjustments tied to GDP growth, with at least 3% yearly increases, starting in 2017. This would potentially mean a cumulative loss of \$25 billion for the provinces. The Prime Minister made it clear to the provinces that they could not expect any other transfer related to health care, neither for capital expenditures nor any other provincial plan. Moreover, no avenues for further negotiation were left open.
3. The federal government also decided unilaterally on a paltry 3% increase in annual transfers to provinces under the Canada Social Transfer program, intended for post-secondary education, child ser-

vices, and other social assistance items. Besides, Ottawa established the amount to be transferred to each province on a per capita basis, thus perpetuating inequalities among provinces in need with limited population and wealthier provinces that at the same time have sizeable demographics.

4. For the 2009 budget, the Conservative government decided to unilaterally impose a ceiling on equalization payments for five years, which would mean a cumulative reduction of \$17.8 billion for the beneficiary provinces.
5. Promises to legislate to curb federal spending power never materialized, and they completely disappeared from the Conservative electoral platform in 2011.
6. Senate reform is another area where Conservative promises did not deliver. In 2011, the Harper government did indeed table Bill C-7, a Senate Reform Act wherein provinces were encouraged to elect nominees to the Senate. Provincial nominees would have to be ratified at the Governor General's discretion, and ultimately at the Prime Minister's as well, in order to follow constitutional procedure. Senators would also see their terms limited to nine years, instead of being appointed until age seventy-five as has been the standard practice.

However, Ottawa introduced the reform with no consultation whatsoever with the provinces, so as one might expect, they reacted in opposition to the measure. In particular, Québec asked its Court of Appeal whether the Constitution's amending formula allowed Ottawa to act without provincial approval on this matter. In October 2013 the Court ruled that a change to the Senate, like the one Bill C-7 wanted to enact, requires the approval of seven provinces holding 50 per cent of the Canadian population, which is the standard formula for constitutional amendments under section 38 (1) of the 1982 Constitution. The Harper government thus asked the Supreme Court of Canada to provide an opinion on the constitutionality of the Act. In December of that same year, the court essentially endorsed Québec's Court of Appeal's decision, adding that the consent of all the provinces and the Senate is required to abolish the upper chamber. So, in the end, unilateralism undermined Conservative plans to fix the Senate.⁹

⁹ Canadian Press, "Senate Reform: Harper Says Issue Now in Hands of Provinces", *Huffington Post* (5 January 2014), online: <www.huffingtonpost.ca/2014/05/01/senate-reform-harper-provinces_n_5248398.html>.

Harper then proceeded with another unilateral plan that could not be stopped either by the provinces or the courts: to kill the Senate by attrition. From then on and until the moment he quit as Prime Minister he simply stopped appointing senators, a decision that left twenty-two vacant seats by the end of his last term in office.

7. The Harper governments also tried to create a Canadian Securities Commission in 2009, arguing that such a federal agency would be positive to promote the country's economic development. This attempt met the resistance of the provinces, Alberta and Québec in particular, arguing that securities is an area of provincial jurisdiction under section 92 (13) of the Constitution, which gives the provinces authority over property and civil rights. As happened with attempts to reform the Senate unilaterally, this equally unilateral project was also rejected by the Supreme Court, which argued that it was contrary to the constitutional division of powers, and that Ottawa had failed to demonstrate that it had to fall under section 91(2), the federal power to regulate trade and commerce.¹⁰
8. In March 2013, the federal government announced the creation of a Canada Job Grants Plan, intended to enhance workers' skills according to business requirements. The government justified the measure by arguing that it was necessary in order to alleviate the economic downturn affecting Canada at the time. However, the provincial governments were again not consulted, instead finding out about the program in the media. This was especially jarring from their point of view, as the program withdrew 60% of federal transfers to provinces aimed at job training programs.
9. In October 2011, the Harper government passed the *Safe Streets and Communities Act*, an omnibus bill dealing with criminal justice. One of the most controversial items contained in this legislation was the imposition of mandatory sentences for a number of relatively minor offences, sentences that would have to be served in provincial jails. The federal government did not commit to any additional expenditure resulting from mandatory sentences, so in fact it offloaded on the provinces an estimated cost of \$140 million a year.

¹⁰ *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.

10. Overall, the Harper governments avoided intergovernmental fora, such as First Ministers Meetings or the Council of the Federation. The last time Harper met with all of his provincial counterparts at the same time was to discuss measures to confront the global economic crisis in January 2009. No other such meeting took place until the end of the Harper era almost seven years later. The Prime Minister instead preferred bilateral negotiations with each province, taken individually. This practice, besides giving bargaining leverage to the federal government, allowed for the continuation of “one-off deals” with some provinces, because it took place outside media attention and scrutiny. This was, of course, contrary to the campaign promise to put an end to such practices.

At first sight, it is hard to make sense of the contradiction between Conservative promises regarding “open federalism” and their actual practice. On the one hand, the federal government seemed to be generously giving up on years of federal patronizing over provincial governments, allowing them to freely choose innovative ways of implementing public policy.¹¹ In some other instances, however, Ottawa seemed intent on unilaterally controlling decisions related to financial transfers to provinces or cost-shared specific programs.

In order to find a comprehensive explanation, we need to look at the Conservative governments’ ideological agenda. It then seems plausible that “open federalism” was in fact a political cover for the real plan of dismantling Canada’s welfare state,¹² one of Harper’s governmental priorities, while at the same time asserting Ottawa’s grip over economic and security matters. The very idea of “open federalism” seems to have been inspired by Ronald Reagan’s “states’ rights” crusade in the United States 30 years earlier, which aimed at similar goals, and became code for dismantling social programs run by the federal government.¹³

This was Harper’s bottom line understanding of federalism: provinces will take care of social policy, the federal government will take care of economic and security matters. The provinces would be left to deal with social programs, either supported with limited federal transfers or at their own cost, and were encouraged to explore market solutions to the most expensive among them.

11 Nadine Changfoot & Blair Cullen, “Why is Quebec Separatism off the Agenda? Reducing National Unity Crisis in the Neoliberal Era” (2011) 44:4 Can J Political Science 769 at 776.

12 Not unlike the way previous Liberal governments had made use of decentralizing programs during the 1990s.

13 Jeffrey, *supra* note 5 at 283.

In the meantime, a leaner federal government would focus its attention to fiscal and economic matters, defence, and foreign policy, limiting the scope of its intervention to preserving a market-friendly, stable economic environment. In short, the promises and practices of "open federalism" are in fact stealth attempts at shrinking the federal state while at the same time implementing major policy changes in intergovernmental relations.¹⁴

Québec: French kiss and say goodbye

Although the province of Québec is not synonymous with the French Canadian national minority, there is a major overlap between these two instances, as the province is home to over 85% of all French Canadians.¹⁵ This is a persistent demographic reality resulting from Canada's colonial history, and subsequent settlement patterns. For that reason, the Quebec provincial government, supported by the French-speaking elites in the province, has often declared itself representative of French Canadians. In 1967, the province's political and cultural elites discarded the French Canadian label, and started defining themselves as *Québécois*, thus precipitating a formal political breakup with other French Canadians.¹⁶

As suggested in the background discussion in this article, electoral gains in the province of Québec were a major motivation for the Conservative "open federalism" approach. The Francophone province was eagerly courted with the promise of self-restrained federal government during the 2005 and 2008 general elections.¹⁷ This promise sounded appealing to the majority of politicians and general public in the province, given that limited federal activity leaves room for the exercise of increased provincial powers.

The Conservative record regarding Québec, however, was also mixed, and it once again tilted towards unilateralism and neglect of earlier campaign promises:

11. The Harper governments did indeed allow the Francophone province to play a formal role within UNESCO, but only as long as Québec

14 Jeffrey, *ibid* at 277.

15 Specifically, according to the 2011 census, 86.5% of people who report speaking only French live in Quebec (6.102 million out of 7.054 across Canada): Statistics Canada, "Population by Mother Tongue, by Province and Territory, excluding institutional residents", (Ottawa: Statistics Canada, 2013) online: <www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo11b-eng.htm>.

16 Marcel Martel, *French Canada: An Account of its Creation and Break-up, 1850-1967* (Ottawa: Canadian Historical Association, 1998).

17 Hébert, *supra* note 6.

representatives were formally part of the Canadian delegation. It was clear from the beginning that Québec delegates could not speak on behalf of their province or French Canadians, nor directly address the assembly of country representatives; those functions were reserved to the envoys of the Canadian federal government. Québec rather played a role akin to lobbying within the international organization: provincial delegates were allowed to talk to other countries' representatives but were devoid of an autonomous voice. This diminished role is a far cry from the one Québec plays at the *Francophonie*, so the Harper governments' campaign promises were not really fulfilled.

12. Another unexpected measure in regards to Québec was the adoption in the House of Commons of a motion that read: "... this House recognizes that the Québécois form a nation within a united Canada."¹⁸ The motion was surprisingly proposed by Harper himself, even if such recognition was absent from his original campaign promises. The measure was so unexpected that it even prompted the resignation of Michael Chong, Minister of Intergovernmental Affairs, in protest against its adoption.¹⁹

The reason for that motion must be found in Harper's efforts to trump a previous motion submitted by the Bloc Québécois in the same sense, which Harper appropriated for his party while adding the last four words ("within a united Canada"), absent from the Bloc's original draft. Moreover, the motion meant a purely symbolic recognition, with no legal effect, which has not had any impact on public policy, or over intergovernmental relations involving Québec. Moreover, it can be easily reversed by a vote in Parliament since it has no constitutional status.

However, the May 2011 general election would put an end to even these lukewarm Conservative attempts at bringing Québec into their fold. The Conservative party had only six candidates elected in the province, out of a total of 75 seats available, whereas in contrast 58 New Democratic Party candidates prevailed.²⁰ In spite of that discrepancy, the Conservatives were able to

18 CBC News, "House passes motion recognizing Québécois as nation", *CBC News* (27 November 2006), online: <www.cbc.ca/news/canada/house-passes-motion-recognizing-qu%C3%A3-b%C3%A3-cois-as-nation-1.574359>.

19 National Post, "Harper government loses minister over Quebec 'nation' resolution", *National Post* (27 November 2006).

20 Sophie-Hélène Lebeuf, "Un tsunami orange déferle sur le Québec et emporte le Bloc", *Radio Canada* (3 May 2011), online: <elections.radio-canada.ca/elections/federales2011/2011/05/02/049-quebec-vague-mpd-deroute-bloc.shtml>

form a majority government thanks to the strong support coming from other regions of the country.

This was a surprise to many observers, and presumably a revelation to Stephen Harper himself, as in Canadian history no majority government had ever been formed without Quebec's clear support. Once the Conservatives realized that the Francophone province was no longer a prerequisite to form a majority government, they eagerly neglected their campaign promises to the electorate of the province, and stopped all attempts at attracting their votes. The attempted honeymoon between Harper and Quebec was over.

Paradoxically, the growing distance between the federal government and Québec might not be such a bad thing for Canada after all. According to Nadine Changfoot and Blair Cullen,²¹ Harper's gradual disengagement from Québec may have appeased the Francophone province's desire for enhanced autonomy, thus weakening the forces that had pushed in the past for forceful assertion of that autonomy through referenda on sovereignty and the election of nationalist governments. Therefore, what seems to be bad news for federalism may in fact be positive from a Canadian unity perspective.

Indigenous governance: no apologies for privatization

Another aspect of Harper's ambiguous approach to federalism is the way he dealt with Canada's other national minority: Indigenous peoples. As previously discussed, Indigenous issues are related to land and self-government, two issues that are in turn intrinsically related to federalism. In fact, an increasing number of authors argue that a full understanding of Canada's federal system must include the Indigenous dimension, especially in regards to "treaty federalism," which predated and made possible the creation of the provinces.²²

Throughout their terms in office, the Conservative governments relentlessly promoted the expansion of the natural resource economy, including pipelines, even within Indigenous traditional lands. Prime Minister Harper also refused to seriously consider reforming the land claims settlement process in accordance with Indigenous nations' wishes; and refused to fully endorse the *United Nations Declaration on the Rights of Indigenous Peoples*. In fact, Canada

21 Chanfoot & Cullen, *supra* note 11 at 781-82.

22 Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism* (Peterborough: Broadview Press, 2003) 167.

was one of only four countries that voted against the Declaration.²³ These attitudes created a backdrop of mutual distrust and confrontation that plagued relations between the federal and Indigenous governments.

In June 2008, Stephen Harper issued an apology to the victims of the residential school system.²⁴ Beyond formally acknowledging the wrongdoings of the past inflicted by the Canadian state upon Indigenous peoples, the apology was the stepping stone for the creation of a commission of inquiry into the impacts of the residential school system and the ways to redress them: the Truth and Reconciliation Commission of Canada.

The creation of this Commission, however, did not result from any openness on the part of the Harper government; it was in fact the product of a court case. Class action lawsuits filed by residential school survivors against the parties responsible for the setup of the residential school system resulted in the Indian Residential Schools Settlement Agreement.²⁵ The Commission was actually funded with the financial compensation obtained through the settlement. It would tour Canada gathering evidence, and would issue a comprehensive report in December 2015, over seven and a half years after being initiated.²⁶ The report details what Justice Murray Sinclair, chair of the Commission, would call a systematic attempt at “cultural genocide”²⁷ and provides 94 specific calls to action to address the impacts of the residential school system.

However, the Conservatives did not commit to any specific action to improve the lot of Indigenous peoples in this country, especially no action with financial implications. In contrast, Harper made no secret of his rejection of the historic Kelowna Accord, agreed upon by federal, provincial, territorial, and Indigenous representatives in November 2005, only three months before

23 CBC News, “Canada votes ‘no’ as UN native rights declaration passes”, *CBC News* (13 September 2007), online: <www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160>

24 *House of Commons Debates*, 39th Parl, 2nd Sess, No 110 (11 June 2008) at 6849-51 (Rt Hon Stephen Harper).

25 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at v, online: <www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>.

26 Truth and Reconciliation Commission of Canada, “TRC Findings”, *Truth and Reconciliation Commission of Canada* (15 December 2015), online: <www.trc.ca/websites/trcinstitution/index.php?p=890>.

27 Gloria Galloway & Bill Curry, “Residential schools amounted to ‘cultural genocide,’ report says”, *The Globe and Mail* (2 June 2015), online: <www.theglobeandmail.com/news/politics/residential-schools-amounted-to-cultural-genocide-says-report/article24740605/>.

Harper became Prime Minister. In the Accord, brokered by Liberal Prime Minister Paul Martin, the federal government committed to contributing with \$5 billion over five years to support the improvement of Indigenous peoples' living conditions regarding healthcare, education, housing, and economic development. Moreover, and more importantly for federalism, the Accord reaffirmed Aboriginal rights and title, promising that future negotiations between Ottawa and Indigenous peoples would take place on a government to government basis.

During the 2005 campaign, Harper declared that he supported the objectives of the Accord, but not its financial promises. However, the Accord was simply ignored from the moment he formed a minority government.

Instead, in its 2005 electoral platform, the Conservative party offered privatization of land on Indigenous reserves, to allow for individual ownership for both housing and business purposes.²⁸ Once in power, the Conservatives tried to push the idea via media interventions by Jim Prentice, Harper's first Minister of Indian Affairs.²⁹ Indigenous leadership was caught by surprise, as they had never put forward this option. As a matter of fact, Assembly of First Nations (AFN) Grand Chief Phil Fontaine explained, they opposed privatization of reserve land as this may over time lead to speculation and to total loss of the land. At any rate, such reform would imply the overhaul of the reserve system, as well as of the *Indian Act* itself, something that Indigenous leadership was wary about doing because of its important constitutional implications.

But the Conservative government got ready for that anyway. They tasked Manny Jules, chief of the Kamloops First Nation and staunch advocate of privatization, to recruit Indigenous leaders and bands favourable to the plan. Their argument was that they wanted to liberate the "dead capital" contained in reserve lands. The promotion effort was soon joined by Patrick Brazeau, Conservative-appointed senator, who praised the government's plan to let Indigenous people enjoy the property rights that any other Canadian does, including on reserve land.

The Conservative leadership was already working on legislation to introduce to allow for this to happen. The policy change was hidden within omnibus Bill C-45, the *Jobs and Growth Act*, a budget bill that, among many other

28 Donald Gutstein, *Harperism: How Stephen Harper and his Think Tank Colleagues Have Transformed Canada* (Toronto: James Lorimer & Company, 2014) at 106-35.

29 The Department changed its name from Indian and Northern Affairs to Aboriginal and Northern Affairs in June 2011, then to Indigenous and Northern Affairs in December 2015.

measures, would allow reserve lands to be surrendered and designated for other uses. The bill was pushed through the House of Commons and the Senate thanks to the Conservative majority in both Houses, and received Royal Assent in December 14, 2012.³⁰

But that part of the legislation was never implemented. It was forestalled by the emergence of the “Idle No More” (INM) Indigenous movement in the Fall of 2012. The movement directly took aim at the *Jobs and Growth Act*.³¹ INM denounced the fallacy of the privatization attempt, as its leadership highlighted that there were many examples of economically successful bands that had not resorted to private ownership of the reserve land.³²

The AFN also reacted swiftly. In a meeting held in Winnipeg, the Indigenous chiefs overwhelmingly rejected the privatization idea, promising vocal opposition and even appealing to the UN should the federal government persist with the plan. In an apparent act of retaliation against the chiefs, the Harper government introduced Bill C-575, entitled the *First Nations Financial Transparency Act*, aimed at forcing Indigenous leadership to disclose the use of federal subsidies that they were getting for their bands. The Bill was quickly approved, thanks to the support of the Conservative caucus and fifteen Liberal MPs, further straining relations between Indigenous leadership and the federal government.

Enter the Liberals: the record so far

On November 4, 2015 a new federal government was sworn in. After almost a decade of Conservative rule, the Liberal Party of Canada won a majority of seats in the House of Commons, thus displacing the Harper Conservatives. To what extent is this change being reflected in the way federalism is practiced in this country?

As this government transition occurred a little more than one year ago, practically anything is still possible regarding federalism in Canada. It may of course be tempting for the new federal government to take advantage of the Conservative doublespeak to preserve its grip over the provinces and Indigenous peoples, and keep federal spending in check. This is possible but not likely, as

30 *Jobs and Growth Act*, SC 2012, c 31

31 Ken Coates, *#idlenomore and the remaking of Canada* (Regina: University of Regina Press, 2015) at 1-20.

32 Robert Animikii Horton, “Idle No More Sees Bigger Issues than C-45”, *Idle No More* (16 June 2013), online: <www.idlenomore.ca/idle_no_more_sees_bigger_issues_than_c_45>.

the Liberal government has already given some indications of its willingness to change course:

- A. In November 23, 2015, less than three weeks after the Liberal government took office, Prime Minister Justin Trudeau met in Ottawa with his provincial and territorial counterparts to discuss measures against climate change and Canada's response to the crisis in Syria. The main goal of the meeting was to coordinate the visions of Canadian governments over the country's position in the upcoming Paris climate change conference, to be held in early December that year.

This kind of meeting, which was routine in Canada before the Conservatives formed governments, turned out to be ground breaking since this was the first such gathering since January 2009.

- B. The meeting was followed by another one, this time a formal First Ministers' Meeting (FMM), which took place in Vancouver March 2 and 3, 2016. Even some Indigenous leaders were also invited to the deliberations. The FMM agenda again included discussions about climate change, but also added Indigenous issues and joint action to face the economic crisis.³³
- C. In June 2016, Ottawa reached an agreement with the provincial and territorial premiers to strengthen the Canada Pension Plan.³⁴ In so doing, they followed the lead of Ontario's government, which had been under fire from the Harper government for trying to do just that at the provincial level some years before.
- D. The Liberal government also announced the adoption of a new, innovative procedure to appoint senators. Instead of following the customary procedure for nominating senators, whereby the Prime Minister simply recommended to the Governor General who was to be appointed, the Trudeau government created a non-partisan Independent Advisory Board for that purpose on January 2016.³⁵ The Board "will provide

33 Office of the Prime Minister, "Prime Minister to meet with Indigenous leaders and host First Ministers' meeting", (Ottawa: Office of the Prime Minister, 10 February 2016), online: <pm.gc.ca/eng/news/2016/02/10/prime-minister-meet-indigenous-leaders-and-host-first-ministers-meeting>.

34 Canada, Department of Finance, "Canada's Finance Ministers Agree to Strengthen Canada Pension Plan", (Ottawa: Department of Finance, 20 June 2016), online: <www.fin.gc.ca/n16/16-081-eng.asp>.

35 Canada, Independent Advisory Board for Senate Appointments, "Mandate and members" (Ottawa: Independent Advisory Board for Senate Appointments, no date), online: <www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments/members.html>.

non-binding merit-based recommendations to the Prime Minister on Senate nominations.” It is formed by three permanent federal members and two members chosen from each of the provinces in which a vacancy is to be filled.

In order to attend to the immediate need to fill some vacancies, the appointments process is being implemented in two phases: first, five appointments were made early in 2016 to represent the provinces with the most vacancies (Manitoba, Ontario and Québec). The second phase, beginning the spring 2016, creates a permanent process to fill the remaining 17 vacancies, and includes an application process open to all Canadians.

The Advisory Board undertook broad consultations with all kinds of organizations, associations and institutions to gather names of potential nominees. Besides the constitutional requirements, gender, Indigenous and minority balance, non-partisanship, knowledge of the work of the Senate, experience, and leadership are being considered when choosing candidates to a Senate position. Bilingualism will be considered an asset.

The Liberal government never explained the reasons why provincial governments were not asked to propose candidates and were even excluded from the new consultation process. As a result, this reform may not guarantee a better representation of provincial interests within the federal government. It may nonetheless open the gates to a more balanced, less partisan, more specialized Senate that could represent Canada’s diversity more effectively.

- E. Canada’s new federal government is also attempting to create a new relationship with Indigenous peoples. It renamed the former Department of Aboriginal Affairs and Northern Development the “Department of Indigenous Affairs and Northern Development,” in order to adjust to international terminology more respectful of these minority nations. Prime Minister Trudeau appointed Jody Wilson-Raybould, formerly Regional Chief of the British Columbia Assembly of First Nations, as Minister of Justice and Attorney General; she became the first Indigenous person to have been ever appointed to such a policy-relevant position. Openly breaking with the Harper governments’ refusal to do so, the new government also created a commission of inquiry to shed light into the recent disappearance and murder of hundreds of Indigenous women and girls, and endorsed the *United Nations Declaration on the Rights of Indigenous Peoples*.

More importantly perhaps, Trudeau re-established a more horizontal dialogue with Indigenous governments and representatives. His commitment to working with this national minority was reflected in the first budget that his government announced in March 2016, in which \$8.4 billion over five years were devoted to the needs of Indigenous communities. This budget will address some of the calls to action made by the Truth and Reconciliation Commission report, for the redress of the consequences of the cultural genocide attempted for over a century at residential schools for Indigenous children, as explained above.³⁶

- F. Regarding Québec, the Liberal leader has repeatedly attempted to send a message of reconciliation to the Francophone province. Of course, it helps the fact that his family background and his education come from Québec, that he is seamlessly bilingual, and that his riding is located in Québec too. The values he represents, both as a Liberal and a member of Generation X, are more attuned to the predominant overview of voters in the province.

His efforts were rewarded in the 2015 general elections, when his party was able to elect slightly over 50% of its candidates in the province (40 out of 78). This result is testimony to the willingness of the majority of Quebecers to deposit once again their trust in the hands of the Liberal Party, thus being on the side of the government all over again. Their votes played no small role in the Liberal majority victory, thus showing that Québec is still quite important for the success of a federal party. This new political geometry has appeased the growing alienation between Québec and Harper's last majority government.

Conclusion

The recent Conservative stint at the head of the Canadian federal government, under Stephen Harper's leadership, left a mostly negative legacy in the area of federalism that is apparently being gradually discarded by the new Liberal government. In some instances, the shift is surprisingly simple, such as holding regular First Ministers meetings and consulting with provincial governments whenever major policies affecting all levels of government are considered. In others, such as Senate reform and relations with Indigenous nations, it will

³⁶ Truth and Reconciliation Commission of Canada, *supra* note 16.

take more effort and time to regain confidence among the main players in the Canadian federal game.

More evidence still needs to be gathered in the coming months and years, as policy unfolds, to confirm whether continuity or change will prevail under the new federal government in the way federalism is practiced in Canada.

